DOUBLE COMPENSATION IN INVESTMENT ARBITRATION

Toward a Principled Treatment of Double Recovery

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AUGUST 2021

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Doctor of Civil Law.

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ABSTRACT/RÉSUMÉ

This thesis analyses the risk of double recovery in investment arbitration and suggests a solution to the problems it creates. The risk of double recovery has not been thoroughly addressed by investment arbitration tribunals or commentators, and this has resulted in host states' concerns about the integrity of the ISDS system. The proposed solution consists of two parts: first, recognising the prohibition of double recovery as a principle in international investment law; and second, setting out a legal mechanism to implement the principle in order to avoid double recovery. The mechanism (which covers both scenarios of parallel proceedings and sequential proceedings) utilizes three procedural tools: the *res judicata* principle, the *lis pendens* principle, and the power of tribunals/courts to stay proceedings. Traditionally, for *res judicata* and *lis pendens* to be applicable, a triple identity test (same parties, same cause of action, and same relief/object) must be met. The thesis argues that the application of a strict identity test in this international context is misguided, and proposes a coherent, principled test that is in line with the underlying policies of international investment law. The thesis also explains that the term "double recovery" does not entirely correspond to the phenomenon it is known to represent and suggests that the term "double compensation" be used instead.

Cette thèse analyse le risque de double recouvrement dans l'arbitrage des différends relatifs aux investissements, et suggère une solution aux problèmes qu'il soulève. Le risque de double recouvrement n'a pas été étudié de manière approfondie par les tribunaux d'arbitrage ou les commentateurs, ce qui a suscité des inquiétudes pour les États hôtes au sujet de l'intégrité du système RDIE. La solution proposée comprend deux parties : en premier lieu, l'interdiction du

double recouvrement en tant que principe du droit international des investissements, et en second lieu, un mécanisme juridique qui permet de mettre en œuvre le principe. Ce mécanisme juridique (qui couvre à la fois des scénarios de procédures parallèles et des procédures antérieures-ultérieures) utilise en particulier trois outils procéduraux : le principe de l'autorité de la chose jugée, le principe de litispendance et le pouvoir des tribunaux de surseoir à une instance. Traditionnellement, pour que les principes de l'autorité de la chose jugée et de litispendance soient applicables, un test strict de triple identité (mêmes parties, même cause et mêmes recours/objet) doit être rempli. Cette thèse affirme que le test de l'identité doit être adapté, mais d'une manière cohérente, fondée sur des principes, et en conformité des politiques du droit international des investissements. La thèse explique également que le terme « double recouvrement » ne correspond pas entièrement au phénomène qu'il est connu pour représenter, et suggère que le terme « double compensation » soit utilisé à la place.

ACKNOWLEDGEMENTS

A doctoral journey is a solo dance. Yet, no soloist can shine on the stage and earn the audience's applause without the support of a stellar team behind the scenes. I would like to express my sincere gratitude to the stellar team in my case:

My supervisor, Professor Fabien Gélinas, for his guidance, inspiring discussions, and generous support;

My thesis Committee, Professors Patrick Dumberry, Geneviève Saumier, Andrea Bjorklund, Claudia Frutos-Peterson, and Stephen Smith, for sharing their knowledge and experience;

McGill Law Graduate Programs Office, for being there every step of the way;

My friend and former colleague at McGill Law, Dr. Eliza Bateman, for her editorial assistance; and

My parents, for teaching me to rise to and enjoy challenges, and thus I always challenged myself to take the next big step.

Merci à toutes et à tous !

LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
BLEU	Belgium-Luxembourg Economic Union
CAFTA-DR	Dominican Republic–Central America Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
CIDS	Center for International Dispute Settlement
CUSMA / USMCA	Canada-United States-Mexico Agreement
DCF	Discounted Cash Flow
ECHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
EU	European Union
FET	Fair and Equitable Treatment
FIPA	Foreign Investment Promotion and Protection Agreement
FITR	Fork-in-the-Road
FTA	Free Trade Agreement
GPL	General principle of law
IAI	International Arbitration Institute
IBA	International Bar Association
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

IIA	International Investment Agreement
ILA	International Law Association
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
LCIA	London Court of International Arbitration
MFN	Most Favored Nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
TIPs	Treaties with Investment Provisions
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

LIST OF ISDS CASES - SHORT FORMS

AAPL v Sri Lanka	*Asian Agricultural Products Ltd (AAPL) v Sri Lanka*, ICSID Case No ARB/87/3.
AES v Argentina	*AES Corporation v Argentina*, ICSID Case No ARB/02/17.
AES v Hungary	*AES Summit Generation Limited and AES-Tisza Erőmű Kft v Hungary*, ICSID Case No ARB/07/22.
AES v Kazakhstan	*AES Corporation and Tau Power BV v Kazakhstan*, ICSID Case No ARB/10/16.
Amco v Indonesia	*Amco Asia Corporation and Others v Indonesia*, ICSID Case No ARB/81/1.
Amoco v Iran	*Amoco International Finance Corporation v Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No 56.
Ampal v Egypt	*Ampal-American Israel Corp, EGI-FUND (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v Egypt*, ICSID Case No ARB/12/11.
AMTO v Ukraine	*Limited Liability Company AMTO v Ukraine*, SCC Case No 080/2005.
Apotex v United States (III)	*Apotex Holdings Inc and Apotex Inc v United States (III)*, ICSID Case No ARB(AF)/12/1.
Arif v Moldova	*Arif v Moldova*, ICSID Case No ARB/11/23.
Awdi v Romania	*Awdi, Enterprise Business Consultants, Inc, and Alfa El Corporation v Romania*, ICSID Case No ARB/10/13.
AWG v Argentina	*AWG Group Ltd v Argentina*, UNCITRAL.
Azurix v Argentina	*Azurix Corp v Argentina*, ICSID Case No ARB/01/12.
Bayindir v Pakistan	*Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, ICSID Case No ARB/03/29.

Benvenuti v Congo	*SARL Benvenuti and Bonfant v Congo*, ICSID Case No ARB/77/2.
Blount Brothers v Iran	*Blount Brothers Corporation v Iran and Iran Housing Company*, IUSCT Case No 52.
Bogdanov v Moldova (IV)	*Bogdanov v Moldova (IV)*, SCC Case No V 091/2012.
Bosca v Lithuania	*Bosca v Lithuania*, PCA Case No 2011-05.
BP America v Argentina	*BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL, and Pan American Continental SRL v Argentina*, ICSID Case No ARB/04/8.
British Caribbean Bank v Belize	*British Caribbean Bank Ltd v Belize*, PCA Case No 2010-18.
Burlington v Ecuador	*Burlington Resources Inc v Ecuador*, ICSID Case No ARB/08/5.
Busta v Czech Republic	*Busta v Czech Republic*, SCC Case No V 2015/014.
Camuzzi v Argentina (I)	*Camuzzi International SA v Argentina (I)*, ICSID Case No ARB/03/2.
Canfor v United States consolidated with *Tembec v United States* and *Terminal Forest v United States*	*Canfor Corporation v United States* consolidated with *Tembec Inc, Tembec Investments Inc and Tembec Industries Inc v United States* and *Terminal Forest Products Ltd v United States*, UNCITRAL.
CEMEX v Venezuela	*CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Venezuela*, ICSID Case No ARB/08/15.
Champion v Egypt	*Champion Trading Company, Ameritrade International, Inc, and Wahbas v Egypt*, ICSID Case No ARB/02/9.
Charanne v Spain	*Charanne BV and Construction Investments Sarl v Spain*, SCC Case No 062/2012.
Chevron and Texaco v Ecuador (I)	*Chevron Corporation and Texaco Petroleum Company v Ecuador (I)*, PCA Case No 2007-02/AA277.
Chevron and Texaco v Ecuador (II)	*Chevron Corporation and Texaco Petroleum Company v Ecuador (II)*, PCA Case No 2009-23.

Claytons v Canada	*Claytons and Bilcon of Delaware v Canada*, PCA Case No 2009-04.
CME v Czech Republic	*CME Czech Republic BV v Czech Republic*, UNCITRAL.
CMS v Argentina	*CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8.
ConocoPhillips v Venezuela	*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela*, ICSID Case No ARB/07/30.
Continental v Argentina	*Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9.
Daimler v Argentina	*Daimler Financial Services AG v Argentina*, ICSID Case No ARB/05/1.
Devas v India	*CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v India*, PCA Case No 2013-09.
Desert Line v Yemen	*Desert Line Projects LLC v Yemen*, ICSID Case No ARB/05/17.
Deutsche Bank v Sri Lanka	*Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/2.
Deutsche Telekom v India	*Deutsche Telekom AG v India*, PCA Case No 2014-10.
Duke Energy v Ecuador	*Duke Energy Electroquil Partners and Electroquil SA v Ecuador*, ICSID Case No ARB/04/19.
EDF v Argentina	*EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentina*, ICSID Case No ARB/03/23.
El Paso v Argentina	*El Paso Energy International Company v Argentina*, ICSID Case No ARB/03/15.
Elsamex v Honduras	*Elsamex, SA v Honduras*, ICSID Case No ARB/09/4.
Enron v Argentina	*Enron Corporation and Ponderosa Assets, LP v Argentina*, ICSID Case No ARB/01/3.

Eskosol v Italy	*Eskosol SpA in liquidazione v Italy*, ICSID Case No ARB/15/50.
Fábrica de Vidrios v Venezuela	*Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v Venezuela*, ICSID Case No ARB/12/21.
Flughafen v Venezuela	*Flughafen Zürich AG and Gestión e Ingeniería IDC SA v Venezuela*, ICSID Case No ARB/10/19.
Fraport v Philippines (I)	*Fraport AG Frankfurt Airport Services Worldwide v Philippines (I)*, ICSID Case No ARB/03/25.
GAMI v Mexico	*GAMI Investments, Inc v Mexico*, UNCITRAL.
Gavrilovic v Croatia	*Gavrilovic and Gavrilovic doo v Croatia*, ICSID Case No ARB/12/39.
Gavazzi v Romania	*Gavazzi v Romania*, ICSID Case No ARB/12/25.
Gemplus v Mexico	*Gemplus SA, SLP SA and Gemplus Industrial SA de CV v Mexico*, ICSID Case No ARB(AF)/04/3.
Genin v Estonia	*Genin, Eastern Credit Limited, Inc and AS Baltoil v Estonia*, ICSID Case No ARB/99/2.
Goetz v Burundi (II)	*Goetz and Others v Burundi (II)*, ICSID Case No ARB/01/2.
Gosling v Mauritius	*Gosling and others v Mauritius*, ICSID Case No ARB/16/32.
Greentech v Italy	*Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v Italy*, SCC Case No V 2015/095.
Guaracachi v Bolivia	*Guaracachi America, Inc and Rurelec PLC v Bolivia*, PCA Case No 2011-17.
GÜRİŞ and Others v Syria	*GÜRİŞ Construction and Engineering Inc and Others v Syria*, ICC Case No 21845/ZF/AYZ.
Helnan v Egypt	*Helnan International Hotels A/S v Egypt*, ICSID Case No ARB/05/19.
Himpurna v Persero	*Himpurna California Energy Ltd v PT (Persero) Perusahaan Listruik Negara*, UNCITRAL.

H&H v Egypt	*H&H Enterprises Investments, Inc v Egypt*, ICSID Case No ARB 09/15.
Hochtief v Argentina	*Hochtief AG v Argentina*, ICSID Case No ARB/07/31.
Hydro and Others v Albania	*Hydro Srl, Costruzioni Srl, Becchetti, De Renzis, Grigolon, and Condomitti v Albania*, ICSID Case No ARB/15/28.
Impregilo v Argentina	*Impregilo SpA v Argentina*, ICSID Case No ARB/07/17.
Impregilo v Pakistan (II)	*Impregilo SpA v Pakistan (II)*, ICSID Case No ARB/03/3.
Inceysa v El Salvador	*Inceysa Vallisoletana SL v El Salvador*, ICSID Case No ARB/03/26.
Inmaris v Ukraine	*Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No ARB/08/8.
Jan de Nul v Egypt	*Jan de Nul NV and Dredging International NV v Egypt*, ICSID Case No ARB/04/13.
Joy Mining v Egypt	*Joy Mining Machinery Limited v Egypt*, ICSID Case No ARB/03/11.
Kardassopoulos and Fuchs v Georgia	*Kardassopoulos and Fuchs v Georgia*, ICSID Case Nos ARB/07/15 and ARB/05/18.
Kappes v Guatemala	*Kappes and Kappes, Cassidy & Associates v Guatemala*, ICSID Case No ARB/18/43.
Khan Resources v Mongolia	*Khan Resources Inc, Khan Resources BV and CAUC Holding Company Ltd v Mongolia and MonAtom LLC*, PCA Case No 2011-09.
Lao Holdings v Laos	*Lao Holdings NV v Laos*, ICSID Case No ARB(AF)/12/6.
Lauder v Czech Republic	*Lauder v Czech Republic*, UNCITRAL.
Lemire v Ukraine (II)	*Lemire v Ukraine (II)*, ICSID Case No ARB/06/18.
Levy v Peru	*Levy and Gremcitel SA v Peru*, ICSID Case No ARB/11/17.

LG&E v Argentina	*LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentina*, ICSID Case No ARB/02/1.
Libananco v Turkey	*Libananco Holdings Co Limited v Turkey*, ICSID Case No ARB/06/8.
Lucchetti v Peru	*Empresas Lucchetti, SA and Lucchetti Peru, SA v Peru* (also known as *Industria Nacional de Alimentos, AS and Indalsa Perú SA v Peru*), ICSID Case No ARB/03/4.
Maffezini v Spain	*Maffezini v Spain*, ICSID Case No ARB/97/7.
Maiman v Egypt	*Maiman, Merhav (MNF), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v Egypt*, PCA Case No 2012/26.
Malicorp v Egypt	*Malicorp Limited v Egypt*, ICSID Case No ARB/08/18.
MCI v Ecuador	*MCI Power Group LC and New Turbine, Inc v Ecuador*, ICSID Case No ARB/03/6.
Metalclad v Mexico	*Metalclad Corporation v Mexico*, ICSID Case No ARB(AF)/97/1.
Micula v Romania (I)	*Micula, SC European Food SA, SC Starmill SRL, and SC Multipack SRL v Romania (I)*, ICSID Case No ARB/05/20.
Mobil v Argentina	*Mobil Exploration and Development Inc Suc Argentina and Mobil Argentina SA v Argentina*, ICSID Case No ARB/04/16.
Mobil v Venezuela	*Mobil Corporation and Others v Venezuela*, ICSID Case No ARB/07/27.
Mobil v Canada (II)	*Mobil Investments Canada Inc v Canada (II)*, ICSID Case No ARB/15/6.
MTD v Chile	*MTD Equity Sdn Bhd and MTD Chile SA v Chile*, ICSID Case No ARB/01/7.
Muhammet v Turkmenistan	*Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd Sti v Turkmenistan*, ICSID Case No ARB/12/6.
Murphy v Ecuador (II)	*Murphy Exploration and Production Company International v Ecuador (II)*, PCA Case No 2012-16.

Nagel v Czech Republic	*Nagel v Czech Republic*, SCC Case No 049/2002.
Noble v Romania	*Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11.
Nordzucker v Poland	*Nordzucker v Poland*, UNCITRAL.
Nykomb v Latvia	*Nykomb Synergetics Technology Holding AB v Latvia*, SCC Case No 118/2001.
Occidental v Ecuador (I)	*Occidental Exploration and Production Company v Ecuador (I)*, LCIA Case No UN3467.
Occidental v Ecuador (II)	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador (II)*, ICSID Case No ARB/06/11.
Oostergetel v Slovakia	*Oostergetel and Laurentius v Slovakia*, UNCITRAL.
Orascom v Algeria	*Orascom TMT Investments Sà rl v Algeria*, ICSID Case No ARB/12/35.
Pac Rim v El Salvador	*Pac Rim Cayman LLC v El Salvador*, ICSID Case No ARB/09/12.
Pan American Energy v Argentina	*Pan American Energy LLC and BP Argentina Exploration Company v Argentina*, ICSID Case No ARB/03/13.
Pantechniki v Albania	*Pantechniki SA Contractors & Engineers (Greece) v Albania*, ICSID Case No ARB/07/21.
Perenco v Ecuador	*Perenco Ecuador Ltd v Ecuador*, ICSID Case No ARB/08/6.
Petrobart v Kyrgyzstan	*Petrobart Limited v Kyrgyzstan*, SCC Case No 126/2003.
Pey Casado v Chile (I)	*Pey Casado and President Allende Foundation v Chile (I)*, ICSID Case No ARB/98/2.
Poštová Banka v Greece	*Poštová Banka, AS and Istrokapital SE v Greece*, ICSID Case No ARB/13/8.
PSEG v Turkey	*PSEG Global Inc and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case No ARB/02/5.

Quasar de Valores SICAV v Russia (formerly *Renta 4 SVSA v Russia*)	*Quasar de Valores SICAV SA and others v Russia* (formerly *Renta 4 SVSA and others v Russia*), SCC Case No 24/2007.
Railroad Development v Guatemala	*Railroad Development Corporation v Guatemala*, ICSID Case No ARB/07/23.
Renco v Peru (I)	*The Renco Group, Inc v Peru (I)*, ICSID Case No UNCT/13/1.
Repsol v Petroecuador	*Repsol YPF Ecuador SA v Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/01/10.
RREEF v Spain	*RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà rl v Spain*, ICSID Case No ARB/13/30.
RSM v Grenada (II)	*RSM Production Corporation and others v Grenada (II)*, ICSID Case No ARB/10/6.
Salini Impregilo v Argentina	*Salini Impregilo SpA v Argentina*, ICSID Case No ARB/15/39.
Santa Elena v Costa Rica	*Compañía del Desarrollo de Santa Elena, SA v Costa Rica*, ICSID Case No ARB/96/1.
Sanum Investments v Laos	*Sanum Investments Limited v Laos*, PCA Case No 2013-13.
SAUR v Argentina	*SAUR International SA v Argentina*, ICSID Case No ARB/04/4.
SEDCO v Iran	*SEDCO, Inc v National Iranian Oil Company and Iran*, IUSCT Case Nos 128 and 129.
Sempra v Argentina	*Sempra Energy International v Argentina*, ICSID Case No ARB/02/16.
SGS v Pakistan	*SGS Société Générale de Surveillance SA v Pakistan*, ICSID Case No ARB/01/13.
SGS v Philippines	*SGS Société Générale de Surveillance SA v Philippines*, ICSID Case No ARB/02/6.
Siemens v Argentina	*Siemens AG v Argentina*, ICSID Case No ARB/02/8.

SPP v Egypt	*Southern Pacific Properties (Middle East) Ltd v Egypt*, ICSID Case No ARB/84/3.
Standard Chartered Bank v Tanzania	*Standard Chartered Bank (Hong Kong) Limited v Tanzania*, ICSID Case No ARB/15/41.
ST-AD v Bulgaria	*ST-AD GmbH v Bulgaria*, PCA Case No 2011-06.
Strabag and Others v Poland	*Strabag SE, Raiffeisen Centrobank AG, Syrena Immobilien Holding AG v Poland*, ICSID Case No ADHOC/15/1.
Suez and InterAguas v Argentina	*Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina* (formerly *Aguas Provinciales de Santa Fe SA, Suez, Sociedad General de Aguas de Barcelona, SA, and InterAguas Servicios Integrales del Agua, SA v Argentina*), ICSID Case No ARB/03/17.
Suez and Vivendi v Argentina	*Suez, Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal, SA v Argentina* (formerly *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal, SA v Argentina*), ICSID Case No ARB/03/19.
Supervision v Costa Rica	*Supervision y Control SA v Costa Rica*, ICSID Case No ARB/12/4.
Talsud v Mexico	*Talsud SA v Mexico*, ICSID Case No ARB(AF)/04/4.
Tecmed v Mexico	*Técnicas Medioambientales Tecmed, SA v Mexico*, ICSID Case No ARB(AF)/00/2.
TECO v Guatemala	*TECO Guatemala Holdings, LLC v Guatemala*, ICSID Case No ARB/10/23.
Teinver v Argentina	*Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina*, ICSID Case No ARB/09/1.
Tokios v Ukraine	*Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18.
Total v Argentina	*Total SA v Argentina*, ICSID Case No ARB/04/1.
Toto v Lebanon	*Toto Costruzioni Generali SpA v Lebanon*, ICSID Case No ARB/07/12.

Unión Fenosa v Egypt	*Unión Fenosa Gas, SA v Egypt*, ICSID Case No ARB/14/4.
United Utilities v Estonia	*United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Estonia*, ICSID Case No ARB/14/24.
Urbaser and CABB v Argentina	*Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No ARB/07/26.
Vannessa v Venezuela	*Vannessa Ventures Ltd v Venezuela*, ICSID Case No ARB(AF)/04/6.
Venezuela Holdings v Venezuela	*Venezuela Holdings BV and Others v Venezuela* (formerly *Mobil Corporation and Others v Venezuela*), ICSID Case No ARB/07/27.
Vivendi v Argentina (I)	*Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentina (I)* (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentina*), ICSID case No ARB/97/3.
von Pezold v Zimbabwe	*von Pezold and Others v Zimbabwe*, ICSID Case No ARB/10/15.
Waste Management v Mexico (I)	*Waste Management, Inc v Mexico (I)*, ICSID Case No ARB(AF)/98/2.
Waste Management v Mexico (II)	*Waste Management, Inc v Mexico (II)*, ICSID Case No ARB(AF)/00/3.
Yukos Universal v Russia in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*	*Yukos Universal Limited (Isle of Man) v Russia*, PCA Case No 2005-04/AA227 in conjunction with *Hulley Enterprises Limited (Cyprus) v Russia*, PCA Case No 2005-03/AA226 and *Veteran Petroleum Limited (Cyprus) v Russia*, PCA Case No 2005-05/AA228.
Zeevi v Bulgaria	*Zeevi Holdings v Bulgaria and the Privatization Agency of Bulgaria*, Case No UNC 39/DK.

PART I: INTRODUCTION

I.1. This thesis analyses the risk of double recovery in investment arbitration and suggests a solution to the problems it creates. In the context of international investment law, the term "double recovery" is known to refer to a situation where, as a result of multiple proceedings, a host state must pay twice or more for the same harm done to a foreign investment that is protected by the applicable international investment agreements ("IIAs").[1] This introductory Part briefly discusses the Context and Overview of the Problem, the thesis's Contribution and Outline, as well as the author's Assumptions, Methodology and Theoretical Approach.

CONTEXT AND OVERVIEW OF THE PROBLEM

I.2. It is commonplace that foreign investors conduct their affairs in the host state through a locally incorporated company/entity (the "investment vehicle"). It is also commonplace that foreign investors invest indirectly in the investment vehicle through a chain of other companies (known as "interposed companies"), which are likely to be incorporated in third states. Once the host state's measures harm the investment vehicle, the damage normally flows from the investment vehicle to the ultimate investors.

I.3. The investment vehicle can, of course, pursue contractual claims (based on, for example, the license agreement it has with the state) in local courts or commercial arbitration. It can initiate

[1] See Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press, 2011) at 185; Andrea K Bjorklund, "Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working" (2007) 59:2 Hastings L J 241 at 259; Christopher Dugan et al, *Investor-State Arbitration* (Oxford University Press, 2008) at 597, fn 125; Charles T Kotuby & Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press, 2017) at 150–151; Borzu Sabahi, Kabir Duggal & Nicholas Birch, "Principles Limiting the Amount of Compensation" in Christina L Beharry, ed, *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill-Nijhoff, 2018) 323 at 343.

(or it might even be required under local laws to initiate)[2] administrative proceedings as well.[3] However, the recourse to justice is not limited to those avenues. Foreign investors that are protected by an IIA[4] have direct recourse against the state: investor-state arbitration. This leads to two typical scenarios in which the double recovery problem may arise.

I.4. The first scenario is when foreign shareholders initiate investor-state arbitration proceedings against the host state based on their treaty rights, while the investment vehicle pursues contractual claims in another forum (such as local courts or commercial arbitration), with all proceedings relying on the same facts and the same alleged wrongful measures by the host state. The second scenario is when foreign investors—at different levels of the same chain of corporate ownership (i.e. the ultimate investors and the interposed companies)—initiate separate investment arbitration proceedings, relying on different applicable IIAs. In both scenarios, what renders double recovery possible is that the legal bases, and often the claimants, differ in different fora.

I.5. The multiplicity of claimants (the ultimate investors, the interposed companies, and the investment vehicle) and the multiplicity of legal bases (the IIAs and the contract), coupled with the lack of a clear legal mechanism in the investor-state dispute settlement ("ISDS") system to prevent double recovery, have created a perfect environment for this problem to emerge and to grow.

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[2] See e.g. *Occidental v Ecuador (I)*, Final Award (1 July 2004) at para 60.
[3] In most administrative proceedings, claimants may only challenge the legality of the government measures; however, in some cases, claimants were allowed to seek damages as well. See e.g. *Charanne v Spain*, Award (21 January 2016) at paras 203, 240–241; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*, Award (16 June 2010) at paras 12.60.19–24.
[4] An IIA is often in the form of a bilateral investment treaty ("BIT") or an investment chapter in a free trade agreement ("FTA").

I.6. The risk of double recovery in investment arbitration was first noticed in 1986, in one of the cases before the Iran-US Claims Tribunal: *Blount Brothers Corporation v Iran*.[5] However, in the context of modern ISDS cases (which are brought based on IIAs), the risk of double recovery was first raised in *Waste Management, Inc v Mexico (I)* in 2000.[6] Thus, we see that the double recovery issue (in the context of investment arbitration) is a relatively new phenomenon. Nevertheless, over the past two decades, it has not been thoroughly addressed by ISDS tribunals and commentators, despite the risk of double recovery being repeatedly raised as an objection by respondent states.

I.7. The author's research shows that of the 1,023 reported investment arbitration cases that were filed as of January 2020,[7] the issue of double recovery was raised at different stages of proceedings (jurisdiction, merits, annulment proceedings, or at all of these stages) in 63 cases.[8] In

[5] *Blount Brothers v Iran*, Award No 215-52-1 (27 February 1986) at para 30.
[6] *Waste Management v Mexico (I)*, Arbitral Award (2 June 2000) at §§ 6, 27.
[7] UNCTAD, *Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019*, IIA Issue Note 2 (July 2020) at 1.
[8] The cases, in alphabetical order, are as follows: *Ampal v Egypt*; *AMTO v Ukraine*; *Azurix v Argentina*; *Bayindir v Pakistan*; *Bosca v Lithuania*; *British Caribbean Bank v Belize*; *Burlington v Ecuador*; *Busta v Czech Republic*; *Camuzzi v Argentina (I)*; *Devas v India*; *CEMEX v Venezuela*; *Chevron and Texaco v Ecuador (I)*; *CME v Czech Republic*; *CMS v Argentina*; *ConocoPhillips v Venezuela*; *Daimler v Argentina*; *Deutsche Bank v Sri Lanka*; *Deutsche Telekom v India*; *Duke Energy v Ecuador*; *EDF v Argentina*; *Enron v Argentina*; *Fábrica de Vidrios v Venezuela*; *GAMI v Mexico*; *Gavrilovic v Croatia*; *Eskosol v Italy*; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*; *Goetz v Burundi (II)*; *Gosling v Mauritius*; *Guaracachi v Bolivia*; *GÜRİŞ and Others v Syria*; *Hochtief v Argentina*; *Hydro and Others v Albania*; *Impregilo v Argentina*; *Inmaris v Ukraine*; *Kappes v Guatemala*; *Kardassopoulos and Fuchs v Georgia*; *Lauder v Czech Republic*; *Manchester Securities v Poland*; *Micula v Romania (I)*; *Nagel v Czech Republic*; *Nykomb v Latvia*; *Occidental v Ecuador (I)*; *Orascom v Algeria*; *Pan American Energy v Argentina* consolidated with *BP America v Argentina*; *Perenco v Ecuador*; *PSEG v Turkey*; *SAUR v Argentina*; *Renco v Peru (I)*; *RREEF v Spain*; *Salini Impregilo v Argentina*; *Sempra v Argentina*; *Standard Chartered Bank v Tanzania*; *Suez and InterAguas v Argentina*; *Strabag and Others v Poland*; *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*; *Teinver v Argentina*; *Unión Fenosa v Egypt*; *Urbaser and CABB v Argentina*; *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*); *von Pezold v Zimbabwe*; *United Utilities v Estonia*; *Waste Management v Mexico (I)*; *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*; *Zeevi v Bulgaria*. Two points should be noted here. First, that the consolidated cases have been counted as one case because they involve one tribunal. The same applies to coordinated cases because they share the same tribunal. The reason for this grouping is that the focus of this thesis (with respect to case law) is how tribunals approach the issue. Second, the total number of ISDS cases that contain the term "double recovery" (or similar terms) is considerably greater than the 63 cases listed above. The reason that many cases did not make it to the list (but are included in the bibliography) is that the

those 63 cases:[9]

- One tribunal noted that it knew of no mechanism to stop or prevent double recovery.[10] (Group No 1).
- Four tribunals made no ruling on the issue of double recovery.[11] (Group No 2)
- One tribunal characterized the risk of double recovery as "policy concerns" and ruled that dealing with such concerns is not within the mandate of a tribunal.[12] (Group No 3).
- Five tribunals and one annulment committee held that there are numerous mechanisms to address the double recovery issue; but none of them named any such mechanisms.[13] (Group No 4).
- Seven tribunals left the issue of dealing with double recovery up to the second deciding forum.[14] (Group No 5).
- One tribunal (which was the second deciding forum) left the issue to be dealt with by the enforcement courts.[15] (Group No 6).

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term "double recovery" (and similar terms) in those cases did not convey the same meaning as the subject of this thesis. As will be explained in Chapter 1, the term "double recovery" can have different meanings.

[9] It should be noted that some cases fit into more than one group.

[10] *Nykomb v Latvia*, Award (16 December 2003) at 9.

[11] *Fábrica de Vidrios v Venezuela*, Award (13 November 2017); *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016); *Zeevi v Bulgaria*, Award (25 October 2006); *Nagel v Czech Republic*, Final Award (9 September 2003).

[12] *Kappes v Guatemala*, Decision on the Respondent's Preliminary Objection (13 March 2020) at para 140.

[13] *Daimler v Argentina*, Award (22 August 2012) at para 155; *Chevron and Texaco v Ecuador (I)*, Partial Award on the Merits (30 March 2010) at para 557; *Azurix v Argentina*, Decision on the Application for Annulment of the Argentine Republic (1 September 2009) at para 116; *Bayindir v Pakistan*, Decision on Jurisdiction (14 November 2005) at para 270; *Camuzzi v Argentina (I)*, Decision on Jurisdiction (11 May 2005) at para 91; *Sempra v Argentina*, Decision on Objection to Jurisdiction (11 May 2005) at para 102.

[14] *Burlington v Ecuador*, Decision on Ecuador's Counterclaims (7 February 2017) at paras 1082, 1086; *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*, Award (9 April 2015) at para 40; *British Caribbean Bank v Belize*, Award (19 December 2014) at para 190; *SAUR v Argentina*, Award (22 May 2014) at para 175; *Enron v Argentina*, Award (22 May 2007) at paras 202, 211–212; *Lauder v Czech Republic*, Final Award (3 September 2001) at para 172; *Gavrilovic v Croatia*, Award (26 July 2018) at para 1297.

[15] *Standard Chartered Bank v Tanzania*, Award (11 October 2019) paras 27–28, 526.

- Sixteen tribunals rejected the double recovery objection to their jurisdiction or the admissibility of claims and held that the issue properly belonged to the merits phase.[16] (Group No 7). Of these thirteen tribunals:
    - Five did not address the issue in the merits phase at all.[17]
    - One tribunal left it to government negotiators (who were engaged in renegotiations with the investment vehicle) to prevent double recovery.[18]
    - One tribunal rejected the respondent's argument at the merits phase because although the state had to pay twice (once to the claimant here and once to the investment vehicle claimant in the local proceeding), the claimant would not recover twice, since it had already transferred its shares and would no longer benefit from the investment vehicle's recovery.[19]
    - Five tribunals rejected all of the claims in the merits phase.[20] Another tribunal noted that the risk of double recovery in the case before it was rendered moot, given that one of the claimants withdrew (due to an external factor) from the proceeding.[21] As such, those five cases never reached the quantum phase where the double recovery issue could be properly discussed.

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[16] *Gosling v Mauritius*, Award (18 February 2020) at para 164; *United Utilities v Estonia*, Award (21 June 2019) at para 465; *Busta v Czech Republic*, Final Award (10 March 2017) at para 217; *RREEF v Spain*, Decision on Jurisdiction (6 June 2016) at para 126; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at para 253; *Hochtief v Argentina*, Decision on Jurisdiction (24 October 2011) at paras 121–122 and Decision on Liability (29 December 2014) at paras 151, 180; *Inmaris v Ukraine,* Decision on Jurisdiction (8 March 2010) at para 112; *AMTO v Ukraine*, Final Award (26 March 2008) at paras 26(e), 26(i), 71; *EDF v Argentina*, Decision on Jurisdiction (5 August 2008) at paras 219–220; *Pan American Energy v Argentina* consolidated with *BP America v Argentina*, Decision on Preliminary Objections (27 July 2006) at para 219; *Suez and InterAguas v Argentina*, Decision on Jurisdiction (16 May 2006) at para 51; *Bayindir v Pakistan*, Decision on Jurisdiction (14 November 2005) at para 270; *Camuzzi v Argentina (I)*, Decision on Jurisdiction (11 May 2005) at para 91; *Sempra v Argentina*, Decision on Objection to Jurisdiction (11 May 2005) at para 102; *Azurix v Argentina*, Decision on Jurisdiction (8 December 2003) at para 101.
[17] *RREEF v Spain*, Decision on Responsibility and on the Principles of Quantum (30 November 2018); *Urbaser and CABB v Argentina*, Award (8 December 2016); *Hochtief v Argentina*, Award (19 December 2016); *Inmaris v Ukraine*, Award (1 March 2012); *Azurix v Argentina*, Award (14 July 2006).
[18] *Enron v Argentina*, Award (22 May 2007) at paras 202, 211–212.
[19] *EDF v Argentina*, Award (11 June 2012) at paras 1139–1142, 172.
[20] *Gosling v Mauritius*, Award (18 February 2020) at para 289(3); *United Utilities v Estonia*, Award (21 June 2019) at para 939; *Busta v Czech Republic*, Final Award (10 March 2017) at para 458(4); *Bayindir v Pakistan*, Award (27 August 2009) at 140; *AMTO v Ukraine*, Final Award (26 March 2008) at para 115.
[21] *Suez and InterAguas v Argentina*, Decision on Jurisdiction (16 May 2006) at paras 1, 16, 51.

- Two cases were discontinued.[22]

- Two tribunals and one annulment committee described the double recovery issue in the case before them as "theoretical" and "hypothetical".[23] (Group No 8).
- Five tribunals were of the view that claimants' compensation under their treaty rights should not be reduced based on the possibility of a favorable outcome in parallel proceedings.[24] (Group No 9).
- In two cases, the risk of double recovery was rendered moot due to certain developments and, as such, the tribunals did not even address the issue. (Group No 10). In one of the cases, the reason was that the claims in the parallel investment arbitration were rejected.[25] In the other case, the reason was that the tribunal found that it did not have jurisdiction (on other grounds) over the relevant claims.[26]
- Seven tribunals invoked the principle of the prohibition of double recovery: five expressly[27] and two impliedly.[28] (Group No 11). Of these, one tribunal was in fact the second deciding forum (following a commercial arbitration proceeding that had been

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[22] *Pan American Energy v Argentina* consolidated with *BP America v Argentina*, Procedural Order (20 August 2018); *Camuzzi v Argentina (I)*, Procedural Order (3 August 2018).
[23] *Busta v Czech Republic*, Final Award (10 March 2017) at para 217; *Impregilo v Argentina*, Award (21 June 2011) at para 139; *Azurix v Argentina*, Decision on the Application for Annulment of the Argentine Republic (1 September 2009) at paras 112–114.
[24] *von Pezold v Zimbabwe*, Award (28 July 2015) at paras 936–937; *Chevron Corporation and Texaco Petroleum Company v Ecuador (I)*, PCA Case No 2007–02/AA277, Partial Award on the Merits (30 March 2010) at para 557; *GAMI v Mexico*, Final Award (15 November 2004) at paras 116–118; *CME v Czech Republic*, Final Award (14 March 2003) at para 489.
[25] *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at paras 28, 30, 33, 136, 143, fn 294.
[26] *Guaracachi v Bolivia*, Award (31 January 2014) at paras 258–260, 268, 405.
[27] *GÜRİŞ and Others v Syria*, Final Award (31 August 2020) at para 374; *ConocoPhillips v Venezuela*, Award (9 March 2019) at para 964; *Burlington v Ecuador*, Decision on Ecuador's Counterclaims (7 February 2017) at para 1083; *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*), Award (9 October 2014) at para 378; *Deutsche Bank v Sri Lanka*, Award (31 October 2012) at para 562.
[28] *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*, Award (9 April 2015) at para 38; *Pan American Energy v Argentina* consolidated with *BP America v Argentina*, Decision on Preliminary Objections (27 July 2006) at para 219.

concluded and where the respondent had already paid the damages awarded).[29] In that case, the investment tribunal noted that any double recovery should be avoided, and yet awarded the total damages and only mentioned that the claimant committed to reimburse the state for any double recovery.[30]

- Only thirteen tribunals effectively prevented double recovery.[31] (Group No 12).

I.8. The above observations show that the overall situation has not changed much since 2003 when the tribunal in *Nykomb v Latvia* described it as follows:

> The risk of double payment is admittedly an effect of the establishment of an arbitration facility also for alleged losses or damages suffered indirectly by an investor … No definite remedies have been developed at this stage, but clearly the Treaty based right to arbitration is not excluded or limited in cases where there is a possible risk of double payment. This risk of double payment is only likely to be resolved through the further development of the law in this area, such as by the means of new judgments, decisions, guidance or other relevant developments.[32]

I.9. However, it does not follow that the problem has gone unnoticed in the ISDS community; on the contrary, there is a growing awareness of the problem. For example, the 2013 edition of the OECD *Working Papers on International Investment*,[33] UNCITRAL's ongoing project since 2013 in relation to the problems associated with multiple proceedings,[34] the 2017 Columbia Law

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[29] *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*), Award (9 October 2014) at paras 120, 379.
[30] *Ibid* at paras 378–381, 404(d)–(e).
[31] *GÜRİŞ and Others v Syria*, Final Award (31 August 2020) at paras 374–375; *Manchester Securities v Poland*, Award (7 December 2018) at paras 525–527; *Orascom v Algeria*, Award (31 May 2017) at paras 542–543, 546; *Renco v Peru (I)*, Partial Award on Jurisdiction (15 July 2016) at paras 8–82, 84, 86–88, 119; *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016) at paras 329–337, 346(h); *Micula v Romania (I)*, Award (11 December 2013) at paras 1240, 1246–47; *Goetz v Burundi (II)*, Award (21 June 2012) at paras 167, 168, 171, 211; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*, Award (16 June 2010) at paras 14.15–14.24; *Kardassopoulos and Fuchs v Georgia*, Award (3 March 2010) at paras 241–242, 452; *Occidental v Ecuador (I)*, Final Award (1 July 2004) at paras 209, 217(10); *PSEG v Turkey*, Award (19 January 2007) at para 340; *CMS v Argentina*, Award (12 May 2005) at paras 429, 469; *Waste Management v Mexico (I)*, Arbitral Award (2 June 2000) at §§ 14, 27, 31.
[32] *Nykomb v Latvia*, Award (16 December 2003) at para 2.4(a) [emphasis added].
[33] David Gaukrodger, "Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency" in *OECD Working Papers on International Investment* (OECD Publishing, 2013) Paper No 2013/03 at 34–36.
[34] UNCITRAL, 48th session, A/CN9/848, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (Vienna, 2015) at para 3; UNCITRAL, 52nd session, A/CN9/964, *Report of the Working Group III (Investor-State*

School Arbitration Day conference,[35] as well as the 2018 report by the International Bar Association ("IBA") Arbitration Subcommittee on Investment Treaty Arbitration,[36] discussed the risk of double recovery. As such, the time is ripe to thoroughly examine the problem and to suggest an effective solution.

CONTRIBUTION AND OUTLINE

I.10. This thesis makes an original contribution to the current legal scholarship on investment arbitration because, to date, a thorough and comparative analysis of double recovery is absent from both commentary and relevant case law. Further, by suggesting an effective solution to the issue of double recovery, this work aims to resolve a targeted, but significant, economic issue in the ISDS system. The author's proposed solution contributes to the integrity of the system.[37] As such, this work would be a constructive part of the global conversation about stability, security, and inter-state connections.

I.11. The first step to addressing the problem is to establish the existence of a general principle of law on the prohibition of double recovery. The second step is to provide a legal mechanism for implementing the principle. This proposed mechanism covers both scenarios of parallel proceedings and sequential proceedings and utilizes three procedural tools: the *res judicata*

Dispute Settlement Reform) on the Work of its Thirty-Sixth Session (Vienna, 2018) at paras 1–2. See also UNCITRAL, 52nd session, A/CN9/970, *Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session* (New York, 2019) at para 84.

[35] "Double Recovery Discussed at Columbia", *Global Arbitration Review* (2 May 2017) (reporting on Columbia Arbitration Day 2017).

[36] IBA Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018) at 15–20.

[37] See Andrea K Bjorklund, "Private Rights and Public International Law", *supra* note 1, at 259 (explaining that "[d]uplicative filings can lead to inefficiency of process ... The legitimacy of the dispute settlement system or systems may also be undermined …To make matters worse, there is the possibility that a claimant will get duplicative recovery, an outcome suggesting substantive unfairness in the process itself").

principle, the *lis pendens* principle, and the tribunals'/courts' power to stay proceedings. Traditionally, courts and tribunals have required a strict triple identity test to be met for *lis pendens* and *res judicata* to apply: the same parties, the same cause of action/legal basis, and the same relief/object. To overcome this impediment, the thesis argues that the application of a strict identity test in this international context is misguided, and proposes a coherent, principled test that is in line with the underlying policies of international investment law.

I.12. The solution proposed by this thesis (described above) is discussed in depth in Part IV. However, before analysing the solution, one must first outline the contours of the problem (this is the work of Part II) and explore how the problem has been dealt with thus far (this is the focus of Part III).

I.13. Part II provides insight into the term "double recovery". The Part first discusses whether the term is the right choice for the phenomenon it represents. It then explains the subject matter of "recovery" in "double recovery", i.e. assuming that we establish that double recovery is prohibited, we must determine what claims may result in double recovery. The Part also sets forth a comprehensive definition of double recovery and its requirements, as well as possible scenarios in which the problem may arise. Part III analyses relevant ISDS case law and commentary as well as relevant international documents. The Part also discusses the solutions that have been suggested thus far by ISDS tribunals and commentators. The author argues that those solutions either need further elaboration or lack a holistic approach. Finally, the last part is Part V, in which the author presents her conclusions.

ASSUMPTIONS

I.14. The solution put forward in this thesis is based on, and supports, four assumptions:

- That the underlying policy in modern international investment law is to offer a higher level of protection to investors and their investment (compared to the protection that is generally available in domestic law and the law of diplomatic protection), in order to support and promote economic development;
- That shareholding investors have standing, regardless of their status as majority/minority or direct/indirect shareholders;
- That a pursuit of multiple proceedings is not in and of itself an "abuse of process" by the investors; and
- That the terms "compensation" and "damages" can be used interchangeably.

I.15. The first two assumptions are intended to ensure that the author's critique of the double recovery problem is not perceived as challenging the standing of shareholders in investor-state arbitration or the underlying policy to protect them. As will be explained in the section on "Methodology and Theoretical Approach", the aim is to find a solution to the problem by interpreting the currently available practice and doctrines, without suggesting any fundamental change to the ISDS system.

I.16. The author's first assumption (that the underlying policy in international investment law is to offer a higher level of protection to investors and their investment, compared to the protection available in domestic law and the law of diplomatic protection) is well recognized.[38] The

[38] See e.g. the preamble of the ICSID Convention; World Bank Group, *Legal Framework for the Treatment of Foreign Investment (Vol 2): Guidelines* (1992) at 35; Rudolf Dolzer & Christoph Schreuer, *Principles of International*

assumption contains three layers which are as follows: the aim of international investment law is to support and promote economic development (layer one), which requires the promotion of rule of law in investor-state relations and the incentivization of foreign direct investment (layer two), which in turn requires providing investors with a higher level of protection—compared to the protection offered by domestic law and the law of diplomatic protection (layer three).[39] Thus, the policy in international investment law to offer a higher level of protection to investors is a means to an end. The author also recognizes the need to protect the public interests that states represent and, hence, proposes a solution in this thesis that strikes a balance between investors' and states' interests—a solution that works in harmony with the underlying policies of international investment law.

I.17. The second assumption (that shareholders have standing, regardless of their status) is also well established,[40] at least for now.[41] The inclusion of the assumption in this work is important because the emergence of the problem of double recovery in the ISDS system mainly originates from shareholders' standing (and their claim for reflective loss). Simply put, if the ISDS system had not recognized the standing of shareholders, there would not have been any risk of double recovery (as the problem stands today). Given this semi-causal link between the double recovery

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Investment Law, 2nd ed (Oxford University Press, 2012) at 5, 8–9; ILA Committee on Law of Foreign Investment, *First Report* (Toronto Conference, 2006) at 4, 7.

[39] See the references cited in the previous footnote.

[40] See Stanimir A Alexandrov, "The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as 'Investors' Under Investment Treaties" (2005) 6:3 J World Inv & Trade 378 at 393–394; Christopher H Schreuer, "Shareholder Protection in International Investment Law" (2005) 3 TDM at 6–7; Dolzer & Schreuer, *supra* note 38, at 58; David Gaukrodger, *supra* note 33, at 25–29; Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, 2nd ed (Oxford University Press, 2017) at paras 6.123–6.132.

[41] It should be noted that the UNCITRAL Working Group III is currently working on a number of possible reforms to the ISDS system, including addressing the question of whether there should be any limitations to shareholders' claims for reflective loss. This topic is discussed later in the thesis. See below, Chapter 5, Subsection "UNCITRAL Project on Multiplicity of Proceedings".

problem and shareholders' standing, the author has included this second assumption so as to clarify that the aim of this work is to find a solution without challenging shareholders' standing in investment arbitration.

I.18. The third assumption (that a mere pursuit of multiple proceedings is not "abuse of process") should not be construed as adopting the general position that the pursuit of multiple proceedings could never be regarded as abusive, given that some parallel proceedings can be characterized as such.[42] Rather, the assumption means that, in the scenarios discussed in this thesis, the author assumes that the claimants have not acted in bad faith. The reason for this is that abuse of process is fact-based and considered an exceptional finding which has a high threshold.[43] In fact, the third assumption (no abuse of process) is the result of the second assumption (shareholders' standing): once the right to bring claims regardless of their status as majority/minority and direct/indirect shareholders is recognized, one should anticipate they might lodge multiple claims at different levels. Therefore, such claims—in and of themselves—must not be considered abusive.

I.19. The fourth and the last assumption is that the terms "compensation" and "damages" can be used interchangeably. Traditionally, the two were considered to refer to different notions, particularly in the context of expropriation: "compensation" was used for what a tribunal would award in lawful expropriations, whereas "damages" was used in relation to unlawful acts of a state.[44] However, the sharp distinction between the two terms seems to have faded over time, and

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[42] See generally, Emmanuel Gaillard, "Abuse of Process in International Arbitration" (2017) 32:1 ICSID Review 17.
[43] *Levy v Peru*, Award (9 January 2015) at para 186 and the accompanying citations.
[44] See e.g. Marjorie M Whiteman, *Damages in International Law* (United States Government Printing Office, 1937) at 6; Derek W Bowett, "Claims Between States and Private Entities: The Twilight Zone of International Law" (1985) 35 Catholic U L Rev 929 at 938; *SEDCO v Iran*, Interlocutory Award No ITL 59-129-3, Separate Opinion of Judge Brower (27 March 1986) *published in* International Legal Materials, vol 25:3 (Cambridge University Press, 1986) 636 at 648, fn 35.

they have increasingly been used interchangeably.[45] This approach received the stamp of approval of the International Law Commission ("ILC") in its 2001 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, which used the term "compensation" for wrongful acts.[46] The author follows this approach and uses the two terms interchangeably.

METHODOLOGY AND THEORETICAL APPROACH

I.20. The research carried out for this thesis is based on bibliographical research and subsequent analysis of cases and commentary. The research mainly focuses on ISDS case law and commentary. However, where it is relevant and helpful, case law and commentary from public international law, international commercial arbitration, and international human rights law are also discussed. In this regard, the author applies a comparative method to assess the approach that is adopted in international investment law, in comparison to those approaches taken in the other fields noted above. The following paragraphs explain the reasons for the focus on the three fields of public international law, international commercial arbitration, and international human rights law.

I.21. The choice of public international law is evident: public international law rules have a strong presence in international investment law.[47] The author uses the connection between the two

[45] See e.g. Irmgard Marboe, "Compensation and Damages in International Law: The Limits of 'Fair Market Value'" (2006) 7:5 J World Investment & Trade 723 at 725–728; Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008) at 4; Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration*, *supra* note 1, at 6.

[46] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Document A/56/10, in Yearbook of the International Law Commission, vol II, part Two (United Nations Publication, 2001) 30, arts 34, 36(1).

[47] The nature of the relationship between the two fields—i.e. whether international investment law is part of public international law, whether it is a separate field but based on public international law, or whether it is a hybrid phenomenon—is not relevant to the topic at issue in this thesis. The reason for this is that the common denominator of all described scenarios is that public international law rules have a strong presence in international investment law. This position is sufficient to indicate the purpose of this research.

fields to argue that a principle on the prohibition of double recovery also exists in international investment law. Additionally, a number of public international law cases are discussed.

I.22. The reason for choosing international commercial arbitration is also clear. Despite the difference between international commercial arbitration and investor-state arbitration (given the presence of states in their sovereign capacity in the latter), the two fields share striking similarities, at least with respect to procedural matters. Given that the author's proposed solution to the double recovery problem is of a procedural nature, international commercial arbitration can contribute meaningfully to the solution.

I.23. However, the choice of international human rights law may seem less clear to readers, who might consider that international investment law and international human rights law inhabit two completely different worlds. As different as these two fields are, the author's research shows that they share two interesting common features which make international human rights case law relevant to the research for this work. These commonalities are as follows.

I.24. First, both fields have witnessed a proliferation of international courts and tribunals, as states' measures have become increasingly subject to more than one treaty or convention. As previously explained, in investor-state arbitration, the double recovery problem is often due to the multiplicity of proceedings against a state,[48] a problem which arises because a wrongful act by the state can be subject to multiple IIAs. A similar situation exists in international human rights law. For example, a European country is a signatory to the *European Convention on Human Rights*[49] as well as to the *First Optional Protocol to the International Covenant on Civil and Political*

[48] See above, Section "Context and Overview of the Problem".
[49] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 December 1950, 213 UNTS 221 (also known as the *European Convention on Human Rights*).

Rights.[50] A wrongful act by that European state that violates the first instrument is very likely to also violate the other. As such, that state may become subject to at least two proceedings (not considering the possibility of domestic proceedings): one before the European Court of Human Rights ("ECtHR") and one before the UN Human Rights Committee.

I.25. Thus, both fields have faced the issue of multiple proceedings concerning the same wrongful conduct, which makes international human rights case law relevant to this inquiry. Therefore, a number of those cases are discussed to examine whether international human rights forums have successfully addressed the issue and, if so, whether their approach could contribute to the formulation of a solution to the double recovery problem.

I.26. The second similarity between international investment law and international human rights law goes beyond the technical similarity discussed above; it goes to the substance of the two fields. Careful analysis shows that both fields give recourse to one side (namely "investors" in international investment law, and "persons" in international human rights law) that is otherwise unavailable internationally against the other side: sovereign states. Such similarity in the underlying policy of the two fields reinforces the relevance of international human rights case law in relation to the issue of multiple proceedings concerning the same wrongful conduct.

I.27. The aim of this thesis is to find a solution to the problem of double recovery by interpreting currently available legal doctrines and practice. In other words, the solution that is set forth in this work neither suggests a fundamental change to present legal doctrines and practice, nor does it

[50] *First Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171. The *Protocol* established a mechanism for individuals to launch complaints against states under the *Covenant*.

require a fundamental change to the regulatory system to take place for the solution to become operative.

I.28. In terms of a theoretical framework, this work is not underpinned by any particular theory of law. In other words, to accept the author's arguments, one does not have to be—for example—a positivist or an interpretivist. This is possible because the thesis discusses a technical legal issue that has no interdisciplinary element that would require the author to take a particular theoretical stand with respect to fundamental questions such as the nature of law, grounds of law, or legal institutions. However, it should be noted that the author is drawn to Dworkinian legal interpretivism in matters of hard cases where the application of certain legal rules could yield unjust results. For example, the following two considerations in Dworkin's position inform and underpin some of the author's arguments.

I.29. The first consideration is Dworkin's position that in most hard cases of law there are "right answers" discoverable through interpretation by judges.[51] To Dworkin, "right answers" are the ones that "follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice".[52] With respect to "interpretation", Dworkin rejects the argument that interpretation should serve to discover the original author's intentions; instead he defines it as "imposing purpose on an object or practice in order to make of it the best possible of the form … to which it is taken to belong".[53]

I.30. This is relevant because the author is of the view that it is possible to find a solution to the double recovery problem by interpreting legal doctrines and practice that are currently available

[51] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) at viii, ix, 76–86.
[52] *Ibid* at 234. For his definition of "justice", "fairness", and "procedural due process", see *ibid* at 164–165.
[53] *Ibid* at 52–55, 77 [emphasis added].

in international investment law. The solution that will be proposed (in Part IV) involves using general principles of law. Unlike statutes or treaties, general principles of law neither have a specific author nor a particular legislative history, nor *travaux préparatoires* to which one can turn. Therefore, retrieving the exact intention of the original authors of general principles of law is neither possible nor desirable, given that those principles have developed and evolved over time.

I.31. In such a context, the application of Dworkin's approach could be helpful, i.e. interpreting general principles of law in a way that gives them the best possible meaning they could hold at present—a meaning that shows those principles in their best light—instead of searching for historical intentions. Of course, giving a principle or rule the best possible meaning does not mean re-writing them anew, which brings us to the second relevant consideration in relation to Dworkin's position.

I.32. The second consideration is Dworkin's emphasis on "integrity" in adjudication, which he defines as a notion that requires judges to enforce law in a "coherent" way.[54] According to Dworkin, integrity "explains how and why the past [judicial decisions] must be allowed some special power of its own in court ... It explains why judges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one".[55] An interpretation that is done with integrity ensures that a principle/rule is interpreted and not invented. As a result, the new interpretation "fits" and "justifies" the previous interpretations.[56]

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[54] *Ibid* at 167.
[55] *Ibid*. For an example offered by Dworkin, see *Ibid* at 240–250.
[56] *Ibid* at 239. For his elaboration on the notions of "fit" and "justification", see *ibid* at 229–232, 255–258. See also Nicos Stavropoulos, "Legal Interpretivism" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Summer 2014 ed (Stanford University Metaphysics Research Lab, 2008) at s 3 "Hybrid Interpretivism".

I.33. However, such interpretation does not close the door on novelty. As previously noted, an interpretation should give a principle/rule the best possible meaning it could hold in the present intellectual climate,[57] which might require inserting new elements into the principle/rule or removing old elements. As such, the question is how such a balance could be struck in order for an interpretation to be novel on the one hand, and to "fit" and "justify" the past on the other? Dworkin's answer is that an interpretation may embrace novelty as long as it is not "too novel", which would be "too far divorced from what past judges and other officials said as well as did."[58] The author believes that the solution proposed in this thesis meets Dworkin's test.

I.34. The last point that should be clarified concerns how Dworkin's view (which was originally framed within the context of domestic law and, more precisely, US common law) can be applied to international law. There are important differences between a domestic law setting and an international law setting, for example, the absence of a centralized court system and legislature. However, it is precisely because of the absence of a centralized system in international law that international courts and tribunals have played such a significant role in the development of international law. In that sense, one can see similarities between the role of international judges/arbitrators and the key role that Dworkin envisaged for domestic judges. The more a field in international law is underdeveloped (like parts of international investment law), the more international judges and arbitrators can use their interpretive tool to help develop the law in that field. As such, the power that Dworkin saw in the interpretative tool wielded by domestic judges in US law also exists in international law.[59] And that makes Dworkinian legal interpretivism not

[57] See above, paras I.29 – I.31.
[58] Ronald Dworkin, *supra* note 51, at 248.
[59] For a discussion on the role of international judges/arbitrators in the development of international law, see Fabien Gélinas, "King Rex v. Judge Judex: Adjudicating Transnational Law", (2018) 64:1 McGill L J 195 at 203–211.

only relevant, but also a perfect choice of legal theory to inform this thesis.

PART II: CONTOURS OF THE PROBLEM

II.1. This Part identifies the contours of the problem of double recovery and has three Chapters. Chapter 1 (Binaries) discusses whether the term "double recovery" has been correctly assigned to the phenomenon it represents. It also distinguishes "double recovery" from similar terms with which it has been used interchangeably. Chapter 2 (Subject Matter of "Recovery" in "Double Recovery") discusses what type of claims, if not administered properly, have the potential to be recovered twice or more. Thereafter, and in light of the discussion in the first two Chapters, Chapter 3 (Definition and Scenarios) provides a definition of double recovery that captures all the necessary requirements for the problem to arise. It also discusses the scenarios where the risk of double recovery has manifested itself. Lastly, there will be a Summary of the Part.

CHAPTER 1: BINARIES

II.2. This Chapter includes four Sections that analyse four binaries. The first Section (Double Recovery v. Double Counting) discusses another phenomenon for which the term "double recovery" has been used and explains that it is best to use the term "double counting" for that phenomenon. The second Section (Double Recovery v. Double Payment) argues that the term "double recovery" does not entirely correspond to the phenomenon it is known to represent. The third Section (Double Payment v. Double Compensation) explains that the best term to describe the phenomenon that is the subject of this thesis is neither "double recovery" nor "double payment", but rather "double compensation". The fourth Section (Actual Double Compensation v. The Risk of Double Compensation) discusses different stages at which double recovery could be addressed and argues that it is the risk that must be the focus of a proposed solution, i.e. tribunals

should not wait for double recovery to occur to do something about it; it is the risk that must be contained.

A. Double Recovery v. Double Counting

II.3. The term "double recovery" has not been used exclusively in relation to the issue of a state's overpayment as a result of multiple proceedings for the same wrongful conduct. There is another situation that has also been called "double recovery": over-compensating a claimant as a result of the tribunal's miscalculation of the damage incurred.

II.4. A typical example includes a case in which the tribunal adopts the discounted cash flow ("DCF") method of evaluation, yet it awards the claimant both the lost profits (*lucrum cessans*) and the expenses incurred (*damnum emergens*).[60] The lost profits already cover the incurred expenses and, as such, if the tribunal also awards the incurred expenses separately, it will amount to over-compensation for the claimant. Simply put, had there been no wrongful conduct by the state, the claimant's incurred expenses would have been recovered through the business's future revenues, which are counted in the DCF method. Thus, the awarding of incurred expenses separately would be an over-compensation, which has been called double recovery.[61]

II.5. Another example includes that discussed in the ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.[62] Paragraph 33 of the commentary to article 36(2) of the *Draft Articles* reads: "If loss of profits are to be awarded, it is inappropriate to award interest under

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[60] Sergey Ripinsky & Kevin Williams, *supra* note 45, at 296–297; Mark A Kantor, *Valuation for Arbitration* (Kluwer Law International, 2008) at 198–199; Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration*, *supra* note 1, at 185.
[61] *Himpurna v Persero*, Final Award (4 May 1999) published in Albert Jan Van den Berg, ed, *Yearbook Commercial Arbitration*, vol XXV (ICCA & Kluwer Law International, 2000) 13 at paras 240, 242.
[62] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 46, para 33 of the commentary to art 36(2), and para 11 of the commentary to art 38(1).

article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation."[63] There are other forms of miscalculation of damage too, which a number of ISDS tribunals have discussed.[64]

II.6. The "double recovery" discussed in the above paragraphs is clearly different from the one that is the subject of this thesis, as the former does not involve the multiplicity of proceedings.[65] However, the two concepts share one similarity, in that the state's payment exceeds full reparation for the harm it has inflicted on the investor. To avoid confusion between the two concepts, some tribunals and commentators have used the term "double counting" for the scenario involving over-compensation of a claimant as a result of the miscalculation of damage.[66] This brings us to the question of whether the term "double recovery" is the right term to describe the concept that is the subject of this thesis. The next two Sections focus on this question.

B. Double Recovery v. Double Payment

II.7. It was explained in the introductory Part that the term "double recovery" refers to a situation where, as a result of multiple proceedings, a host state must pay twice or more for the

[63] *Ibid* [emphasis added]. See e.g. *Bosca v Lithuania*, Award (13 May 2013) at para 290 (the respondent argued that awarding interest on both the lost profits and the income-earning capital would amount to "double recovery" for the claimant).
[64] See e.g. *Suez and Vivendi v Argentina*, Award (9 April 2015) at para 104 (holding that the value of unpaid dividends was already calculated in the value of the shareholders' equity and, thus, "to grant recovery of such separate amounts for unpaid dividends would be to allow the Claimants a double recovery"); *Total v Argentina*, Award (27 November 2013) at para 95 (holding that, in order to avoid "double recovery", the amount of operator fees awarded must be reduced by the claimant's proportionate ownership in the company). See also *Murphy Exploration and Production Company International v Ecuador (II)*, PCA Case No 2012–16, Final Award (10 February 2017) at paras 54, 67–70.
[65] See above, paras I.4 – I.5.
[66] See e.g. *Perenco v Ecuador*, Award (27 September 2019) at paras 108, 707; *ConocoPhillips v Venezuela*, Award (9 March 2019) at paras 946, 1010.5; *Burlington v Ecuador*, Decision on Ecuador's Counterclaims (7 February 2017) at para 104; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*, Award (16 June 2010) at paras 14.1, 14.15–14.24; Sergey Ripinsky & Kevin Williams, *supra* note 45, at 109.

same harm done to a foreign investor who is protected by the applicable IIA(s).[67] It is clear from the description that the focus of the issue is on the payer (the state) and not the payee (the investor), i.e. that the state pays more than once. However, the term that has been used—"double recovery"[68]—revolves around the payee recovering more than once. This begs the question of whether the term "double recovery" has been correctly assigned to the concept it represents. The following paragraphs explain that this is not merely a linguistic issue, but rather an issue with practical implications, and that in fact "double payment" is a better term to use.

II.8. Normally, the state is on one side of the equation and the investor on the other and, as such, when the state pays more than once, it will be the investor who receives more than once. Thus, one might wonder what difference it would make to focus the term on either side of the equation given that, whether it is called double recovery or double payment, it concerns the same equation. However, the equation does not always operate as simply as just described.

II.9. Consider the following scenario. A shareholder initiates an investment arbitration and recovers. The shareholder then transfers the shares to a new shareholder. Thereafter, the local investment vehicle commences a contract-based proceeding (which could take the form of a local court proceeding or a commercial arbitration) and recovers. Here, the state has paid twice (once to the initial shareholder and once to the investment vehicle) but neither party has really recovered twice: not the initial shareholder (because it transferred its shares and will no longer benefit as a shareholder when the investment vehicle recovers), nor the investment vehicle, and not even the new shareholder.

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[67] See above, paras I.2 – I.5.
[68] Similar terms such as "double dipping" and "two bites of the apple" have also been used. See e.g. *Enron v Argentina*, Award (22 May 2007) at para 167; *RREEF v Spain*, Decision on Jurisdiction (6 June 2016) at para 126.

II.10. The above scenario is similar to the facts of *EDF v Argentina*.[69] The case was launched by EDF and SAURI (two French companies) and Léon (a Luxembourg company).[70] The claimants were members of a consortium that purchased 51% of the shares of a local company which entered into a concession contract with a provincial government in Argentina for transmission and distribution of electricity.[71]

II.11. After initiating the investor-state arbitration in 2003, EDF bought SAURI's and Léon's shares in the consortium and became the sole shareholder but, soon after, sold all its shares to a local investment firm in 2004 and 2005.[72] As such, the three claimants were no longer shareholders in the consortium (and hence no longer the indirect shareholders in the local company), but they retained the right to pursue their claim with respect to their previous ownership of the shares.[73]

II.12. While the claimants' ICSID arbitration was pending, the local company pursued three claims locally in relation to the government measures affecting the concession contract.[74] Two of the claims were dismissed, but one led to a possibility for the local company to receive compensation through a settlement with the local government in Argentina.[75] The respondent state objected that, if the tribunal awarded compensation to the claimants in the ICSID proceeding, this would lead to double recovery.[76] The tribunal rejected the objection on the grounds that although the awarding of damages could cause an overlap in payment by the respondent, it would not

[69] *EDF v Argentina*, Award (11 June 2012).
[70] *Ibid* at para 3.
[71] *Ibid* at paras 50, 61, 68, 71.
[72] *Ibid* at paras 8–9, 172, 174.
[73] *Ibid* at para 175.
[74] *Ibid* at paras 1137, 1139–1140.
[75] *Ibid*.
[76] *Ibid* at paras 473, 1137.

constitute double recovery by the claimants, because one of the payments would be made to the local company in which the claimants no longer held shares.[77]

II.13. The *EDF* tribunal, in fact, only looked at one side of the equation: the claimants. According to the tribunal's logic, as long as the claimants do not receive more than once, it does not really matter if the respondent pays more than once. As unfortunate as this interpretation is, it is not surprising, given that the term representing the problem ("double recovery") focuses on investors' recovery. However, if the problem concerns the state's overpayment, then the term representing this problem must also reflect that. As such, the term "double payment" better represents the phenomenon. The usage of "double payment" is not without precedent; for example, the tribunal in *Nykomb v Latvia* used this term to describe the problem.[78] However, we have to determine whether the term "double payment" is the best description of the problem. The next Section answers this question.

C. Double Payment v. Double Compensation

II.14. The previous Section explained that between the two terms of "double recovery" and "double payment", the latter prevails because it is more inclusive. However, even "double payment" does not cover all possible scenarios. There is one exceptional scenario which the term "double payment" fails to cover: when the respondent state is the party that is overcompensated. Imagine a scenario where the respondent state (which is involved in two parallel investment arbitrations) brings counterclaims in both proceedings and recovers in both. This scenario happened in the related arbitrations of *Burlington v Ecuador* and *Perenco v Ecuador*.

[77] *Ibid* at paras 1141–1142.
[78] *Nykomb v Latvia*, Award (16 December 2003) at para 2.4(a).

II.15. Burlington and Perenco were consortium partners in a project concerning the exploration and exploitation of hydrocarbons in Ecuador.[79] Once a dispute arose between Ecuador and the two companies, Burlington and Perenco initiated separate ICSID arbitrations under two different BITs.[80] The respondent state then brought counterclaims against both companies in their respective proceedings, for environmental and infrastructure harms.[81] The basis of the counterclaims was joint and several liability,[82] yet the state was compensated through both arbitrations.[83]

II.16. As inclusive as the term "double payment" is in typical ISDS cases where the respondent state is the party at risk of overpayment, the term does not cover the exceptional counterclaim situation described above. It is true that the consortium partners together paid more than once, but neither of them individually made a double payment. As such, neither of the claimants really paid twice, while the state did recover twice. Thus, to cover all possible scenarios, a term that is even more inclusive than "double payment" is required.

II.17. As previously explained, the state is on one side of the equation and the investor on the other and, as such, normally when one side pays more than once, it will be the other side who receives more than once.[84] However, as this Section and the previous Section explained, there are situations involving double payment without double recovery, or *vice versa*. This demonstrates the need for a term that encompasses both the double recovery and double payment situations.

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[79] *Perenco*, Decision on Jurisdiction (30 June 2011) at paras 1, 13.
[80] *Burlington v Ecuador*, Decision on Jurisdiction (2 June 2010) at 4; *Perenco*, Decision on Jurisdiction (30 June 2011) at para 1.
[81] *Burlington v Ecuador*, Decision on Counterclaims (7 February 2017) at paras 6, 52, 64.
[82] *Perenco*, Decision on Claimant's Application for Dismissal of Respondent's Counterclaims (18 August 2017) at para 5.
[83] *Perenco*, Award (27 September 2019) at paras 445, 899.
[84] See above, para II.8.

II.18. The author suggests the term "double compensation". Unlike "recovery" (which suggests the payee's side) and "payment" (which suggests the payer's side), "compensation" is a neutral term that more readily describes both sides of the equation.[85] As such, the term "double compensation" can act as an umbrella term that encompasses both "double recovery" and "double payment" and, thus, covers all possible scenarios. Further, once the principle on the prohibition of double compensation is established (a task carried out in Part IV), it will reflect both the prohibition of double payment and the prohibition of double recovery. The usage of "double compensation" is not without precedent in the ISDS case law, given that at least two tribunals have used it to refer to the issue.[86] Accordingly, the author adopts the term "double compensation" for the rest of this thesis and suggests the same term be used in the future.

D. Actual Double Compensation v. The Risk of Double Compensation

II.19. Careful analysis of the relevant ISDS case law shows that tribunals' determinations as to the stage of the proceedings at which double compensation should be addressed is far from consistent. Tribunals have set forth three different approaches.

II.20. According to the first approach, unless and until there has been an actual payment, double compensation is not an issue. For example, in *Busta v Czech Republic*, the tribunal was of the opinion that, for the double compensation issue to materialize, there has to be payments by the state and not just a favorable award of damages for the claimant.[87]

[85] For a discussion on the relationship between "compensation" and "damages", see above, para I.19.
[86] *Busta v Czech Republic*, Final Award (10 March 2017) at para 217; *Impregilo v Argentina*, Award (21 June 2011) at para 139.
[87] *Busta v Czech Republic*, Final Award (10 March 2017) at para 217.

II.21. According to the second approach, if there is already a favorable final award/court judgment for the claimant or the investment vehicle, once the second favorable final award/court judgment is rendered (or is about to be rendered) in favor of the claimant, this would be the critical point in time that brings the double compensation issue to the table; as such, the issue should be dealt with by the second deciding forum. This approach was adopted in *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*.[88]

II.22. The third approach was set forth by the tribunal in *Ampal v Egypt*.[89] The tribunal held that the point in time at which two parallel investment arbitration tribunals both accept jurisdiction for overlapping claims is the time when the risk of double compensation materializes, and the risk of double compensation should be avoided by the claimant withdrawing the overlapping portion of the claim from one of the proceedings.[90]

II.23. These three approaches show that the issue can be formulated as whether a tribunal's obligation is to avoid actual double compensation (as prescribed by the first approach discussed above), or whether it is the risk of double compensation that has to be avoided (as prescribed by the second and third approaches). It should be noted that the difference between the second and third approaches is that one confronts the risk at the rendering of a final award while the other confronts the risk at the jurisdiction/admissibility phase.

II.24. In *Factory at Chorzów*—the authoritative case on the principle of reparation in international law—the Permanent Court of International Justice ("PCIJ") noted the need to avoid

[88] *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*, Award (9 April 2015) at paras 38, 40.
[89] *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016).
[90] *Ibid* at paras 330, 332–333.

"running the risk of the same damage being compensated twice over".[91] Thus, the author is of the opinion that, of the approaches listed above, the ones that seek to contain the risk of double compensation are preferable. Further, between the second and third approaches, the third approach (namely, the one that confronts the risk at the jurisdiction/admissibility phase) is preferable. In fact, if the risk of double compensation has already been identified by a tribunal, and if it is possible to contain it, it is not justifiable from the perspective of procedural economy to ignore the risk, hoping to address the matter later down the road.[92] The costs of two forums deciding the overlapping claims are clearly higher.

II.25. In *Ampal v Egypt* (the decision that set forth the third approach), there was a parallel investment arbitration, and part of the claims in the two arbitrations was overlapping.[93] The tribunal, while noting that the claimants did not act in bad faith, held that:

> This is tantamount to double pursuit of the same claim in respect of the same interest. In the Tribunal's opinion, while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals.[94]

Given that both tribunals ruled positively with respect to their jurisdiction over the claims, the *Ampal* tribunal instructed the claimants to withdraw the overlapping portion of the claims from one of the proceedings, as there was no longer "[any] risk of a denial of justice occasioned by the absence of a tribunal competent to determine the [overlapping] portion of the claim."[95]

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[91] *Case Concerning Factory at Chorzów (Germany v Poland)*, PCIJ, Decision on Merits (13 September 1928), Publication of the PCIJ (Series A) No 17 at 47–48 [emphasis added].
[92] The issue of procedural economy is further discussed in Part IV.
[93] *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016) at paras 10(ii), 12 (iv), 313(iv), 331.
[94] *Ibid* at para 331.
[95] *Ibid* at paras 332–333.

II.26. In conclusion, the risk of double compensation must be addressed as early as possible. However, if for any reason it is not possible for a tribunal to contain the risk at an early stage, the matter will have to be addressed later, whether that would be at the stage of rendering the award or the enforcement stage. The point is that double compensation must be avoided, and the sooner the better.[96]

CHAPTER 2: SUBJECT MATTER OF "COMPENSATION" IN "DOUBLE COMPENSATION"

II.27. Assuming that it is established that double compensation is prohibited (a task carried out in Part IV), what type of claims are the subject of this discussion? In other words, what type of claims, if not administered properly, are likely to be compensated twice over? Given that generally double compensation has emerged as an undesired side effect of shareholders' claims, the answer should be found in the type of claims that are recoverable by shareholders. In the ISDS system, shareholders have been able to claim damages for their reflective loss and, under certain circumstances, for injury to the investment vehicle's assets.

II.28. This Chapter has three Sections. The first Section briefly discusses Reflective Loss. The second Section briefly discusses Injury to the Investment Vehicle's Assets. The discussion in the third Section then turns to the Relevance of the Matter, i.e. how knowing about the subject matter of compensation could help with understanding the problem and formulating a solution.

[96] Certainly, preventing double compensation must not lead to denying the investors their day in court (or arbitration, for that matter). The task of striking a balance between the two is discussed in depth in Part IV.

A. Reflective Loss

II.29. In most cases in which the double compensation issue arises, shareholders have sought compensation for reflective loss. As such, this section briefly discusses the Notion of and Shareholders' Standing to Recover for reflective loss.

i. Notion

II.30. Shareholders' losses are categorized into two groups: direct loss and reflective loss. Direct loss is a form of loss that a shareholder incurs if there has been any interference with its rights as a shareholder: whether these are primary rights (such as the shareholders' right to vote and the right to dividends) or secondary rights (such as the right to receive information and the right to inspect the company's records).[97] It is called direct loss because it is inflicted directly upon the shareholder and not the company.[98]

II.31. However, in reflective loss, the shareholder incurs loss as a result of a harm that is inflicted on the company, and it is called reflective loss because it is reflective of the loss of the company.[99] A typical example is when the wrongful conduct toward the company results in a decrease in the value of its assets, which could then translate into diminution in the value of the shares and, hence, shareholders' reflective loss.[100] There are other forms of reflective loss. In fact, "it extends to the loss of dividends … and all other payments which the shareholder might have obtained from the company if [the company] had not been deprived of its funds."[101]

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[97] Marcus Lutter, "Limited Liability Companies and Private Companies" in Alfred Conard & René David, eds, *International Encyclopedia of Comparative Law*, vol XIII: *Business and Private Organizations* (Brill-Nijhoff, 2007).
[98] Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) at 402.
[99] Julien Chaisse & Lisa Zhuoyue Li, "Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss" (2016) 52 Stan J Int'l L 51 at 53.
[100] David Gaukrodger, *supra* note 33, at 13; Julien Chaisse & Lisa Zhuoyue Li, *supra* note 99, at 53.
[101] *Johnson v Gore Wood and Co (No 1)* [2000] UKHL 65, [2001] BCC 820 (Lord Millet).

ii. Shareholders' Standing to Recover

II.32. At the domestic law level, major civil law and common law jurisdictions do not recognise shareholders' standing to recover for reflective loss, as it is generally only the company that may claim for its loss.[102] The domestic law rule barring shareholders' claims for reflective loss—known as the no reflective loss principle—is in fact "derived from the legal personality of the corporation and is often seen as a corollary of shareholders' limited liability for the company's obligations."[103] The no reflective loss principle involves a number of important policy considerations: predictability, judicial economy, avoidance of double compensation, and fairness (in that, once the company recovers, the recovery flows to all interested parties, just as the loss did).[104]

II.33. At the international law level, the recoverability of reflective loss depends on whether the claim is pursued under customary international law or under international investment law. Under customary international law, as under domestic law, shareholders lack standing to claim for their reflective loss. In *Barcelona Traction*, the International Court of Justice ("ICJ") held that the Belgian shareholders of a Canadian company with subsidiaries in Spain lacked standing under customary international law to claim for their alleged reflective loss caused by Spain.[105] The ICJ repeated its position, nearly four decades later, in the *Diallo* case.[106]

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[102] For a comparative study of the matter, see David Gaukrodger, *supra* note 33, at 15–17; Julien Chaisse & Lisa Zhuoyue Li, *supra* note 99, at 55–58.
[103] David Gaukrodger, *supra* note 33, at 24.
[104] *Ibid* at 11, 19.
[105] *Case Concerning Barcelona Traction, Light & Power Co, Ltd*, ICJ, Judgment (5 February 1970), (1970) ICJ Rep 3 at paras 1–2, 9, 32, 38, 42, 44, 47, and at 51.
[106] *Case Concerning Ahmadou Sadio Diallo (Guinea v Congo)*, ICJ, Preliminary Objections (27 May 2007), (2007) ICJ Rep 582 at paras 86–90, 94.

II.34. Although the ICJ closed the door on shareholders' claims under customary international law, it left a window open for matters that are governed by a specific treaty regime.[107] Such exception made the ICJ Chamber's decision in *ELSI* possible,[108] and paved the way in international investment law for a favorable approach to shareholders' claims for reflective loss.

II.35. Under international investment law, unlike customary international law and domestic law, the ISDS system has generally allowed for shareholders' claims. Investor-state arbitration tribunals have repeatedly held that shareholders have standing to claim for reflective loss, regardless of their status as majority/minority or direct/indirect shareholders.[109]

II.36. ISDS tribunals calculate shareholders' reflective loss either by reference to diminution in the value of the shares or by reference to lost dividends.[110] The first method (i.e. the one on the basis of shareholding value) is applied normally—but not exclusively—when the injury to the investment is at a serious and more permanent level, whereas the second method (i.e. the one on the basis of lost dividends) is usually employed when the underlying business has been temporarily impaired, but is still a going concern.[111]

II.37. Shareholders' standing to recover for reflective loss is settled law (at least for now) in the practice of ISDS tribunals and is listed as one of the author's assumptions in this thesis.[112]

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[107] *Case Concerning Barcelona Traction, Light & Power Co, Ltd*, ICJ, Judgment (5 February 1970), (1970) ICJ Rep 3 at para 90.
[108] *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, ICJ, Judgment (20 July 1989), (1989) ICJ Rep 15 (deciding the shareholders' claims that were espoused by the United States, within the framework of the *Treaty of Friendship, Commerce and Navigation* between the United States and Italy).
[109] For a detailed examination of the practice of ISDS tribunals in this regard, see Stanimir A Alexandrov, *supra* note 40, at 393–394; Christopher H Schreuer, *supra* note 40, at 6–7; Dolzer & Schreuer, *supra* note 38, at 58; David Gaukrodger, *supra* note 33, at 25–29; Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at paras 6.123–6.132.
[110] Sergey Ripinsky & Kevin Williams, *supra* note 45, at 157.
[111] *Ibid*. See Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration*, *supra* note 1, at 123–125.
[112] See above, paras I.14, I.17.

Nevertheless, in recent years, there has been a growing policy debate surrounding the potential long-term impact of shareholders' claims on the ISDS system itself, as well as on corporations and corporate finance.[113] In fact, the UNCITRAL Working Group III is currently working on a number of possible reforms in the ISDS system, including addressing the question of whether there should be any restrictions to shareholders' claims for reflective loss.[114] Once the mission of Working Group III is completed, its output is likely to constitute an important document. However, it remains to be seen what the outcome of these deliberations will be and—even if the Working Group III suggests major changes—how ISDS tribunals will implement those suggestions. For the time being (and perhaps for the foreseeable future), ISDS tribunals continue to allow shareholders' claims.

B. Injury to the Investment Vehicle's Assets

II.38. Are shareholders, in the ISDS system, allowed to bypass the investment vehicle (a separate juridical person) to recover directly for injuries inflicted on the investment vehicle's assets? The first Subsection briefly discusses the Notion of injury to the investment vehicle's assets, and the second Subsection (Shareholders' Standing to Recover) answers the above question.

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[113] For arguments highlighting possible negative impacts, see e.g. David Gaukrodger, *supra* note 33, at 29–30, 32–52; David Gaukrodger, "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law" in *OECD Working Papers on International Investment* (OECD Publishing, 2014) Paper No 2014/02 at 18–25; Julian Arato et al, "Reforming Shareholder Claims in ISDS" in *Academic Forum on ISDS Concept Paper 2019/9* (2019); Mark A Clodfelter & Joseph D Klingler, "Reflective Loss and its Limits Under International Investment Law" in Christina L Beharry, ed, *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill-Nijhoff, 2018) 57. For arguments rejecting such negative impacts, see e.g. Julien Chaisse & Lisa Zhuoyue Li, *supra* note 99, at 83–92; Lukas Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Arbitration – The Rule and its Demystification* (DCL Thesis, McGill University, 2018).

[114] This topic is discussed later in the thesis. See below, Chapter 5, Subsection "UNCITRAL Project on Multiplicity of Proceedings".

i. Notion

II.39. An investment vehicle—when it is in the form of an incorporated company—enjoys a separate personality and may own a variety of tangible and non-tangible assets. Injury by a host state to its assets may come in different forms, for example when the host state terminates a license agreement with the investment vehicle. This injury is different from the reflective loss that the foreign shareholders of that investment vehicle may suffer (e.g. the diminution in the value of their shares) as a result of the termination of the license agreement.[115] The relevant question is whether shareholders have standing to claim directly for such injury, independent of their reflective loss.

II.40. Given that a company is considered to be a separate legal person from its shareholders, a jurist not familiar with the ISDS system is likely to give a negative answer to the above question. In fact, a comparative study of major civil law and common law jurisdictions in corporate law[116] shows that a core function of separate corporate personality is called "entity shielding", which protects corporate assets (including the company's claims) from shareholders and their personal creditors.[117] However, as discussed in the following Subsection, the ISDS system has taken a different approach to the question of whether shareholders could claim for injury to the investment vehicle's assets.

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[115] Not all commentators have distinguished the two types of injuries. See e.g. Julien Chaisse & Lisa Zhuoyue Li, *supra* note 99, at section II.A (discussing, under the heading of reflective loss, the case law on shareholders' claims for both reflective loss and injury to the investment vehicle's assets).
[116] Reinier Kraakma et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3rd ed (Oxford University Press, 2017) (a comparative study of a number of major jurisdictions in corporate law, such as the US, the UK, France, Germany, Japan, and Brazil).
[117] John Armour et al, "What Is Corporate Law?" in Reinier Kraakma et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3rd ed (Oxford University Press, 2017) at 6.

ii. Shareholders' Standing to Recover

II.41. While shareholders' recovery for reflective loss is settled law (at least for now) in the practice of ISDS tribunals,[118] there is no consensus on the issue of shareholders' recovery for injury to the investment vehicle's assets. Some commentators are of the opinion that the latter is recoverable—without any specific limitation—just like the former. Stanimir Alexandrov, after examining the practice of ISDS tribunals, concluded that:

> It is clear that they all considered it to be beyond doubt that a shareholder's interest in a company includes an interest in the assets of that company, including its licences, contractual rights, rights under law claims to money or economic performance, etc., and that in finding jurisdiction they based that reasoning on the broad definition of investment in the applicable BITs.[119]

Likewise, Rudolf Dolzer and Christoph Schreuer are of the opinion that "[s]hareholder protection is not restricted to ownership in shares; it extends to the assets of the company".[120]

II.42. However, careful analysis of ISDS case law does not return an absolute affirmative response to the question. In fact, there are tribunals that refused to recognise the investment vehicle's assets as protected investment.[121] Thus, a more nuanced approach is needed. Sergey

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[118] See above, para II.37.
[119] Stanimir A Alexandrov, *supra* note 40, at 406–407.
[120] Dolzer & Schreuer, *supra* note 38, at 59–60.
[121] See e.g. *Poštová Banka v Greece*, Award (9 April 2015) at 245 (holding that "a shareholder of a company incorporated in the host State may assert claims based on measures taken against such company's assets that impair the value of the claimant's shares. However, such claimant has no standing to pursue claims directly over the assets of the local company, as it has no legal right to such assets"); *Enkev Beheer v Poland*, First Partial Award (29 April 2014) at para 313 ("the Tribunal decides that the Claimant is a covered investor with a covered investment under the Treaty. It cannot claim directly for any harm suffered directly by Enkev Polska [the investment vehicle]; but it can claim in its own right under the Treaty for harm suffered by itself, e.g., from the diminution or total loss of rights derived from its shares in Enkev Polska [the investment vehicle]"); *ST-AD v Bulgaria*, Award on Jurisdiction (18 July 2013) at 271, 275, 284, 278, 282 (while confirming its jurisdiction on the basis of the claimant's shareholding in the local company, emphasized that "the Claimant has no direct right it can claim over the property of LIDI-R [the local company], whatever this property consists of. It must be recalled that the main subject of the dispute concerns title to the Property allegedly belonging to LIDI-R … including the factory and commercial buildings located on it ... It has been repeatedly held by arbitral tribunals that an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it owns shares"); *El Paso v Argentina*, Award (31 October 2011) at paras 156, 178, 181–183, 187–189 (holding that the local companies are neither protected investors nor protected

Ripinsky and Kevin Williams argue that the answer to the question of whether shareholders are allowed to claim directly for injuries to the investment vehicle's assets depends on two factors: first, the definition that the applicable IIA offers of "investment" and second, the status of shareholders in terms of majority/minority shareholding.[122]

II.43. With respect to the first factor, if the definition of "investment" in the applicable IIA is sufficiently broad, so that (in addition to the shares) it covers the local investment vehicle and its assets, tribunals are more likely to rule that shareholders may claim and recover directly for an injury to the investment vehicle's assets.[123] Most US BITs and the Energy Charter Treaty ("ECT") offer a broad definition for "investment" by considering indirect ownership or control of an asset as "investment".[124] For example, in *Azurix v Argentina*, which was filed under the US-Argentina BIT,[125] the tribunal relied on the definition of investment in the BIT and held that "rights under a

investments and, as such, "their rights and licenses cannot be considered protected investments"); *Impregilo v Argentina*, ward (21 June 2011) at paras 245–246 (holding that "AGBA [the investment vehicle] does not qualify as a protected investor under the ICSID Convention and the BIT, and its contractual rights cannot be considered protected investments. On the other hand, Impregilo's shares in AGBA were an investment protected under the BIT"); *AAPL v Sri Lanka*, Award (27 June 1990) at para 95 (holding that "[t]he undisputed 'investments' effected since 1985 by AAPL in Sri Lanka are in the form of acquiring shares in [the investment vehicle] … Accordingly, the Treaty protection provides no direct coverage with regard to Serendib's physical assets as such …, or to the intangible assets of Serendib if any …. The scope of the international law protection granted to the foreign investor in the present case is limited to a single item: the value of his share-holding in the joint-venture entity (Serendib Company)"). See also *CMS v Argentina*, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) at paras 66–68 (noting (i) the respondent's argument that the investment vehicle's assets do not qualify as an investment, and (ii) that the claimant shared the same view that the investment vehicle's license is not an investment; holding that the tribunal nevertheless has jurisdiction on the basis of CMS's shareholding in the investment vehicle).

[122] Sergey Ripinsky & Kevin Williams, *supra* note 45, at 150.

[123] *Ibid* at 149–151.

[124] The 2012 US Model BIT partly defines investment as "every asset that an investor owns or controls, directly or indirectly". Online: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last visited 12 March 2021) [emphasis added]. The ECT, article 1(6), partly defines investment as "every kind of asset owned directly or indirectly by an investor". Online: <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> (last visited 12 March 2021) [emphasis added].

[125] The 1991 US-Argentina BIT partly defines investment as "every kind of asset, owned or controlled directly or indirectly by an Investor." Online: <https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000897.asp> (last visited 12 March 2021).

contract held by a local company constitute an investment protected by the BIT".[126]

II.44. However, not all IIAs provide for such a broad definition of investment that includes indirect ownership/control: for example, the Italy-Argentina BIT (1990)[127] and the UK-Sri Lanka BIT (1980).[128] In *Impregilo v Argentina* (filed under the Italy-Argentina BIT) and in *AAPL v Sri Lanka* (filed under the UK-Sri Lanka BIT), both tribunals refused to find for shareholders to recover for injury to their investment vehicle's assets, as those assets were not considered protected investments under the applicable BITs.[129]

II.45. It should be noted that the IIAs that offer a broad definition of investment (covering the local investment vehicles and their assets) are different from IIAs that allow investors to file claim on behalf of the investment vehicle that they own/control (directly or indirectly). An example of the latter type of IIAs is the North American Free Trade Agreement ("NAFTA"), article 1117 (now article 14.D.3.1.b of the Canada-United States-Mexico Agreement ["CUSMA" or "USMCA"], with respect to US-Mexico relations only). The two types of IIAs are different because under the first type, the investor files the claim on its own behalf for the injury to the investment vehicle's assets and thus bypasses the investment vehicle as a separate juridical person; whereas under the second type of IIAs, the investor files the claim on behalf of the local investment vehicle and with recovery for the investment vehicle, thus respecting its separate corporate personality.[130] In

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[126] *Azurix v Argentina*, Decision on Jurisdiction (8 December 2003) at para 63.
[127] Available [in original language] on *UNCTAD Investment Policy Hub*: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5899/download> (last visited 11 March 2021).
[128] Available on *UK Treaties Online*: <http://foto.archivalware.co.uk/data/Library2/pdf/1981-TS0014.pdf> (last visited 11 March 2021).
[129] *Impregilo v Argentina*, Award (21 June 2011) at paras 245–246; *AAPL v Sri Lanka*, Award (27 June 1990) at para 95.
[130] See *Claytons v Canada*, Submission of the United States of America (29 December 2017) at paras 6, 11–12 (discussing NAFTA article 1117 and its relationship with the principle of corporate separateness).

addition, an IIA that allows an investor to bring a claim on behalf of its investment vehicle normally requires the investment vehicle to waive any right to pursue other court or tribunal proceedings with respect to the same state measures.[131] In any event, the applicable IIA's definition of investment is not the only factor that tribunals consider in determining whether shareholders are allowed to claim directly for injuries to the investment vehicle's assets. There is a second factor.

II.46. The second factor that tribunals consider is the status of shareholders in terms of majority/minority shareholding.[132] In cases where foreign shareholders own—even indirectly—all or a majority of the shares of an investment vehicle, it is more likely for tribunals to find that the investment vehicle's assets are considered protected investments.[133] For example, Germany-Argentina BIT (1991) does not provide for a broad definition of investment,[134] yet in *Siemens v Argentina*, which was filed under the same BIT, the claimant sought damages for the termination of a contract signed by its wholly-owned local investment vehicle, and the tribunal found that the claimant had standing.[135]

C. Relevance of the Matter

II.47. The previous two Sections discussed reflective loss and injury to the investment vehicle's assets as the two subject matters of compensation in shareholders' claims. The discussion in this

[131] See e.g. NAFTA art 1121(2)(b) [now art 14.D.5.1(e)(ii) of CUSMA].
[132] This should not be confused with what was discussed in the previous Section: that shareholders enjoy standing to recover for reflective loss, regardless of their status as majority/minority shareholders. The discussion in the previous Section was on reflective loss, whereas here the discussion is about injury to the investment vehicle's assets.
[133] Sergey Ripinsky & Kevin Williams, *supra* note 45, at 152.
[134] Available [in original language] on *UNCTAD Investment Policy Hub*: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/92/download> (last visited 11 March 2021).
[135] *Siemens v Argentina*, Decision on Jurisdiction (3 August 2004) at paras 23–27, 184.

Section turns to the question of how does knowing about the difference between these two subject matters help us to better understand the double compensation problem?

II.48. Consider this hypothetical example of double compensation. A foreign investor (company A) invests in Ruritania by acquiring the majority of the shares of a local company (company B), which then signs a concession agreement with the state. After a while, Ruritania terminates the concession agreement, which has a dispute resolution clause in favor of commercial arbitration before the International Chamber of Commerce ("ICC"). Company B files a contractual claim before the ICC, while its foreign shareholder (company A) launches an investor-state arbitration against Ruritania under the applicable IIA. If both companies succeed in the parallel proceedings, company A will recover twice:

- once, through the damages that it receives in the investor-state arbitration; and
- once, as a result of company B receiving compensation in the ICC commercial arbitration. This is because the damages received by company B eventually flows to company A (just like the harm did initially), for example, in the form of the value of the shares bouncing back or payments for lost dividends.

II.49. Now, apply the question (about the relevance of the difference between reflective loss and injury to the investment vehicle's assets) to the first bullet point above: does it affect the double compensation issue if, in the investor-state arbitration, company A claims damages for injury to the investment vehicle's assets instead of claiming damages for reflective loss? The answer is yes, it has consequences that are discussed in two Subsections below.

II.50. Subsection (i) explains that the overall amount of double compensation is likely to be higher when shareholders seek damages for injury to the investment vehicle's assets. Subsection (ii) then explains that the negative impact on the principle of corporate separateness is far more

severe when shareholders seek damages for injury to the investment vehicle's assets. Both consequences must be considered when formulating a solution to the double compensation problem.

i. Amount of Double Compensation

II.51. The discussion in this Subsection compares shareholders' recovery for reflective loss with their recovery for injury to the investment vehicle's assets in order to explain in which scenario shareholders receive a higher monetary sum and how that could increase the amount of double compensation.

II.52. It was explained that shareholders' reflective loss originates from the loss that is sustained by the investment vehicle, yet it should be noted that not all the loss sustained by the investment vehicle "translate[s] automatically, i.e. in the same amount, into the shareholders' [reflective] loss".[136] Therefore, shareholders are not entitled to all of the damages that the investment vehicle is entitled to.[137] In *Nykomb v Latvia*, the tribunal explained a number of possible reductions, as follows:

> [T]he reduced flow of income into Windau [the local investment vehicle] obviously does not cause an identical loss for Nykomb [the parent company] as an investor. If one compares this with a situation where Latvenergo [the state-owned company] would have paid the double tariff to Windau, it is clear that the higher payments for electric power would not have flowed fully and directly through to Nykomb. The money would have been subject to Latvian taxes etc., would have been used to cover Windau's costs and down payments on Windau's loans etc., and disbursements to the shareholder would be subject to restrictions in Latvian company law on payment of dividends. An assessment of the Claimant's loss on or damage to its investment based directly on the reduced income flow into Windau is unfounded and must be rejected.[138]

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[136] Sergey Ripinsky & Kevin Williams, *supra* note 45, at 157.
[137] *Ibid* at 155.
[138] *Nykomb v Latvia*, Award (16 December 2003) at 39 [emphasis added].

II.53. No such reductions apply when shareholders claim for injury to the investment vehicle's assets, because they claim (in proportion to their shareholding) directly for what the investment vehicle has suffered. As such, by bypassing the investment vehicle, shareholders receive (in proportion to their shareholding) all of the damages that could have been paid to the investment vehicle itself. The decision in *Arif v Moldova* is an example.[139] In *Airf*, the claimant was a natural person who wholly owned a Moldavian company that had signed a series of agreements with local customs offices to set up and run a number of duty free stores.[140] The claimant directly claimed damages for loss of profits due to the state's interference with the agreements.[141] The tribunal found that the France-Moldova BIT protection is not limited to shares and extends to the local company's assets as well, including the signed agreements.[142] The tribunal then awarded the loss of profits without deducting any specific amount to reflect the fact that the claimant was not the local company itself.[143]

II.54. In conclusion, shareholders are likely to recover more when they claim directly for injury to the investment vehicle's assets, in comparison to claiming for reflective loss. Now, going back to the hypothetical example discussed earlier (namely, company A as a foreign shareholder, and company B as the local investment vehicle),[144] it was explained that, if both companies succeed in the parallel proceedings, company A will recover twice:

- once, through the damages it receives in the investor-state arbitration; and

[139] *Arif v Moldova*, Award (8 April 2013).
[140] *Ibid* at paras 3, 41, 43, 49, 87.
[141] *Ibid* at paras 370, 561.
[142] *Ibid* at paras 369, 379–380.
[143] *Ibid* at paras 573–58.
[144] See above, para II.48.

- once, as a result of company B receiving damages in the commercial arbitration (the flow-through of compensation to shareholders).

Based on the conclusion reached at the beginning of the paragraph, if, in the investor-state arbitration (the first bullet point), company A claims directly for injury to the investment vehicle's assets rather than for reflective loss, the overall amount of double compensation for company A will increase.

ii. Principle of Corporate Separateness

II.55. It was explained earlier in this Chapter that, at the domestic law level, major civil law and common law jurisdictions do not recognise shareholders' standing to recover even for reflective loss, let alone for injury to the investment vehicle's assets, as it is generally only the company that may claim for its loss.[145] The domestic law rule barring shareholders' claims stems from the principle of corporate separateness.[146] From a domestic law perspective, shareholders' claims undermine the principle, which could lead to multiple proceedings (by shareholders and the company over essentially the same harm) and thus double compensation, which in turn would undermine important policy considerations such as predictability, judicial economy, and fairness.[147]

II.56. By applying the principle of corporate separateness, through barring shareholders' claims, domestic law has managed to guard itself against the double compensation problem. It was explained in the previous Sections that in international investment law, the ISDS system has

[145] See above, paras II.32, II.39 – II.40.
[146] David Gaukrodger, *supra* note 33, at 24.
[147] See *ibid* at 11, 19.

allowed for shareholders' claims. A number of commentators have noted that the ISDS practice undermines the principle of corporate separateness and may even pierce the corporate veil.[148] This Subsection elaborates on the impact of shareholders' claim on the principle of corporate separateness and explains the connection between this issue and the solution that is proposed in Part IV.

II.57. The principle of corporate separateness has three limbs:

- The first limb is called the "entity shielding" rule, which protects corporate assets from shareholders and their personal creditors in favor of the company and its creditors;
- The second limb is called the "delegated management" rule, which provides for the board of directors (or another subset of a company, but not its shareholders) to have the decision-making authority in the name of the company with respect to third parties; and
- The third limb consists of procedural rules concerning the company's ability "to sue and be sued in its own name", which obviate the need to name and serve notice on the shareholders.[149]

Due to the high volume of the rules associated with the second limb in corporate law, it is sometimes discussed separately from and on a par with the principle of corporate separateness.[150]

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[148] August Reinisch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes" (2004) 3:1 The Law and Practice of International Courts and Tribunals 37 at 59; Christopher H Schreuer, "Shareholder Protection in International Investment Law", *supra* note 40, at 2, 8–9; Zachary Douglas, *supra* note 98, at para 759; Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at paras 6.117, 6.149.
[149] John Armour et al, *supra* note 117, at 6–8.
[150] There are five core structural characteristics of corporate law: (1) corporate separate legal personality, (2) limited liability, (3) transferable shares, (4) delegated management, and (5) shared ownership by contributors of equity capital. *Ibid* at 5, 7.

II.58. An OECD working paper that was published in 2014 has examined how shareholders' claims for reflective loss undermine the core structural characteristics of corporate law.[151] With respect to the impact on the principle of corporate separateness, the OECD paper explains that shareholders' claims compromise all the three limbs of the principle.[152] The first limb (i.e. the entity shielding rule) is compromised because shareholders' claims may impose risks and costs on the company's creditors by (i) preventing the company from reconstituting its assets, and (ii) the unlikeliness of ISDS tribunals to be "interested in creditor claims or able to prioritise them adequately".[153] The second limb of the principle (i.e. the delegated management rule) is compromised because—

> Instead of the board having control of the litigation decision, covered shareholders can individually decide whether to claim for their part of injury to the company, decisions which may significantly alter the business environment for the company as a whole. Individual covered shareholders such as hedge funds may have interests that diverge significantly from those of the board with regard to maintaining the value of a brand or the importance of maintaining a constructive long-term investment relationship in the host jurisdiction.[154]

II.59. The third limb (i.e. the company's ability to sue and be sued in its own name) is compromised because "claims by the company are not fully resolved by a company claim; shareholders have rights to claim as well" and, as such, "[t]o avoid the risk of double jeopardy, shareholders need to be joined to the suit so that they are bound by the outcome."[155] However, even the joinder of shareholders to the company's contract-based proceedings (in local courts or a commercial arbitration) would not effectively address the problem. The reason is that shareholders

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[151] David Gaukrodger, "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law" in *OECD Working Papers on International Investment* (OECD Publishing, 2014) Paper No 2014/02.
[152] *Ibid* at 20–23.
[153] *Ibid* at 20.
[154] *Ibid* at 23.
[155] *Ibid* at 21.

have their separate treaty-based claims, which are not eliminated by joining the shareholders to the company's contract-based proceedings. Even if the applicable IIA allows the local investment vehicle to bring a treaty-based claim in its own name (because of its foreign control),[156] one level of its shareholders might be protected under another IIA and, to date, the ISDS system has not yet developed rules for mandatory consolidation of all related investment arbitration proceedings.

II.60. If the above shows that shareholders' claims for reflective loss have bent the three limbs of the principle of corporate separateness, one could argue that shareholders' claims for injury to the investment vehicle's assets take the harm to the principle to another level and completely breaks the three limbs. The reason is that in the reflective loss scenario, it is for their own loss that shareholders seek recovery, whereas in the other scenario it is for the investment vehicle's loss that shareholders seek recovery, as though the investment vehicle does not exist as a separate juridical person. The tribunal in *El Paso v Argentina*, when faced with shareholders' claims for injury to the investment vehicle's assets, described the theory allowing such recovery as a theory according to which:

> [T]he domestic companies' legal existence is but a fiction, at least on the international level, and can therefore be disregarded, which would mean that the investment can practically be characterised as a direct one, the consequence being that the foreign investor may claim, as the owner of the local companies, the legal and contractual rights in question.[157]

II.61. The principle of corporate separateness is at the core of corporate law and is also the basis of many rules in the field and other relevant fields. Shareholders' recovery (whether for reflective

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[156] Article 25(2) of the ICSID Convention reads: "National of another Contracting State means: … (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." [emphasis added].

[157] *El Paso v Argentina*, Award (31 October 2011) at para 174 [emphasis added].

loss or for injury to the investment vehicle's assets) affects the principle, and this has flow-on effects, such as the problem of double compensation.

II.62. However, as previously explained, shareholders' standing and recovery may not be challenged, because not only is it established law in the practice of ISDS tribunals,[158] but also because it is rooted in the IIAs' definition of "investment"[159] and more broadly in the underlying policy in international investment law to protect investors and their investment.[160] As the tribunal in *Sempra v Argentina* noted, IIAs "facilitate agreement between the [state] parties thereby preventing that the corporate personality of the company might interfere with the protection of the real interests associated with the investment".[161]

II.63. If, in international investment law, a compromised principle of corporate separateness is a new reality, could it help formulate a solution to the problem of double compensation? Put another way, if the compromised principle is part of the problem, could it also be part of the solution?

II.64. The answer is in the affirmative. The above analysis illustrated that international investment law has bent or broken (depending on the subject matter of the shareholders' claims) the principle of corporate separateness. However, once the principle of corporate separateness is compromised, it does not create a one-way street (where only shareholders' interests could be served); rather it creates a two-way street (where, just as shareholders could benefit from the compromised principle of corporate separateness, others could also use it as a defense against

[158] See above, paras II.35, II.37.
[159] See above, para II.43.
[160] See above, para I.16.
[161] *Sempra v Argentina*, Decision on Objection to Jurisdiction (11 May 2005) at para 70 [emphasis added].

shareholders). This analysis lays the groundwork for an aspect of the author's proposed solution in Part IV (i.e. the aspect that deals with the multiplicity of claimants).[162]

II.65. As will be discussed in Part IV, ISDS tribunals have generally not been keen to rely on the economic reality that exists in the relationship between shareholders and the investment vehicle, due to the legal principle of corporate separateness. However, the discussion in this Subsection explained that the principle of corporate separateness is already compromised/violated in international investment law. The logic of the two-way street description of the effect of the compromised principle allows the author to argue (in Part IV) that shareholders and their investment vehicle could be regarded as the same entity. The argument will be developed through the principle of estoppel.

CHAPTER 3: DEFINITION AND SCENARIOS

II.66. On the basis of the analysis provided thus far, this Chapter offers a comprehensive Definition of the double compensation problem and categorizes different Scenarios in which the problem may arise.

A. Definition

II.67. Commentators on the ISDS system have not offered a clear definition of "double compensation"; neither have they set forth the requirements that must be present for the problem to arise. At best, they discuss a typical scenario that may lead to double compensation. For example, Charles Kotuby and Luke Sobota explain that double compensation may occur "for

[162] The fact that the ISDS system permits multiplicity of claims (and thus double compensation) has different components. The multiplicity of claimants is one component. There are other components such the multiplicity of legal bases and the relief sought. All those components are addressed in Part IV.

instance, where a claimant brings parallel arbitrations under different instruments with respect to the same governmental measure".[163] According to Christopher Dugan et al, "a potential for double recovery may exist in parallel proceedings involving the same dispute, which may take place on the international level."[164] Borzu Sabahi's description of double compensation provides further information:

> Determination of whether there is any potential for double compensation should be made on a case-by-case basis. This problem can be particularly vexatious in investment treaty arbitrations, when there is potential for parallel proceedings, resulting from the fact that the same conduct of the host state can be a basis for several cases both at the international and the domestic levels, more than one leading to liability of the host state for the same act and the same (material) harm.[165]

II.68. However, none of the above descriptions can be considered—or claim to be—a definition of double compensation. While many double compensation cases might fit into one of the above descriptions, some do not. For example, all the above descriptions include the term "parallel" proceedings, which suggests that, for double compensation to occur, there has to be more than one proceeding and those proceedings should be parallel in time. However, as will be explained in the following paragraphs, there is no need to have more than one proceeding, and when there is more than one proceeding, they do not have to be parallel in time—they could be sequential. Given the lack of clarity and comprehensive application of the descriptions set out above, there is a need to set out a comprehensive definition of "double compensation" and its requirements.

II.69. "Double compensation"[166] in international investment law can be defined as a situation

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[163] Charles T Kotuby & Luke A Sobota, *supra* note 1, at 150–151.
[164] Christopher Dugan et al, *supra* note 1, at 597, fn 125. See also David Gaukrodger, *supra* note 33, at 34 (describing double compensation through a hypothetical example set forth by Eilís Ferran).
[165] Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration*, *supra* note 1, at 185 [emphasis added].
[166] For a discussion on why the term "double compensation" is more suitable than "double recovery", see above, Sections "Double Recovery v. Double Payment" and "Double Payment v. Double Compensation".

where the state pays double or multiple compensation for the same harm inflicted on an investment vehicle, with the result that the investor is usually (but not necessarily) overcompensated. For double compensation to occur, five requirements must be met: (i) there must be more than one claimant against a host state, otherwise (i.e. if there is only one claimant) there must be more than one legal basis; (ii) (when there is more than one claimant) the relationship between the claimants must be vertical; (iii) the state's wrongful measures must be taken against the investment vehicle and not against the shareholding investors in their capacity as shareholders; (iv) the harm at issue across different claims/proceedings must be the same; and (v) the state pays more than once. The requirements are discussed in turn, in five Subsections. It should be noted that there are two factors that—despite being present in most double compensation cases—are not a requirement for double compensation, namely the investors' receiving of compensation more than once and the multiplicity of proceedings.

II.70. The above definition and requirements do not address the exceptional scenario where a respondent state could benefit from double compensation as a result of bringing counterclaims against the investors. The sixth Subsection explains the requirements for double compensation in that scenario.

i. The First Requirement

II.71. The first requirement is the presence of more than one claimant (at least one of whom must be a protected investor) or more than one legal basis (at least one of which must be an IIA). In fact—logically—for the host state to pay more than once, there must be either more than one claimant to receive the payment or more than one legal basis to justify it.

II.72. The multiplicity of claimants could be satisfied in two forms: (i) the investment vehicle and its protected shareholders (direct or indirect) act as claimants; or (ii) the protected shareholders—at different levels of the same corporate chain—act as claimants. In the first form, the risk of double compensation arises because compensation is sought once for injury to the investment vehicle's assets and once for the shareholder's reflective loss. In the second form, the risk arises from the fact that compensation is sought for two sets of reflective losses at different levels of the same corporate chain.

II.73. Likewise, the multiplicity of legal bases could involve two situations: (i) where the state's wrongful conduct is simultaneously in breach of a contract and in violation of an IIA (thus arising in contract claims and treaty claims); or (ii) where the state's wrongful conduct violates more than one IIA at the same time (thus arising in separate claims under different treaties). In both forms, the risk arises because the same harm will be compensated on the application of two different legal bases.

II.74. While both factors (the multiplicity of claimants and the multiplicity of legal bases) are present in the overwhelming majority of double compensation cases (i.e. there are multiple claimants who bring claims that are based on multiple legal bases),[167] only one of the two factors is sufficient for the risk of double compensation to arise.

II.75. For example, in *Pan American Energy and BP Argentina v Argentina* which was consolidated with *BP America v Argentina*, although there was only one legal basis (the US-Argentina BIT), there was a risk of multiple compensation because the requirement of the multiplicity of claimants was met: the parent company, its interposed companies, and the

[167] See below, Part III, Chapter 4.

investment vehicle were all claimants in the consolidated cases.[168] On the other hand, in *Bosca v Lithuania*, there was only one claimant (an individual investor) in the investment arbitration, who also pursued contract claims in local courts.[169] As such, there was no multiplicity of claimants, yet there was still a risk of double compensation due to the fact there were two legal bases: the Italy-Lithuania BIT and the contract.

II.76. It should be noted that neither the multiplicity of claimants nor the multiplicity of legal bases requires the existence of multiple proceedings—although the majority of double compensation cases involve more than one proceeding.[170] With respect to claimants, they can be parties to one investor-state arbitration. For example, in *Micula v Romania (I)*, the claimants consisted of two individual shareholders (who directly and indirectly owned more than 99% of the investment vehicle group) together with three companies from the investment vehicle group.[171] The requirement of multiple claimants was satisfied, and the risk of double compensation was present in only one proceeding.[172] Similarly, in *PSEG v Turkey*, the parent company and the investment vehicle were claimants in one investment arbitration where the tribunal had to deal with the risk of double compensation.[173]

II.77. Likewise, claims based on multiple legal bases can be brought in one investor-state arbitration if those legal bases consist of different IIAs. There are several ISDS cases where claims

[168] *Pan American Energy v Argentina* consolidated with *BP America v Argentina*, Decision on Preliminary Objections (27 July 2006) at paras 1–2, 4, 12–19, 219.
[169] *Bosca v Lithuania*, Award (13 May 2013) at paras 1, 91–93.
[170] See below, para II.100.
[171] *Micula v Romania (I)*, Award (11 December 2013) at paras 2–5, 156, 936–943.
[172] *Ibid* at paras 1240–41, 1246–47.
[173] *PSEG v Turkey*, Award (19 January 2007) at paras 1, 5, 340.

based on more than one IIA were brought in one investment arbitration.[174] However, if there are contract claims in addition to treaty claims, it is likely to have more than one proceeding.

II.78. It should also be noted that, even where two or more proceedings are involved, the proceedings need not be parallel in time, i.e. they could be sequential proceedings. This means that, by the time the tribunal faces the double compensation objection in one proceeding (the subsequent proceeding), the other proceeding has already concluded and become final (the preceding proceeding). For example, in *Mobil Corporation v Venezuela*, a parent company—along with its holding company and four of the holding company's direct and indirect subsidiaries—brought a claim against Venezuela in relation to two projects in the country.[175] One of the subsidiaries had also launched a commercial arbitration with respect to one of the projects and obtained a favorable award, which was paid by the state.[176] Thus, the investment arbitration proceeding was the "subsequent" proceeding in which the tribunal was faced with the question of how to avoid awarding what had already been awarded through the "preceding" proceeding.[177]

II.79. In summary, the first requirement for double compensation involves the presence of either more than one claimant or more than one legal basis. While neither of these two factors requires that there be a multiplicity of proceedings (unless the legal bases involve breach of contract as well), the multiplicity of claimants, legal bases, and proceedings often go hand in hand in double compensation cases.

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[174] See e.g. *Ampal v Egypt* (based on the US-Egypt BIT and the Germany-Egypt BIT); *AES v Kazakhstan* (based on the US-Kazakhstan BIT and the ECT); *EDF v Argentina* (based on the France-Argentina BIT and the BLEU-Argentina BIT); *Flughafen v Venezuela* (based on the Switzerland-Venezuela BIT and the Chile-Venezuela BIT).
[175] *Mobil v Venezuela*, Decision on Jurisdiction (10 June 2010) at paras 1, 186–187.
[176] *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*), Award (9 October 2014) at paras 117–118, 120, 379.
[177] *Ibid* at para 379.

II.80. If the first requirement for double compensation is not met (i.e. when there is only one claimant and one legal basis), any risk of overcompensation would not be a double compensation issue, but rather a miscalculation of the damage (which, as discussed in the first Chapter, should be called "double counting").[178] One example of double counting shares similarities with double compensation. In *El Paso v Argentina*, the first requirement for double compensation was not met, as there was only one claimant (an indirect shareholder in a number of Argentine companies) and one legal basis (the US-Argentina BIT).[179] Yet, there was a risk of overcompensation because the claimant claimed for both its reflective loss and the injury to the investment vehicle's assets.[180] The tribunal found that the claimant's argument would "amount to claiming twice for damage caused by the same events: once for the taking of the rights of the Argentine companies [the investment vehicles] and once for the diminution in value of the shares of those companies held by El Paso [the claimant]."[181]

II.81. The *El Paso* tribunal's finding might appear, on the face of it, to be a double compensation situation. However, it was in fact a double counting situation, because had the tribunal accepted the claimant's argument, it would have caused a contradiction within its decision. The tribunal correctly observed this point:

> [The claimant's] line of argument appears contradictory: either the domestic companies enjoy an independent legal existence, in which case it is they who own said legal and contractual rights, this meaning that the foreign investors' losses can be measured only by the diminished value of their shares in the companies. Or the domestic companies' legal existence is but a fiction, at least on the international level, and can therefore be disregarded, which would mean that the investment can practically be characterised as a direct one, the consequence being that the foreign investor may claim, as the owner of the local companies, the legal and contractual rights in question, but not its losses as a

[178] See above, Chapter 1, Section "Double Recovery v. Double Counting".
[179] *El Paso v Argentina*, Award (31 October 2011) at paras 1, 3, 7.
[180] *Ibid* at paras 156, 174.
[181] *Ibid* at para 175.

> shareholder. In the Tribunal's eyes, the above two views are irreconcilable, so that it is indispensable to opt for the one or the other.[182]

In other words, the claimant cannot have their cake and eat it too.

II.82. It was previously explained that double counting consists of the elements of "miscalculation" and "contradiction" in a tribunal's calculation of damage or its reasoning that results in a situation where the tribunal awards the same damage twice.[183] The situation in *El Paso* was of this nature, and the tribunal correctly avoided it. On the other hand, in double compensation, because there is more than one claimant and/or more than one legal basis involved, there is no miscalculation or contradiction in awarding each of those claims; it is, in fact, the cumulative effect of those claims combined that results in double compensation. As such, the first requirement (the presence of more than one claimant or more than one legal basis) is a key requirement for double compensation that could help to distinguish it from double counting cases.

ii. The Second Requirement

II.83. The second requirement for double compensation concerns the circumstances where there is more than one claimant. The claimants' relationship must be vertical, i.e. one should own an interest—e.g. shares—in the other(s). Where the relationship is vertical, the damage flows from the investment vehicle to the shareholders, entitling each of the claimants in the vertical line to recover for essentially the same harm, whereas if the relationship of the claimants is horizontal, each claimant seeks recovery in proportion to its own block of shares once, without any double compensation.

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[182] *Ibid* at paras 174–175.
[183] See above, Chapter 1, Section "Double Recovery v. Double Counting".

II.84. Consider this hypothetical example. Company A (an investor) owns 60% of the shares in company B (the investment vehicle) in Ruritania. The remaining 40% of the shares in B is owned by company C (an investor from a third country). The relationship between A and B is vertical whereas the relationship between A and C is horizontal. If both A and C initiate proceedings against Ruritania, there will be no double compensation because A recovers for its 60% block of shares and C recovers for its 40% block of share. But, if both A and B launch proceedings, there will be a risk of double compensation surrounding A's 60%, because A can recover for its 60% once through the treaty-based arbitration and once through the flow-through of 60% of the total compensation that B receives in its contract-based proceeding. Thus, we see that the risk of double compensation appears when more than one claim is pursued with respect to the same block of shares.

II.85. The example of the horizontal relationship between A and C can be found in the two related cases of *Burlington v Ecuador* and *Perenco v Ecuador*. Burlington and Perenco were members of a consortium and held two production sharing contracts for the exploration and exploitation of hydrocarbons in the Amazon region of Ecuador.[184] The relationship between the two companies was horizontal: Burlington was a US company that was ultimately owned by a multinational company, while Perenco was a Bahamas company that was ultimately owned by a French investor.[185] When Ecuador enacted a law that negatively affected the production sharing contracts,[186] Perenco and Burlington initiated separate investor-state arbitrations under two different BITs.

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[184] *Perenco*, Decision on Jurisdiction (30 June 2011) at paras 1, 13.
[185] *Burlington v Ecuador*, Decision on Reconsideration and Award (7 February 2017) at para 1; *Perenco*, Decision on Jurisdiction (30 June 2011) at paras 3–4.
[186] *Perenco*, Decision on Jurisdiction (30 June 2011) at para 15.

II.86. In *Burlington*, the tribunal noted that the claimant sought to "recover the value of its own investment, represented by its share in the Consortium's revenues, and not the entire value of the Consortium's investment … As a result, no risk of double recovery by Burlington and Perenco (who has initiated its own claim) would arise from an award from this Tribunal on this head of claim."[187] As such, although the first requirement for double compensation was present (i.e. the multiplicity of claimants and even the legal bases), the double compensation problem did not arise due to the absence of the second requirement (a vertical relationship between the claimants).

II.87. A notable example involving both the horizontal and vertical relationships can be found in the two related cases of *Urbaser and CABB v Argentina* and *Impregilo v Argentina*. The three claimants (Urbaser, CABB, and Impregilo) directly and indirectly held shares in a local investment vehicle (called AGBA) which held a concession agreement for the provision of drinking water and sewage services in Argentina.[188] Each of the three claimants had a vertical relationship with AGBA while having a horizontal relationship with one another: Impregilo was an Italian company,[189] and Urbaser and CABB were two unrelated Spanish entities.[190] When Argentina took certain measures that harmed AGBA,[191] Impregilo brought an investment arbitration under the Italy-Argentina BIT, while Urbaser and CABB joined forces to pursue an investment arbitration under the Spain-Argentina BIT. Because the relationship of the claimants was horizontal, the two parallel investment arbitrations did not create any risk of double compensation. However, the risk

[187] *Burlington v Ecuador*, Decision on Reconsideration and Award (7 February 2017) at para 233.
[188] *Urbaser and CABB*, Decision on Jurisdiction (19 December 2012) at paras 1, 28–31; *Impregilo v Argentina*, Award (21 June 2011) at para 1.
[189] *Impregilo v Argentina*, Award (21 June 2011) at para 1.
[190] *Urbaser and CABB*, Decision on Jurisdiction (19 December 2012) at para 31.
[191] *Ibid* at para 32.

arose because AGBA (the investment vehicle that had a vertical relationship with each of the corporate shareholders) was pursuing a domestic parallel proceeding in local courts.[192]

II.88. In summary, the second requirement for double compensation is that, when there is more than one claimant, their relationship must be vertical and not horizontal. When claimants stand in a horizontal line with respect to one another, each seeks recovery in proportion to its own block of shares once, whereas when they are in a vertical line, more than one claim is pursued with respect to the same block of shares, due to the flow-through of damage.

iii. The Third Requirement

II.89. The third requirement is that the state's wrongful conduct must be taken against the investment vehicle and not against the shareholding investors in their capacity as shareholders. In the discussion on the subject matter of "compensation", it was explained that when shareholders suffer loss in their capacity as shareholders (for example when their voting right is affected), such loss is "direct loss", seeking recovery for which would not pose any risk of double compensation.[193] What could entail the risk of double compensation is the other type of shareholder loss, namely "reflective loss"—which is a loss that shareholders incur as a result of a harm inflicted on their company.[194]

II.90. Under the third requirement for double compensation, the state's wrongful conduct must be taken against the investment vehicle, because it generally results in the flow-through of damage from the investment vehicle to the shareholders. This provides for the multiplicity of claims: claim

[192] *Impregilo v Argentina*, Award (21 June 2011) at para 119; *Urbaser and CABB*, Decision on Jurisdiction (19 December 2012) at paras 81, 87, 91, 199, 219.
[193] See above, paras II.30 – II.31.
[194] *Ibid*.

by the investment vehicle and claims by protected investors (which could exist at different shareholding levels).

iv. The Fourth Requirement

II.91. The fourth requirement is that the harm at issue across different claims/proceedings must be the same.[195] This is a logical requirement: for double compensation to occur, both payments must compensate for the same harm; otherwise, if two payments in compensation are made to remedy two different harms, this would not be considered double compensation. An obvious example is when an investment vehicle pursues a claim before local courts for the state's termination of a concession agreement, and then later, the shareholding investors launch a treaty-based arbitration for the injury to the investment vehicle's asset (i.e. the terminated concession agreement). The harm at issue in both proceedings is the same.[196]

II.92. The other example where this situation may arise is less obvious: if the shareholders, in the above scenario, seek compensation for the diminution in the value of their shares due to the state's termination of the concession agreement. The harm at issue in the shareholders' claim may seem, on the face of it, to be different from the harm at issue in the investment vehicle's claim, as the former is only reflective of the latter. However, closer scrutiny of the valuation methods adopted by ISDS tribunals to calculate shareholders' reflective loss shows that this is not the case. This topic is discussed thoroughly in Part IV.[197] In short, the ISDS tribunals determine the amount

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[195] Borzu Sabahi, Kabir Duggal & Nicholas Birch, "Principles Limiting the Amount of Compensation", *supra* note 1, at 343 ("the mere existence of multiple proceedings would itself not be a basis to reduce damages if the damages relate to different losses").
[196] For a discussion on shareholders' claim for injury to the investment vehicle's assets, see above, Chapter 2, Section B.
[197] See below, Part IV, Chapter 8, Segment "Same Harm Factor".

of reflective loss by examining the value of the investment vehicle (through its cash flow, its value on the stock market, or its assets and liabilities) and how that value has been impacted by the harm inflicted by the state. Therefore, even when shareholders seek compensation for reflective loss in the treaty-based proceeding, the tribunals examine the same harm that would be examined in a contract-based proceeding launched by the investment vehicle.

v. The Fifth Requirement

II.93. For double compensation to occur, the fifth and final requirement is that there must be more than one payment by the host state. This poses two questions: (i) whether the state's double or multiple payments entail the investors' double or multiple recovery; and (ii) if the state must pay more than once for double compensation to occur, does this mean that the responsibility to prevent double compensation falls on ISDS tribunals only when the sums are paid? Both questions have been discussed in the first Chapter.

II.94. In the Section on Double Recovery v. Double Payment, it was explained that normally the state is on one side of the equation and the investors on the other, which means that when the state pays more than once, it will be the investors who receive more than once. However, the equation does not always operate as simply as that, because there are situations where the state pays more than once while no one really recovers more than once: for example, due to an earlier share transfer by the investors. It was explained that the focus of the problem is on the payer (the state) and not the payee (the investor), whereas the term that has been often used for the concept (namely, "double recovery") revolves around the issue of the payee recovering more than once.

Thus, the author suggested that the term "double compensation" be preferred.[198]

II.95. In the Section on Actual Double Compensation v. The Risk of Double Compensation, the author identified two main approaches among ISDS tribunals: the first approach sees a tribunal's obligation as avoiding the actual double compensation, whereas the other approach sees a tribunal's obligation as avoiding the risk of double compensation. Within the second approach, there are two sub-approaches: one confronts the risk at the rendering of a second final award, while the other confronts the risk at the jurisdiction/admissibility phase. The author argued that the risk of double compensation must be addressed as early as possible in the proceeding.

vi. The Counterclaim Exception

II.96. This Subsection discusses the concept of double compensation in the exceptional scenario where a respondent state in an investment arbitration brings counterclaims against the claimants. It should be noted that the usage of the term "exceptional" to describe the scenario does not relate to the issue of whether it is rare or common for states to file counterclaims,[199] but rather to the fact that, among the total 63 cases involving the risk of double compensation,[200] in only one occasion (involving two parallel arbitrations) the risk arose from the state's counterclaims.[201]

II.97. The fact that, thus far, there has been only one example of such a scenario (and hence a lack of other examples for comparison) makes it difficult to offer a comprehensive definition, or to extract general requirements for the kind of double compensation that benefits states. However,

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[198] See above, Chapter 1, Section "Double Payment v. Double Compensation".
[199] See generally Jean E Kalicki, "Counterclaims by States in Investment Arbitration" (January 2013) IISD Investment Treaty News; Borzu Sabahi, Kabir Duggal & Nicholas Birch, "Principles Limiting the Amount of Compensation", *supra* note 1, at 333.
[200] See above, para I.7.
[201] *Perenco v Ecuador* and *Burlington v Ecuador*.

what can be done at this stage is to discuss the only available example and thereby examine how double compensation in favor of a state is different from typical double compensation in favor of investors (the requirements of which were set out in the previous five Subsections).

II.98. The available example concerns the two parallel arbitrations of *Burlington v Ecuador* and *Perenco v Ecuador*. Burlington (a US company) and Perenco (a Bahamas company ultimately owned by a French investor) were consortium partners in two production sharing contracts that were awarded by Ecuador for exploration and exploitation of hydrocarbons in the Amazon region of the country.[202] When a dispute arose between Ecuador on the one hand, and the two companies on the other,[203] Burlington filed an ICSID arbitration based on the US-Ecuador BIT,[204] while Perenco initiated a separate ICSID arbitration based on the France-Ecuador BIT.[205] The respondent state also brought counterclaims in both arbitrations, for environmental harms to the sites where the two companies operated as well as for their alleged failure to maintain the sites' infrastructure.[206] Although the counterclaims in each arbitration were filed on the basis of joint and several liability,[207] Ecuador managed to recover from both Perenco and Burlington.[208]

II.99. The situation in *Perenco* and *Burlington* highlights a number of fundamental differences between a typical double compensation scenario where investors are beneficiaries and the

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[202] *Burlington v Ecuador*, Decision on Jurisdiction (2 June 2010) at paras 2, 8, 14–15, 17; *Perenco v Ecuador*, Decision on Jurisdiction (30 June 2011) at paras 1, 3–4, 13.
[203] *Perenco v Ecuador*, Decision on Jurisdiction (30 June 2011) at para 26.
[204] *Burlington v Ecuador*, Decision on Jurisdiction (2 June 2010) at 4.
[205] *Perenco v Ecuador*, Decision on Jurisdiction (30 June 2011) at para 1.
[206] *Burlington v Ecuador*, Decision on Counterclaims (7 February 2017) at paras 6, 52, 64.
[207] *Perenco v Ecuador*, Decision on Claimant's Application for Dismissal of Respondent's Counterclaims (18 August 2017) at para 5.
[208] *Ibid*, Award (27 September 2019) at paras 445, 899. There was a complicated interplay between the two proceedings, with many twists and turns. Eventually, the *Perenco* tribunal deducted the *Burlington* damages from the total damages it awarded for the counterclaims; however, the set off did not avoid double compensation—it only reduced the amount of it. These two cases are discussed in detail below, in Part III, Chapter 4, *Burlington* and *Perenco*.

exceptional double compensation scenario where a host state benefits. The following table compares these two scenarios.

No.	Typical Double Compensation	Exceptional Double Compensation
1.	The side that benefits from double compensation can have multiple participants: the investors.	The side that benefits from double compensation has only one participant: the state.
2.	The side that is at risk of double compensation consists of only one participant: the state.	The side that is at risk of double compensation consists of more than one participant: the investors.
3.	The investors have a vertical relationship.	The investors have a horizontal relationship.
4.	The multiplicity of proceedings is not a requirement.	The multiplicity of proceedings seems to be a requirement. It is difficult to imagine that a single tribunal would have awarded damages twice on the basis of joint and several liability, had *Perenco* and *Burlington* been decided in one proceeding.

B. Scenarios

II.100. This Section discusses and categorizes the possible scenarios that involve the risk of double compensation. Of the 63 cases where the risk of double compensation was raised as an objection:[209]

- 11 cases (equal to 18%) involved only one proceeding, i.e. a single investment arbitration.[210] Of those 11 cases: in eight, the risk of double compensation arose out of

[209] For the full list of cases, see above, note 8. This Section discusses only the scenarios to which each case belongs. The details of each case are discussed in Chapter 4.
[210] *CEMEX v Venezuela*; *CMS v Argentina*; *Enron v Argentina*; *Duke Energy v Ecuador*; *Goetz v Burundi (II)*; *Inmaris v Ukraine*; *Micula v Romania (I)*; *Kardassopoulos and Fuchs v Georgia*; *PSEG v Turkey*; *Sempra v Argentina*; *Suez and InterAguas v Argentina*.

the same proceeding,[211] while in the other three cases, the risk was due to the fact that the investment vehicle was in the process of renegotiating a favorable contract with the state or had already done so.[212]

- 52 cases (equal to 82%) involved more than one proceeding, i.e. there was at least one other proceeding (the "other" proceeding) in addition to the investment arbitration at issue.

II.101. When there is more than one proceeding involved, different scenarios may play out. If the "other" proceedings are categorized according to their legal bases, they could be contract-based or treaty-based. If they are categorized according to timing, they could be parallel to the investment arbitration at issue or they could precede the investment arbitration at issue. These two factors of Legal Basis and Timing are discussed in the two following Subsections. Not only does such categorization contribute to the understanding of double compensation, it is also used in Part IV to formulate a solution to the problem.

i. Based on Legal Basis

II.102. When there is more than one proceeding involved, the "other" proceeding could (depending on its legal basis) be another treaty-based arbitration or a contract-based proceeding. The author's research shows that, of the 52 ISDS cases that involved more than one proceeding:

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[211] *Micula v Romania (I)*, Award (11 December 2013) at paras 1240–1241, 1246–1247; *Goetz v Burundi (II)*, Award (21 June 2012) at paras 167–168, 171, 211; *CEMEX v Venezuela*, Decision on Jurisdiction (30 December 2010) at paras 18–19, 29; *Inmaris v Ukraine*, Decision on Jurisdiction (8 March 2010) at para 112; *Kardassopoulos and Fuchs v Georgia*, Award (3 March 2010) at para 452; *Duke Energy v Ecuador*, Award (18 August 2008) at paras 470–472, 476; *PSEG v Turkey*, Award (19 January 2007) at paras 1, 340; *Suez and InterAguas v Argentina*, Decision on Jurisdiction (16 May 2006) at paras 1, 46.

[212] *Sempra v Argentina*, Award (28 September 2007) at paras 228, 395; *Enron v Argentina*, Award (22 May 2007) at paras 74–75, 79, 202; *CMS v Argentina*, Award (12 May 2005) at paras 83, 96.

- in 36 cases, the "other" proceeding(s) was a contract-based proceeding, of which:
    - in 28 cases, it was a local court proceeding;[213]
    - in seven cases, it was a commercial arbitration (local or international);[214] and
    - in one case, there were both a local court proceeding and a commercial arbitration.[215]
- in nine cases, the "other" proceeding was another treaty-based arbitration;[216] and
- in seven cases, the "other" proceedings included both another treaty-based arbitration and

[213] *Strabag and Others v Poland*, Partial Award on Jurisdiction (4 March 2020) at paras 6.2, 6.5; *Gosling v Mauritius*, Award (18 February 2020) at paras 164, 68; *Kappes v Guatemala*, Decision on Respondent's Preliminary Objections (13 March 2020) at paras 67, 78; *United Utilities v Estonia*, Award (21 June 2019) at paras 447, 461; *Manchester Securities v Poland*, Award (7 December 2018) at para 525; *Gavrilovic v Croatia*, Award (26 July 2018) at para 1297; *Salini Impregilo SpA v Argentina*, Decision on Jurisdiction and Admissibility (23 February 2018) at paras 141–143; *Busta v Czech Republic*, Final Award (10 March 2017) at paras 194–195, 217; *Renco v Peru (I)*, Partial Award on Jurisdiction (15 July 2016) at paras 59, 61–62; *RREEF v Spain*, Decision on Jurisdiction (6 June 2016) at paras 103, 125; *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*, Award (9 April 2015) at para 38; *British Caribbean Bank v Belize*, Award (19 December 2014) at paras 176, 182; *SAUR v Argentina*, Award (22 May 2014) at paras 149–150, 174; *Guaracachi v Bolivia*, Award (31 January 2014) at paras 258, 260; *GÜRİŞ and Others v Syria*, Final Award (31 August 2020) at paras 374–375; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at paras 81, 87, 91, 199, 219*; EDF v Argentina*, Award (11 June 2012) at paras 1121–1123, 1137, 1138; *Deutsche Bank v Sri Lanka*, Award (31 October 2012) at paras 556, 561; *Hochtief v Argentina*, Decision on Jurisdiction (24 October 2011) at para 121; *Impregilo v Argentina*, Award (21 June 2011) at para 119; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*, Award (16 June 2010) at paras 4.190–4.201, 12.60; *Chevron and Texaco v Ecuador (I)*, Partial Award on the Merits (30 March 2010) at paras 134, 135, 545; *Zeevi v Bulgaria*, Award (25 October 2006) at paras 842–844; *Camuzzi v Argentina (I)*, Decision on Jurisdiction (11 May 2005) at paras 91, 105; *GAMI v Mexico*, Final Award (15 November 2004) at paras 8, 116–123; *Occidental v Ecuador (I)*, Final Award (1 July 2004) at paras 4–6, 209; *Azurix v Argentina*, Decision on Jurisdiction (8 December 2003) at paras 37, 101; *Nykomb v Latvia*, Award (16 December 2003) at 9; *Nagel v Czech Republic*, Final Award (9 September 2003) at paras 14–15, 236, 272.

[214] *Deutsche Telekom v India*, Final Award (27 May 2020) at para 322; *Devas v India*, Award on Jurisdiction and Merits (25 July 2016) at para 161; *ConocoPhillips v Venezuela*, Award (9 March 2019) at paras 35–36, 961; *Unión Fenosa v Egypt*, Award (31 August 2018) at paras 1.25, 6.6, 6.8–6.9; *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*), Award (9 October 2014) at paras 118–120, 379; *Bayindir v Pakistan*, Decision on Jurisdiction (14 November 2005) at paras 33–34, 270.

[215] *Waste Management v Mexico (I)*, Arbitral Award (2 June 2000) at §§ 6, 27.

[216] *Fábrica de Vidrios v Venezuela*, Award (13 November 2017) at paras 8–9, 61; *Orascom v Algeria*, Award (31 May 2017) at paras 34, 485(f); *Standard Chartered Bank v Tanzania*, Award (11 October 2019) paras 27–28, 526; *Perenco v Ecuador*, Decision on Claimant's Application for Dismissal of Respondent's Counter-claims (18 August 2017) at paras 5, 38–39; *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at paras 28, 33, 136, 143; *Burlington v Ecuador*, Decision on Counterclaims (7 February 2017) at paras 64–65; *von Pezold v Zimbabwe*, Award (28 July 2015) at paras 5–6, 118, 127, 324–325, 936; *Daimler v Argentina*, Award (22 August 2012) at para 155; *Pan American Energy v Argentina* consolidated with *BP America v Argentina*, Decision on Preliminary Objections (27 July 2006) at paras 1, 3–4, 12–19, 219.

contract-based proceedings.[217]

II.103. The above numbers show that, of the 52 cases that involved more than one proceeding, in the majority (approximately 69%) of cases, the risk of double compensation arose from contract-based proceedings, and that within contract-based proceedings, local court proceedings had higher numbers when compared to commercial arbitration.

ii. Based on Timing

II.104. When there is more than one proceeding involved, another factor according to which the cases could be categorized is the timing of the "other" proceeding with respect to the investment arbitration at issue. Three scenarios are possible for the investment arbitration at issue and the "other" proceeding: (i) the two are parallel in time, which means that neither has concluded and become final; (ii) the two are sequential proceedings, meaning that one of the proceedings has already concluded and become final, which makes it the preceding proceeding with respect to the other proceeding (the subsequent proceeding); (iii) the "other" proceeding has not yet been initiated, but there are reasons to regard it as likely to be initiated, for example when no contract-based proceeding has started yet, but the administrative proceedings to obtain a ruling on the illegality of the government's measures are underway, and this ruling would form the basis for the investment vehicle to then initiate a contract-based proceeding to obtain damages.

[217] *Hydro and Others v Albania*, Award (24 April 2019) at paras 10, 261–262, 13–14 (fn 13), 822; *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016) at para 196 *together with* Decision on Provisional Measures (8 April 2016) at paras 31, 36, 66, 180; *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016) at paras 10, 313(vii); *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*, Interim Award on Jurisdiction and Admissibility (30 November 2009) at paras 589, 591; *AMTO v Ukraine*, Final Award (26 March 2008) at paras 20–21, 23, 71, 26(e), 26(i); *CME v Czech Republic*, Final Award (14 March 2003) at paras 22–25; *Lauder v Czech Republic*, Final Award (3 September 2001) at paras 142–143, 172.

II.105. The author's research shows that, of the 52 ISDS cases that involved more than one proceeding:

- in 23 cases, the investor-state arbitration at issue and the "other" proceeding were parallel;[218]
- in 12 cases, the investor-state arbitration at issue and the "other" proceeding were sequential proceedings;[219]
- in six cases, there were two or more "other" proceedings, some of which had already concluded and become final while the rest were still afoot in parallel with the investor-state arbitration at issue;[220] and
- in 11 cases, the "other" proceeding was not yet initiated, of which:

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[218] *Gosling v Mauritius*, Award (18 February 2020) at paras 164, 68; *Busta v Czech Republic*, Final Award (10 March 2017) at paras 194–195, 217; *Burlington v Ecuador*, Decision on Counterclaims (7 February 2017) at paras 64–65; *RREEF v Spain*, Decision on Jurisdiction (6 June 2016) at paras 103, 125; *von Pezold v Zimbabwe*, Award (28 July 2015) at paras 5–6, 118, 127, 324–325, 936; *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*, Award (9 April 2015) at para 38; *British Caribbean Bank v Belize*, Award (19 December 2014) at paras 176, 182; *Guaracachi v Bolivia*, Award (31 January 2014) at paras 258, 260; *Hochtief v Argentina*, Decision on Jurisdiction (24 October 2011) at para 121; *Chevron and Texaco v Ecuador (I)*, Partial Award on the Merits (30 March 2010) at paras 134–135, 545; *Pan American Energy v Argentina* consolidated with *BP America v Argentina*, Decision on Preliminary Objections (27 July 2006) at paras 1, 3–4, 12–19, 219; *Bayindir v Pakistan*, Decision on Jurisdiction (14 November 2005) at paras 33–34, 270; *Camuzzi v Argentina (I)*, Decision on Jurisdiction (11 May 2005) at paras 91, 105; *Azurix v Argentina*, Decision on Jurisdiction (8 December 2003) at paras 37, 101; *Lauder v Czech Republic*, Final Award (3 September 2001) at paras 142–143, 172.

[219] *Deutsche Telekom v India*, Final Award (27 May 2020) at para 322; *Fábrica de Vidrios v Venezuela*, Award (13 November 2017) at paras 8–9, 61; *Orascom v Algeria*, Award (31 May 2017) at paras 34, 485(i)–(j); *Standard Chartered Bank v Tanzania*, Award (11 October 2019) paras 27–28, 526; *ConocoPhillips v Venezuela*, Award (9 March 2019) at paras 35–36, 961; *Perenco v Ecuador*, Decision on Claimant's Application for Dismissal of Respondent's Counter-claims (18 August 2017) at paras 5, 38–39; *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at paras 28, 33, 136, 143; *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*), Award (9 October 2014) at paras 117–120, 379; *EDF v Argentina*, Award (11 June 2012) at paras 1121–1123, 1137–1138; *GAMI v Mexico*, Final Award (15 November 2004) at paras 8, 116–123; *Nagel v Czech Republic*, Final Award (9 September 2003) at paras 14–15, 236, 272; *Waste Management v Mexico (I)*, Arbitral Award (2 June 2000) at §§ 6, 27.

[220] *Unión Fenosa v Egypt*, Award (31 August 2018) at paras 1.25, 6.6, 6.8–6.9, 11.28–11.29; *Hydro and Others v Albania*, Award (24 April 2019) at paras 10, 261–262, 13–14 (fn 13), 822; *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016) at paras 10, 12, 313(vii); *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*, Interim Award on Jurisdiction and Admissibility (30 November 2009) at paras 589, 591; *AMTO v Ukraine*, Final Award (26 March 2008) at paras 20–21, 23, 71, 26(e), 26(i); *CME v Czech Republic*, Final Award (14 March 2003) at paras 22–25.

- in four cases, there were administrative proceedings, based on the result of which the investment vehicle could initiate a local court proceeding to obtain damages.[221]
- in one case, the respondent state anticipated that the parent company would file a separate investor-state arbitration.[222]
- in six case, the respondent state anticipated that the investment vehicle would initiate local court proceedings to seek damages.[223]

The above numbers show that approximately half of the 52 cases involved parallel proceedings, and the other half involved: sequential proceedings and the situation where the "other" proceeding had not yet been initiated.

II.106. The relevant question is what point in time is determinative? In other words, what point in time—in the investment arbitration at issue—is the critical point where if the "other" proceeding has concluded, it becomes the "preceding" proceeding and if it has not concluded or become final, it is considered to be in "parallel" with the investment arbitration? The ISDS tribunals' approach to this issue is far from consistent. A review of the above decisions shows that, for some tribunals, the relevant point in time was that of their decision on jurisdiction, while for other tribunals the critical point in time was that of their awards (for some in the merits part of the award and for the rest at the quantum part).[224] The inconsistency in the approach further indicates that there is a lack of clear rules pertaining to the issue of double compensation. Thus, the question remains: what

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[221] *SAUR v Argentina*, Award (22 May 2014) at paras 149–150, 156–157, 174; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at paras 81, 87, 91, 199, 219; *Impregilo v Argentina*, Award (21 June 2011) at paras 178, 224; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*, Award (16 June 2010) at paras 4.190–4.201, 12.60.
[222] *Daimler v Argentina*, Award (22 August 2012) at para 155.
[223] *GÜRİŞ and Others v Syria*, Final Award (31 August 2020) at paras 374–375; *Kappes v Guatemala*, Decision on Respondent's Preliminary Objections (13 March 2020) at paras 67, 78; *Gavrilovic v Croatia*, Award (26 July 2018) at para 1297; *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016) at para 196 *together with* Decision on Provisional Measures (8 April 2016) at paras 31, 36, 66, 180; *Deutsche Bank v Sri Lanka*, Award (31 October 2012) at paras 556, 561; *Nykomb v Latvia*, Award (16 December 2003) at 9.
[224] See *supra*, notes 218 – 223.

point in time is the right time to determine the status of the proceedings? Is it the initiation of the investment arbitration at issue? Is it at some point in the jurisdiction phase or the merits phase?

II.107. Logically, the initiation of the investment arbitration at issue cannot be the appropriate point in time. Consider this scenario: the investment arbitration commences, and the "other" proceeding has not yet concluded and, as such, it is parallel. However, shortly after the investment arbitration commences, but still before the tribunal has the chance to consider the objection as to the risk of double compensation, the "other" proceeding concludes and becomes final. Should we then expect the investment arbitration tribunal to consider the two proceedings artificially as "parallel" proceedings just because by the time the investment arbitration commenced the two were parallel? The answer must be no because the reality is that, when the tribunal decides the objection, the "other" proceeding has already concluded.

II.108. This author is of the opinion that the right point in time to decide whether the "other" proceeding has become "preceding" or is still "parallel" is when the tribunal hears the parties' arguments on jurisdiction and admissibility. In fact, the question of what point in time is the right time to determine the status of the proceedings is an aspect of another question: at what stage should the double compensation issue be decided? This question has already been discussed earlier in this Part[225] and will be analysed in more detail in Part IV.

SUMMARY OF THE PART

II.109. This Part identified the contours of the double compensation problem. Chapter 1 discussed four binaries. The first binary was Double Recovery v. Double Counting. It was

[225] See above, Chapter 1, Section "Actual Double Compensation v. The Risk of Double Compensation".

explained that there is another situation that has also been called "double recovery": overcompensating a claimant as a result of the tribunal's miscalculation of the damage incurred. This latter concept is clearly different from the one that is the subject of this thesis. To avoid confusion between the two concepts, some tribunals and commentators have used the term "double counting" for the overcompensation of a claimant as a result of miscalculation of damage.

II.110. The second binary was Double Recovery v. Double Payment. It was explained that the term "double recovery" does not entirely correspond to the phenomenon it is known to represent. The term, as it currently stands, revolves around the payee (investor) recovering more than once, whereas there are situations in which the payer (the state) pays more than once for the same harm, while the investor does not necessarily receive more than once. As such, the term "double payment" better represents the phenomenon at issue. However, the third binary (Double Payment v. Double Compensation) explained that even the term "double payment" is not sufficiently inclusive, as it does not cover the exceptional scenario where states could benefit from overpayment as a result of counterclaims. Thus, it was suggested that the term "double compensation" be used instead, because it is a neutral term that encompasses both "double recovery" and "double payment".

II.111. The fourth binary was Actual Double Compensation v. The Risk of Double Compensation. The author identified two main approaches taken by ISDS tribunals. According to the first approach, a tribunal's obligation is to avoid the actual double compensation, whereas according to the second approach, a tribunal's obligation is to avoid the risk of double compensation. Within the second approach, there are two sub-approaches: one confronts the risk at the rendering of a second final award, while the other confronts the risk at the jurisdiction/admissibility phase. The author argued that the risk of double compensation must be

addressed as early as possible in the proceeding and, therefore, the approach that seeks to confront the risk at the jurisdiction/admissibility phase is preferable.

II.112. Chapter 2 of the Part discussed the subject matter of compensation in double compensation, i.e. the question of what type of claims, if not properly administered, are likely to be compensated twice over. In most cases that the risk of double compensation arises, shareholders have sought compensation for Reflective Loss, which is a loss that a shareholder incurs as a result of a harm that is inflicted on the company. The ISDS system has generally allowed for shareholders' claims, regardless of their status as majority/minority or direct/indirect shareholders.

II.113. Another type of loss that shareholders in some ISDS cases have sought recovery for is the Injury to the Investment Vehicle's Assets, i.e. bypassing the investment vehicle (which is a separate juridical person) and recovering directly for injuries to its assets. Unlike shareholders' recovery for reflective loss that is settled law in the ISDS system (at least for now), there is no such consensus on shareholders' recovery for injury to the investment vehicle's assets. It was explained that shareholders' recovery for the latter type of loss depends on two factors: whether the applicable IIA provides for a broad definition of "investment", and whether the shareholder owns (even indirectly) all or a majority of the investment vehicle. If one of the two factors is available, ISDS tribunals are more likely to allow the shareholder to recover for injury to the investment vehicle's assets.

II.114. The discussion then turned to the question as to the Relevance of the Matter, i.e. how does knowing about the subject matter of compensation (namely reflective loss and injury to the investment vehicle's asset) help to improve understanding of the double compensation problem? It was explained that, when shareholders seek damages for injury to the investment vehicle's assets instead of reflective loss, this action has two consequences: (i) the overall amount of double

compensation tends to be higher, and (ii) the negative impact on the principle of corporate separateness is more severe, in that shareholders' recovery for reflective loss bends the principle of corporate separateness, while their recovery for injury to the investment vehicle's assets breaks the principle.

II.115. Given that shareholders' standing and recovery may not be challenged, it was explained that a compromised principle of corporate separateness seems to be a new reality in international investment law. This begs the question: if the compromised principle is part of the problem, could it also be part of the solution? The answer is in the affirmative because once the principle of corporate separateness is compromised, it creates a two-way street where, just as shareholders could benefit from the compromised principle, others could also use it as a defense against shareholders. The logic of the two-way street allows the author to argue (in Part IV) that shareholders and their investment vehicle could be regarded as the same entity. The argument will be developed through the principle of estoppel.

II.116. Based on the insight that Chapters 1 and 2 offered, Chapter 3 set forth a comprehensive Definition of "double compensation" along with its requirements. Double compensation was defined as a situation in which, for the same harm inflicted on an investment vehicle, the host state pays double or multiple compensation to the investor, with the result that the investor is usually—but not necessarily—overcompensated. It was explained that, for "double compensation" to occur, five requirements must be met. There must be: (i) more than one claimant (at least one of whom must be a protected investor) or more than one legal basis (at least one of which must be an IIA); (ii) a vertical relationship between the claimants; (iii) wrongful measures by the state against the investment vehicle and not the shareholding investors in their capacity as shareholders; (iv) the same harm at issue across different claims/proceedings; and (v) more than one payment by the

state. A separate Subsection then discussed the exceptional situation where a respondent state could benefit from double compensation as a result of bringing counterclaims against the investors.

II.117. The discussion then turned to the Scenarios where the double compensation problem may arise. Of the 63 cases where the risk of double compensation was raised as an objection, the author's research shows that 11 cases involved only one proceeding, while 52 cases involved more than one proceeding. For the latter group (i.e. the cases that involved more than one proceeding), the author used two factors to categorize different scenarios. The first factor is their legal bases, i.e. whether the proceedings are contract-based or treaty-based. The research shows that the risk of double compensation in the majority of those 52 cases came from contract-based proceedings. The second factor is their timing, i.e. whether the proceedings are parallel in time or sequential. Approximately half of those 52 cases involved parallel proceedings, while the other half included sequential proceedings and the situation that the "other" proceeding had not yet initiated. A table presenting an overview of the double compensation problem is annexed to the thesis.

PART III: DOUBLE COMPENSATION ACROSS ISDS CASE LAW, INTERNATIONAL DOCUMENTS, AND COMMENTARY

III.1. In order to propose a solution to the double compensation problem (which is the focus of the next Part), two preliminary steps should be taken: first, examining the exact nature of the problem and second, assessing how the problem has been dealt with thus far. The first step was the focus of the previous Part, while the second step is the focus of this Part, which proceeds in three chapters (Chapters 4, 5, and 6).

III.2. Chapter 4 analyses the relevant ISDS case law. The discussion shows that, overall, tribunals have failed to establish a clear, holistic approach that is supported by theory with respect to the double compensation issue. Chapter 5 discusses international documents and commentary. The discussion of international documents addresses the rules and reports that have been issued by international organizations and that have a bearing on double compensation. The discussion of relevant commentary evaluates how scholars have addressed the issue. Chapter 6 then sets out and analyses the solutions that have been suggested thus far by ISDS tribunals and commentators. Finally, there will be a Summary of the Part.

CHAPTER 4: ISDS CASE LAW

III.3. This Chapter presents a full picture of how ISDS tribunals have treated the issue of double compensation. It shows how the possible scenarios and different requirements of double compensation (which were set out in the previous Chapter) have played out in practice. This Chapter has a significant research value for two reasons. First, it provides an exhaustive list of all ISDS cases where the risk of double compensation was raised, which, to the author's knowledge, is absent from the literature. Second, the Chapter provides the relevant information from each case

and analyzes how the double compensation issue unfolded in that case. This is important because, unlike the way that tribunals have treated routine topics (e.g. the FET standard or MFN clauses), in most cases, they have not dedicated a specific section of their decisions to the issue of double compensation. Thus, the relevant paragraphs are often scattered in a decision, or even across different decisions from one case, which makes researching this topic a challenging endeavour. However, this Chapter contains not only all the relevant ISDS cases but also the relevant information from each case, coupled with analysis of the most important parts of the decisions.

III.4. Of the 1,023 reported investment arbitration cases filed as of January 2020,[226] the author's research shows that in 63 cases the issue of double compensation was raised at different levels of proceedings.[227] Those 63 cases are discussed in this Chapter, which will show that the majority of ISDS tribunals have either rejected the risk of double compensation or, if the tribunals acknowledged it as a problem, they did not develop a holistic approach that takes into account all potential scenarios of the double compensation problem.

III.5. Accordingly, this Chapter includes two Sections that reflect the two groupings of cases: the first Section analyses those Cases Where the Risk was Not Effectively Addressed, while the second Section discusses Cases Where the Risk was Effectively Addressed. Of the total 63 cases, only thirteen fall into the second group,[228] while the rest (50 cases) fall into the first group.

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[226] UNCTAD, *Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019*, IIA Issue Note 2 (July 2020) at 1.
[227] For the full list of cases, see *supra*, note 8.
[228] The ten cases are as follows: *Ampal v Egypt*; *CMS v Argentina*; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*; *Goetz v Burundi (II)*; *GÜRİŞ and Others v Syria*, Final Award (31 August 2020) at paras 374–375; *Kardassopoulos and Fuchs v Georgia*; *Manchester Securities v Poland*; *Micula v Romania (I)*; *Occidental v Ecuador (I)*; *Orascom v Algeria*; *PSEG v Turkey*; *Renco v Peru (I)*; *Waste Management v Mexico (I)*.

III.6. It should be noted that, in each Section, cases are set out in chronological order based on the date of the first decision (in each case) in which the tribunal addressed the double compensation issue. The cases are organized into chronological order because there is value to identifying which tribunals first adopted an approach and set a precedent for other tribunals. The chronological arrangements of the cases also indicate that cases decided later in time (i.e. those that are discussed further down the list) generally include more arguments by the parties and more analysis by the tribunals in relation to double compensation, reflecting the fact that there is a growing awareness of (and hence a growing sensitivity to) the issue of double compensation.

A. Cases Where the Risk was Not Effectively Addressed

III.7. The ISDS tribunals' failure or unwillingness to address the risk of double compensation has manifested itself in different forms: either through procedural justifications, or substantive justifications, or a combination of both. As such, this Section contains three Subsections. The first addresses those cases where the risk of double compensation was not effectively addressed due to Justifications of a Procedural Nature; the second Subsection discusses the cases where Justifications of a Substantive Nature were relied on; and the third Subsection covers cases where Justifications of a Mixed Nature (both substantive and procedural) were invoked.

i. Cases with Justifications of a Procedural Nature

III.8. ISDS tribunals have invoked different procedural justifications to dismiss states' objections related to the risk of double compensation, for example: by postponing the issue to the merits phase where the tribunals failed to address it; or by leaving it to the second deciding forum (from respective parallel proceedings) to deal with the double compensation issue. Of the 50 cases

where the risk of double compensation was not effectively addressed,[229] tribunals in 18 cases provided justifications of a procedural nature.[230] These 17 cases are discussed and analysed in this Subsection.

a. *Lauder v Czech Republic*[231]

III.9. The claimant (a US citizen) was an indirect majority shareholder in an investment vehicle (a broadcasting company called CNTS) in the Czech Republic.[232] The investment was made through a German interposed company (called CEDC) which was later replaced by a Dutch interposed company (called CME).[233] When a dispute arose between the parties, the claimant brought an *ad hoc* investment arbitration based on the US-Czech Republic BIT and under the UNCITRAL arbitration rules. There were several parallel proceedings afoot concerning the same dispute: another investment arbitration brought by the interposed company (*CME v Czech Republic*),[234] an ICC commercial arbitration launched by CME against a Czech citizen, and a number of local court proceedings.[235]

III.10. The respondent objected to the tribunal's jurisdiction on several different grounds: the fork-in-the-road ("FITR") provision of the BIT, *lis pendens*, and abuse of process.[236] The tribunal rejected those objections,[237] but noted that the risk of double compensation was real due to the

[229] See above, para III.5.
[230] *Lauder v Czech Republic*; *Camuzzi v Argentina (I)*; *Suez and InterAguas v Argentina*; *Pan American Energy v Argentina* consolidated with *BP America v Argentina*; *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*; *Zeevi v Bulgaria*; *CEMEX v Venezuela*; *Hochtief v Argentina*; *Urbaser and CABB v Argentina*; *Teinver v Argentina; SAUR v Argentina*; *British Caribbean Bank v Belize*; *RREEF v Spain*; *Fábrica de Vidrios v Venezuela*; *Burlington v Ecuador*; *Gavrilovic v Croatia*; *Kappes v Guatemala*.
[231] *Lauder v Czech Republic*, UNCITRAL, Final Award (3 September 2001) ("*Lauder v Czech Republic*").
[232] *Ibid* at paras 4–7.
[233] *Ibid* at paras 5, 47, 77.
[234] This is discussed below, in the current Chapter, Subsection "Cases with Justifications of a Substantive Nature".
[235] *Lauder v Czech Republic* at paras 142–143.
[236] *Ibid* at paras 153, 156, 167–168, 176.
[237] *Ibid* at paras 161–166, 171–174, 177.

existence of multiple parallel proceedings.[238] Yet, the tribunal—in the jurisdiction part of its Final Award—held that the second deciding forum (be it the local courts or arbitral tribunals) would take the risk into account.[239] As such, despite acknowledging the risk of double compensation, the tribunal did not apply a solution. In the end, the tribunal found that the respondent had breached the BIT but denied all claims for damages.[240]

b. *Camuzzi v Argentina (I)*[241]

III.11. The claimant, Camuzzi International SA (a Luxembourg company), was an indirect majority shareholder in two Argentine investment vehicles (called CGS and CGP) that held licenses to supply and distribute natural gas in parts of Argentina.[242] The remaining shares in CGS and CGP were held by Sempra Energy International (a US company) which had concurrently launched a separate arbitration (*Sempra v Argentina*)[243] that shared the same tribunal with this arbitration.[244] The claimant brought this ICSID arbitration based on the BIT between Argentina and the Belgium-Luxembourg Economic Union ("BLEU").[245]

III.12. When objecting to the tribunal's jurisdiction on the ground of lack of *jus standi*, the respondent raised the risk of double compensation due to an already pending local court proceeding which was initiated pursuant to the forum selection clause in the licenses.[246] It also

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[238] *Ibid* at para 172.
[239] *Ibid*.
[240] *Ibid* at 74.
[241] *Camuzzi International SA v Argentina (I)*, ICSID Case No ARB/03/2, Decision on Jurisdiction (11 May 2005) ("*Camuzzi v Argentina (I)*").
[242] *Ibid* at paras 9, 32.
[243] This is discussed below, in the current Chapter, Subsection "Cases with Justifications of a Mixed Nature".
[244] *Camuzzi v Argentina (I)* at paras 4, 9.
[245] *Ibid* at para 1.
[246] *Ibid* at paras 91, 105.

objected to jurisdiction on the basis that the claimant was barred from pursuing the claim in this forum due to the forum selection clause, and because the dispute was already before local courts.[247]

III.13. In its Decision on Jurisdiction, the tribunal rejected the forum selection clause argument.[248] First, it noted the difference between the causes of action for treaty claims and contract claims,[249] and then found that the BIT did not "strictly" provide for a FITR clause, as the relevant BIT provision did not "reflect the exercise of an option in favor of the local jurisdiction; to the contrary, it reflect[ed] the option in favor of arbitral jurisdiction".[250] The tribunal held that double compensation could be "a real problem", but that it was an issue for the merits phase and not jurisdiction.[251] It then went on to state that "international law and decisions offer numerous mechanisms for preventing the possibility of double recovery".[252] However, the tribunal did not name any of those "numerous mechanisms".

III.14. This case was suspended by agreement in 2007[253] and, eventually, discontinued in 2018.[254] As such, the case never reached the merits phase, so the tribunal could not elaborate on how it would prevent double compensation. However, the *Sempra* case—which was before the same tribunal[255]—went forward, and thus the tribunal's approach to the double compensation issue can be discerned from its decision in that case: it effectively left the issue to be resolved by government negotiators.

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[247] *Ibid* at para 105.
[248] *Ibid* at para 119.
[249] *Ibid* at paras 109, 111.
[250] *Ibid* at paras 117–118.
[251] *Ibid* at para 91.
[252] *Ibid*.
[253] *Sempra v Argentina*, Award (28 September 2007) at para 9.
[254] See ICSID website, online: <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/03/2> (last visited 11 March 2021).
[255] See above, para III.11.

c. *Suez and InterAguas v Argentina*[256]

III.15. The claimants brought this ICSID arbitration based on the France-Argentina BIT and the Spain-Argentina BIT.[257] There were initially four claimants: Aguas Provinciales de Santa Fe SA (APSF - an investment vehicle in Argentina) and its three major foreign shareholders: Suez (a French company), Sociedad General de Aguas de Barcelona SA (AGBAR - a Spanish company), and InterAguas Servicios Integrales del Agua SA (InterAguas - a Spanish company).[258] However, later, the investment vehicle (the first claimant) withdrew from the case when the three shareholders transferred their shares in the investment vehicle to another company.[259]

III.16. The respondent objected to the tribunal's jurisdiction on the ground that the shareholders had no standing to bring a claim for their reflective loss, arguing *inter alia* that awarding damages to both the investment vehicle and its shareholders would lead to double compensation.[260] The tribunal rejected the objection and held that the issue of double compensation belonged to the merits phase and not jurisdiction. According to the tribunal:

> While the Respondent's concern about the danger of double recovery to the corporation and to the shareholders for the same injury is to be noted, the Tribunal's decision at this point relates only to jurisdiction. Moreover, the Tribunal believed that any eventual award in this case could be fashioned in such a way as to prevent double recovery.[261]

The tribunal then noted that "[i]n any event, the withdrawal of APSF from the case vitiates any concerns about a possible double recovery to the shareholders and the corporation for the same

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[256] *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina* (formerly *Aguas Provinciales de Santa Fe SA, Suez, Sociedad General de Aguas de Barcelona, SA, and InterAguas Servicios Integrales del Agua, SA v Argentina*), ICSID Case No ARB/03/17.
[257] *Ibid*, Decision on Jurisdiction (16 May 2006) at para 2.
[258] *Ibid* at para 1.
[259] *Ibid* at para 16.
[260] *Ibid* at para 46.
[261] *Ibid* at para 51.

injury".[262]

III.17. In this regard, the timing of the investment vehicle's withdrawal from the case is significant:

- The case was commenced in 2003;[263]
- The respondent filed its objection to jurisdiction (including its concern about double compensation) in 2004, and the hearing on jurisdiction was held in 2005;[264]
- The investment vehicle's withdrawal from the case took place in 2006, and the decision on jurisdiction was rendered one month later.[265]

As such, the fact that the risk of double compensation was rendered moot resulted from the investment vehicle's withdrawal from the proceeding (a month prior to the Decision on Jurisdiction being issued), and was not due to any effective solution imposed by the tribunal (whose approach was to push the issue to the merits phase).

d. *Pan American Energy v Argentina* consolidated with *BP America v Argentina*[266]

III.18. The claimants of the two consolidated ICSID arbitrations consisted of: the parent company (BP America), two interposed companies (BP Argentina and Pan American Energy - both incorporated in the US), as well as the investment vehicles (three Argentine companies) in the hydrocarbon industry.[267] The two consolidated cases were brought under the US-Argentina

[262] *Ibid*.
[263] *Ibid* at para 1.
[264] *Ibid* at paras 11, 13.
[265] *Ibid* at para 16.
[266] *Pan American Energy LLC and BP Argentina Exploration Company v Argentina*, ICSID Case No ARB/03/13 consolidated with *BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL, and Pan American Continental SRL v Argentina*, ICSID Case No ARB/04/8.
[267] *Ibid*, Decision on Preliminary Objections (27 July 2006) at paras 1, 3–4, 12–19.

BIT.[268] The tribunal held that it had jurisdiction,[269] but noted that there was a risk of double or even triple recovery for the claimants, which, according to the tribunal, would constitute "double jeopardy" for the respondent.[270] The tribunal also noted that "damages may be claimed only once; but this is an issue to be considered at the merits phase."[271] Both cases were discontinued in 2008 pursuant to ICSID Arbitration Rule 43(1).[272]

III.19. Thus, as in the *Lauder* case, the tribunal acknowledged the risk of double compensation but refused to solve the issue at this phase of the proceeding. It should be noted that, among the 63 cases where the risk of double compensation was raised, this is the only case where a tribunal used the term "double jeopardy" with respect to a state as a result of double compensation for an investor.

e. *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*[273]

III.20. The claimants of the two investment arbitrations included a local investment vehicle (called AASA) and its four foreign shareholders: Suez and Vivendi (two French companies), AGBAR (a Spanish company), and AWG (a UK company).[274] The consortium (which the shareholders were part of) held a concession contract for water distribution and wastewater treatment services in parts of Argentina and formed the investment vehicle to hold and operate the

[268] *Ibid* at 1, 3.
[269] *Ibid* at 72.
[270] *Ibid* at para 219.
[271] *Ibid*.
[272] Rule 43(1) reads: "If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding."
[273] *Suez, Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal, SA v Argentina* (formerly *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal, SA v Argentina*), ICSID Case No ARB/03/19 in conjunction with *AWG Group Ltd v Argentina*, UNCITRAL ("*Suez and Vivendi v Argentina*").
[274] *Ibid*, Decision on Jurisdiction (3 August 2006) at para 1.

concession.[275] The claimants brought two investment arbitrations (one under the ICSID rules and based on the France-Argentina BIT and the Spain-Argentina BIT, and one under the UNCITRAL rules and based on the UK-Argentina BIT) that were decided by the same tribunal.[276]

III.21. While challenging the standing of the shareholding claimants, the respondent raised the risk of double compensation on the ground that both the shareholders and the investment vehicle were claimants in the two arbitrations.[277] In the Decision on Jurisdiction, the tribunal noted that, while it understood the respondent's concern about double compensation, the issue did not belong to jurisdiction and that "any eventual award in this case could be fashioned in such a way as to prevent double recovery."[278] The tribunal then pointed out that the risk no longer existed in the two arbitrations because a couple of months before the Decision on Jurisdiction was issued, the investment vehicle withdrew from the arbitration once the shareholding claimants sold their shares in that company.[279]

III.22. However, other developments led to another risk of double compensation. In the same year that the tribunal issued its Decision on Jurisdiction, the respondent was sued in local courts on the basis of the concession contract.[280] As such, the respondent objected again to the risk of double compensation.[281] In the Award, the tribunal indirectly referred to the principle prohibiting double compensation by stating that "[w]hile international law requires full compensation for

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[275] *Ibid* at para 23.
[276] *Ibid* at paras 2–6.
[277] *Ibid* at para 46.
[278] *Ibid* at para 51.
[279] *Ibid* at paras 16, 51.
[280] *Suez and Vivendi v Argentina*, Award (9 April 2015) at para 38. It is unclear whether the proceeding was brought by the investment vehicle or by the four shareholding companies. Paragraph 34 of the Award states that the local proceeding was commenced by the investment vehicle, whereas paragraph 38 states that the "Claimants"—which in paragraphs 1 and 2 of the Award were defined as the four shareholding companies—brought the local proceeding.
[281] *Ibid* at para 34.

injury, it does not allow for *more* than full compensation."[282] However, it rejected the respondent's objection, on the ground that no evidence was presented that the local courts had "either awarded or [were] about to award compensation" and, thus, left it to the local courts to prevent double compensation.[283] The tribunal also took into account the claimants' undertaking not to seek compensation in the local proceeding for the amount that they would be awarded and paid in this arbitration.[284]

III.23. A comparison of the tribunal's Decision on Jurisdiction and the Award shows that, in the former, the tribunal created an expectation that it failed to fulfill in the latter. At the jurisdiction phase, the first risk of double compensation was rendered moot by the investment vehicle's withdrawal from the proceeding.[285] Nevertheless, the tribunal, when formulating its general approach to the issue, stated that "any eventual award in this case could be fashioned in such a way as to prevent double recovery."[286] However, in the Award, when faced with the second risk of double compensation, the tribunal refused to formulate any solution to "prevent" double compensation (as it had promised), simply because the local courts had not yet awarded any damages. The tribunal failed to consider the fact that effective prevention of a problem may require necessary measures to be taken before the problem eventuates, rather than waiting for it to happen and then responding to it.

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[282] *Ibid* at para 38 [emphasis in original].
[283] *Ibid* at paras 38, 40.
[284] *Ibid* at para 39. The respondent's request for annulment of the Award was denied. Decision on Argentina's Application for Annulment (5 May 2017).
[285] See above, para III.21.
[286] *Ibid* [emphasis added].

f. *Zeevi v Bulgaria*[287]

III.24. The claimant (Zeevi - an Israeli company), together with its partner (also an Israeli company, but not a party to this proceeding), concluded an agreement with the Bulgarian privatization agency to purchase 75% of the shares of Balkan Bulgarian Airlines (Bulgaria's national carrier).[288] Later, disputes arose between the parties in relation to the performance of the agreement, which eventually led to the bankruptcy of the airline.[289] Therefore, Zeevi filed this investment arbitration before the ICC based on the arbitration provision in the agreement and under the UNCITRAL rules.

III.25. The terms "double recovery" and "unjust enrichment" appear in this Award in relation to two issues: first, that the claimant had already sold the airline's assets (including shares in another company and also real estate properties)[290] which would compensate it for part of the loss; and second, that the claimant's local subsidiaries had submitted parallel claims in the local bankruptcy proceedings.[291] Of course, only the second issue is relevant to the subject matter of this thesis.

III.26. In this regard, the claimant submitted that the local bankruptcy proceedings were not a bar to this arbitration, as the claimant had "the right to seek recovery from different entities in different actions."[292] It also argued that there was no risk of double compensation because the

[287] *Zeevi Holdings v Bulgaria and the Privatization Agency of Bulgaria*, Case No UNC 39/DK ("*Zeevi v Bulgaria*")
[288] *Ibid*, Award (25 October 2006) at 16, 19.
[289] *Ibid* at 22–23.
[290] *Ibid* at paras 837–838, for the details, see paras 279, 281, 291, 442, 444, 451–452, 561, 707–708, 725,735–741, 847–848.
[291] *Ibid* at paras 842–844.
[292] *Ibid* at para 846.

claimant would offset or withdraw the overlapping claims from the local proceedings.[293] However, the tribunal discussed only the first issue and did not even mention the second issue.[294]

g. *CEMEX v Venezuela*[295]

III.27. The claimants were two Dutch interposed companies—one owning the other—which indirectly held (through Vencement, which was an interposed company in the Cayman Islands and not a party to this proceeding) ownership interests in a local cement company.[296] Although the respondent held the view that Vencement was the proper claimant and not the two Dutch companies, both sides agreed that the absence of Vencement from the proceeding meant that there was no risk of double compensation.[297]

III.28. However, there was another risk of double compensation in this case due to another fact: one of the Dutch claimants owned the other claimant and hence there would be flow of damages between them. This issue was neither raised by the parties nor discussed by the tribunal.

h. *Hochtief v Argentina*[298]

III.29. The claimant (a German company)—together with other members of a consortium—were awarded a concession for road construction and operation in Argentina.[299] They incorporated an investment vehicle (called PdL) in which the claimant became a minority shareholder.[300] When a dispute arose, the claimant launched this ICSID arbitration based on the Germany-Argentina

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[293] *Ibid* at para 844.
[294] *Ibid* at paras 853–860, 1217–1219.
[295] CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Venezuela, ICSID Case No ARB/08/15 ("*CEMEX v Venezuela*").
[296] *Ibid*, Decision on Jurisdiction (30 December 2010) at paras 18–19, 29.
[297] *Ibid* at paras 23, 27, 39, 52, 55.
[298] *Hochtief AG v Argentina*, ICSID Case No ARB/07/31 ("*Hochtief v Argentina*").
[299] *Ibid*, Decision on Jurisdiction (24 October 2011) at paras 1, 4.
[300] *Ibid*.

BIT.[301] The respondent raised the risk of double compensation on the ground that the claims pursued here overlapped with parallel contract claims that were pursued in the local courts.[302] In its Decision on Jurisdiction, the tribunal rejected the objection and held that it "is aware of this risk, but does not consider that it is a matter that goes to the question of jurisdiction" and that the issue would "if necessary, be addressed at a later stage in these proceedings."[303]

III.30. The exact nature of those parallel local court proceedings and their timeline are not indicated in the Decision on Jurisdiction or in any later decisions issued by the tribunal. However, it is clear from the Decision on Liability that the investment vehicle and the state eventually reached a settlement agreement.[304] This time, the respondent raised an objection related to the risk of double compensation as a result of the settlement agreement.[305] Again, the tribunal rejected the objection and postponed consideration of the issue to a later stage:

> Even assuming that such a possibility exists, however, that is a matter concerning the remedy rather than the claim. It is not a bar to the admissibility of a claim – unless, perhaps, it arises as an aspect of an argument based upon the principle of *res judicata*, which is not the case here. To the extent that there may be a possibility of double recovery, that is a matter to be taken into account in the context of the need to prove and to quantify loss, and in the drafting of any Order by the Tribunal. The Tribunal accordingly rejects this objection to the admissibility of the claim.[306]

III.31. In the Award, a number of key developments were revealed: (i) that some months before the tribunal issued its Decision on Liability, the shareholders of the investment vehicle dissolved the company; (ii) that the respondent terminated the concession contract; (iii) that the respondent was sued in local courts for its actions in relation to the concession contract;[307] (iv) that the tribunal

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[301] *Ibid* at para 1.
[302] *Ibid* at para 121.
[303] *Ibid* at para 122.
[304] *Hochtief v Argentina*, Decision on Liability (29 December 2014) at para 155.
[305] *Ibid* at para 151.
[306] *Ibid* at para 180.
[307] *Hochtief v Argentina*, Award (19 December 2016) at para 49.

was not informed of any of these developments until after it issued the Decision on Liability;[308] and (v) that when the tribunal was informed of the developments, it was not given a detailed account of the circumstances, whereas the ICSID proceeding were not yet declared closed.[309]

III.32. The claimant then argued that, given these developments, the tribunal must award damages for the remaining part of the terminated concession contract as well.[310] The respondent objected that this was a new claim which had not been properly analysed during the liability phase, and given that the investment vehicle was pursuing an action in local courts with respect to the termination of the concession contract, the new claim would pose another risk of double compensation.[311] The tribunal agreed with the claimant's argument in this regard,[312] and did not address the double compensation issue.[313]

III.33. This is an interesting case because the issue of double compensation presented itself in different forms, at different stages of the proceeding, and every time the tribunal postponed it to a later stage, and eventually failed to address it. The tribunal's failure to address the double compensation issue can be chronicled as follows:

- First, at the jurisdiction phrase, there was a risk of double compensation due to the parallel local court proceeding. The tribunal held that the double compensation issue did not concern the jurisdiction phase and should be addressed at a "later stage".

[308] *Ibid* at para 53.
[309] *Ibid* at para 55.
[310] *Ibid* at para 53.
[311] *Ibid* at paras 40, 53.
[312] *Ibid* at paras 55–56.
[313] The respondent filed an annulment proceeding, but it was suspended as per the parties' agreement. ICSID website: <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/31> (last visited 11 March 2021).

- Second, in the Decision on Liability, it appeared that the risk of double compensation was no longer due to the parallel court proceedings, but rather due to an existing settlement agreement that the respondent had reached with the investment vehicle. The tribunal again refused to deal with the risk and postponed it to the quantum phase.
- Third, in the Award, the tribunal made no reference to the previous objections made by the respondent to the risk of double compensation. The only time that the tribunal referred to the issue of double compensation was in addressing the new objection that the respondent made on the basis of developments in the case, and how those developments could also lead to double compensation. Yet, again, the tribunal did not substantively address the issue at this stage.

i. *Urbaser and CABB v Argentina*[314]

III.34. The claimants (two unrelated Spanish entities)[315] held shares, directly and indirectly, in an investment vehicle (called AGBA) which held a concession agreement for the provision of drinking water and sewage services in Argentina.[316] When Argentina took certain measures that harmed AGBA, the claimants joined forces to pursue this ICSID arbitration based on the Spain-Argentina BIT.[317] There was a parallel administrative court proceeding initiated by AGBA, which if it succeeded, would enable AGBA to seek damages before local courts.[318] However, the

[314] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No ARB/07/26 ("*Urbaser and CABB v Argentina*").
[315] *Ibid*, Decision on Jurisdiction (19 December 2012) at para 31.
[316] *Ibid* at paras 1, 28–31. Another shareholder in the investment vehicle was Impregilo, which had launched its own ICSID arbitration. See below, *Impregilo v Argentina*, discussed in the Subsection "Cases with Justifications of a Substantive Nature".
[317] *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at paras 1, 32.
[318] *Ibid* at paras 81, 87, 91, 199, 219.

administrative proceedings remained pending after five years.[319] The respondent argued that, given that AGBA was not precluded from launching court proceedings to seek damages, there was a risk of double compensation.[320]

III.35. The tribunal noted that the risk of double compensation existed, given the ongoing local proceedings.[321] However, it held that such a risk is "inherent in many investment disputes" and, as such, it may not act as a bar to the tribunal's jurisdiction.[322] It also held that any damages awarded by one of the forums "would affect the claims" before the other and thus the tribunal would, if necessary, deal with the issue in the merits phase.[323] Nevertheless, in the Award, the tribunal made no statement as to the double compensation issue.[324] This is another case where the double compensation issue was pushed to the merits phase, where the tribunal then failed to address it.

j. *Teinver v Argentina*[325]

III.36. The claimants (two Spanish companies that were members of the same group of companies) held investments in two Argentine airlines and alleged that the respondent violated the Spanish-Argentine BIT by, *inter alia*, re-nationalizing those airlines.[326]

III.37. The respondent raised the risk of double compensation on the ground that "there [was] nothing to prevent [the airlines] from filing an action before the Argentine courts in parallel with

[319] *Ibid* at para 91.
[320] *Ibid* at para 219.
[321] *Ibid* at para 253.
[322] *Ibid*.
[323] *Ibid*.
[324] *Urbaser and CABB v Argentina*, Award (8 December 2016).
[325] *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina*, ICSID Case No ARB/09/1 ("*Teinver v Argentina*").
[326] *Ibid*, Decision on Provisional Measures (8 April 2016) at paras 1–2.

the present arbitration".[327] The claimants argued that the respondent's concerns about double compensation were not relevant to the jurisdictional stage and should be discussed at the merits phase.[328] The tribunal found that the claimants had standing[329] and agreed with them to postpone the double compensation issue to the merits phase on the ground that the respondent "fail[ed] to demonstrate why these assertions [were] relevant at the jurisdictional stage."[330]

III.38. Another risk of double compensation was also raised as the case took another turn. The claimants had initiated voluntary insolvency proceedings in Spain, which then progressed to liquidation proceedings and thus the claimants were given court-appointed receivers.[331] The Argentine Treasury Attorney General and also the head of the Office of the Prosecutor for Economic Crimes and Money Laundering filed criminal proceedings (called, respectively, the TAG Complaint and the PROCELAC Complaint) against *inter alia* the claimants, their representatives, and their third party funder, alleging, among other things, that they (together with the claimants' Spanish court-appointed receivers) participated in defrauding the claimants' creditors in the Spanish insolvency proceeding.[332]

III.39. According to the respondent, the criminal complaints were "closely intertwined with certain facts at stake in this arbitration and [were] intended to prevent the Argentine Republic - in the hypothetical case that this tribunal found it must pay compensation - from making a payment to detriment of [sic] the legitimate creditors in Claimants' insolvency proceedings", because in

[327] *Ibid* at para 196.
[328] *Ibid* at para 205.
[329] *Ibid* at para 235.
[330] *Ibid* at para 234.
[331] *Teinver v Argentina*, Decision on Provisional Measures (8 April 2016) at para 31.
[332] *Ibid* at paras 30, 32–33, 172.

that case, the respondent "would be making a wrong payment and would therefore be forced to pay twice."[333]

III.40. The claimants, on the other hand, argued that the respondent's premise was false because "the creditors [had] brought no other claims against Argentina and the only form in which they [could] obtain compensation [was] through Claimants in this arbitration."[334] The claimants added that "[a]ny payment by Respondent would be made pursuant to an award issued by an ICSID tribunal and it is unlikely that the Spanish authorities would consider that Respondent was in breach of any legal obligation for complying with any such award".[335]

III.41. In the Decision on Provisional Measures, the tribunal noted the parties' positions but did not make any specific ruling about the risk of double compensation. It also held that some aspects of the case were not clear to it and, accordingly, deferred its decision on whether or not to order the suspension of criminal proceedings.[336] Eventually, even when the tribunal issued the Award, it did not address any of the respondents' objections as to double compensation (one with respect to a potential local court proceeding and one relating to the alleged defrauding of the Spanish creditors).[337]

k. *Guaracachi v Bolivia*[338]

III.42. The claimants brought this ICSID arbitration based on the US-Bolivia and UK-Bolivia BITs[339] to seek damages for the nationalization of a local investment vehicle (called EGSA – in

[333] *Ibid* at paras 36, 66, 180.
[334] *Ibid* at para 132.
[335] *Ibid* at para 108.
[336] *Ibid* at paras 206–208.
[337] *Teinver v Argentina*, Award (21 July 2017).
[338] *Guaracachi America, Inc and Rurelec PLC v Bolivia*, PCA Case No 2011-17 ("*Guaracachi v Bolivia*").
[339] *Ibid*, Award (31 January 2014) at paras 1, 3.

which the claimants held just above 50% of the shares) as well as for the seizing the assets of one of the claimant's local subsidiary.[340]

III.43. The respondent argued that the FITR clause in the US-Bolivia BIT should bar part of the claims, as those were already submitted to local courts.[341] It challenged the applicability of the triple identity test to the FITR clause, on the basis that doing so would be "excessively formalistic and liable to leave the [FITR] clause without any purpose."[342] The respondent also expressed concerns about the risk of double compensation, as the same damages were sought in both proceedings.[343]

III.44. The claimants submitted that the objection should be rejected because the requirements of the triple identity test were not met:[344] (i) the parties could not be considered identical when EGSA and not the claimants initiated the proceedings in Bolivia, and because the state was not the respondent in those proceedings; (ii) the causes of action were different, as the domestic proceedings were based on Bolivian law and this arbitration based on the BITs; and (iii) the subject matters of the proceedings were not the same, as the relief sought in the local proceedings was the revocation of certain administrative resolutions.[345] Further, the claimants argued that there would not be any double compensation because even if EGSA secured a favorable judgment in the local proceedings, it would not benefit the claimants (given that EGSA was nationalized).[346]

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[340] *Ibid* at para 4.
[341] *Ibid* at paras 258–260.
[342] *Ibid* at para 261.
[343] *Ibid* at paras 260, 268.
[344] *Ibid* at para 264.
[345] *Ibid*.
[346] *Ibid* at para 268.

III.45. The tribunal did not rule on the double compensation concern or the FITR objection because it had already decided that it did not have jurisdiction over that part of the claims on other grounds.[347]

l. *SAUR v Argentina*[348]

III.46. The claimant (a French company) was part of a consortium that won the bid for the privatization of an Argentine company (called OSM) which held a concession in relation to sanitation and distribution of water.[349] The claimant then incorporated a wholly-owned Argentine company through which the claimant owned shares in OSM.[350] When the dispute arose, the claimant filed this ICSID arbitration based on the France-Argentina BIT.[351]

III.47. The respondent objected on the ground that there was a risk of double compensation due to the administrative proceeding that OSM had filed in relation to the revocation of the concession agreement.[352] The respondent argued that a favorable result in the administrative proceeding would entitle OSM to obtain damages in local courts where the grounds and objects would then be the same as the ones pursued in this forum.[353] The claimant responded by arguing that only OSM and its other shareholders participated in the administrative proceeding, not the claimant.[354]

III.48. The tribunal noted that there was a risk of double compensation and that the claimant failed to admit the risk and dispel any doubts as to it.[355] However, it found that the risk of double

[347] *Ibid* at para 405.
[348] *SAUR International SA v Argentina*, ICSID Case No ARB/04/4 ("*SAUR v Argentina*").
[349] *Ibid*, Award (22 May 2014) at paras 47–50.
[350] *Ibid* at para 51.
[351] *Ibid* at 4.
[352] *Ibid* at paras 149–150.
[353] *Ibid* at para 150.
[354] *Ibid* at paras 156–157.
[355] *Ibid* at paras 172, 174.

compensation would not materialize unless both forums (the tribunal and the local court) awarded damages in favor of the claimants.[356] Accordingly, the tribunal held that, given that it was the first forum, it would be up to the second deciding forum (the local court) to take into account the amount that was awarded here.[357] The respondent's application for annulment of the award was dismissed.[358]

m. *British Caribbean Bank v Belize*[359]

III.49. The claimant (BCP - a company incorporated in Turks and Caicos Islands) owned an interest in the loan and security agreements that were concluded with two local companies in Belize.[360] The state compulsorily acquired the two local companies and, hence, those interests.[361] BCB and Belize launched a number of proceedings in local courts against each other.[362] In addition, the claimant launched this investment arbitration based on the UK-Belize BIT before the Permanent Court of Arbitration ("PCA").[363] By the time the tribunal issued the Award, those local proceedings were concluded.[364]

III.50. The respondent had objected that the claim was inadmissible because of, *inter alia*, the risk of double compensation as a result of the then-parallel local court proceedings, and had argued that the tribunal should stay or dismiss the claims here.[365] The claimant submitted that, first, *lis*

[356] *Ibid* at para 175.
[357] *Ibid*.
[358] *SAUR v Argentina*, Decision on Argentina's Application for Annulment (19 December 2016).
[359] *British Caribbean Bank Ltd v Belize*, PCA Case No 2010-18, Award (19 December 2014) ("*British Caribbean Bank v Belize*").
[360] *Ibid* at paras 1, 4.
[361] *Ibid*.
[362] *Ibid* at paras 97–98, 100, 104, 106–114.
[363] *Ibid* at paras 3, 5.
[364] *Ibid* at paras 97–98, 106–107.
[365] *Ibid* at paras 176–180, 182, fn 154.

pendens was not applicable given the difference between the legal bases relied on here and in the local proceedings and, second, with respect to the issue of double compensation, it cited *Lauder* (discussed above) and *CME*[366] as authorities for the proposition that the issue should be left to the second deciding forum.[367]

III.51. The tribunal rejected the respondent's objection on the grounds that the existence of parallel proceedings did not constitute any bar to the tribunal's jurisdiction because of the difference between treaty claims and contract claims, unless there was a FITR provision in the applicable IIA.[368] The tribunal then noted that it had discretion in terms of timing and the conduct of arbitration (e.g. the power to stay the proceeding) but that, in the absence of an exclusive jurisdiction clause in the contract, it had to approach any request for a stay "skeptically".[369] It also agreed with the claimant in applying *Lauder*, in that the double compensation issue should be left to the second deciding forum to address.[370] The tribunal also noted the claimant's undertaking not to receive double compensation if it was fully compensated through the investment arbitration.[371]

III.52. It is unclear why the tribunal's ruling made no reference to the fact that, by the time the Award was rendered, the local court proceedings were no longer parallel with this arbitration and had already concluded,[372] which made the tribunal the second deciding forum.

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[366] This is discussed below, in the current Chapter, Subsection "Cases with Justifications of a Substantive Nature".
[367] *British Caribbean Bank v Belize* at paras 184, 186.
[368] *Ibid* at para 187.
[369] *Ibid* at paras 187–188.
[370] *Ibid* at para 190.
[371] *Ibid*.
[372] The Award was rendered in December 2014, at which point all the local court proceedings had concluded: the "First Constitutional Challenge" was completed in June 2011, the "Claim 360" was stayed in October 2012, and the "Second Constitutional Challenge" was completed in May 2014. *Ibid* at paras 97(c), 98, 107.

n. *RREEF v Spain*[373]

III.53. The claimants (two companies incorporated in the UK and Luxembourg)[374] brought this ICSID arbitration based on the ECT.[375] They indirectly held shares in a number of local companies that owned renewable energy production plants in Spain.[376] In parallel to this investment arbitration, the local companies challenged the same state measures before national courts[377] and, as such, the respondent raised the risk of double compensation.[378] The claimants submitted that they were not party to the local court proceedings and had in fact voted against the decision to pursue the matter before local courts and that, in any event, the ECT (on which the claimants relied in the ICSID proceeding) was a separate legal basis from the Spanish domestic law that was relied on in proceedings before local courts.[379]

III.54. The tribunal held that preventing double compensation "concerns the amount and the modalities of the compensation … [which] is a question for quantum, not of jurisdiction" and thus the parties "may properly address the issue during the next phase of the proceeding."[380] However, in the next two decisions that were rendered (i.e. the "Decision on Responsibility and on the Principles of Quantum" and the "Award"), the tribunal made no reference to the double compensation issue.[381]

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[373] *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà rl v Spain*, ICSID Case No ARB/13/30 ("*RREEF v Spain*").
[374] *Ibid*, Decision on Jurisdiction (6 June 2016) at paras 1, 136.
[375] *Ibid* at para 10.
[376] See *ibid* at paras 99, 35.
[377] *Ibid* at para 125.
[378] *Ibid* at para 103.
[379] *Ibid* at para 111.
[380] *Ibid* at para 126.
[381] *RREEF v Spain*, Decision on Responsibility and on the Principles of Quantum (30 November 2018); *Ibid*, Award (11 December 2019).

o. *Fábrica de Vidrios v Venezuela*[382]

III.55. The claimants were two local companies (active in the production of glass containers) that were controlled by a Dutch company (called OIEG).[383] OIEG launched a separate investment arbitration with respect to the same state measures and was awarded compensation, but the award was the subject of an annulment proceeding at the time of this arbitration.[384]

III.56. The respondent requested that the claimants adjust their claims, in light of the award in the parallel arbitration, to avoid double compensation.[385] The respondent argued that the overlapping claims between the two proceedings should be withdrawn.[386] The claimants, on the other hand, argued that, given that the respondent had not yet paid the other award and had initiated an annulment proceeding, there was no need to re-adjust the claims in this proceeding.[387] They submitted that, once damages were paid in any of the two proceedings, that amount would be set against the amount awarded in the other proceeding.[388]

III.57. In the end, the tribunal held that it did not have jurisdiction and thus did not even address the other objections, including the one pertaining to the risk of double compensation.[389]

p. *Burlington v Ecuador*[390]

III.58. Of the 63 cases where the risk of double compensation was raised, *Burlington* and its

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[382] *Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v Venezuela*, ICSID Case No ARB/12/21 ("*Fábrica de Vidrios v Venezuela*").
[383] *Ibid*, Award (13 November 2017) at paras 2–3, 7.
[384] *Ibid* at paras 8–9.
[385] *Ibid* at para 61.
[386] *Ibid* at paras 168, 170.
[387] *Ibid* at para 171.
[388] *Ibid* at para 172.
[389] *Ibid* at paras 305–306.
[390] *Burlington Resources Inc v Ecuador*, ICSID Case No ARB/08/5 ("*Burlington v Ecuador*").

parallel investment arbitration (*Perenco v Ecuador*)[391] are exceptional. This is because the two cases involved the risk of double compensation in favor of a host state rather than investors, due to the similar counterclaims that the state brought in both arbitrations.[392] Given that both cases were decided more recently—compared to the other cases discussed in this Section—arguments in relation to double compensation were advanced by all parties involved, which increased the complexity and interrelatedness of the issues raised between the two parallel arbitrations.

III.59. Here, the claimant (a US company) held a number of production sharing contracts that were awarded by Ecuador for the exploration and exploitation of hydrocarbons in the Amazon region of the country.[393] Two of those contracts were held jointly by the claimant and another investor called Perenco.[394] When a dispute arose between the investors and Ecuador,[395] Burlington filed this ICSID arbitration under the US-Ecuador BIT,[396] while Perenco pursued a separate investment arbitration under another BIT. The respondent state also made counterclaims against Burlington in this ICSID proceeding and against Perenco in the parallel proceeding for environmental harms done to the sites where they operated, as well as for failure to maintain the sites' infrastructure.[397]

III.60. Burlington raised the double compensation objection on the ground that, in both counterclaims, Ecuador had sought the same compensation for the same damage.[398] Ecuador,

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[391] This is discussed below, in the current Chapter, Subsection "Cases with Justifications of a Mixed Nature".
[392] For a discussion on this exceptional scenario, see above, Part II, Chapter 3, Subsection "The Counterclaim Exception".
[393] *Burlington v Ecuador*, Decision on Jurisdiction (2 June 2010) at paras 2, 8, 14–15.
[394] *Ibid* at para 17.
[395] *Ibid* at para 26.
[396] *Ibid* at 4.
[397] *Burlington v Ecuador*, Decision on Counterclaims (7 February 2017) at paras 6, 52, 64. Given that the investor and the state each had two procedural positions (claimant/counter-respondent and respondent/counter-claimant), the author uses their original names (i.e. Burlington and Ecuador) instead of their procedural positions, to avoid confusion.
[398] *Ibid* at para 70.

which admitted the risk, submitted that there would not be any double compensation, as it would collect damages only based on the more favorable decision.[399] Accordingly, Burlington asked the tribunal to expressly address the issue, in the sense that "if the dispositive part of either of the awards on counterclaims provide[d] for any compensation, Ecuador would be prevented from enforcing the second award to the extent that it [had] already been compensated by the first."[400]

III.61. The tribunal referred to the principle of prohibition of double compensation as a "well-established principle" and noted the state's position that it would not collect damages twice.[401] However, it held that:

> As of the date of the present Decision, the *Perenco* tribunal has issued no decision yet on the counterclaims before it. Therefore, this Tribunal lacks the necessary information or basis to adopt any specific measures … to prevent double recovery, a task that it must leave to the *Perenco* tribunal as the one deciding in second place. This being said, this Tribunal nonetheless states that, as a matter of principle, the present Decision cannot serve and may not be used to compensate Ecuador twice for the same damage.[402]

III.62. As exceptional as this case was in terms of the switch in the positions of investor and state (in relation to which party was at the risk of paying twice), the tribunal's approach to the issue of double compensation was not exceptional: it left it to the second deciding forum to deal with the issue. Nevertheless, in fairness to the tribunal, it was one of the only seven tribunals (of the total of 63) which referred to—and affirmed—the principle of prohibition of double compensation.[403]

III.63. However, in the last phase of the proceeding, the issue of double compensation was raised again. This time, in its conventional form: double compensation in favor of the investor.

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[399] *Ibid* at paras 70, 1084.
[400] *Ibid*.
[401] *Ibid* at paras 1083, 1085.
[402] *Ibid* at para 1086.
[403] See above, Group No 11 discussed in para I.7.

The issue was whether the fact that Burlington's partner (Perenco) was involved in a parallel investment arbitration concerning the same project[404] would expose Ecuador to double compensation. The tribunal rightfully noted that Burlington sought to "recover the value of its own investment, represented by its share in the Consortium's revenues, and not the entire value of the Consortium's investment".[405] The tribunal then held that "no risk of double recovery by Burlington and Perenco … would arise from an award from this Tribunal on this head of claim."[406]

III.64. In fact, Ecuador's concern as to double compensation was invalid because the relationship between the two investors (Burlington and Perenco) in the two parallel proceedings was horizontal and not vertical, i.e. one did not hold an interest in the other. The requirement of a vertical relationship between the investors was discussed in detail in the previous Part.[407]

q. *Gavrilovic v Croatia*[408]

III.65. An Austrian individual and his local investment vehicle (which was active in the food production industry) brought this ICSID arbitration based on the Austria-Croatia BIT.[409] One of the issues before the tribunal concerned "the effect of any award of damages for expropriation on potential domestic claims to the respective property".[410] In this regard, the tribunal ruled that the issue of double compensation was "a question for [Croatian] courts. Ultimately, those courts may

[404] Discussed above, para III.59.
[405] *Burlington v Ecuador*, Decision on Reconsideration and Award (7 February 2017) at para 233.
[406] *Ibid*. Ecuador initiated the annulment proceeding, but it was later discontinued pursuant to ICSID Arbitration Rule 43(1). ICSID website: <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/08/5> (last visited 11 March 2021).
[407] See above, Part II, Chapter 3, Subsection "The Second Requirement".
[408] *Gavrilovic and Gavrilovic doo v Croatia*, ICSID Case No ARB/12/39 ("*Gavrilovic v Croatia*").
[409] *Ibid*, Award (26 July 2018) at paras 1–2, 5.
[410] *Ibid* at 48 (para 9.1(g))

have reference to this decision so as to prevent double-recovery. No doubt the Respondent will bring this Award to the attention of those courts."[411]

III.66. As previously explained, the obligation of a tribunal is to avoid the risk of double compensation (in addition to avoiding actual double compensation).[412] However, in the case at bar, even the risk had not yet materialized, as there were no local court proceedings yet. As such, there was only a possibility of a local court proceeding. However, it does not follow that a tribunal should do nothing about such a possibility. In fact, given that the initiation of local court proceedings was still a possibility, the risk of double compensation was also a possibility. The author's solution to the double compensation issue (set out in Part IV) will cover this scenario as well.

r. *Kappes v Guatemala*[413]

III.67. The claimants included a US national and his wholly-owned US company.[414] Together, they owned a local company (called Exmingua) that was active in the exploitation and exportation of gold and silver in Guatemala.[415] They brought this ICSID arbitration based on DR-CAFTA.[416] The respondent objected to the tribunal's jurisdiction on the ground that the claimants brought these claims on their own behalf but for the injury sustained by the local investment vehicle, which—the respondent argued—is not allowed under DR-CAFTA.[417]

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[411] *Ibid* at para 1297.
[412] See above, Part II, Chapter 1, Section "Actual Double Compensation v. The Risk of Double Compensation".
[413] *Kappes and Kappes, Cassidy & Associates v Guatemala*, ICSID Case No ARB/18/43 ("*Kappes v Guatemala*").
[414] *Ibid*, Decision on Respondent's Preliminary Objections (13 March 2020) at para 2.
[415] *Ibid* at paras 25–26.
[416] *Ibid* at para 1.
[417] *Ibid* at para 56.

III.68. According to the respondent, under the relevant provision of DR-CAFTA, investors may either bring a claim on their own behalf for the loss they directly sustained or bring a claim on behalf of their local enterprise for the loss that the enterprise sustained.[418] The respondent argued that this was not what the two claimants did here: rather, they brought a claim on their own behalf in order to recover for the loss sustained by the local company.[419] The respondent submitted that the intent of the relevant provision in DR-CAFTA is to avoid multiple proceedings and double compensation.[420] Further, the argument goes, once the claims were filed on behalf of the local company, the claimants, under the relevant DR-CAFTA provision, should have provided a waiver from the local company to avoid the risk of double compensation, which they did not provide.[421]

III.69. The claimants, however, submitted that the respondents' concern should not affect the tribunal's jurisdiction and argued that "tribunals have various means at their disposal to address such concerns, including by fashioning awards so as to prevent double recovery or double payment".[422]

III.70. The tribunal acknowledged the respondent's concern about double compensation but ruled that "its role is not to determine how best to address policy concerns, only to determine what the Contracting State Parties themselves have provided".[423] Accordingly, it interpreted the text of DR-CAFTA and found that the claimants' claims were allowed under it.[424]

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[418] *Ibid* at para 64.
[419] *Ibid* at paras 58–60.
[420] *Ibid* at para 67.
[421] *Ibid* at para 78.
[422] *Ibid* at paras 95, 109.
[423] *Ibid* at para 140.
[424] *Ibid* at paras 141, 154.

ii. Cases with Justifications of a Substantive Nature

III.71. Among the cases where the risk of double compensation was not effectively addressed, some ISDS tribunals used justifications of a substantive nature, for example: by rejecting the application of *res judicata*, *lis pendens*, and FITR clauses; by describing the risk of double compensation in the case before them as "theoretical" and "hypothetical"; or by holding that there were numerous mechanisms to address the issue, but then not identifying any such mechanisms. Of the 50 cases where the risk of double compensation was not effectively addressed,[425] 23 cases fit within the group where tribunals provided justifications of a substantive nature.[426] These 23 cases are discussed and analysed in this Subsection.

a. *CME v Czech Republic*[427]

III.72. The case concerned an investment made by a US national (Mr. Lauder) through the claimant (a Dutch interposed company called CME) in an investment vehicle (a broadcasting company called CNTS) in the Czech Republic.[428] CME brought this *ad hoc* investment arbitration based on the Netherlands-Czech Republic BIT and under the UNCITRAL rules.[429] Mr. Lauder, on the other hand, had launched a separate investment arbitration (the *Lauder* case).[430] Both cases concerned the same dispute.[431] The two arbitrations ran in parallel for some time, but the *Lauder*

[425] See above, para III.5.
[426] *CME v Czech Republic*; *Nagel v Czech Republic*; *Nykomb v Latvia*; *GAMI v Mexico*; *AMTO v Ukraine*; *Duke Energy v Ecuador*; *Chevron and Texaco v Ecuador (I)*; *Deutsche Bank v Sri Lanka*; *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*; *Inmaris v Ukraine*; *Impregilo v Argentina*; *Daimler v Argentina*; *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*); *von Pezold v Zimbabwe*; *Eskosol v Italy*; *ConocoPhillips v Venezuela*; *Unión Fenosa v Egypt*; *Hydro and Others v Albania*; *United Utilities v Estonia*; *Strabag and Others v Poland*; *Deutsche Telekom AG v India*; *Devas v India*.
[427] *CME Czech Republic BV v Czech Republic*, UNCITRAL ("*CME v Czech Republic*").
[428] *Ibid*, Final Award (14 March 2003) at paras 4, 6–7.
[429] *Ibid* at paras 2–3.
[430] This is discussed above, in the current Chapter, Subsection "Cases with Justifications of a Procedural Nature".
[431] *CME v Czech Republic*, Final Award (14 March 2003) at paras 2–3.

case concluded nearly two years before the final award was rendered in this case.[432] The *Lauder* tribunal, while finding that the Czech Republic was in breach of its BIT obligation, rejected all claims for damages.[433] There was also a pending local court proceeding between the investment vehicle and its original license holder.[434] In addition, there was an ICC commercial arbitration between CME and a Czech citizen, which had concluded in favor of CME.[435]

III.73. The respondent argued that the tribunal should be bound by the final award in *Lauder* on the basis of *res judicata*,[436] as both cases met the triple identity test, in that they concerned: (i) the same subject matter (because they involved the same facts and dispute);[437] (ii) the same legal bases (because, although this case and *Lauder* were based on two different BITs, the two BITs offered almost the same protection);[438] and (iii) the same parties (because, although the two claimants were legally separate, they belonged to the same corporate group and constituted "one and the same economic reality").[439]

III.74. The tribunal rejected the respondent's arguments and held that the *Lauder* decision had no *res judicata* effect on the case at bar.[440] The tribunal reasoned that the claimants of the two cases could not be considered the same, because the "group of company" doctrine would apply in exceptional cases and the doctrine was "not generally accepted in international arbitration and there was no precedent to rely on."[441] In addition, according to the tribunal, the BITs were not

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[432] *Ibid* at para 25.
[433] *Lauder v Czech Republic*, Final Award (3 September 2001) at 74.
[434] *CME v Czech Republic*, Final Award (14 March 2003) at para 22.
[435] *Ibid* at paras 23–24.
[436] *Ibid* at paras 198–199, 212–213.
[437] *Ibid* at para 200.
[438] *Ibid* at paras 200–201.
[439] *Ibid* at para 205.
[440] *Ibid* at para 432.
[441] *Ibid* at para 436.

"exactly the same" and the facts were possibly different.[442] The tribunal held that, even if there were any *res judicata* effect, it would not apply because the respondent had effectively waived the *res judicata* defense by refusing to consolidate or coordinate the two proceedings.[443]

III.75. With respect to the pending local court proceeding, the tribunal held that the evaluation of damages here should not be affected by the remote possibility of those proceedings providing any favorable decision for the claimant.[444] CME had undertaken not to seek double compensation,[445] but the tribunal did not reiterate or note CME's undertaking and went on to state that "[t]he Czech civil courts may or may not consider payments made by the Respondent as a consequence of this Final Award".[446]

III.76. The *Lauder* and *CME* duet is a notorious example of conflicting decisions over essentially the same dispute: one brought by the ultimate investor (whose request for damages was entirely rejected) and one brought by the interposed company (which was awarded about $270 million in damages plus interest).[447]

b. *Nagel v Czech Republic*[448]

III.77. The claimant was Mr. Nagel (a UK national) who, together with a Czech state-owned telecommunication entity (called ČRa) and a Dutch telecommunication company, entered into a cooperation agreement to obtain necessary licenses for establishing, owning, and operating a

[442] *Ibid* at paras 432–433.
[443] *Ibid* at paras 426–430.
[444] *Ibid* at para 489.
[445] *Ibid* at para 185.
[446] *Ibid*.
[447] *Ibid* at 161.
[448] *Nagel v Czech Republic*, SCC Case No 049/2002 ("*Nagel v Czech Republic*").

telecommunication network in the Czech Republic.[449] The dispute arose out of the respondent's refusal to grant the license, following which ČRa withdrew from the cooperation agreement.[450]

III.78. Mr. Nagel then initiated local court proceedings against ČRa to receive compensation, after which both sides concluded an agreement for "full settlement and complete discharge of all of the claims".[451] However, Mr. Nagel initiated a local court proceeding against the Czech Ministry of Transport and Communications and sought further damages but did not pay the court fees, which resulted in the discontinuance of that proceeding.[452] He then filed this investment arbitration based on the UK-Czech BIT before the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC").[453]

III.79. The respondent objected to the admissibility of claims on the ground that the claimant had already received compensation based on the settlement agreement concluded with ČRa.[454] The respondent argued that the settlement agreement would bar all claims relating to the cooperation agreement against ČRa and its stockholders, which included the respondent too, as it owned—through the National Property Fund—the majority of shares in ČRa.[455]

III.80. The respondent submitted that "[f]or Mr Nagel to argue that the Czech Republic is somehow bound by the acts of ČRa but then argue that the Czech Republic is not a shareholder of ČRa because it owns the shares of ČRa through the National Property Fund is disingenuous."[456] As such, the respondent argued, if the cooperation agreement (concluded with the Čra) bound the

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[449] *Ibid*, Final Award (9 September 2003) at paras 1–2.
[450] *Ibid* at paras 3–6, 11.
[451] *Ibid* at paras 14–15.
[452] *Ibid* at para 16.
[453] *Ibid* at paras 17–18.
[454] *Ibid* at paras 236, 272.
[455] *Ibid* at para 225.
[456] *Ibid* at para 226.

respondent to issue the license, the settlement agreement (also concluded by the ČRa) should likewise release the respondent.[457]

III.81. However, the claimant argued that the settlement agreement should not apply to the respondent because none of its provisions expressly provided this.[458] According to the claimant, given that the settlement agreement was mostly drafted by Čra, it should be interpreted in favor of the claimant and thus the terms "stockholder", "parent corporation", and "affiliate" (which were all used in the settlement agreement) could not expand to include the respondent which indirectly held interests in Čra.[459] The claimant added that the settlement agreement only settled the domestic contract law claims, which are different from treaty claims raised in this SCC arbitration.[460]

III.82. The tribunal agreed with the claimant's position (that the settlement agreement did not apply to the respondent because it held interests in Čra only indirectly and thus could not be considered a "stockholder" in it).[461] According to the tribunal, if the parties to the settlement agreement wished to release the government from any liability, they should have stated this without any ambiguity.[462] This raises the question of how is it possible that the term "shareholder" in BITs has been (correctly) interpreted to include both direct and indirect shareholders but, as per the tribunal's interpretation here, the same approach cannot apply to the state when it indirectly holds interests in a company?

III.83. The tribunal did not address the issue of double compensation and held that the damage inflicted on the claimant was not fully compensated through the settlement agreement because "the

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[457] *Ibid* at para 232.
[458] *Ibid* at para 105.
[459] *Ibid* at paras 103, 106, 111–112, 273.
[460] *Ibid* at para 113.
[461] *Ibid* at para 278.
[462] *Ibid* at para 283.

claims against the Czech Republic [in the SCC proceeding] concern deprivation of property rights and not breach of contract".[463] As will be explained in Part IV, just because the bases of two claims are different does not mean that those legal bases address two different harms.[464]

c. *Nykomb v Latvia*[465]

III.84. The claimant Nykomb was a Swedish company that wholly owned the local investment vehicle (called Windau) in Latvia.[466] The dispute concerned an agreement between Nykomb and a state-owned company, whereby the former was to build a plant and produce heat and electric power.[467] Nykomb initiated this investment arbitration based on the ECT, before the SCC.[468]

III.85. The respondent objected to the tribunal's jurisdiction on the ground that, *inter alia*, "[t]here is nothing to prevent Windau from suing for the same alleged breaches in a Latvian court, with a risk of double payment of the same claim".[469] The tribunal rejected the respondent's objections and, regarding the risk of double compensation, held that:

> The risk of double payment is admittedly an effect of the establishment of an arbitration facility also for alleged losses or damages suffered indirectly by an investor, for instance through violations against its subsidiary in a country that has adhered to the Treaty. No definite remedies have been developed at this stage, but clearly the Treaty-based right to arbitration is not excluded or limited in cases where there is a possible risk of double payment. This risk of double payment is only likely to be resolved through the further development of the law in this area, such as by means of new judgements, decisions, guidance or other relevant developments.[470]

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[463] *Ibid* at para 284.
[464] See below, Part IV, Chapter 8, Section "Same Harm Factor".
[465] *Nykomb Synergetics Technology Holding AB v Latvia*, SCC Case No 118/2001 ("*Nykomb v Latvia*").
[466] *Ibid*, Award (16 December 2003) at 1.
[467] *Ibid*.
[468] *Ibid*.
[469] *Ibid* at 9.
[470] *Ibid* [emphasis added].

III.86. The tribunal correctly phrased the issue as a "possible risk" instead of a "risk". As previously explained, the obligation of a tribunal is to avoid the risk of double compensation (in addition to avoiding actual double compensation).[471] However, in the case at bar, even the risk had not yet materialized, as there was no other proceeding (pending or concluded) concerning the same dispute. Rather, there was a possibility of a local court proceeding. Therefore, the tribunal correctly characterized the circumstances as involving the "possible risk" of double compensation. However, it does not follow that a tribunal should do nothing about such a possible risk. Thus, the author's solution to the double compensation issue (set out in Part IV) will also cover this scenario.

d *GAMI v Mexico*[472]

III.87. The claimant (a US company called GAMI) was a minority shareholder in an investment vehicle (called GAM) in Mexico.[473] GAM (whose policy was not to distribute dividends to the shareholders)[474] owned five sugar mills which the respondent expropriated.[475] With respect to three of those mills, GAM launched local court proceedings and succeeded in regaining ownership.[476] With respect to the other two mills, GAM was about to receive indemnity.[477] On the other hand, GAMI brought this *ad hoc* investment arbitration based on NAFTA and under the UNCITRAL rules.[478]

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[471] See above, Part II, Chapter 1, Section "Actual Double Compensation v. The Risk of Double Compensation".
[472] *GAMI Investments, Inc v Mexico*, UNCITRAL ("*GAMI v Mexico*").
[473] *Ibid*, Award (15 November 2004) at para 1.
[474] *Ibid* at para 83.
[475] *Ibid* at para 8.
[476] *Ibid* at paras 18, 20, 122.
[477] *Ibid* at para 122.
[478] *Ibid* at paras 2–3.

III.88. The exact nature of the respondent's objection is not mentioned in the Award,[479] but it is likely that the respondent invoked NAFTA's waiver clause (article 1121) given the investment vehicle's pursuit of the dispute locally. The basis of NAFTA's waiver clause is assumed because the tribunal, in rejecting the objections to its jurisdiction, reasoned that GAMI (as a minority shareholder) must not suffer as a result of the majority shareholders' decision to direct the investment vehicle to launch local court proceedings.[480] In the end, the tribunal dismissed GAMI's claim on the merits.[481] However, the tribunal discussed the risk of double compensation in two hypothetical scenarios.

III.89. The first hypothetical scenario was as follows. A Mexican court would decide the claims by GAM at the same time as a NAFTA tribunal would decide GAMI's claims.[482] GAMI would claim—and the NAFTA tribunal would find—that the damages due to it under NAFTA were more than the damages that would flow to it from GAM.[483] Therefore, in a "perfect world", the Mexican court and the NAFTA tribunal would cooperate in quantifying the additional damages that GAMI would be entitled to.[484] However, the tribunal concluded that it was "aware of no procedural basis on which such coordination could take place", that this solution was a "fantasy", "factually implausible", and that it "lack[ed] commercial credibility" because "[w]hy should GAMI's recovery be debited on account of a payment to GAM which [was] perhaps utterly unlikely to find its way to the pockets of its shareholders" because of GAM's dividend policy.[485]

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[479] It should be noted that the relevant submissions by the parties (i.e. Mexico's Memorial on Jurisdiction and the investor's Counter-Memorial on Jurisdiction) are also not publicly available. See NAFTAclaims.com at <http://naftaclaims.com/disputes-with-mexico.html> (last visited 1 February 2021).
[480] *GAMI v Mexico*, Award (15 November 2004) at paras 38, 43.
[481] *Ibid* at para 137.
[482] *Ibid* at para 116.
[483] *Ibid*.
[484] *Ibid*.
[485] *Ibid* at paras 117–118 [emphasis added].

III.90. In the second hypothetical scenario: the local court and the NAFTA tribunal would be "unsynchronised",[486] i.e. the NAFTA tribunal would award damages to GAMI prior to the time that the Mexican court would order payment of damages to GAM.[487] The tribunal rejected the proposition that the solution to such a scenario would be to reduce the measure of damages for GAM, reasoning that:

> How could GAM's recovery be reduced because of the payment to GAMI? GAM is the owner of the expropriated assets. It has never paid dividends. It would have been most unlikely to distribute revenues in the amount recovered by GAMI. At any rate, such a decision would have required due deliberation of GAM's corporate organs. Creditors would come first. And other shareholders would have an equal right to the distribution. GAM would obviously say that it is the expropriated owner and that its [compensable] loss under Mexican law could not be diminished by the amount paid to one of its shareholders.[488]

III.91. Ultimately, the tribunal offered no solution to the double compensation issue. However, given that the local courts had returned three of the mills and compensation for the other two mills was to be paid to the investment vehicle, the tribunal criticized the claimant's approach for "neglect[ing] to give any weight to the remedies available to GAM."[489]

III.92. The tribunal's approach to the investment vehicle's dividend policy is questionable. Why should an investment vehicle's policy not to distribute dividends to its shareholders prevent a tribunal from effectively addressing the double compensation issue? In other words, why should a host state pay extra damages for an internal policy that exists between the investment vehicle and its shareholders?

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[486] *Ibid* at para 119.
[487] *Ibid* at para 120.
[488] *Ibid*.
[489] *Ibid* at paras 132–133.

e. *AMTO v Ukraine*[490]

III.93. The claimant (called AMTO) was a Latvian company that held the majority of shares in a local Ukrainian company (called EYUM-10) which in turn had a contract with the largest Ukraine nuclear power plant (called ZAES).[491] When ZAES faced financial difficulties and defaulted on its contractual obligations to EYUM-10, the latter commenced local court proceedings against ZAES for damages, which were successful, but the enforcement process was stayed due to the bankruptcy proceedings of ZAES' parent company.[492] The two sides eventually signed a settlement agreement whereby ZAES' parent company made certain payments to AMTO.[493] Further, EYUM-10 initiated a parallel proceeding before the ECtHR against Ukraine for violating the *European Convention on Human Rights*.[494]

III.94. The respondent raised the risk of double compensation due to the ECtHR proceeding and argued that this arbitration should be terminated or (at least) suspended.[495] It asked for the application of the *lis pendens* principle and argued that such application should not be "formalistic".[496] The respondent also argued that the subject matter of the dispute no longer existed because it had already been settled through the settlement agreement between the investment vehicle and the state-owned company.[497]

III.95. The claimant submitted that the risk of double compensation was not a jurisdictional objection and that the existence of another proceeding before the ECtHR was neither grounds for

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[490] *Limited Liability Company AMTO v Ukraine*, SCC Case No 080/2005 ("*AMTO v Ukraine*").
[491] *Ibid*, Final Award (26 March 2008) at paras 15–20.
[492] *Ibid* at paras 20–21.
[493] *Ibid* at para 23.
[494] *Ibid* at para 71.
[495] *Ibid* at para 26(i).
[496] *Ibid*.
[497] *Ibid* at para 26(e).

termination nor even suspension of this arbitration.[498] It argued that, for *lis pendens* to apply, the same parties and the same cause of action requirements must be met, which were not in the case at bar.[499] The claimant also argued that the settlement agreement could not be a bar to this arbitration because that agreement never came into force and because the payments made by the state-owned company were made unilaterally and did not continue.[500]

III.96. The tribunal pointed out that both this SCC arbitration and the ECtHR proceeding concern the same facts, but rejected the respondent's objection on the grounds that the parties and the legal bases were different.[501] Likewise, with respect to the settlement agreement, the tribunal rejected the respondent's objection because the parties and the legal bases in the two proceedings were not the same.[502] According to the tribunal,

> The settlement agreement relates to the contractual dispute between EYUM-10 and [the state-owned entity] and not to the treaty claims of the Claimant against the Respondent pursuant to the ECT. The contract and treaty claims are, of course, part of the same wider dispute, and the contractual settlement, depending on the parties to the settlement and its terms, might preclude the ECT claims, but that is not the case here. Accordingly, the Tribunal finds that the settlement agreements have no implications for the jurisdiction of this Tribunal.[503]

III.97. In the end, the tribunal dismissed the claimant's claims on the merits[504] and, thus, it remained unclear how the tribunal would have treated the issue of the amounts that were already paid to EYUM-10 (through the settlement agreement) had the case reached the quantum phase.

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[498] *Ibid* at para 26(i).
[499] *Ibid*.
[500] *Ibid* at para 26(e).
[501] *Ibid* at paras 71–72.
[502] *Ibid* at para 54.
[503] *Ibid*.
[504] *Ibid* at para 115.

f. *Duke Energy v Ecuador*[505]

III.98. The two claimants were Duke Energy (a US partnership) and Electroquil (an Ecuadorian power generation company in which Duke Energy indirectly held the majority of shares).[506] They brought this ICSID arbitration against Ecuador based on two instruments:

- An arbitration agreement that the parties concluded to refer their disputes in relation to their Power Purchase Agreement (PPA) to ICSID (called the "Arbitration Agreement"),[507] which covered most of the claims submitted to this arbitration (i.e. claims as to late payments and the establishment of payment trusts);[508] and
- The US-Ecuador BIT, which covered both the claims that were already covered by the Arbitration Agreement[509] and another claim (i.e. the claim as to the implementation of payment trusts).[510]

III.99. With respect to those claims that were covered by both the BIT and the Arbitration Agreement, the tribunal, in the damages part of the Award, turned to the issue of how double compensation should be avoided.[511] Given that the tribunal found that the respondent had breached the PPA,[512] the respondent was found to be in violation of its obligation under the umbrella clause of the BIT as well.[513] However, the tribunal correctly ruled that the loss under these two different

[505] *Duke Energy Electroquil Partners and Electroquil SA v Ecuador*, ICSID Case No ARB/04/19 ("*Duke Energy and Electroquil v Ecuador*").
[506] *Ibid*, Award (18 August 2008) at paras 2–5, 9, 44.
[507] *Ibid* at paras 62, 56.
[508] *Ibid* at paras 124–125, 138–143, 149.
[509] *Ibid* at para 150.
[510] *Ibid* at para 170.
[511] *Ibid* at paras 440–441.
[512] *Ibid* at para 442.
[513] *Ibid* at para 325.

legal bases was the same and thus, by awarding damages under the PPA (and hence the Arbitration Agreement), no damages should be awarded based on the umbrella clause of the BIT.[514]

III.100. Nevertheless, when the tribunal reached the FET provision of the BIT, it discussed whether the claimants were entitled to damages for both sets of claims, i.e. the ones that were in common between the Arbitration Agreement and the BIT and the claims that was exclusive to the BIT.[515] The tribunal eventually found that no amounts were due under the FET provision of the BIT, but reached this conclusion not on the basis that it had already awarded damages under the Arbitration Agreement, but rather on other grounds.[516] As such, with respect to the FET issue, the tribunal failed to address the risk of double compensation.

III.101. Further, there is no discussion in the Award as to another risk of double compensation: given that one of the claimants owned the majority of shares in the other claimant, the tribunal failed to address the issue of flow of damages between the two claimants.

g. *Chevron and Texaco v Ecuador (I)*[517]

III.102. The dispute in this arbitration concerned the operation of the second claimant (Texaco Petroleum Company, called TexPet) through its local subsidiary—and in the form of a consortium with a state-owned oil company—in Ecuador.[518] TexPet was a US company that was initially owned by Texaco Inc (not a party to this proceeding), but later, TexPet became a subsidiary of the

[514] *Ibid* at paras 470–472, 476.
[515] *Ibid* at para 477.
[516] *Ibid* at paras 477–483.
[517] *Chevron Corporation and Texaco Petroleum Company v Ecuador (I)*, PCA Case No 2007-02/AA277 ("*Chevron and Texaco v Ecuador (I)*").
[518] *Ibid*, Interim Award (1 December 2008) at paras 50–52.

first claimant (Chevron).[519] TexPet had filed seven court proceedings in Ecuador,[520] and together with Chevron, initiated this investment arbitration based on the US-Ecuador BIT before the PCA.[521]

III.103. The respondent argued that the dispute was already submitted to local courts and, as such, the claimants were barred by the BIT's FITR clause from resubmitting it here.[522] The claimants replied that the investment claims were not barred by the FITR clause, because the subject of the local proceedings was a breach of the investment agreements under domestic Ecuadorian law whereas the claim here was for denial of justice under customary international law regarding those local court proceedings that were pending without any results after approximately 15 years by then.[523]

III.104. The tribunal, in the Interim Award, rejected the respondent's argument and reasoned that "[t]he customary international law claim for denial of justice by Ecuador's judiciary with regard to the breach-of-contract claims is fundamentally different than the breach-of-contract claims themselves."[524] Although the respondent's objection, at that stage, was raised on the basis of the FITR clause and not the risk of double compensation, the state's underlying concern was the same: the consequences of multiple proceedings against a state.

III.105. The respondent reformulated and presented its argument at a later stage in the ICSID arbitration, and this time the objection was based on double compensation: that the pending local

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[519] *Ibid* at 6 and para 61; see also *Chevron Corporation and Texaco Petroleum Company v Ecuador (II)*, PCA Case No 2009-23, Third Interim Award on Admissibility and Jurisdiction (27 February 2012) at paras 1.3, 1.8.
[520] *Chevron and Texaco v Ecuador (I)*, Interim Award (1 December 2008) at paras 2, 9.
[521] *Ibid* at para 8.
[522] *Ibid* at para 198.
[523] *Ibid* at para 200.
[524] *Ibid* at para 207.

court proceedings posed the risk of double compensation.[525] The claimants argued that they would address the respondent's concern as follows: (i) if the local courts found in favor of TexPet before the tribunal rendered its award, and if the respondent paid the amount in full, the claimants would notify the tribunal and would make "the necessary adjustments"; and (ii) if the tribunal awarded damages in the full amount sought by the claimants prior to the local courts issuing their decision, and if the respondent paid that amount in full, TexPet would withdraw the claims from the local court proceedings.[526]

III.106. The tribunal, in the Partial Award on the Merits, rejected the respondent's objection on the ground that the claimants' recovery under the BIT "should not be reduced based on the uncertain possibility of a favorable outcome in the national court proceedings, noting that in any case, international law and decisions as well as domestic court procedures offer numerous mechanisms for preventing the possibility of double recovery".[527] The tribunal did not elaborate on any of those "numerous mechanisms".[528] In the Final Award, the tribunal did not discuss the issue and only referred briefly to the relevant part of the Partial Award on the Merits.[529]

III.107. Simply put, the tribunal's holding in the Partial Award on the Merits can be read as meaning that: there was a risk of double compensation, but it was essentially an "uncertain possibility" and thus the BIT claim should remain intact. There is a hidden inconsistency between this ruling and the one that the tribunal set forth in the Interim Award. In the Interim Award, the tribunal rejected the respondent's objection on the ground that the subject matter of the two

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[525] *Chevron and Texaco v Ecuador (I)*, Partial Award on the Merits (30 March 2010) at para 545.
[526] *Ibid* at para 517.
[527] *Ibid* at para 557.
[528] *Ibid*.
[529] *Chevron and Texaco v Ecuador (I)*, Final Award (31 August 2011) at paras 56, 86, 279.

proceedings was different (one concerned breach of contract and one concerned denial of justice), as though they concerned two different harms, which would mean that there was no risk of double compensation in the first place.[530]

III.108. In any event, given that, in the Partial Award on the Merits, the tribunal acknowledged the risk of double compensation (albeit seeing it as an uncertain possibility), its approach to addressing the risk was not effective. This is clearly the case, because while the tribunal mentioned that there are "numerous mechanisms" to prevent double compensation, it failed to name any such mechanisms.[531]

h. *Deutsche Bank v Sri Lanka*[532]

III.109. The claimant (Deutsche Bank) was in dispute with Sri Lanka's national oil corporation (called CPC) over an oil hedging agreement[533] and brought this ICSID arbitration based on the Germany-Sri Lanka BIT.[534] It was also possible for the claimant to pursue its claims against CPC in English courts.[535]

III.110. The tribunal held that the mere fact that the claimant had potential contract claims did not exclude its treaty rights in this proceeding.[536] It listed the respondent's violations of the BIT and the amount that the claimant had suffered, and held that "the fact that Claimant has in theory another way to obtain recovery of the amount does not prevent this Tribunal from granting

[530] See above, para III.104.
[531] *Chevron and Texaco v Ecuador (I)*, Partial Award on the Merits (30 March 2010) at para 557.
[532] *Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/2 ("*Deutsche Bank v Sri Lanka*").
[533] *Ibid*, Award (31 October 2012) at paras 1, 6.
[534] *Ibid* at para 7.
[535] See *ibid* at paras 473, 435, 497, 513.
[536] *Ibid* at para 556.

compensation to Claimant.[537] According to the tribunal:

> [T]he contract claim and the treaty claim are analytically distinct. An investor may elect to initiate one or the other, or both. … If the Tribunal concludes that one or several breaches occurred, it must then consider and quantify any losses arising from those breaches. The responsibility to compensate for a breach of the Treaty is not excused by the existence of a right to claim against CPC in debt in the English Courts. The State and the State entity are in any case protected by the prohibition of double recovery.[538]

III.111. Given that no other parallel proceeding had started in English courts, the tribunal was correct about the absence of a present risk of double compensation. But it does not follow that a tribunal should do nothing about a potential risk of double compensation. Given that English court proceeding was still a possibility, the risk of double compensation was also a possibility. This situation is similar to *Nykomb v Latvia* (discussed above) where the respondent was concerned about another company from the same corporate group being allowed to launch a separate proceeding against the state. The author's solution to the double compensation issue (set out in Part IV) would also cover this scenario as well. Nevertheless, in fairness to the tribunal, it was one of the only seven tribunals (of the total of 63) which referred to the prohibition of double compensation.[539]

i. *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*[540]

III.112. This set of proceedings involved three PCA arbitrations that were conducted in conjunction with each other.[541] The claimants, together, constituted the majority and controlling

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[537] *Ibid* at para 561.
[538] *Ibid* at para 562 [emphasis added].
[539] See above, Group No 11 discussed in para I.7.
[540] *Yukos Universal Limited (Isle of Man) v Russia*, PCA Case No 2005-04/AA227 in conjunction with *Hulley Enterprises Limited (Cyprus) v Russia*, PCA Case No 2005-03/AA226 and *Veteran Petroleum Limited (Cyprus) v Russia*, PCA Case No 2005-05/AA228 ("*Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*").
[541] *Ibid*, Final Award (18 July 2014) at para 2.

shareholders in Yukos—once the most prominent Russian oil and gas company.[542] The claimants included Yukos Universal (an Isle of Man company), Hulley (a Cypriot company), and Veteran Petroleum (another Cypriot company).[543] They launched the three arbitrations against Russia based on the ECT.[544]

III.113. The respondent argued that the claims were barred pursuant to the ECT's FITR provision (article 26(3)(b)).[545] It pointed out that Russia was one of the countries listed in Annex ID to the ECT, according to which its consent did not cover circumstances where a dispute was already submitted to other forums.[546] The respondent argued that the dispute before the tribunal was the same as the one presented to the ECtHR and local courts.[547] According to the respondent, the term dispute "should be interpreted as a dispute between essentially the same parties relating to the same material facts or injuries that constitute the basis of the dispute before the Arbitral Tribunal", otherwise it would frustrate the object of the relevant ECT provision.[548]

III.114. One of the claimants (Yukos Universal) argued that the ECT's FITR provision was not applicable, as the triple identity test (i.e. the same parties, same cause of action, and same object) was not met.[549] Yukos Universal elaborated that it was not a party to any other proceeding and that none of those proceedings were based on the ECT.[550] The respondent countered by asserting that the FITR objection should be upheld because, despite the precedent on the triple identity test,

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[542] *Ibid* at paras 5, 69, 71.
[543] *Ibid* at para 1.
[544] *Ibid* at paras 9–10.
[545] *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*, Interim Award on Jurisdiction and Admissibility (30 November 2009) at paras 587–589.
[546] *Ibid* at para 588.
[547] *Ibid* at paras 589, 591.
[548] *Ibid* at para 590.
[549] *Ibid* at paras 593, 595, 2.
[550] *Ibid* at para 594.

the same "dispute" was decided by the highest local courts, and this tribunal should not "sit above" those courts.[551]

III.115. In its Interim Award on Jurisdiction and Admissibility (the "Interim Award"), the tribunal rejected the FITR objection, without mentioning which prong of the triple identity test was not met.[552] It also dismissed the respondent's concern about the tribunal acting as an appellate body to local courts, noting that the domestic proceedings were based on Russian law, whereas the PCA arbitrations were based on the ECT.[553]

III.116. In the merits phase, the respondent raised the FITR objection once more.[554] It submitted that the tribunal failed in the Interim Award to discuss the triple identity test and to explain which prong was not met.[555] It argued that the bases of the claims before the ECtHR and the claims here were mostly the same and that certain developments after the Interim Award showed that the claimants were seeking the same damages for the same loss before both fora.[556]

III.117. The claimants argued that the objection should be rejected based on the *res judicata* effect of the Interim Award.[557] They pointed out that the respondent had raised the same objection

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[551] *Ibid* at para 596.
[552] *Ibid* at paras 598, 601(a).
[553] *Ibid* at paras 599–600.
[554] *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*, Final Award (18 July 2014) at para 1258.
[555] *Ibid* at para 1261.
[556] *Ibid* at paras 1258, 1260. Russia raised the risk of double compensation in another case relevant to Yukos as well. In *Quasar de Valores SICAV v Russia* (formerly *Renta 4 SVSA v Russia*), the claimants were Spanish investment funds and stock companies that held Yukos American Depository Receipts (ADRs - a kind of securities) in Yukos. The *Quasar* claimants were not part of Group MENATEP Limited (the majority shareholder in Yukos – also the parent company of the three claimants in the case discussed above in the body). In *Quasar,* Russia raised the risk of "double recovery", but that risk was not the same as the one discussed in this thesis. The risk in *Quasar* arose from a statement by Group MENATEP that, once it recovered damages from the ECtHR proceeding and the three PCA arbitrations, it would distribute damages to all shareholders (including the claimants in the *Quasar* case). The reason the risk of "double recovery" in *Quasar* had a different meaning is that the *Quasar* claimants were not in the same corporate group as MENATEP. See *Quasar de Valores SICAV v Russia* (formerly *Renta 4 SVSA v Russia*), Award on Preliminary Objections (20 March 2009) at paras 3, 141–142; Award (20 July 2012) at para 34.
[557] *Ibid* at paras 1262–1263.

before the ECtHR, which in turn rejected that argument because the parties were not the same.[558] The claimants also maintained that there would not be any double compensation as a result of these proceedings and cited a disclaimer that read: "should any pecuniary damages be awarded to Yukos in the ECtHR proceedings, and should the Claimants receive any payments, such payments would be deducted from the amounts claimed in these arbitrations."[559] In the Final Award, the tribunal summarily dismissed the respondent's objection on the ground that the tribunal had already ruled on this in the Interim Award.[560]

j. *Inmaris v Ukraine*[561]

III.118. This ICSID arbitration was brought by a German company (called IPS) and an insolvency administrator on behalf of two insolvent German companies (called IWS and IWC).[562] The three claimants were in the same corporate group, and their relationship was as follows:

- IWC was owned by the other two companies, i.e. by IWS (directly) and by IPS (indirectly through WKG that was not a party to this proceeding);
- Both IPS and IWS were then ultimately owned by an individual named Captain Koch.[563]

III.119. The claimants and a Ukrainian state-owned institution entered into a series of contracts regarding the use of a windjammer sail training ship.[564] Their subsequent disagreements over the

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[558] *Ibid* at para 1265.
[559] *Ibid* at para 1266.
[560] *Ibid* at paras 1271–1272. It should be noted that the tribunal used the term "double recovery" in other parts of the Final Award (see e.g. paras 1733, 1756, 1828) in the meaning of miscalculation of damages, which is different from the subject of in this thesis. For a discussion on the difference between the two, see Part II, Chapter I, Section "Double Recovery v. Double Counting".
[561] *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No ARB/08/8 ("*Inmaris v Ukraine*").
[562] *Ibid*, Decision on Jurisdiction (8 March 2010) at para 1.
[563] *Ibid* at para 31.
[564] *Ibid* at paras 33, 37, 39, 41.

operation of the contracts led to the claimants initiating this ICSID arbitration based on the Germany-Ukraine BIT.[565]

III.120. While there is no explicit objection by the respondent in relation to the risk of double compensation reported in the Decision on Jurisdiction, the tribunal noted the risk and committed to preventing it. According to the tribunal:

> [G]iven that the Tribunal has concluded that IWC itself has covered investments (as part of the integrated contract-based investment) and can also rest claims on expected returns, any claims of WKG and IWS as the owners of IWC would be, in effect, derivative of IWC's own claims. Likewise, were the Tribunal to find liability, any damages claims of WKG and IWS would be derivative of IWC's own damages claims, and the Tribunal of course would not permit any double recovery with respect to the quantum awarded (if any).[566]

However, in the Award, the tribunal did not live up to the commitment that it made and awarded damages to both IWS and IWC.[567]

k. *Impregilo v Argentina*[568]

III.121. The claimant, Impregilo (an Italian company), held shares in an investment vehicle (called AGBA) which held a concession agreement for the provision of drinking water and sewage services in Argentina.[569] The other shareholders in AGBA were two Spanish companies (called Urbaser and CABB) which had launched a separate ICSID arbitration (namely *Urbaser and CABB v Argentina*).[570] Impregilo brought this ICSID arbitration based on the Italy-Argentina BIT.[571]

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[565] *Ibid* at paras 48–49.
[566] *Ibid* at para 112.
[567] *Ibid* at paras 387, 391.
[568] *Impregilo SpA v Argentina*, ICSID Case No ARB/07/17 ("*Impregilo v Argentina*").
[569] *Ibid*, Award (21 June 2011) at paras 1, 110, 137, 238.
[570] Discussed above, in the current Chapter, Subsection "Cases with Justifications of a Procedural Nature". *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at paras 28–29, 35.
[571] *Impregilo v Argentina*, Award (21 June 2011) at para 12.

AGBA, on the other hand, had already initiated local proceedings before administrative courts, which, if successful, would enable AGBA to seek damages before local courts.[572]

III.122. The respondent argued that there was a risk of double compensation in this matter because AGBA was pursuing local court proceedings, through which it could receive damages.[573] It pointed out that many tribunals in Argentine cases had noted the double compensation problem but had not advanced any solution.[574] The claimant argued that the double compensation issue should be dealt with at the merits phase and not at jurisdiction and that, if the local courts wished to compensate AGBA, they would have already done so.[575]

III.123. The tribunal, in its ruling on the jurisdiction section of the Award, rejected the respondent's objection, reasoning that "[t]he question of double compensation being granted would seem to the Arbitral Tribunal to be a theoretical rather than a real practical problem."[576] The tribunal's description of the situation was not correct. It is true that, when a local investment vehicle has not yet succeeded in the administrative proceeding (and thus there is not yet a proceeding through which to seek damages), the risk of double compensation has not yet materialized. However, as previously explained, a possible risk of double compensation exists in such scenarios, because it is possible that the investment vehicle might obtain a favorable result in the administrative proceeding and start a local court proceeding to seek damages, and this is when the risk of double compensation would materialize. As such, the tribunal's description of the situation as "theoretical" is not accurate.

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[572] *Ibid* at paras 178, 224; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at para 199.
[573] *Impregilo v Argentina*, Award (21 June 2011) at para 119.
[574] *Ibid* at para 118.
[575] *Ibid* at para 135.
[576] *Ibid* at para 139 [emphasis added].

III.124. The tribunal also added that "[i]t seems obvious that if compensation were granted to AGBA at domestic level, this would affect the claims that Impregilo could make under the BIT, and conversely, any compensation granted to Impregilo at international level would affect the claims that could be presented by AGBA before Argentine courts."[577] However, it did not elaborate on how that outcome should be achieved.

III.125. The respondent then launched an annulment proceeding where it argued that "[t]he Tribunal went on to speculate about the possibility of it being resolved in the future by someone … [whereas] the possibility of there being double recovery must be avoided through legal considerations established for these purposes and through the correct interpretation of the applicable instruments. This is not what the Tribunal did."[578] However, the annulment committee rejected the respondent's argument, finding that it was not a ground for annulment under article 52 of the ICSID Convention.[579]

l. *Daimler v Argentina*[580]

III.126. The claimant, Daimler Financial Services (DFS - a German company), was wholly owned by DCAG (another German company, and not a party to this arbitration).[581] DFS owned more than 99% of the shares of an Argentine investment vehicle which had a number of subsidiaries engaged in the business of financing local dealers in the automobile industry in

[577] *Ibid*.
[578] *Impregilo v Argentina*, Decision of the *ad hoc* Committee on the Application for Annulment (24 January 2014) at para 48.
[579] *Ibid* at paras 213–216.
[580] *Daimler Financial Services AG v Argentina*, ICSID Case No ARB/05/1.
[581] *Ibid*, Award (22 August 2012) at para 33.

Argentina.[582] DFS brought this ICSID arbitration based on the Germany-Argentina BIT.[583]

III.127. It is understood from the respondent's objection to the claimant's standing that the respondent was concerned about DCAG being allowed to launch another investment arbitration, thus creating the risk of double compensation.[584] The tribunal stated that the possibility that DCAG might initiate another investment proceeding against the respondent did not affect the tribunal's jurisdiction to decide the case at bar because the tribunal was not tasked to decide on such a possibility, and if in the future a tribunal was tasked to decide that issue, "that tribunal would have ample legal tools at its disposal to prevent any double recovery against the Respondent arising out of the same set of facts and circumstances as the present claim".[585] The tribunal did not elaborate on what those "ample tools" are. The tribunal also noted that "in the event that the evidence indicates that DFS has already been compensated for its losses in some fashion, the Tribunal can address this at the quantum stage of the proceedings".[586]

III.128. This situation is similar to *Nykomb v Latvia* (discussed above) where the respondent was concerned about another company from the same corporate group being allowed to launch a separate proceeding against the state. Apart from the difference between the two cases (being that, in *Nykomb* the other company was the investment vehicle, while in this case the other company was the parent company), both cases share the fact that the other companies had the right to initiate a separate proceeding, but had not yet taken any measures to do so at the time.[587] On the other

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[582] *Ibid* at para 38.
[583] *Ibid* at para 35.
[584] *Ibid* at paras 113, 118, 155.
[585] *Ibid* at para 155. Finally, the tribunal upheld another objection to jurisdiction and dismissed all of the claims accordingly. *Ibid* at para 286.
[586] *Ibid* at para 154.
[587] See above, paras III.85 – III.86.

hand, *Nykomb* and the case at bar are different from *Impregilo* (also discussed above) where, despite the fact that the "other" proceeding was not yet initiated, there was a pending administrative proceeding that made the possibility of the risk of double compensation greater.

m. *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*)[588]

III.129. This ICSID arbitration was brought on the basis of the Netherlands-Venezuela BIT and Venezuela's Investment Law.[589] The claimants initially consisted of six companies:

- Mobil Corporation (a US company owned by Exxon Mobil Corporation);
- Venezuela Holdings (a Dutch holding company owned by the first claimant);
- two US holding companies (owned by the second claimant); and
- two Bahamas companies (owned by the claimants mentioned in the third row),[590] which held interests in two oil projects in Venezuela: the Cerro Negro project and the La Ceiba project.[591]

However, following the tribunal's decision that it only had jurisdiction based on the BIT, the arbitration continued without the first claimant.[592]

III.130. There was a parallel ICC commercial arbitration that was brought by one of the Bahamas companies (identified above in the fourth bullet point) against Venezuela's state-owned oil company PDVSA, with respect to one of the oil projects.[593] The ICC tribunal awarded damages

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[588] *Venezuela Holdings BV and Others v Venezuela* (formerly *Mobil Corporation and Others v Venezuela*), ICSID Case No ARB/07/27 ("*Venezuela Holdings v Venezuela*").
[589] *Ibid*, Decision on Jurisdiction (10 June 2010) at paras 24–25; Award (9 October 2014) at fn 23.
[590] *Ibid*, Decision on Jurisdiction (10 June 2010) at paras 1, 186–187.
[591] *Ibid* at paras 17–18.
[592] *Ibid* at 209; Award (9 October 2014) at fn 1.
[593] *Venezuela Holdings v Venezuela*, Award (9 October 2014) at paras 118, 37, 55, fns 59, 28.

to the claimant in that proceeding, which were paid.[594] The contract that provided for the ICC arbitration had a provision to avoid double compensation (by way of reimbursing the respondent for the overlapping part), and the claimant in the ICC arbitration had also made a statement to the same effect in that proceeding.[595] Here in the ICSID arbitration, too, the claimants made a similar statement that, in case of a favorable result in the investment proceeding, they would be "willing to make the required reimbursement" to PDVSA.[596]

III.131. The tribunal noted the existence of the risk of double compensation in this matter, and also noted that the principle of prohibition of double compensation is "a well-established" principle which, according to the tribunal, is also referred to as "*enrichissement sans cause*".[597] The tribunal referred to the claimants' statement (that they would reimburse PDVSA for any double compensation) and expressed that it had no "no reason to doubt" the claimants in this regard.[598] The tribunal held that "effectively" the total compensation must be the damages determined in this arbitration less the damages already paid through the ICC arbitration.[599] However, in the operative part of the decision, the tribunal awarded the entire damages without making any deduction, and only noted that the claimants were "willing to make the required reimbursement" to avoid double compensation.[600] As such, while the tribunal could—and in fact had to—deduct the overlapping part, it left the prevention of double compensation to the claimants' "willing[ness]". However, it

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[594] *Ibid* at paras 120, 379.
[595] *Ibid* at paras 118–119, 380.
[596] *Ibid* at para 380.
[597] *Ibid* at paras 378–379.
[598] *Ibid* at para 380.
[599] *Ibid* at para 381.
[600] *Ibid* at paras 404(d)–(e). The respondent successfully applied for annulment of the award. However, the part of the annulment that went to damages was due to the choice of law as well as reasoning and did not concern the tribunal's analysis in relation to the double compensation issue. To be more precise: those paragraphs in which the tribunal held how much was due in total were annulled as a result of the defect in the tribunal's choice of law and lack of reasoning. That finding did not impact the tribunal's double compensation analysis, which was set out in another part of the award. Decision on Annulment (9 March 2017) at paras 189–190, 196(3).

should be noted that the tribunal was one of only seven tribunals (out of a total of 63) to refer to the principle of prohibition of double compensation.[601]

n. *von Pezold v Zimbabwe*[602]

III.132. The claimants included nine members of the von Pezold family, eight of whom held both Swiss and German nationalities, and one who only held German nationality.[603] The dispute was essentially a land dispute over three estates in Zimbabwe (the Forrester Estate, the Border Estate, and the Makandi Estate), which von Pezolds owned through their investment vehicles.[604]

III.133. There were two parallel ICSID arbitrations: one initiated by von Pezolds (this arbitration based on the Switzerland-Zimbabwe BIT and the Germany-Zimbabwe BIT) and the other arbitration[605] that was initiated by a number of the investment vehicles in connection with the Border Estate.[606] The two arbitrations had the same tribunal, the same evidence, the same hearings, and were both conducted with respect to an overlapping loss.[607]

III.134. The tribunal noted that the claimants here—either completely or by a controlling majority—owned the investment vehicles (some of which were the claimants in the parallel arbitration) and, as such, any injury to the investment vehicles must be considered an injury to the claimants in this matter.[608] Given that the Border Estate was the subject of both arbitrations, the

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[601] See above, Group No 11, discussed in para I.7.
[602] *von Pezold and Others v Zimbabwe*, ICSID Case No ARB/10/15 ("*von Pezold v Zimbabwe*").
[603] *Ibid*, Award (28 July 2015) at paras 9–10.
[604] *Ibid* at paras 2, 118–120, 126–127, 135–136.
[605] *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co (Private) Limited v Zimbabwe*, ICSID Case No ARB/10/25.
[606] *von Pezold v Zimbabwe*, Award (28 July 2015) at paras 1, 5–6.
[607] *Ibid.*
[608] *Ibid* at paras 324–325.

tribunal found that there was an overlap between the claims, yet it cited *Lauder*[609] and held that:

> [T]he existence of two separate but related arbitrations [cannot] act as a bar to recovery. For the Tribunal to refuse to grant relief in either arbitration simply because two sets of Claimants share overlapping rights under international law would render an injustice to both sets of Claimants.[610]

The tribunal then "wishe[d] to make clear that, although the von Pezold Claimants and the Border Claimants have each been granted the same relief in respect of the Border Estate, these rights cannot both be jointly enforceable".[611] However, this statement was not repeated in the operative part of the Award.

III.135. If any injury to the investment vehicles is considered by the tribunal to also be an injury to the shareholders, so should the compensation. In other words, any compensation that is awarded to the investment vehicle should also be considered to be compensation awarded to the shareholders, because the compensation flows to the shareholders just as the initial harm did. Therefore, there would have been no "injustice" (to use the words of the tribunal) done to the claimants had the tribunal deducted the overlapping part of the compensation from the award to the claimants here (who were the shareholders). In fact, the "injustice" was done to the respondent which faced two awards with overlapping damages.

III.136. In addition, given that the prohibition on the enforcement of both awards was not stated in the operative part of those awards, it is not guaranteed that the prohibition would be implemented at the enforcement stage: for example, enforcement might be sought in a civil law jurisdiction where the *res judicata* effect attaches only to the operative part of a final judgment

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[609] Discussed above, in the current Chapter, Subsection "Cases with Justifications of a Procedural Nature".
[610] *von Pezold v Zimbabwe*, Award (28 July 2015) at paras 936–937 [emphasis added].
[611] *Ibid* at para 938.

and not the reasoning part.[612] Even if the prohibition on "double enforcement" holds, it is disappointing that a tribunal (which had the advantage of deciding both of the parallel arbitrations) rendered two awards, only to hold that these could not be enforced jointly. There would not have been any of these complications had the tribunal properly offset the overlapping portion between the two awards.

o. *Eskosol v Italy*[613]

III.137. The claimant, Eskosol, was an investment vehicle in Italy, involved in a photovoltaic energy project.[614] Of the total of Eskosol's shares, 80% belonged to a Belgian company (called Blusun - owned by a German and a French national) and the remaining 20% belonged to two Italian nationals.[615] Eskosol filed this ICSID arbitration based on the ECT, while the shareholding company (Blusun), along with its shareholders, had launched a separate ICSID arbitration—also based on the ECT—against the respondent.[616] The claimants in that arbitration (called the "*Blusun*" case) sought damages for their investments (through Eskosol) in Italy and challenged essentially the same state measures.[617]

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[612] It is true that, under article 54(1) of the ICSID Convention, all states that are signatory to the Convention must recognise and enforce an ICSID award as if it were a final judgment of their own courts. However, under article 54(3), the enforcement is governed by the law of the enforcing state. As such, the enforcing state's rules on the *res judicata* effect of final judgments become relevant when enforcing an ICSID award. It has been explained that: "[r]ecognition has two possible effects. One is the confirmation of the award as binding or *res judicata*. The other is a step preliminary to enforcement." Christoph H Schreuer et al, *The ICSID Convention: A Commentary*, 2nd ed (Cambridge University Press, 2009, reprinted 2013) at 1128. It is known that common law and civil law jurisdictions do not share the same view as to whether the *res judicata* effect covers the reasoning part of a judgment (in addition to the operative part). As pointed out by the ILA Committee on International Commercial Arbitration, "the Civil Law doctrine, by and large, is more restricted than the Common Law perspective on *res judicata*. … This is because, generally, a more formalistic approach is taken and it is only the operative order of the court, the '*dispositif*', that has *res judicata* effect"). ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) at 14.

[613] *Eskosol SpA in liquidazione v Italy*, ICSID Case No ARB/15/50 ("*Eskosol v Italy*").

[614] *Ibid*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at paras 2–3.

[615] *Ibid* at paras 20–21.

[616] *Ibid* at paras 1, 28, 33.

[617] *Ibid* at para 28. *Blusun SA, Lecorcier, and Stein v Italy*, ICSID Case No ARB/14/3.

III.138. When this arbitration was filed, the *Blusun* case was already underway and its final award was issued before the decision here was rendered.[618] The *Blusun* tribunal denied the claims on the merits,[619] which rendered moot the risk of double compensation in this matter. Relevantly, however, the parties' arguments were submitted while the *Blusun* case was still pending, as was the tribunal's ruling on those arguments. The arguments and findings are discussed in the following paragraphs.

III.139. Italy raised a number of objections related to the risk of double compensation. It first argued that the ECT's FITR provision (article 26(3)(b)(i)) would bar the claimant's claim, because the respondent was one of the contracting states listed in Annex ID to the ECT and, as such, the respondent's consent to arbitration did not include the situation where the "investor" had already submitted the same "dispute" to another arbitration.[620] It submitted that the claimant here and the claimants in the *Blusun* arbitration should be considered the same "investor" for the purposes of article 26(3)(b)(i), and further, that the dispute here and in the *Blusun* case should be considered the same "dispute".[621]

III.140. The respondent also raised *lis pendens* and *res judicata*, arguing that "[those] public international law principles prohibit the prosecution of multiple claims in relation to the same prejudice", as they recognise that the multiplicity of proceedings may lead to the risk of conflicting decisions and double compensation.[622] Italy initially based its argument on *lis pendens*, because

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[618] *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at paras 28, 30.
[619] *Ibid* at para 33.
[620] *Ibid* at para 121. Article 26(3)(b)(i) of the ECT reads: "The Contracting Parties listed in Annex ID do not give such unconditional consent [to the submission of a dispute to international arbitration] where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)."
[621] *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at paras 122, 125–126.
[622] *Ibid* at para 136.

the *Blusun* case was still pending at the time, but it also noted that, once the *Blusun* tribunal issued its decision, the principle of *res judicata* should apply.[623]

III.141. While the respondent acknowledged that tribunals usually apply the triple identity test (same parties, same cause of action, and same object) strictly in relation to the *res judicata* principle, it argued that the tribunal should adopt a "flexible" approach, otherwise it "would deprive the rule of *effet utile*, and therefore its application should depart from the traditional application under domestic law".[624]

III.142. According to Italy, the same parties requirement was met here, as the claimants of the two proceedings were so closely related that the privity doctrine could apply.[625] It argued that the fact that there was a dispute between the claimant's majority and minority shareholders and that the majority initiated the *Blusun* proceeding were issues between the claimant and its shareholders, the consequences of which should not be borne by the respondent, otherwise it would face the risk of double compensation.[626] Once the *Blusun* decision was issued (where the claims were denied on the merits), Italy added that, despite the possibility of double compensation being rendered moot, it was still "confronted with the additional burdens and costs of having to re-litigate the underlying issues".[627]

III.143. The claimant Eskosol submitted that the *Blusun* claimants launched that arbitration without consulting with Eskosol or its bankruptcy receiver, and noted that Eskosol's request to ICSID to consolidate the case at bar with the *Blusun* case had been denied.[628] It even described

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[623] *Ibid*.
[624] *Ibid* at paras 138–139.
[625] *Ibid* at paras 140–143.
[626] *Ibid* at para 143.
[627] *Ibid*.
[628] *Ibid* at paras 29–30.

the *Blusun* arbitration as "abusive" for seeking damages to which only Eskosol was entitled.[629] However, the claimant argued that the respondent's FITR argument should fail because the two disputes could not be considered the same—as the tribunal did not have access to *Blusun*'s records to examine the alleged similarity—and because Eskosol was a distinct legal entity from its shareholding company which was not the sole shareholder in Eskosol.[630]

III.144. With respect to the respondent's argument on *res judicata*, the claimant argued that the majority of international law authorities provided for a strict application of the triple identity test.[631] It challenged the applicability of the privity doctrine to the identity test, as the "concept of privity is primarily one from the common law, not a concept of public international law".[632] Eskosol also argued that the strict application of the test would not result in any double compensation, particularly given that the *Blusun* case did not succeed.[633]

III.145. The tribunal found that, with respect to the FITR argument, it could be abusive for an investor to re-litigate a dispute under the ECT multiple times, but that the tribunal was "skeptical" about whether the FITR clause was the right doctrine to bar such re-litigation, and that the appropriate doctrine was *res judicata*.[634] It held that, even if the FITR clause were the appropriate mechanism, it would not have applied here, because Eskosol in this arbitration and its shareholding company in the *Blusun* arbitration could not be considered the same "investor".[635]

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[629] *Ibid* at para 31.
[630] *Ibid* at paras 130–131.
[631] *Ibid* at para 151.
[632] *Ibid* at paras 153, 156.
[633] *Ibid* at para 151.
[634] *Ibid* at paras 133–134.
[635] *Ibid* at para 135.

III.146. As regards *res judicata*, the tribunal held that it was not applicable because—again—the claimants in the two proceedings were not the same.[636] It noted that ECT considered both a foreign investor (like the claimant in the *Blusun* case) and a local company that was under foreign control (like the claimant here) qualified as foreign investors.[637] The tribunal also accepted that if a company and its shareholders had identical interests (for example, where the company is wholly owned by those shareholders), the same parties requirement could be met.[638] However, it found that the claimants in the *Blusun* case were the majority shareholder in Eskosol, and given that the respondent here was not willing to share the records of the *Blusun* case (out of the concern for the confidentiality obligation to the claimants in *Blusun*), these factors showed that even the respondent did not consider the claimants of the two proceedings to be the same.[639]

III.147. The tribunal pointed out that it was "not unsympathetic to Italy's circumstances, having to face claims now that are closely related to those it already successfully vanquished in a prior proceeding", and that "there could be both efficiency and fairness reasons to prefer that all shareholders of an entity affected by a challenged State measure could be heard in a single forum at a single time, together with the entity that they collectively own."[640] However, the tribunal found:

> [T]he fact remains that neither the ICSID system as presently designed, nor the ECT itself, incorporate clear avenues (much less a requirement) for joinder in a single proceeding of all stakeholders potentially affected by the outcome. Absent such a system – which States have the power to create if they so wish – it would not be appropriate for tribunals to

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[636] *Ibid* at para 171.
[637] *Ibid* at para 166.
[638] *Ibid* at para 167.
[639] *Ibid* at para 168. Given that the tribunal held that the same parties requirement was not met, it did not proceed to examine the other two requirements of the triple identity test. *Ibid* at para 171.
[640] *Ibid* at para 170.

> preclude arbitration by qualified investors, simply because other qualified investors may have proceeded before them without their participation.[641]

III.148. In a footnote, the tribunal added that it "would have to be vigilant to prevent double recovery from Italy for the same loss" if the *Blusun* tribunal had awarded damages to the claimants in that case.[642] The tribunal did not explain on what basis it would have prevented double compensation, considering that it had already rejected the applicability of *res judicata* and the FITR rule.

III.149. Furthermore, the fact that the *Blusun* claimants had disregarded Eskosol's interests when initiating a parallel arbitration, or the fact that the respondent refused to disclose the records of the *Blusun* case (out of respect to its confidentiality obligation),[643] would not entitle Eskosol and the *Blusun* claimants to receive two separate damages for the same harm. Those facts only indicate a dysfunctional relationship between Eskosol and its shareholders, for which there should be rules at the international level (just like those set out in domestic corporate laws) that would protect the interests of both the company and its shareholders. Clearly, the solution to a lack of such rules in the ISDS system is not that both the company and its shareholders receive separate, overlapping damages, which results in the respondent state bearing the consequences of that dysfunctional relationship.

III.150. In terms of the relationship between a company and its shareholders, a similar issue was discussed earlier in *GAMI v Mexico*, where the investment vehicle had a policy of not distributing dividends to its shareholders. The *GAMI* tribunal was concerned about whether any damages paid

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[641] *Ibid*.
[642] *Ibid* at fn 294.
[643] See above, paras III.143, III.146.

to the investment vehicle would flow to the shareholders.[644] The tribunal's approach in that case was criticized on the basis that it would lead to the respondent state paying double compensation because of an internal policy between the investment vehicle and its shareholders.[645]

III.151. In the end, the tribunal in the case at bar made the following statement:

> [T]he Tribunal acknowledges that if any damages Eskosol recovered were sufficient to allow for distribution to shareholders after resolving priority debt obligations, Blusun itself could benefit indirectly from Eskosol's recovery, despite previously failing in its direct claim against Italy. The Tribunal accepts the awkwardness of this outcome, but it is one that arises mainly because of the odd circumstances of this case, where a majority shareholder and the company in which it holds shares did not have aligned interests and did not coordinate their respective litigations, but rather acted in various respects at cross-purposes with one another. The Tribunal is confident that this situation does not arise regularly. However, the possibility of an awkward outcome in an anomalous case, that could result in some indirect benefit to a prior litigant who lost a prior case, is not a reason in principle to strip a current litigant of a right to arbitration that the ECT expressly grants it, to pursue claims on its own behalf.[646]

p. *ConocoPhillips v Venezuela*[647]

III.152. The claimants in this arbitration included three Dutch companies and their US parent company (ConocoPhillips Company), which indirectly held interests in three oil projects in Venezuela.[648] The four claimants commenced this ICSID arbitration, claiming that Venezuela had violated its obligations under Venezuela's Investment Law (with respect to the parent company) and under the Netherlands-Venezuela BIT (with respect to the three Dutch claimants).[649] In the Decision on Jurisdiction and Merits, the tribunal found that it did not have jurisdiction over the

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[644] See above, paras III.87, III.89.
[645] See above, para III.92.
[646] *Eskosol v Italy*, Award (4 September 2020) at para 267.
[647] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, ConocoPhillips Gulf of Paria BV, and ConocoPhillips Company v Venezuela*, ICSID Case No ARB/07/30 ("*ConocoPhillips v Venezuela*").
[648] *Ibid*, Decision on Jurisdiction and Merits (3 September 2013) at paras 2, 7.
[649] *Ibid* at paras 213, 223.

parent company based on the Investment Law, but it had jurisdiction over some of the claims brought by the three Dutch claimants based on the BIT.[650]

III.153. The Congressional authorizations for the three oil projects included a provision stating that disputes arising out of the Association Agreements in relation to the projects would be resolved through ICC arbitration.[651] There was a parallel ICC arbitration pursuant to the Association Agreements, launched by ConocoPhillips Petrozuata BV (one of the Dutch claimants here) and Phillips Petroleum Company Venezuela Limited (the local subsidiary of another Dutch claimant here), against Venezuela's national oil company (called PDVSA) and two of its subsidiaries.[652] The ICC award was issued more than a year prior to the rendering of the Award in this case.[653] The parties to the ICC arbitration then reached an agreement in relation to the payment of damages awarded in that arbitration.[654]

III.154. The claimants in this case declared that they "intend[ed] to comply with the principle that there should not be any double recovery" and that "if they obtain[ed] payment from the relevant governmental actor through the other remedies expressly contemplated in the compensation provisions, they must provide an offset to the PDVSA subsidiaries through an appropriate credit or reimbursement".[655]

III.155. The tribunal recalled "a principle of international law that [the claimants] shall not be permitted to seek double recovery and thus cause an illegal enrichment that the international legal

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[650] *Ibid* at paras 262, 290.
[651] *Ibid* at paras 127, 146, 169.
[652] *Ibid* at para 100; *ConocoPhillips*, Award (9 March 2019) at paras 35, 103, 1010.5.
[653] *ConocoPhillips v Venezuela*, Award (9 March 2019) at para 36.
[654] *Ibid*.
[655] *Ibid* at para 961.

order must condemn."[656] It noted that "the official and solemn submission of [the claimants'] undertaking [about double compensation] would have had no meaning" if the tribunal would not do anything about it.[657] However, it noted that the respondent had not approved or rejected the claimants' undertaking.[658] The tribunal pointed out that it set out a number of questions to the parties with respect to the nature of such commitment by the claimants, but it was not "called to proceed with such examination any further".[659]

III.156. The tribunal further noted that it had not received the text of the agreement that the parties made for the payment of damages in the ICC arbitration, and thus it was not clear whether that agreement contained any details about the claimants' undertaking not to collect double compensation.[660] However, the tribunal found that the claimants were acting in good faith and had expressed their intention not to seek double compensation.[661] As such, the tribunal held that the claimants were "under a duty of good faith not to seek double recovery when seeking enforcement, in full or in part, of the Award rendered by this ICSID Tribunal", and ruled that it was not "called to do more than to acknowledge the claimants' undertaking, possibly in providing some support for the Claimants and some relief to the Respondent."[662]

III.157. This case is an exception among the cases listed in this Subsection, in that it is clear that the fact that the tribunal could not effectively address the risk of double compensation was not the

[656] *Ibid* at para 964.
[657] *Ibid* at para 963.
[658] *Ibid* at para 961.
[659] *Ibid* at para 962.
[660] *Ibid* at para 961.
[661] *Ibid* at para 964.
[662] *Ibid* at paras 963, 965.

result of the tribunal's failure or unwillingness to address it, but rather was the result of the parties' failure to effectively cooperate.

III.158. With respect to the claimants' undertaking not to seek double compensation, there is a notable difference between the tribunal's approach in this case and those of the tribunals in *Burlington v Ecuador*[663] and *Venezuela Holdings v Venezuela* (discussed above). In those cases, the claimants' mere statements that they would not seek double compensation were deemed sufficient,[664] whereas here, the tribunal was of the view that the claimants' statement had to be incorporated into the tribunal's holding, otherwise a mere statement by the claimants "would have had no meaning". Regardless of whether such statements by claimants have any independent effect, it was a positive step by the tribunal to increase the pressure on the claimant's statement by recognising it as an undertaking.

q. *Unión Fenosa Gas v Egypt*[665]

III.159. The claimant, Unión Fenosa Gas (UFG - a Spanish company), was a subsidiary of a Spanish electricity utility company.[666] UFG succeeded another company (from its own corporate group) and became party to a sale and purchase agreement with an Egyptian state-owned company called EGAS.[667] The agreement provided for arbitration of their disputes before an arbitration institution in Cairo. Both UFG and EGAS were also shareholders in an Egyptian joint stock company (called SEGAS) that was in charge of the development and operation of a natural gas

[663] Discussed above, in the current Chapter, Subsection "Cases with Justifications of a Procedural Nature".
[664] See above, paras III.60 – III.61, III.130 – III.131.
[665] *Unión Fenosa Gas, SA v Egypt*, ICSID Case No ARB/14/4. It should be noted that one of the arbitrators issued a dissenting opinion. However, his dissent did not address the issues discussed here. As such, the tribunal's decision remained unanimous with respect to those issues.
[666] *Ibid*, Award (31 August 2018) at para 1.1.
[667] *Ibid* at paras 3.8, 5.4, 5.17.

liquefaction plant in Egypt: UFG held 80% and EGAS held 10% of the shares in SEGAS.[668] EGAS and SEAGS then signed a tolling agreement which had a clause in favor of ICC arbitration.[669]

III.160. UFG filed this ICSID arbitration based on the Spain-Egypt BIT.[670] At the time, three relevant commercial arbitrations were already on foot:[671]

- An ICC arbitration brought by SEGAS against EGAS under the tolling agreement, where a final award was rendered (before the award was issued here) dismissing all claims.[672]
- The first Cairo arbitration launched by UFG against EGAS under the sale and purchase agreement, where all the claims were dismissed prior to the award being issued here.[673]
- The second Cairo arbitration, again between UFG and EGAS under the sale and purchase agreement.[674] The arbitration was initiated at approximately the same time as the first Cairo arbitration, but it was stayed for some time and then the stay was lifted following the dismissal of the claims in the first Cairo arbitration.[675] However, it was still pending by the time the Award in the ICSID arbitration was rendered.[676]

III.161. The respondent here argued that the tribunal should either decline jurisdiction or stay the proceeding, pending the resolution of the then-parallel commercial arbitrations, given that the tribunal had an "inherent power" to do so based on "the principles of *lis pendens*, comity, collateral estoppel and *res judicata*."[677] According to the respondent, those principles "ensure sound judicial

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[668] *Ibid* at paras 5.6. 5.9, 2.1.
[669] *Ibid* at paras 3.24, 3.26.
[670] *Ibid* at para 3.2.
[671] *Ibid* at paras 1.25, 2.13.
[672] *Ibid* at para 6.6.
[673] *Ibid* at para 6.8.
[674] *Ibid* at para 6.9.
[675] *Ibid.*
[676] *Ibid*.
[677] *Ibid* at paras 11.5–11.6.

administration, procedural efficiency and protection against abuses, conflicting decisions, double recovery and duplication of costs."[678]

III.162. The claimant countered that the respondent's argument was flawed and that *res judicata* and *lis pendens* did not apply to the present case.[679] According to the claimant, the triple identity test was not met: the claimant was not a party to the ICC arbitration, and this arbitration involved treaty claims whereas the commercial arbitration involved contract claims.[680] The claimant submitted that it was not seeking double compensation and, as such, to the extent that it would receive damages in the commercial arbitrations (which overlapped with the damages claimed here), the overlapping part could be deducted from the amount claimed here, and *vice versa*, if the claimant received damages here first.[681]

III.163. The tribunal noted that the ICC arbitration and the first Cairo arbitration were already concluded by the time the tribunal deliberated here, and as such, the suspension of this arbitration was no longer relevant with respect to those arbitrations.[682] The tribunal then noted that the second Cairo arbitration was still pending, but the tribunal was not aware of the timetable for the conclusion of that proceeding.[683] The tribunal rejected the request to stay this arbitration pending the conclusion of the second Cairo arbitration, because the latter involved a different respondent (i.e. EGAS – the state-owned company) and there was not sufficient privity between the two respondents.[684] With respect to the risk of double compensation, the tribunal ruled that:

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[678] *Ibid*.
[679] *Ibid* at paras 11.12, 11.24.
[680] *Ibid* at paras 11.13–11.15.
[681] *Ibid* at para 10.13.
[682] *Ibid* at para 11.28.
[683] *Ibid* at para 11.29.
[684] *Ibid* at paras 11.30, 11.32, 11.36.

> In the event of the Claimant receiving any monies under this Award, the Claimant is forever precluded from claiming against the Respondent or EGAS any compensation in respect of the same monies in any legal or arbitration proceedings against the Respondent, EGPC or EGAS, including the pending second [Cairo] arbitration between the Claimant and EGAS. The Tribunal records that the Claimant has undertaken in this arbitration, as stated in its written submissions and its submissions at the Hearing, that it will not make any attempt at double-recovery.[685]

III.164. A closer look at the decision reveals that the two parts of the tribunal's ruling contradict one another. On the one hand, when ruling on *lis pendens* and *res judicata*, the tribunal held that the respondents in the two proceedings (i.e. the state and the state-owned company) were not sufficiently privy to each other. On the other hand, when ruling on double compensation, the tribunal treated them as though they were the same or privy, by holding that the claimant could not claim the same damages from both the state and the state-owned company. In other words, if the state and the state-owned company were not privy to one another for the purposes of *lis pendens* and *res judicata*, how could they be considered the same or privy for the purposes of double compensation? The tribunal did not answer that question.

III.165. Furthermore, when the tribunal precluded the claimant from claiming the same damages from the state-owned company, it did not elaborate on how that prohibition should translate into action on the ground. In other words, how should the parties proceed from that point in time (considering that the claimant was already claiming the same damages from the state-owned company in the pending Cairo arbitration)?

r. *Salini Impregilo v Argentina*[686]

III.166. In the 1990s, the claimant and several other construction companies formed a

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[685] *Ibid* at para 10.142.
[686] *Salini Impregilo SpA v Argentina*, ICSID Case No ARB/15/39 ("*Salini Impregilo v Argentina*").

consortium which won the bid for a long-term government contract on the construction, maintenance, and operation of a toll road between two cities in Argentina.[687] The consortium then incorporated a local company in which the claimant held 26% of the shares.[688] The contract was eventually terminated in 2014, following which the claimant brought this ICSID arbitration based on the Italy-Argentina BIT.[689]

III.167. The respondent submitted that the claimant did not abandon the domestic proceedings as it was required to do under the relevant provision of the BIT, which read: "From the time arbitration proceedings are commenced, each party to the dispute shall take any such measures as may be necessary to dismiss any pending court proceedings".[690] The respondent argued that such a provision was intended to safeguard the respondent state from, *inter alia*, the risk of double compensation.[691]

III.168. However, the claimant argued that the objection should be rejected because the claimant's presence in the local proceedings was not its choice but rather it was summoned to appear and, thus, it would be "improper for Argentina to force [the claimant] to join domestic proceedings and then argue that [the claimant's] presence in [those] proceedings justifies the dismissal of its treaty claim in the arbitration".[692] The claimant also argued that the causes of action between the two proceedings were different, as one involved domestic law claims while this arbitration involved treaty claims.[693]

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[687] *Ibid*, Decision on Jurisdiction and Admissibility (23 February 2018) at paras 14–15.
[688] *Ibid* at para 16.
[689] *Ibid* at para 17.
[690] *Ibid* at para 141.
[691] *Ibid* at para 143.
[692] *Ibid* at para 159.
[693] *Ibid* at para 160.

III.169. The tribunal rejected the respondent's objection[694] on the grounds that the relevant BIT provision provided for only "best efforts requirement".[695] It found that the claimant "was not in a position to withdraw proceedings to which it was not a party" and, as such, holding otherwise "would place minority shareholders at a serious disadvantage in seeking to uphold their rights under the BIT".[696] The tribunal then held that "there [was] no danger of double recovery, having regard *inter alia* to the express assurances given by the Claimant in oral argument".[697]

III.170. The tribunal's findings with respect to the BIT provision and its inapplicability to the case at bar are solid. However, its approach to the risk of double compensation is questionable. If it was possible for the claimant to receive compensation through the local proceeding (even if joining that proceeding was not its choice initially), the Tribunal's statement that "there [was] no danger of double recovery" is not valid. Further, the tribunal's solution to the problem (which involved relying on "assurances given by the Claimant in oral argument") seems to be overly optimistic and not a reasonable legal approach to a problem between two parties that were already at odds.

s. *Hydro and Others v Albania*[698]

III.171. The claimants included two Italian companies and four Italians nationals who brought this ICSID proceeding based on the Italy-Albania BIT, with respect to their alleged investments in Albania's hydroelectric energy and media industries.[699] The first company claimant (Hydro - itself

[694] *Ibid* at para 173.
[695] *Ibid* at para 147.
[696] *Ibid* at para 148.
[697] *Ibid* at para 173.
[698] *Hydro Srl, Costruzioni Srl, Becchetti, De Renzis, Grigolon, Condomitti v Albania*, ICSID Case No ARB/15/28 ("*Hydro and Others v Albania*").
[699] *Ibid*, Award (24 April 2019) at paras 1–2, 5.

owned by three of the individual claimants)[700] owned, among other things, a set of minority shares in an Italian television company that was a subsidiary of an Albanian television company called Agonset.[701] The second company claimant (itself owned by one of the individual claimants)[702] owned, among other things, a set of minority shares in Agonset as well as minority shares in a local company that held a concession agreement to construct and operate a waste management facility in Albania.[703]

III.172. There were two other relevant proceedings: first, an ICC commercial arbitration brought by the first company claimant, which concluded in favor of the respondent;[704] and second, another ICSID arbitration brought by the second company claimant based on the ECT.[705] The respondent raised the risk of double compensation, arguing that if the claimants receive the fair market value of Agonset:

> (i) Agonset could recommence its operations at any time; (ii) the Claimants could continue to pursue other legal claims and potentially obtain damages; and (iii) the Claimants could, depending on the outcome of the criminal proceedings discussed [in the Award], receive compensation by (a) selling Agonset Albania's broadcasting license and physical property, and (b) withdrawing Agonset Albania's cash at bank.[706]

III.173. The tribunal awarded damages for the expropriation of the claimants' investment,[707] but also stated that:

> The Tribunal accepts that there is a possibility that the Claimants may obtain double recovery if they receive the fair market value of Agonset as damages while still maintaining their shareholdings in Agonset and any accrued rights with respect to Agonset.
> However, the Tribunal has found that the value of Agonset has been destroyed and any issues of double recovery are rather speculative and inherently unlikely in the sense that

[700] *Ibid* at para 9.
[701] *Ibid* at paras 8–10.
[702] *Ibid* at para 26.
[703] *Ibid* at paras 12–13, 16.
[704] *Ibid* at paras 10, 261–262.
[705] *Ibid* at paras 13–14, fn 13.
[706] *Ibid* at para 822.
[707] *Ibid* at para 914.

> they are contingent upon the happening of several events, such as [listing the events] which may or may not happen. Further, if the Claimants did use the same corporate vehicles to resume broadcasting, they would essentially have to start from scratch, given the minimal assets those companies now hold. The Tribunal is not able to determine the likelihood or otherwise of these events occurring, and does not consider it proper to diminish the Claimants' claim on these speculative events. However, the Tribunal does not wish to potentially overcompensate the Claimants.
> In the absence of guidance from the parties as to the way forward, the Tribunal looks to how other investment tribunals have dealt with similar scenarios.[708]

III.174. The tribunal then cited (with approval) two other investment arbitration cases in which the tribunals, upon awarding full damages for expropriation, ordered the claimants in those cases to transfer the title of what was left of the investment to the respondent states.[709] Accordingly, the tribunal, in the case at bar, held that "upon the Respondent's payment of the compensation fixed in this Award, including any interest and costs deemed payable, the Respondent shall be released from any further claims from any of the Claimants concerning Agonset."[710]

III.175. However, a careful analysis of the case shows that the tribunal's ruling significantly differs from the approach adopted in the cases on which the tribunal relied. The cases that the tribunal cited required the claimants to transfer their title to the respondent states, the result being that those states would then be free from any possible future claims with respect to those investments. That is not what the tribunal did in the present case. Rather, the tribunal in the case bar only stated that "the Respondent shall be released from any further claims" without ordering the claimants to transfer the title. This is as though the tribunal wished to attain a result (i.e. the respondent becoming free of further claims) without requiring the necessary steps to achieve that result (i.e. the claimants transferring the title). As such, it is not clear how the respondent may be free from further claims if the title is still vested in the claimants. The tribunal's solution more

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[708] *Ibid* at para 886–888.
[709] *Ibid* at paras 889–890.
[710] *Ibid* at para 891.

closely aligns with the situation of requiring an undertaking by the claimant not to bring further claims, which (as explained in Chapter 6) has no clear enforcement mechanism.[711]

III.176. Further, the tribunal's solution is only limited to the claimants that were party to this proceeding and would not apply to other companies in the same corporate chain, which could still bring claims given that the title remained with the claimants. Had the tribunal ordered the transfer of the title to the respondent, there would not have been such limitation.

III.177. Moreover, there was one other risk of double compensation that remained undiscussed, namely, the risk arising from the flow of damages between the claimants, given that the two companies were owned by the individual claimants.

t. *United Utilities v Estonia*[712]

III.178. The claimants included a Dutch company (called UUTBV) which was created for the purpose of bidding on the privatization of the second claimant (called ASTV - a water and sewerage management company, once owned by an Estonian city).[713] The two claimants brought this ICSID arbitration based on the Netherlands-Estonia BIT.

III.179. The respondent raised the risk of double compensation and objected to the tribunal's jurisdiction on the grounds that the claims before this tribunal were essentially the same as those that were brought by ASTV in Estonian courts and, thus, a finding of jurisdiction would violate article 26 of the ICSID Convention.[714] The claimants did not dispute that both proceedings concerned the same facts, but argued that the two proceedings were distinct because they were

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[711] See below, in the current Part, Chapter 6, Section "Undertaking not to Seek Double Compensation".
[712] *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Estonia*, ICSID Case No ARB/14/24 ("*United Utilities v Estonia*").
[713] *Ibid*, Award (21 June 2019) at paras 1, 3, 123, 125, 155.
[714] *Ibid* at paras 447, 461.

brought based on different legal bases: this arbitration was based on a treaty, whereas the local proceedings were filed based on Estonian administrative law.[715]

III.180. The tribunal rejected the respondent's objection because the two proceedings were "not substantially the same".[716] It reasoned that:

> The remedies sought in this arbitration derive from a different normative source than those articulated before the domestic courts. The thrust of Claimants case consists of alleged breaches by Respondent of the fair and equitable treatment standard and of due process, as well as other international obligations. It is unchallenged that the Estonian courts have considered facts that are also before the Tribunal, including most notably the rejection of the 2011 Tariff Application. … That the Estonian courts were seized of claims sharing much of the same factual basis as the present arbitration cannot prevent a finding of jurisdiction by the Tribunal. Moreover, Claimants' contentions before the Tribunal, as set out above at paragraphs 307-322, cannot be said to amount to a mere international window-dressing of the claims brought by ASTV before the Estonian Courts.[717]

In the end, the tribunal dismissed all the claims on the merits.[718] Therefore, it is unclear how the tribunal would have approached the double compensation issue had the case reached the quantum phase.

III.181. Chapter 8 of the thesis will discuss whether it is best to address the risk of double compensation at the preliminary stage or at later stages. However, regardless of the issue of suitable timing to address the risk, it is notable that in the case at bar, the tribunal did not recognize that the risk existed or that double compensation must be avoided. Rather, the tribunal merely acknowledged that the two parallel proceedings concerned the same facts and state measures, but took no further position on the matter.

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[715] *Ibid* at para 462.
[716] *Ibid* at para 464.
[717] *Ibid* at para 465.
[718] *Ibid* at para 939.

u. *Strabag and Others v Poland*[719]

III.182. This ICSID arbitration was brought by three Austrian companies (two of which owned the third one) that indirectly owned a Polish investment vehicle, which in turn owned and operated two hotels in Poland.[720] The respondent objected to the tribunal's jurisdiction, arguing that it should be considered abuse of process when the claimants pursued "the claims relating to the Bank Guarantee before Polish and Austrian courts and then bringing the same claims in this arbitration".[721]

III.183. The claimants, on the other hand, characterized the respondents' position as invalid because the legal bases of the two proceedings were different (one was based on a treaty and the other based on Polish domestic law) and because it would be "perfectly legitimate for the same set of facts to give rise to both contractual claims and treaty claims".[722] The claimants also added that they did not seek double compensation and would "declare bindingly and irrevocably to ensure that any compensation awarded in this arbitration [would] be respected in the proceedings under domestic law".[723]

III.184. The tribunal rejected the respondent's objection,[724] reasoning that:

> [C]ontract claims and treaty claims do not exclude each other. The same is true procedurally: claims allegedly resulting from the SPA [share purchase agreement] based on Polish domestic law can be pursued in domestic court proceedings in Poland, and claims allegedly resulting from the Treaty concerning the international responsibility of the Respondent under international law and can only be pursued in the present arbitration.[725]

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[719] *Strabag SE, Raiffeisen Centrobank AG, Syrena Immobilien Holding AG v Poland*, ICSID Case No ADHOC/15/1 ("*Strabag and Others v Poland*").
[720] *Ibid*, Partial Award on Jurisdiction (4 March 2020) at paras 1.1–1.5.
[721] *Ibid* at paras 6.2, 6.5.
[722] *Ibid* at para 6.6.
[723] *Ibid* at para 6.8.
[724] *Ibid* at para 6.14.
[725] *Ibid* at para 6.11.

III.185. The tribunal took no position as to whether that the risk of double compensation existed or whether double compensation should be avoided. The case proceeded to the merits phase,[726] and it remains to be seen whether, if at all, the tribunal will address the risk in that phase.

v. *Deutsche Telekom v India*[727]

III.186. The claimant (a German company) brought this PCA arbitration based on the Germany-India BIT and under the UNCITRAL rules.[728] The dispute concerned an agreement in relation to satellite services between Devas (a company where the claimant was an indirect minority shareholder) and an Indian state-owned company (called Antrix).[729] There was also an ICC arbitration brought by Devas against Antrix with respect to the same facts and economic harm, which resulted in a favorable award for Devas.[730] An action for annulment of the ICC award was pending before Indian courts.[731] The PCA tribunal asked the parties for their position on the effect of the ICC award on this arbitration.[732]

III.187. The claimant submitted that it did not intend to obtain double compensation and, at the hearing, added that it "formally undertakes to ensure that no double recovery will ensue".[733] The counsel for the respondent, however, made the following statement at the hearing: "[W]ith respect to the ICC award, I do not see the answer right now, to be honest. … But I frankly have no idea at this time how to deal with the double recovery issue in the meantime. Maybe I'll think of

[726] *Ibid* at para 10.1.9.
[727] *Deutsche Telekom AG v India*, PCA Case No 2014-10 ("*Deutsche Telekom v India*").
[728] *Ibid*, Final Award (27 May 2020) at paras 1–2.
[729] *Ibid* at para 8 and fn 5.
[730] *Ibid* at para 322.
[731] *Ibid*. There was another PCA arbitration brought by another set of shareholders in Devas (see below, *Devas v India*). However, that arbitration is not relevant to the issue of double compensation in the case at bar.
[732] *Deutsche Telekom v India*, Final Award (27 May 2020) at para 324.
[733] *Ibid* at paras 323, 325.

something for the post-hearing brief, but right now I'm at a loss."[734] The tribunal held that:

> [The risk of double compensation] could materialize, because both the ICC arbitration and the present arbitration deal with the same underlying facts and the same economic harm, even though the parties and the legal bases are distinct. Having reviewed the Parties' positions, the Tribunal takes due notice of [the claimant's] undertaking that it does not seek double recovery in relation to its investment, and that it will take appropriate steps to ensure that it is not compensated twice in the event that any damages were to be paid by Antrix to Devas pursuant to the ICC Award. The Tribunal will reflect such undertaking in the operative part of this Award.[735]

III.188. As will be explained in Chapter 6, an undertaking not to obtain double compensation is not an effective solution to address the risk of double compensation, as it has no clear enforcement mechanism.[736] As such, the tribunal failed to effectively address the risk. However, it is equally important to note that the respondent, too, failed to provide any assistance to the tribunal when asked for its position.

w. *Devas v India*[737]

III.189. The claimants in this PCA arbitration were three Mauritius companies that held shares in a local investment vehicle in India (called Devas)[738] which held a contract in relation to satellite services with an Indian state-owned company (called Antrix).[739] Another PCA arbitration was also filed by another shareholder in Devas (see above, *Deutsche Telekom v India*) which, although concerned the same facts, is not relevant to the issue of double compensation here. This is because the shareholder in that case belonged to a different corporate group. There was, however, an ICC arbitration initiated by Devas against Antrix with respect to the same facts, which resulted in a

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[734] *Ibid* at paras 327–328.
[735] *Ibid* at para 329. The tribunal did reflect the undertaking in the operative part of the award. *Ibid* at para 357.e.
[736] See below, in the current Part, Chapter 6, Section "Undertaking not to Seek Double Compensation".
[737] *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v India*, PCA Case No 2013-09 ("*Devas v India*").
[738] *Ibid*, Award on Jurisdiction and Merits (25 July 2016) at paras 1, 5.
[739] *Ibid* at paras 5–6.

favorable award for Devas.[740] The ICC award, which was being challenged before Indian courts, is relevant to the risk of double compensation in the case at bar.[741]

III.190. In the Award on Jurisdiction and Merits, the tribunal ruled that there were "major differences" between this arbitration and the ICC arbitration, as the parties and the legal bases in the two proceedings were different.[742] However, in the Award on Quantum, the tribunal held that:

> Prior to payment of any amounts awarded in [this decision], the Claimants shall provide an undertaking that they will not seek double recovery in relation to their investment, and will take appropriate steps to ensure that they are not compensated twice in the event that any damages were to be paid by Antrix Corporation Limited to Devas Multimedia Private Limited pursuant to the ICC Award.[743]

III.191. The tribunal's approach is questionable if considered from two angles. First, if the ICC arbitration and this arbitration had "major differences" (as the tribunal initially described them), why was the tribunal later concerned about the risk of double compensation (which logically implies that the claims filed and the compensation sought in two proceedings should be the same in order to amount to double compensation)?

III.192. Second, if the tribunal eventually came to the conclusion that the risk of double compensation existed, was its solution (that the claimants "provide an undertaking that they will not seek double recovery") effective? As will be explained in Chapter 6, an undertaking by the claimant not to seek double compensation lacks a clear enforcement mechanism and, thus, it is not an effective solution.[744] However, the tribunal's solution is one step behind that because the

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[740] *Ibid* at para 161.
[741] *Ibid*.
[742] *Ibid* at para 166.
[743] *Devas v India*, Award on Quantum (13 October 2020) at para 663(k).
[744] See below, in the current Part, Chapter 6, Section "Undertaking not to Seek Double Compensation".

tribunal only imposed an undertaking on the claimant to give an undertaking not to seek double compensation.

iii. Cases with Justifications of a Mixed Nature

III.193. In some ISDS cases, the states' objections as to the risk of double compensation were dismissed based on justifications of a mixed nature (i.e. both of a procedural nature and of a substantive nature). Of the 49 cases where the risk of double compensation was not effectively addressed,[745] in nine cases justifications of a mixed nature were provided.[746] Those cases are discussed and analysed in this Subsection.

a. *Azurix v Argentina*[747]

III.194. The claimant, Azurix (a US company), indirectly owned an investment vehicle (called ABA) which held a concession for the provision of drinkable water and sewerage services in Argentina.[748] The claimant brought this ICSID arbitration under the US-Argentina BIT.[749] There were a number of local proceedings underway, including: twelve administrative appeals by ABA before an administrative body (called ORAB), as well as a court proceeding between ABA and one of the provinces in relation to the termination of the concession.[750]

III.195. The respondent objected to the tribunal's jurisdiction on the ground that the claimant was barred from pursuing its claims here pursuant to the BIT's FITR provision.[751] The claimant

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[745] See above, para III.5.
[746] *Azurix v Argentina*; *Sempra v Argentina*; *Enron v Argentina*; *EDF v Argentina*; *Bayindir v Pakistan*; *Busta v Czech Republic*; *Perenco v Ecuador*; *Standard Chartered Bank v Tanzania*.
[747] *Azurix Corp v Argentina*, ICSID Case No ARB/01/12 ("*Azurix v Argentina*").
[748] *Ibid*, Decision on Jurisdiction (8 December 2003) at paras 1, 19, 21–22.
[749] *Ibid* at para 1.
[750] *Ibid* at paras 37, 39.
[751] *Ibid* at para 37.

submitted that the objection should fail because: (i) the causes of action, the parties, and the subject matters of the BIT proceeding and the local proceedings were different; (ii) the ORAB was not an administrative tribunal or a court for the purposes of the FITR provision, but rather a regulator; and (iii) the local court proceedings were initiated after the ICSID arbitration.[752]

III.196. In the Decision on Jurisdiction, the tribunal held that the investment vehicle's pursuit of local remedies had not triggered the BIT's FITR provision, because the parties and the claims were not the same and because the administrative body was not an administrative tribunal for the purposes of the FITR clause.[753] The tribunal then held that, while it appreciated the respondent's concern over the risk of double compensation, the issue concerned the merits phase and not jurisdiction.[754] However, in the Award, the tribunal did not discuss the double compensation issue.[755]

III.197. The respondent then applied for annulment of the award and raised the risk of double compensation.[756] The annulment committee rejected the argument and ruled that:

> [W]hile there may be unresolved problems in relation to the possibility of multiple proceedings, double recovery and the extent to which minority shareholders should be compensated if the local company remains a going concern, this in itself does not make the interpretation of the BIT referred to above "ambiguous or obscure" or "manifestly absurd or unreasonable" within the meaning of article 32 of the Vienna Convention. … As the problems identified by Argentina appear to be hypothetical in the present case, the Committee found that it did not need to address them.[757]

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[752] *Ibid* at paras 38–40.
[753] *Ibid* at paras 90, 92.
[754] *Ibid* at para 101.
[755] *Azurix*, Award (14 July 2006).
[756] *Azurix*, Decision on the Application for Annulment of Argentina (1 September 2009) at paras 61(h)(3), 113.
[757] *Ibid* at para 114.

III.198. The annulment committee also rejected the argument that if shareholders were allowed to bring a claim, this "could lead to an endless number of claims".[758] It reasoned that there were no examples of such multiple claims, rather "to the contrary: tribunals have repeatedly pointed out that mechanisms exist in international law for preventing double recovery".[759] Further, with respect to the concern about the investment vehicle attempting to settle the dispute, the annulment committee—while acknowledging the possibility—held that, if that occurred, the "tribunal would only award the shareholder damages for the shareholder's own loss and the amount of any settlement reached by the [investment vehicle] would be a matter to which the tribunal would have regard in assessing such damages."[760]

III.199. The Annulment Committee noted that there were unresolved issues about double compensation, but offered no solution thereto, other than repeating the mantra that other tribunals have set forth: that there are numerous solutions to double compensation, without elaborating on any of these solutions.

b. *Sempra v Argentina*[761]

III.200. The claimant in this ICSID arbitration (brought based on the US-Argentina BIT) was Sempra Energy International which was an indirect minority shareholder in two Argentine investment vehicles (CGS and CGP) that held licenses to supply and distribute natural gas in parts of Argentina.[762] The other shareholder in CGS and CGP was Camuzzi (a Luxembourg company) which had initiated a separate parallel arbitration (*Camuzzi v Argentina*)[763] that shared the same

[758] *Ibid* at para 115.
[759] *Ibid* at para 116.
[760] *Ibid* at para 117.
[761] *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16 ("*Sempra v Argentina*").
[762] *Ibid*, Decision on Objection to Jurisdiction (11 May 2005) at paras 1, 19.
[763] Discussed above, in the current Chapter, Subsection "Cases with Justifications of a Procedural Nature".

tribunal with this arbitration.[764] The respondent raised the risk of double compensation as a result of a pending local court proceeding, and objected to the tribunal's jurisdiction on the basis of the BIT's FITR clause.[765]

III.201. Like its decision in *Camuzzi*, here the tribunal ruled that double compensation could be "a real problem" but that it was a matter for the merits phase and not relevant to jurisdiction, and that "international law and decisions offer numerous mechanisms for preventing the possibility of double recovery", but the tribunal did not elaborate on any of those mechanisms.[766] With respect to the FITR objection, again like *Camuzzi*, the tribunal rejected this objection, reasoning that a treaty claim is different from a contract claim and that "[t]he principle *electa una via* does not show that an option in favor of local jurisdiction has been made; rather to the contrary, it shows opting for arbitral jurisdiction."[767]

III.202. In the Award, the tribunal noted that the respondent state and the investment vehicles had reached renegotiated agreements which would impact the claimant, despite the fact that the claimant had disavowed those agreements.[768] It also noted that the renegotiated agreements included a provision to "keep the Respondent free from any adverse implications of compensations that could be obtained by the Claimant in an arbitral or other forum."[769] The tribunal further pointed out that a company executive (appearing as witness for the claimant) testified that: "these

[764] *Sempra v Argentina*, Decision on Objection to Jurisdiction (11 May 2005) at paras 5, 19.
[765] *Ibid* at paras 102, 116.
[766] *Ibid* at para 102. See above, para III.13.
[767] *Ibid* at paras 120–123, 127–128.
[768] *Sempra v Argentina*, Award (28 September 2007) at paras 220, 226.
[769] *Ibid* at para 228.

two sources are mutually exclusive, and I don't think there is any possibility for double compensation to exist."[770]

III.203. The tribunal found those statements of the company executive "proved to be correct as the 2007 agreements with the [investment vehicles], as explained, expressly envisage that the Respondent shall be kept free of any adverse consequences".[771] It held that double compensation would not be an issue in the case at bar because the "government negotiators will make sure that any recovery obtained from one source is not duplicated by means of a separate recovery from another source."[772] As such, the tribunal left the double compensation issue to be dealt with by the government negotiators.

III.204. The respondent applied to annul the award, but the annulment committee upheld the tribunal's decision on jurisdiction, as well as its ruling to postpone the double compensation issue to the merits phase.[773] However, as to the Award, the committee annulled it entirely on the basis of the tribunal's manifest excess of power, for its failure to apply one of the BIT provisions.[774] It should be noted that the basis on which the Award was annulled concerned the applicable law and not the tribunal's ruling in relation to the double compensation issue.

c. *Enron v Argentina*[775]

III.205. The claimants included Enron (a US company) and its wholly-owned US subsidiary (Ponderosa), which directly and indirectly (through a local interposed company called CIESA)

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[770] *Ibid* at para 395.
[771] *Ibid*.
[772] *Ibid*.
[773] *Sempra v Argentina*, Decision on Argentina's Application for Annulment of the Award (29 June 2010) at paras 91, 104.
[774] *Ibid* at paras 159–165.
[775] *Enron Corporation and Ponderosa Assets, LP v Argentina*, ICSID Case No ARB/01/3.

held minority interests in an investment vehicle called TGS.[776] The two claimants brought this ICSID arbitration based on the US-Argentina BIT.[777]

III.206. The risk of double compensation presented itself twice: first, in relation to CIESA and, second, in relation to TGS. With respect to the first risk, the tribunal agreed with the respondent that CIESA should not later be allowed to claim compensation for the same harm if the claimants were compensated for that harm.[778] The tribunal held that:

> CIESA could not claim for the interest the investors had in TGS, if these were separately compensated, …, and if such eventual compensations were to be accumulated, they would result in a "double-dipping" or double recovery. To the extent that the investors are compensated for their interest, that is the end of the matter in respect of such interest as far as the Respondent is concerned.[779]

III.207. The second double compensation risk was discussed when the tribunal reached the issue of a possible renegotiated contract with the investment vehicle. The tribunal held that, if the respondent state reached a new agreement with TGS, government negotiators would consider any compensation awarded to the claimants in this forum.[780] According to the tribunal:

> The Tribunal cannot provide an answer to a question which is in essence speculative. However, as noted above in respect of another argument concerning double recovery, it can only express the certainty that if the situation arises or its consequences would end up affecting the tariffs, able government negotiators or regulators would make sure that no such double recovery or effects occur.[781]

III.208. The tribunal's position with respect to the first risk shows that the tribunal was mindful that the award must not result in double compensation. However, when the tribunal reached the second risk, it offered no solution to the risk, rather leaving it to "able government negotiators" to

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[776] *Ibid*, Award (22 May 2007) at paras 1, 42, 47, 50–54, 191–193.
[777] *Ibid* at para 4.
[778] *Ibid* at 167.
[779] *Ibid*.
[780] *Ibid* at para 202.
[781] *Ibid* at paras 211–212.

resolve. As Gabriel Bottini noted, avoiding double compensation "cannot depend on the ability of 'able government negotiators' or regulators and on the actual existence of ways to avoid it, but should depend on firm—and already existing—legal principles."[782]

d. *EDF v Argentina*[783]

III.209. This ICSID arbitration involved three claimants: EDF International (a French company that held the overseas investments of Électricité de France), SAURI International (also a French company), and Léon Participaciones Argentinas (a Luxembourg company that was originally owned by Crédit Lyonnais, but was later acquired by the first claimant).[784] The claimants were members of a consortium (called SODEMSA) that purchased 51% of the shares of a local Argentine company (called EDEMSA) which held a concession for transmission and distribution of electricity in one of the Argentine provinces.[785]

III.210. After initiating this arbitration based on the France-Argentina BIT and BLEU-Argentina BIT in 2003,[786] EDF became the sole shareholder in the consortium through the purchase of SAURI's and Léon's shares, but then sold all the shares to a local investment firm in 2004 and 2005.[787] Therefore, none of the three claimants was any longer a shareholder in EDEMSA, but they all retained the right to pursue their claim with respect to their previous ownership of the shares.[788]

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[782] Gabriel Bottini, "Indirect Claims Under the ICSID Convention" (2008) 29:3 U Pa J Int'l L 563 at 612.
[783] *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentina*, ICSID Case No ARB/03/23 ("*EDF v Argentina*").
[784] *Ibid*, Award (11 June 2012) at para 3.
[785] *Ibid* at paras 50, 61, 68, 71.
[786] *Ibid* at paras 1, 8–9.
[787] *Ibid* at paras 171–172, 174.
[788] *Ibid* at para 175.

III.211. The Decision on Jurisdiction is not public. However, it is understood that the respondent had raised the risk of double compensation. According to the excerpts of the decision that are quoted elsewhere, the tribunal had ruled that:

> [T]he Tribunal will remain vigilant about the possibility of double recovery that might result from any intersection between the treaty claims and the contract claims.[789]
> To the extent that the judicial process in Mendoza (pursuant to the forum selection clause) results in Claimants receiving compensation for their loss, recovery under the French and Luxembourg investment treaties would likely be barred.[790]

III.212. From the Award (which is publicly available), it is clear that the respondent argued that, of the 10 claims against the respondent's measures affecting the concession contract, five were litigated in national courts and judgements on their merits were rendered, for which *res judicata* should attach.[791] The respondent also argued again that there was a risk of double compensation given that "several of such claims" had already been settled with EDEMSA.[792] The claimants did not address the double compensation issue in their arguments, but argued that local court decisions should have no *res judicata* effect on the BIT proceeding, otherwise the claimants' "treaty rights would be unenforceable at the international level".[793]

III.213. The tribunal held that *res judicata* did not apply to the claims that were litigated in national courts,[794] because:

> Claimants decision to first pursue local remedies does not lead to a determination that such remedies are to the exclusion of arbitration. … Multiple sources of law may apply to a

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[789] *EDF v Argentina*, Decision on Jurisdiction (5 August 2008) at para 219, as quoted in Gabriel Bottini, *The Admissibility of Shareholder Claims: Standing, Causes of Action, and Damages* (PhD Thesis, University of Cambridge, 2017) at 148. It should be noted that Mr. Bottini's knowledge about investment arbitration cases involving Argentina is relevant, as he had served as National Director of International Affairs and Disputes of the Treasury-Attorney General's Office of Argentina.
[790] *EDF v Argentina*, Decision on Jurisdiction (5 August 2008) at para 220, as quoted in *EDF*, Award (11 June 2012) at para 1138.
[791] *EDF v Argentina*, Award (11 June 2012) at paras 1119, 1121, 1123.
[792] *Ibid* at paras 473, 1137–1139.
[793] *Ibid* at paras 476, 1124.
[794] *Ibid* at para 1125.

> single set of facts, as is the case with the facts of the Pre-Emergency Measures affecting the concession. While Argentina's national courts may have made decisions pursuant to national laws, the France BIT still furnishes Claimants the opportunity to seek redress before an international tribunal for violations of rights established under international law.[795]

The tribunal found that there was no shared identity between the proceedings with respect to the parties, causes of action, and applicable legal standards.[796]

III.214. The tribunal also rejected the respondent's double compensation argument.[797] It found that claims as to two categories of debts were dismissed in local proceedings (which rendered moot the risk of double compensation in relation to those claims), but that with respect to another category of claims, it remained a possibility for the local company to receive compensation through a settlement with the local government in Argentina.[798] With respect to that possibility, the tribunal held that, although awarding damages could cause an overlap in payment by the respondent, it would not constitute "double recovery" in favor of the claimants because the payments would be made to the local company in which the claimants no longer held shares.[799]

III.215. In fact, the tribunal's ruling means that: as long as the claimants did not receive more than once, it did not really matter if the respondent paid more than once. In Part II of the thesis, in the discussion on Double Recovery v. Double Payment, the author used this case to argue that the term "double recovery" does not fully represent the problem that is the subject of this thesis and thus suggested that the term "double compensation" be used instead.[800]

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[795] *Ibid* at paras 1128, 1131.
[796] *Ibid* at paras 1132–1135.
[797] *Ibid* at para 1098.
[798] *Ibid* at paras 1137, 1139–1140.
[799] *Ibid* at paras 1141–1142.
[800] See above, Part II, Chapter 1, Section "Double Payment v. Double Compensation".

e. *Bayindir v Pakistan*[801]

III.216. The claimant (a Turkish company active in the road construction industry) entered into a series of agreements with Pakistan's National Highway Authority (NHA - a public corporation controlled by the government of Pakistan) for the construction of a motorway in that country.[802] Disputes arose and the NHA served a notice of commercial arbitration to the claimant which, in return, informed the NHA that it had already initiated this ICSID arbitration based on the Turkey-Pakistan BIT.[803] The NHA then requested a court in Pakistan to appoint an arbitrator for the commercial arbitration.[804] However, further to a request by the Pakistani government, the NHA moved for the commercial arbitration to be stayed pending the decision of the ICSID tribunal on its jurisdiction.[805]

III.217. In the ICSID arbitration, the respondent argued that, given the close relationship between the treaty claims and the contract claims in this matter, even if the tribunal had jurisdiction, this proceeding should be stayed pending the result of the commercial arbitration.[806] The tribunal noted that, while the respondent's suggested approach was adopted in *SGC v Philippines*,[807] the same approach was rejected in *Impregilo v Pakistan (II)*.[808]

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[801] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, ICSID Case No ARB/03/29 ("*Bayindir v Pakistan*").
[802] *Ibid*, Decision on Jurisdiction (14 November 2005) at paras 2–3, 10–14.
[803] *Ibid* at para 33.
[804] *Ibid* at para 34.
[805] *Ibid*.
[806] *Ibid* at para 264.
[807] *Ibid* at para 265. See *SGS v Philippines*, Decision on Jurisdiction (29 January 2004) at paras 174–175 (holding that the Philippines' liability under the BIT depended on the "factual predicate of a determination" by the local court proceeding of the Philippines' liability under the contract in that matter).
[808] *Bayindir v Pakistan*, Decision on Jurisdiction (14 November 2005) at paras 267–268. See *Impregilo v Pakistan (II)*, Decision on Jurisdiction (22 April 2005) at paras 289–290 (rejecting the application to stay the arbitration proceeding on the grounds that the causes of action and the parties of the two proceedings were different).

III.218. The tribunal accepted that it had the authority to stay the proceeding pending the result of the commercial arbitration, but refrained from doing so because it had the jurisdiction to hear—if need be—the underlying contract claim as a preliminary question and that the treaty and commercial proceedings were distinct in nature and each should proceed on its own timeline.[809] According to the tribunal, its authority to stay the proceeding should be exercised only when there were "truly compelling reasons" to do so, which were not present here.[810] The tribunal stated that it was "sympathetic" towards the approach taken in *SGC v Philippines*, but that there were "several practical difficulties" with that approach, such as the difficulty "to decide, at this preliminary stage, which contractual issues (if any) will have to be addressed by the Tribunal on the merits."[811]

III.219. The tribunal noted that it was "aware that this system implies an intrinsic risk of contradictory decisions or double recovery", yet agreed with the tribunal in *Camuzzi v Argentina* (discussed above) which found that the issue of double compensation belonged to the merits phase and that there were "numerous mechanisms" to address the double compensation issue.[812] However, this case never reached the phase where the double compensation issue could be properly discussed because the tribunal rejected all of the claims in the merits phase.[813]

f. *Busta v Czech Republic*[814]

III.220. The claimants (two UK nationals) were engaged in the wholesale of vehicle parts and accessories in the Czech Republic through their local investment vehicle (called Sprint CR).[815]

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[809] *Bayindir v Pakistan*, Decision on Jurisdiction (14 November 2005) at paras 270–271.
[810] *Ibid* at para 271.
[811] *Ibid* at para 272.
[812] *Ibid* at para 270.
[813] *Bayindir v Pakistan*, Award (27 August 2009) at 140.
[814] *Busta v Czech Republic*, SCC Case No V 2015/014 ("*Busta v Czech Republic*").
[815] *Ibid*, Final Award (10 March 2017) at paras 2–3, 95, 181.

The state measures at issue concerned a series of events in the year 2000, following which Sprint CR initiated local court proceeding against the state in 2001 to claim for damages.[816] which was at the appeal stage in 2014 when the claimants brought this investment arbitration before the SCC based on the UK-Czech Republic BIT.[817]

III.221. The respondent invoked *lis pendens*[818] and also argued that not staying the arbitration in favor of the local court proceeding would result in an abuse of process by the claimants.[819] The claimants argued that there was no general principle of *lis pendens* in international law and denied any abuse of process.[820] The claimants also emphasized that the local court proceeding was initiated 16 years prior to the date of the decision here and had not yet yielded any results.[821]

III.222. In the Final Award, the tribunal held that for *lis pendens* to apply, four conditions had to be met: same parties, same relief, same legal grounds, and same legal order—which were not met here[822]—and thus, there was also no abuse of process.[823] The tribunal noted that the respondent's concern about double compensation should be dealt with at the merits phase and that, for double compensation to occur, there must be payments from the respondent state and not just a favorable award of damages for the claimants.[824]

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[816] *Ibid* at para 195.
[817] *Ibid* at paras 1, 8.
[818] *Ibid* at paras 194–200.
[819] *Ibid* at para 219.
[820] *Ibid* at paras 209, 221.
[821] *Ibid* at para 216.
[822] *Ibid* at paras 210–215.
[823] *Ibid* at paras 225–226.
[824] *Ibid* at para 217.

g. *Perenco v Ecuador*[825]

III.223. The claimant was Perenco (a Bahamas company that was ultimately owned by a French investor) who filed this ICSID arbitration based on the France-Ecuador BIT.[826] This case was the parallel investment arbitration to *Burlington v Ecuador*.[827] Perenco was Burlington's partner in two production sharing contracts for the exploration and exploitation of hydrocarbons in the Amazon region of Ecuador.[828] Once Perenco filed this ICSID proceeding, Ecuador (as in the Burlington case) brought environmental counterclaims. As will be discussed, the two parallel counterclaims by the state led to double compensation in favor of the state, as these counterclaims were filed on the basis of joint and several liability.[829] In both *Perenco* and *Burlington*, elaborate arguments relevant to the double compensation issue were advanced by the parties involved, which added to the complexity of the interplay between the two parallel arbitrations.[830]

III.224. In the *Perenco* case, it is understood from the tribunal's Interim Decision on Environmental Counterclaims (the "Interim Decision") that Perenco had not raised the risk of double compensation that was posed as a result of Ecuador's parallel counterclaims.[831] However, once the *Burlington* tribunal issued its final decision on the counterclaims whereby it awarded damages to Ecuador and left it to the *Perenco* tribunal—as the second deciding forum—to deal

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[825] *Perenco Ecuador Ltd v Ecuador*, ICSID Case No ARB/08/6 ("*Perenco v Ecuador*").
[826] *Ibid*, Decision on Jurisdiction (30 June 2011) at paras 1, 3–4.
[827] Discussed above, in the current Chapter, Subsection "Cases with Justifications of a Procedural Nature", particularly para III.59.
[828] *Perenco v Ecuador*, Decision on Jurisdiction (30 June 2011) at para 13.
[829] For a discussion on the exceptional scenario where the risk of double compensation arises from the respondent state's counterclaims in multiple proceedings, see above, Part II, Chapter 3, Subsection "The Counterclaim Exception".
[830] Given that the investor and the state each held two procedural positions in this case (claimant/counter-respondent and respondent/counter-claimant), the author uses their original names (i.e. Perenco and Ecuador) instead of their procedural positions to avoid any confusion.
[831] *Perenco v Ecuador*, Interim Decision on Environmental Counterclaims (11 August 2015).

with the risk of double compensation,[832] Perenco filed an application in this forum to have the counterclaims dismissed (the "First Dismissal Application").

III.225. Perenco argued that the same counterclaims on the basis of joint and several liability were brought before two forums, and since one of the forums (the *Burlington* tribunal) had issued its final decision on the counterclaims in that case, the counterclaims here became inadmissible pursuant to the *res judicata* principle.[833] Ecuador countered, arguing that: (i) if the investor "wished to prevent parallel litigation of the counterclaims, it should have filed a *lis pendens* application many years ago", noting that they had been arbitrating the counterclaims for more than five years at the time; and (ii) for *res judicata* to attach, the parties must be identical, whereas the investors in the two arbitrations were neither identical nor privy to each other.[834]

III.226. Agreeing with Ecuador about the timing of Perenco's application and also Perenco's failure to raise *lis pendens* earlier, the tribunal rejected Perenco's First Dismissal Application.[835] The tribunal reasoned that it had already made findings of fact and law on Ecuador's counterclaims in its Interim Decision, which implied the admissibility of those counterclaims, and thus the issue could not be reopened on the basis of the ruling in *Burlington* which itself was subject of an annulment proceeding.[836] The tribunal held that it would continue its work on the counterclaims, but noted "its duty to eliminate the risk of double recovery."[837]

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[832] See above, para III.61.
[833] *Perenco v Ecuador*, Decision on Claimant's Application for Dismissal of Respondent's Counterclaims (18 August 2017) at paras 1, 5–11.
[834] *Ibid* at paras 15–25, 18.
[835] *Ibid* at paras 44, 53.
[836] *Ibid* at paras 40–51.
[837] *Ibid* at para 52.

III.227. In the meantime, and before the tribunal here issued its final award, the parties in the *Burlington* case signed a settlement agreement whereby Ecuador received the damages awarded for the counterclaims[838] and the annulment proceeding in that case was discontinued.[839] Subsequently, in this case, Perenco applied again to have the counterclaims dismissed (the "Second Dismissal Application").[840]

III.228. This time, Perenco submitted that, with the full payment of the counterclaims in the *Burlington* case, these counterclaims should be dismissed on the basis of satisfaction of joint and several liability, *res judicata*, mootness, and abuse of process.[841] Most relevantly, it argued that: (i) the possibility that the tribunal "might ultimately determine higher or lower quantification of the counterclaims damages is irrelevant, because the obligation on which those damages were premised has been satisfied and extinguished";[842] (ii) the annulment proceeding in *Burlington* (which this tribunal had initially found to have suspended the *res judicata* effect of the *Burlington* award)[843] was eventually discontinued and thus the *res judicata* effect of the *Burlington* award should be in effect;[844] (iii) by failing to raise *lis pendens*, the claimant had not waived *res judicata*;[845] and (iv) dismissing the counterclaims on the basis of *res judicata* would not mean revisiting the tribunal's Interim Decision, but rather that the tribunal would decide that the *Burlington* decision had "preclusive effect as of the time it became *res judicata*".[846]

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[838] *Perenco v Ecuador*, Award (27 September 2019) at para 445.
[839] See *supra*, note 406.
[840] *Perenco v Ecuador*, Award (27 September 2019) at para 29.
[841] *Ibid* at paras 447–460.
[842] *Ibid* at para 449.
[843] See *supra*, note 406.
[844] *Perenco v Ecuador*, Award (27 September 2019) at paras 452, 455.
[845] *Ibid* at para 455.
[846] *Ibid* at para 457.

III.229. Ecuador then presented arguments that were mostly similar to the ones it had submitted in relation to the First Dismissal Application.[847] However, it advanced two new arguments: (i) that *res judicata* should not apply because there were "material differences" between the "subject matter" of the counterclaims here and the ones in *Burlington* on the ground that the witnesses and evidentiary records presented in the two proceedings were not the same;[848] and (ii) the tribunal should not even offset the amount awarded by the *Burlington* tribunal against any amount to be awarded here, because the harm considered in the two proceedings was not the same, as the two tribunals did not "assess the object of the underlying obligation in an identical manner".[849]

III.230. The tribunal, by a majority, rejected Perenco's Second Dismissal Application.[850] The tribunal first recalled its prior finding that its Interim Decision was *res judicata*.[851] It then reasoned that it was not convinced that, once it had established its jurisdiction and course of action and made certain findings of fact and law in the Interim Decision, it was precluded from continuing its mandate just because later in time another tribunal (which did not take into account this tribunal's earlier Interim Decision) made a decision on a similar dispute.[852] According to the tribunal:

> [F]rom the perspective of a de-centralised international legal regime in which investment treaties confer jurisdiction over *ad hoc* tribunals which in turn have jurisdiction only over the parties to the disputes brought before them, and where it is accepted that different tribunals considering similar matters can arrive at different conclusions, in the Tribunal's view, by the time of Perenco's Second Dismissal Application it was far too late to turn off the process which the Tribunal had ordered to be conducted and which was nearing its completion.[853]

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[847] See e.g. *ibid* at paras 466–467, 470.
[848] *Ibid* at para 471.
[849] *Ibid* at paras 480–481.
[850] *Ibid* at paras 486, 513. No dissenting opinion was filed.
[851] *Ibid* at para 488.
[852] *Ibid* at paras 493–494.
[853] *Ibid* at para 496.

III.231. The tribunal also agreed with Ecuador that the *Burlington* tribunal had failed to accurately estimate the extent of contamination and, as such, Ecuador remained undercompensated, whereas this tribunal's independent expert provided a more accurate report on the harm inflicted.[854] Finally, the tribunal determined the damages for the counterclaims (which was more than twice the amount awarded in *Burlington*) and then, according to the tribunal, to "avoid" double compensation, it deducted the amount already paid in *Burlington* from the total amount awarded here.[855]

III.232. By agreeing with Ecuador that the *Burlington* tribunal failed to accurately estimate the extent of environmental harm, the tribunal here effectively acted as an appellate body and redecided the counterclaims (which were based on joint and several liability) in a manner that it thought to be superior, and awarded further damages to address (what it assessed to be) the failings of the *Burlington* tribunal. Therefore, although the tribunal deducted the *Burlington* damages, it did not avoid double compensation; it only reduced the amount of it. The reason for this is that the first judgment (the *Burlington* decision) was the final determination of the compensation due to Ecuador, by which the cause of action (joint and several liability) extinguished and thus awarding any additional compensation through a second judgment (here, the *Perenco* decision) would constitute double compensation.

III.233. In addition, the fact that the *Burlington* tribunal had not deferred to this tribunal's Interim Decision in the first place[856] seemed to have left this tribunal unwilling to grant *res judicata* effect to the *Burlington* decision on the counterclaims, which eventually came at the cost of double

[854] *Ibid* at paras 508, 512, 898.
[855] *Ibid* at paras 898–899.
[856] See above, para III.61.

compensation in favor of the state. Although this tribunal's frustration is understandable, two points must be taken into account: first, the counterclaims were first filed with the *Burlington* tribunal and then here;[857] and second, there seems to be more important concerns (such as the integrity and the efficiency of the ISDS system) that should be prioritized over what could be characterized as simple miscommunication between two tribunals. This last point will be elaborated on in Part IV.

III.234. Furthermore, one cannot help but notice that the state (Ecuador) did not honor the undertaking it gave in *Burlington*: that, in order to avoid double compensation, it would collect damages only based on the more favorable decision.[858] Ecuador did not wait to see which decision would be more favorable. It received the *Burlington* damages[859] and then, in *Perenco*, went on to argue that the *Burlington* damages should not even be deducted from the *Perenco* damages.[860] This raises the question of whether such undertakings by a party who benefits from double compensation are really enforceable in practice.

III.235. Overall, careful analysis of *Burlington* and *Perenco* shows that leaving the double compensation issue to the second deciding forum is not an effective solution. It also shows that, when the risk of double compensation is not addressed early in the proceeding, the task of preventing double compensation could become more difficult and complicated as the two proceedings develop. When the *Burlington* tribunal awarded damages on the counterclaims (i.e.

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[857] Compare the dates noted in *Burlington v Ecuador*, Decision on Ecuador's Counterclaims (7 February 2017) at para 6, with *Perenco v Ecuador*, Interim Decision on the Environmental Counterclaim (11 August 2015) at para 6.
[858] See above, para III.60.
[859] See above, para III.227.
[860] See above, para III.229.

well after the early stages of the proceeding), the *Perenco* tribunal was faced with a difficult choice:

- accepting the *res judicata* effect of the *Burlington* decision, which would go against the *res judicata* effect of its own Interim Decision; or
- insisting on the *res judicata* effect of its Interim Decision, which meant allowing the same counterclaims being pursued twice.

The tribunal took the second path, which led to double compensation. Had the parties and the tribunals in *Burlington* and *Perenco* addressed the double compensation issue early in the proceedings, the *Perenco* tribunal would not have been in the difficult position it was in at the end.[861]

h. *Standard Chartered Bank (Hong Kong) v Tanzania*[862]

III.236. The claimant was a Hong Kong bank that brought this arbitration, as it succeeded a consortium of foreign lenders to a Tanzanian joint venture company called IPTL.[863] Mechmar (a Malaysian company) was the majority shareholder in IPTL, and VIP (a Tanzanian company) was the minority shareholder.[864] Later, VIP sold its shares to a company called PAP.[865] IPTL held a license to build and operate a power plant[866] and entered into a number of agreements, including:

[861] For a discussion on when double compensation should be addressed, see above, Part II, Chapter 1, Section "Actual Double Compensation v. The Risk of Double Compensation".
[862] *Standard Chartered Bank (Hong Kong) Limited v Tanzania*, ICSID Case No ARB/15/41.
[863] *Ibid*, Award (11 October 2019) at paras 2, 7, 16–18.
[864] *Ibid* at paras 6–7.
[865] *Ibid* at para 37.
[866] *Ibid*.

- a Power Purchase Agreement (PPA) with the Tanzania Electric Supply Company (TANESCO) for the sale and delivery of electricity by the former to the latter;[867] and
- an Implementation Agreement with the state, whereby the state provided certain assurances about IPTL and also undertook to pay IPTL any sums owed by TANESCO under the PPA.[868] The Implementation Agreement was the instrument based on which this ICSID proceeding was filed.[869]

III.237. The parties were involved in several proceedings,[870] two of which are relevant to the double compensation issue. First, another ICSID arbitration (called "PPA Arbitration") was initiated by the claimant here—in its capacity as the assignee of the PPA—against TANESCO, to recover sums owned under the PPA.[871] The tribunal in that case found for the claimant and awarded damages.[872] Second, an English court proceeding (called "Flaux J's Judgment") was brought by Standard Chartered Bank Hong Kong (the claimant here) as well as by Standard Charter Bank Malaysia against IPTL, VIP, and PAP.[873] The English court found for the claimants and ordered IPTL to pay a certain amount to Standard Chartered Bank Hong Kong.[874]

III.238. The respondent state raised the risk of double compensation and argued that the tribunal (as the second deciding forum) should set off the amounts that were awarded in the two above-mentioned proceedings from any amount that it would award here.[875] The tribunal rejected the respondent's request. It reasoned that the respondent in this arbitration is not the same as any of

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[867] *Ibid* at para 9.
[868] *Ibid* at paras 10–11.
[869] *Ibid* at para 1.
[870] *Ibid* at paras 10–48.
[871] *Ibid* at paras 27–28.
[872] *Ibid*.
[873] *Ibid* at para 41.
[874] *Ibid* at paras 42, 89.
[875] *Ibid* at para 526.

the respondents in the other two proceedings.[876] Additionally, according to the tribunal, given that damages awarded in the other two proceedings were not yet paid, "there is no basis to suggest that the Claimant has obtained double recovery or has such intention to do so".[877] Accordingly, the tribunal left the double compensation issue to be dealt with by the enforcement courts where the state "could easily bring this to the attention of the relevant forum to resist any enforcement action which could lead to double recovery".[878] The tribunal then stated that "the Claimant shall not seek recovery beyond the amount adjudged in this Award".[879]

III.239. There are two notable points about the tribunal's reasoning. First, although the tribunal was right about the lack of identity between the respondent here and the respondent in the Flaux J's Judgment, the tribunal's determination is questionable with respect to the respondent in the first ICSID proceeding (i.e. the PPA Arbitration). This is so because the actions of TANSECO (the respondent in the PPA Arbitration) were likely to be attributable to the state as per the text of the Implementation Agreement (the very instrument based on which this ICSID arbitration was brought and under which the government had guaranteed to pay any amounts that TANESCO owed to IPTL under the PPA).[880]

III.240. Second, the two parts of the tribunal's reasoning contradict one another. On the one hand, the tribunal reasoned that there is no risk of double compensation due to a lack of identity between the respondents. Yet, on the other hand, it reasoned that the issue of double compensation was of no concern because there was not yet any payment, and thus left it to the enforcement courts

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[876] *Ibid*.
[877] *Ibid*.
[878] *Ibid*.
[879] *Ibid*.
[880] See *ibid* at paras 255, 442.

to deal with the double compensation issue. Either there was no risk of double compensation, in which case it would not matter that there was no payment yet; or there was a risk of double compensation, in which case the tribunal's only solution was to leave it to the enforcement courts.

III.241. Further, in this matter, like *Perenco v Ecuador* (discussed above), the tribunal was the "second deciding forum", and yet it did not effectively address the double compensation issue. However, unlike *Perenco* (where the double compensation issue was complicated, given the interplay between the *res judicata* effect of different decisions), here the tribunal simply refused to engage with the issue and passed it on to the enforcement courts.

i. *Gosling v Mauritius*[881]

III.242. The claimants included one UK national (Mr. Gosling), one UK company (called PPDM) and three locally incorporated Mauritius companies (called TGI, PPD, and PPH).[882] Mr. Gosling was a majority shareholder in TGI which owned PPD and PPH.[883] Disputes arose in relation to the claimants' investment in two real estate and tourism projects in Mauritius,[884] following which they brought this ICSID arbitration based on the UK-Mauritius BIT.[885] There were parallel local court proceedings by two local companies that were not parties to this proceeding, but one of them (called LMB) was controlled by the claimants.[886]

III.243. The respondent objected to the admissibility of claims based on *lis pendens* and the risk of double compensation.[887] It argued that the contemporary approach (recommended by the

[881] *Gosling and others v Mauritius*, ICSID Case No ARB/16/32, Award (18 February 2020) ("*Gosling v Mauritius*").
[882] *Ibid*, Award (18 February 2020) at para 2.
[883] *Ibid* at para 89(b).
[884] *Ibid* at paras 5, 41.
[885] *Ibid* at para 1.
[886] *Ibid* at paras 164, 68.
[887] *Ibid* at paras 162, 164.

International Law Association ["ILA"])[888] would warrant a degree of flexibility in the application of the triple identity test.[889] The respondent submitted that the test was met because the parties in the parallel proceedings were substantially the same, and so were the challenged state measures.[890] Regarding the risk of double compensation, the respondent pointed out the same loss was claimed for one of the projects in the parallel proceeding.[891]

III.244. The claimant disputed the admissibility objection on the bases that the ILA recommendations were not relevant here and because the triple identity test was not met.[892] It also argued that "[b]oth courts and tribunals have adequate tools to address any risk of inconsistent judgments or double recovery", and given that the local proceedings had taken nearly 10 years by then, any judgment in those proceedings was likely to be issued after the decision here.[893]

III.245. The tribunal rejected the admissibility objections concerning *lis pendens* and double compensation. It reasoned that the parties and the causes of action were not the same in the parallel proceedings and, thus, the overlap in the claimed compensation would not be a sufficient factor alone.[894] The tribunal saw no reason to part with the traditional triple identity test, as there was an "abundance of jurisprudence" on it and because the respondent did not rely on any investment treaty case applying the ILA recommendations.[895] It also observed that there was no FITR provision in the BIT.[896] However, given the tribunal's approach to the triple identity test, even if

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[888] See ILA Committee on International Commercial Arbitration, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration* (Toronto Conference, 2006).
[889] *Gosling v Mauritius*, Award (18 February 2020) at paras 102, 162.
[890] *Ibid* at para 102.
[891] *Ibid* at para 164.
[892] *Ibid* at para 115.
[893] *Ibid*.
[894] *Ibid* at para 164.
[895] *Ibid* at para 163.
[896] *Ibid*.

the BIT had such a provision, it is not clear whether it would have made any difference. Regarding the risk of double compensation, the tribunal ruled that it could be considered in the quantum phase.[897] In the end, the tribunal (by a majority) dismissed all the claims on the merits.[898]

B. Cases Where the Risk was Effectively Addressed

III.246. Only a limited number of ISDS tribunals (thirteen to be exact) have thus far taken the risk of double compensation seriously and addressed it effectively.[899] Those tribunals did not set out a comprehensive solution, yet some of them fashioned innovative ways to prevent double compensation. This Section discusses those cases.

i. *Waste Management v Mexico (I)*[900]

III.247. This case was the first ISDS case where the risk of double compensation was raised[901] and also the first case where this risk was addressed effectively. The claimant was a US company that brought this ICSID arbitration based on NAFTA, on its own behalf (as an investor) and on behalf of its Mexican subsidiary (as the "enterprise").[902] Given that NAFTA article 1121(2)(b)[903] required the investor and the enterprise to waive the right to initiate or continue any proceedings with respect to the measures that were alleged to be in breach of NAFTA, the claimant submitted

[897] *Ibid* at para 164.
[898] *Ibid* at para 289(3). It should be noted that one of the arbitrators issued a dissenting opinion. However, his dissent concerned only the liability part of the Award. As such, the tribunal's decision remained unanimous with respect to jurisdiction and admissibility that was discussed above. See Dissenting Opinion of Arbitrator Alexandrov (14 February 2020) at para 1.
[899] *Waste Management v Mexico (I)*; *CMS v Argentina*; *PSEG v Turkey*; *Occidental v Ecuador (I)*; *Kardassopoulos and Fuchs v Georgia*; *Goetz v Burundi (II)*; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*; *Micula v Romania (I)*; *Ampal v Egypt*; *Renco v Peru*; *Orascom v Algeria*; *Manchester Securities v Poland*; *GÜRİŞ and Others v Syria*.
[900] *Waste Management, Inc v Mexico (I)*, ICSID Case No ARB(AF)/98/2 ("*Waste Management v Mexico (I)*").
[901] For a discussion on the historical background, see above, Part I, para I.6.
[902] *Waste Management v Mexico (I)*, Arbitral Award (2 June 2000) at § 1.
[903] Now art 14.D.5.1(e) of CUSMA, with respect to US-Mexico relations only.

a waiver.[904] However, its waiver did not include the proceedings that concerned allegations as to the respondent's violation of laws other than NAFTA.[905]

III.248. The respondent objected to the tribunal's jurisdiction on the grounds that the claimant's waiver did not meet the requirements set out in article 1121 of NAFTA and that, in fact, the claimant's enterprise had already initiated two local court proceedings and a local arbitration against the state-owned entities for the same measures that were subject of this NAFTA arbitration.[906] The respondent argued that the claimant's pursuit of the same dispute in both domestic and international fora caused a risk of double compensation.[907] The claimant, on the other hand, argued that NAFTA article 1121 required the claimants only to abstain from initiating or continuing proceedings that would invoke NAFTA, whereas the enterprise had not relied on any NAFTA provisions in those local proceedings.[908]

III.249. The tribunal, by a majority, held that it did not have jurisdiction because the claimant's waiver did not meet the requirements laid down by article 1121(2)(b) of NAFTA, which was a condition precedent to the jurisdiction of a NAFTA tribunal.[909] It reasoned that, for the waiver to be valid, it had to meet both the "formal" and "material" requirements;[910] the latter concerned the issuing party's intent, i.e. that the issuing party's conduct must be in line with the waiver it issued.[911] The majority found that, while the claimant's waiver met the "formal" requirement,[912]

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[904] *Waste Management v Mexico (I)*, Arbitral Award (2 June 2000) at § 5.
[905] *Ibid*.
[906] *Ibid* at §§ 6, 1.
[907] *Ibid* at § 6. It should be noted that, by the time the Award was issued, the two local court proceedings were concluded and became final and binding (one was decided in favor of the state-owned entity and the other was dismissed), and the local arbitration was abandoned. *Ibid* at § 25.
[908] *Ibid* at § 27.
[909] *Ibid* at §§ 14, 31.
[910] *Ibid* at § 20.
[911] *Ibid* at § 24.
[912] *Ibid* at § 23.

it did not meet the "material" requirement[913] because:

> [W]hen both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid. … [T]his Tribunal understands that the domestic proceedings initiated by [the enterprise] fall within the prohibition of NAFTA Article 1121 in that they refer to measures that are also invoked in the present arbitral proceedings as breaches of NAFTA provisions.[914]

III.250. However, the dissenting arbitrator disagreed with the result and with parts of the reasoning.[915] In his opinion, the claimant's understanding of article 1121 of NAFTA was not incorrect,[916] nor did its conduct (in maintaining the local proceedings) render the waiver ineffective.[917] The dissenting arbitrator reasoned that: (i) the state's obligations under NAFTA were different from the state's obligations under its own domestic law;[918] (ii) although the term "measure" was generally defined as a state act on an official level, the "measure" discussed in article 1121[919] was a measure that was actionable under NAFTA and did not include measures that were not actionable under NAFTA;[920] (iii) the local proceedings and the NAFTA proceeding here were not identical, as the relief sought in those proceedings was different: the amount sought in the local proceedings was more than 8 million dollars less.[921]

III.251. The government of Canada presented a written submission that "[t]he same measure ... cannot be the subject of both a Chapter 11 arbitration and domestic court proceedings. The investor

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[913] *Ibid* at § 27.
[914] *Ibid* [emphasis added].
[915] *Waste Management v Mexico (I)*, Dissenting Opinion (8 May 2000) at 1.
[916] *Ibid* at para 7.
[917] *Ibid* at para 27.
[918] *Ibid* at para 8.
[919] Article 1121 reads: "any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117".
[920] *Waste Management v Mexico (I)*, Dissenting Opinion (8 May 2000) at paras 12–13.
[921] *Ibid* at para 31.

has a clear choice and can choose one or the other—but not both".[922] The dissenting arbitrator was of the opinion that his position was not inconsistent with the Canadian position because, in his view, measures that were actionable under NAFTA (for instance a claim of expropriation) may not be submitted to both a NAFTA tribunal and a domestic court.[923]

III.252. The dissenting arbitrator further opined that there would be "no harm" in allowing the local subsidiary to pursue a claim in local proceedings for a measure that was a constituting element of a NAFTA claim for the investor.[924] His reasoning was that, if the local subsidiary was successful in receiving damages, the claimant's NAFTA claim "would be reduced *pro tanto* by the amount of the recovery by [the enterprise]" and the state "would have been relieved of State responsibility under the NAFTA claim to the extent of those local damages already recovered."[925] Further, if the local subsidiary was unsuccessful in the local proceedings—assuming there was no denial of justice—"the NAFTA claimant's basis of claim against the contesting government would again be reduced by application of the *res judicata* of the unfavorable local result".[926]

III.253. However, it is not clear how the dissenting arbitrator reached the conclusion that *res judicata* could apply, given that, in an earlier part of his Dissenting Opinion, he expressed the view that the identity test was not met between the NAFTA proceeding and the local proceedings.[927]

ii. *CMS v Argentina*[928]

III.254. The claimant was a US company that had purchased from the government of Argentina

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[922] *Ibid* at para 40.
[923] *Ibid* at para 42.
[924] *Ibid* at para 51.
[925] *Ibid* at para 50.
[926] *Ibid* at para 51 [emphasis added].
[927] See above, para III.250.
[928] *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8 ("*CMS v Argentina*").

approximately 30% of the shares of a company (called TGN) which held a license for transmission of gas in Argentina.[929] The claimant brought this ICSID arbitration based on the US-Argentina BIT.[930] The respondent objected to the tribunal's jurisdiction on the grounds that, *inter alia*: (i) the BIT's FITR provision was triggered, given that local court proceedings were already pending in Argentina; (ii) there were ongoing negotiations between the respondent and TGN, which could lead to a result that was different from the tribunal's decision; and (iii) the tribunal's finding of jurisdiction could lead to multiple proceedings initiated by other investors under other IIAs.[931]

III.255. The claimant submitted that the FITR clause was not triggered because: first, the parties and the subject matters of the proceedings were not the same; second, it was not TGN that initiated the local proceeding but rather the Argentine Ombudsman; and third, TGN could only pursue its contractual claims through renegotiation.[932] The claimant also argued that the pending renegotiations concerned TGN's losses, while this arbitration concerned CMS' losses.[933] The claimant offered to sell its shares in TGN back to the respondent in order to prevent the risk of double compensation, but at the same time argued that the matter was for the merits phase and not relevant to jurisdiction.[934]

III.256. In the Decision of the Tribunal on Objections to Jurisdiction, the tribunal rejected the respondent's objections.[935] With respect to the FITR objection, the tribunal held that the parties involved in the local court proceedings were different from those involved here and that the local

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[929] *Ibid*, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) at paras 1, 19.
[930] *Ibid* at 1.
[931] *Ibid* at paras 77, 83.
[932] *Ibid* at paras 78–79.
[933] *Ibid* at para 85.
[934] *Ibid* at para 96.
[935] *Ibid* at para 131.

proceedings were based on contractual claims, whereas the claims here were treaty claims.[936] The tribunal also held that it was "not possible to foreclose rights that different investors might have under different arrangements" and that it was "not for the Tribunal to rule on the perspectives of the negotiation process or on what TGN might do in respect of its shareholders, as these are matters between Argentina and TGN or between TGN and its shareholders."[937]

III.257. In the Award, the tribunal noted that:

> [S]ince the Claimant has offered to transfer its shares in TGN to the Respondent, upon payment of compensation, the Respondent would stand to benefit after the transfer of shares if, as argued by the Respondent, a favorable renegotiation were eventually to be concluded.[938] …
> Asking for the value of the shares remitted to the Government of Argentina is a legitimate claim, so long as CMS is ready to transfer to the Respondent the title to those shares, which it has indicated willingness to do.[939]

The tribunal identified the value of the claimant's shares in TGN and held that the claimant must transfer the ownership of the shares if the respondent paid the amount, and also gave the respondent a one-year option to purchase the shares.[940] Following the respondent's application for annulment of the Award, the annulment committee annulled the part that concerned the umbrella clause but left the damages part of the award (including the part on double compensation) intact.[941] It has been reported that Argentina did not ultimately purchase the shares, and CMS sold them to a third party.[942]

III.258. A unique feature of the *CMS* decision is the tribunal's ruling that the respondent could

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[936] *Ibid* at para 80.
[937] *Ibid* at para 86.
[938] *CMS v Argentina*, Award (12 May 2005) at para 429.
[939] *Ibid* at para 465.
[940] *Ibid* at paras 468–469.
[941] *CMS v Argentina*, Decision of the ad hoc Committee on the Application for Annulment of Argentina (25 September 2007) at paras 159–160.
[942] David Gaukrodger, *supra* note 33, at fn 75.

purchase the claimant's shares. This was essentially intended to prevent any double compensation, as mentioned in the decision on jurisdiction.[943] It should be noted that, in the case at bar, the shares were originally owned by the government of Argentina, and the claimant bought them from the government.[944] As such, a ruling as to the respondent state buying back the shares was not out of context. However, there are doubts as to the feasibility of such a solution. The share-purchase solution will be discussed in further detail in Chapter 6.[945]

iii. *PSEG v Turkey*[946]

III.259. This ICSID arbitration was based on the US-Turkey BIT and concerned an investment in the Turkish electric power industry.[947] There were initially three claimants: PSEG (a US company), North American Coal (another US company), and Konya (an investment vehicle in Turkey, wholly owned by the first claimant).[948] However, in the Decision on Jurisdiction, the tribunal held that it only had jurisdiction over PSEG and Konya.[949]

III.260. There is not much information—in the Decision on jurisdiction or the Award—on the parties' arguments about the risk of double compensation. However, in the Award, the tribunal granted compensation only to PSEG and refused to award compensation to Konya, because it was wholly owned by PSGE.[950] While the tribunal did not expressly refer to the double compensation

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[943] See above, para III.255.
[944] See above, para III.254.
[945] See below, Chapter 6, Section "Purchase of the Claimant Investor's Shares by the Respondent State".
[946] *PSEG Global Inc and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v Turkey* (formerly *PSEG Global Inc, The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v Turkey*) ICSID Case No ARB/02/5 ("*PSEG v Turkey*").
[947] *Ibid*, Decision on Jurisdiction (4 June 2004) at paras 2, 18–19, 49.
[948] *Ibid* at para 1.
[949] *Ibid* at para 194.
[950] *PSEG v Turkey*, Award (19 January 2007) at para 340.

issue, it is understood from the way the tribunal awarded damages that its goal (or one of its goals) was to avoid double compensation.

iii. *Occidental v Ecuador (I)*[951]

III.261. The claimant was a US company (called OEPC) that had entered into a participation contract with an Ecuadorian state-owned company to explore and produce oil in the country.[952] OEPC would regularly receive VAT reimbursements from the relevant authority in Ecuador for the purchases it had made but, at some point in time, that authority stopped issuing the reimbursements.[953] OEPC then filed four local court proceedings and brought this investment arbitration based on the US-Ecuador BIT before the London Court of International Arbitration ("LCIA").[954]

III.262. The respondent objected to the tribunal's jurisdiction based on the FITR clause in the BIT.[955] The tribunal rejected the objection[956] on the grounds that contract claims are different from treaty claims and hence the cause of action prong of the triple identity test was not met.[957] In addition, the tribunal found that the claimant "did not have real choice" when it pursued local court proceedings.[958] The tribunal reasoned that the FITR mechanism "by its very definition assumes that the investor has made a choice between alternative avenues", which in turn "requires that the choice be made entirely free and not under any form of duress" whereas, here, "the Ecuadorian

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[951] *Occidental Exploration and Production Company v Ecuador (I)*, LCIA Case No UN3467 ("*Occidental v Ecuador (I)*").
[952] *Ibid*, Final Award (1 July 2004) at para 1.
[953] *Ibid* at paras 2–3.
[954] *Ibid* at paras 4–6.
[955] *Ibid* at paras 38–39.
[956] *Ibid* at para 63.
[957] *Ibid* at paras 51–53, 55, 57–58.
[958] *Ibid* at para 61.

Tax Law requires the taxpayer to apply to the courts within the brief period of twenty days following the issuance of any resolution that might affect it."[959]

III.263. Although the tribunal held that the FITR clause was not applicable to the case at bar, it acknowledged that the local proceedings (where the claimant was seeking VAT refunds) entailed the risk of double compensation for the claimant.[960] Accordingly, the tribunal held that the claimant "shall not benefit from any double recovery" and ordered the claimant to withdraw from the local proceedings.[961] The tribunal included the order in the operative part of the award as well.[962]

iv. *Kardassopoulos and Fuchs v Georgia*[963]

III.264. Each of the claimants, Messrs. Kardassopoulos (a Greek national) and Fuchs (an Israeli national), held an indirect 25% interest in a joint-venture investment vehicle (called GTI) engaged in the development of an oil pipeline from the Caspian Sea to the Black Sea.[964] Mr. Kardassopoulos brought his claims based on the ECT and the Greece-Georgia BIT, while Mr. Fuchs brought his claims based on the Israel-Georgia BIT.[965] The issue of double compensation was raised only with respect to claims by Mr. Kardassopoulos, as he had relied on two legal bases for his claims.[966]

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[959] *Ibid* at para 60.
[960] *Ibid* at para 209.
[961] *Ibid*.
[962] *Ibid* at para 217(10).
[963] *Kardassopoulos and Fuchs v Georgia*, ICSID Case Nos ARB/07/15 and ARB/05/18 ("*Kardassopoulos and Fuchs v Georgia*").
[964] *Ibid*, Award (3 March 2010) at paras 2, 72–73, 77.
[965] *Ibid* at para 1.
[966] *Ibid* at para 452.

III.265. The tribunal found for Mr. Kardassopoulos in relation to his expropriation claim under the ECT and, accordingly, Mr. Kardassopoulos acknowledged that it was unnecessary for the tribunal to also find for his FET claim under the Greece-Georgia BIT, as this would amount to double compensation.[967] As was explained in the previous Part, for the risk of double compensation to arise, there is no need to have multiple proceedings: having either multiple claimants or multiple legal bases is sufficient.[968] Here, there was only one proceeding (this arbitration) and one relevant claimant (Mr. Kardassopoulos), but there was more than one legal basis (the ECT and the BIT) which was sufficient for the risk to arise. In order to avoid double compensation, the tribunal refused to rely on both legal bases.[969]

v. *Goetz v Burundi (II)*[970]

III.266. The claimants included six natural persons (Belgian nationals who were shareholders of four local companies in Burundi) and AFFIMET (one of those four local companies).[971] The claimants brought this ICSID arbitration on three legal bases: the BLEU-Burundi BIT and two agreements between the parties that were incorporated in an award issued in the first ICSID arbitration between the parties more than a decade prior to this arbitration:[972] the *Memorandum of Understanding on a Friendly Settlement of the Dispute of 1998*, and the *Special Agreement on the Functioning of AFFIMET SA of 1998*.[973]

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[967] *Ibid* at paras 241–242, 452.
[968] See above, Part II, Chapter 3, Subsection "The First Requirement".
[969] *Ibid* at para 452.
[970] *Goetz and Others v Burundi (II)*, ICSID Case No ARB/01/2 ("*Goetz v Burundi (II)*").
[971] *Ibid*, Award (21 June 2012) at paras 1–2.
[972] See *Goetz and others v Burundi (I)*, ICSID case ARB 95/3, Award (10 February 1999), (2000)15:2 ICSID Rev 457 at 518.
[973] *Goetz v Burundi (II)*, Award (21 June 2012) at paras 1, 171.

III.267. The claimants argued that the state's measures harmed the investment vehicles and thus the shareholders, and sought compensation for the harm inflicted on them based on all of the three legal instruments.[974] The tribunal found that the shareholders were entitled to compensation for the state's conduct, but that they could not receive compensation based on more than one legal basis, as it would lead to double compensation:

> Le Tribunal précise que la réparation de ce préjudice pour violation du TPI et de la Convention spéciale ne pourra bien entendu donner lieu à une double indemnisation. Le Tribunal note du reste que les dommages et intérêts réclamés pour les consorts Goetz pour méconnaissance de la Convention spéciale le sont à titre subsidiaire, dans l'hypothèse où la somme demandée ne serait pas octroyée au titre des violations du TPI.[975]

Similar to the *Kardassopoulos* case,[976] the tribunal avoided double compensation by refusing to award damages based on more than one legal basis.

vi. *Gemplus v Mexico* in conjunction with *Talsud v Mexico*[977]

III.268. The claimants consisted of two French companies (Gemplus and SLP), their investment vehicle in Mexico (Gemplus Industrial - initially owned by Gemplus and then by SLP), and an Argentine company (Talsud).[978] First Gemplus and then SLP (but both through Gemplus Industrial), together with Talsud, owned shares in a Mexican company (the Concessionaire) that held a concession for the operation of a national vehicle registry in Mexico.[979] Gemplus, SLP, and Gemplus Industrial filed an ICSID arbitration under the France-Mexico BIT, while Talsud filed a

[974] *Ibid* at paras 167–168, 171.
[975] *Ibid* at para 211.
[976] See above, para III.265.
[977] *Gemplus SA, SLP SA, and Gemplus Industrial SA de CV v Mexico*, ICSID Cases No ARB(AF)/04/3 in conjunction with *Talsud SA v Mexico*, ICSID Case No ARB(AF)/04/4.
[978] *Ibid*, Award (16 June 2010) at paras 1.1–1.5, 5.12, 5.28, 5.30.
[979] *Ibid* at paras 1.10, 4.15, 4.33, 4.38, 5.12, 5.30.

separate ICSID arbitration under the Argentina-Mexico BIT.[980] The two cases were decided in conjunction with each other by the same tribunal.[981]

III.269. The double compensation issue was raised on two occasions. The first concerned past payments to the shareholders, which were paid by the Concessionaire pursuant to an authorization by the state. In fact, after the state's requisition of the Concessionaire's operations, but before the state's termination of the concession agreement, the state authorized the Concessionaire to: (i) distribute dividends to its shareholders; (ii) return their capital; and (iii) reimburse them for the start-up phase expenses.[982] Thus, the tribunal had to decide whether the amounts the shareholders had already received should be deducted from the damages to be awarded here.[983] The second double compensation issue was raised in relation to the possibility of the Concessionaire receiving compensation from local courts, given that it had already challenged the legality of the state measures before the Federal Court for Tax and Administrative Justice (TJFA).[984]

III.270. The claimants argued that their treaty claims were "jurisdictionally distinct and wholly separate" from any claims that the Concessionaire might bring before local courts;[985] and that the risk of double compensation was unlikely, given that local courts would consider any award when granting damages.[986] Nevertheless, the claimants appreciated "the concern that, in practical terms, they may be seen as recovering compensation for the same acts through separate sets of proceedings",[987] and thus offered that they could "enter into a legally binding assignment to

[980] *Ibid* at para 1.9.
[981] *Ibid* at paras 1.15–1.16.
[982] *Ibid* at paras 4.177, 4.184, 1.13¸ 2.54, 14.14–14.17.
[983] *Ibid* at paras 14.1, 14.18.
[984] *Ibid* at paras 4.190–4.201, 12.60.
[985] *Ibid* at para 12.60.18.
[986] *Ibid* at para 12.60.24.
[987] *Ibid* at para 12.60.18.

Mexico of any and all pecuniary benefits, up to the value of any award in damages made in this arbitration, which they may derive as shareholders in the Concessionaire" in the local court proceeding.[988]

III.271. To avoid the first risk of double compensation, the tribunal took into account the payments that were already made to the shareholders as follows. With respect to the claimants' capital contribution, the entire amount was deducted from the damages.[989] As to the dividends, half of them concerned the period preceding the valuation date, and the other half concerned the post-valuation date: as such, the tribunal deducted the latter from the damages.[990] With regard to past expenses, the tribunal did not deduct these from the damages, because they were incurred before the valuation date and were paid to the claimants as creditors of the Concessionaire rather than as its shareholders.[991] As such, the tribunal effectively handled the first risk of double compensation.

III.272. With respect to the second double compensation issue (the one associated with the administrative proceedings), the tribunal impliedly agreed with the claimants' position that there was no risk of double compensation, particularly considering the claimants' offer to the respondent.[992] Given that the local proceeding to obtain damages had not yet commenced at the time (i.e. there was only a pending administrative proceeding and not yet a proceeding to obtain damages), the tribunal's finding as to the lack of a risk of double compensation was correct. However, there was a possibility of the risk of double compensation, given that the Concessionaire

[988] *Ibid* at para 12.60.25.
[989] *Ibid* at paras 14.17¸ 14.19.
[990] *Ibid* at paras 14.16¸ 14.22–14.23.
[991] *Ibid* at paras 14.15, 14.24.
[992] *Ibid* at paras 12.60–12.61.

could initiate a local proceeding to recover damages upon obtaining a favorable result in the administrative proceeding. While there is not much that an investment tribunal could do in this scenario, there are some small measures that could be taken to minimize such "possibility". These measures will be discussed in Part IV.

vii. *Micula v Romania (I)*[993]

III.273. The five claimants in this arbitration consisted of two Swedish nationals (the Micula brothers who owned more than 99% of an investment vehicle group in Romania, which was engaged in the production of food and beverage) and three of the companies from the investment vehicle group.[994] They brought this ICSID arbitration based on the Sweden-Romania BIT.[995] The individual claimants requested all the damages to be awarded to them or, alternatively, to all of the claimants collectively without proffering any specific allocation.[996]

III.274. The tribunal awarded damages to the claimants collectively without allocating damages among them.[997] The tribunal explained that it could not award damages to corporate claimants for the direct harm they had suffered while also compensating the individual claimants for the indirect harm they had suffered, because it would amount to double compensation and there was no evidence on the record assisting the tribunal to distinguish between the two types of harm.[998]

III.275. The tribunal also reasoned that, on the one hand it could not award all the damages to the individual claimants only (because that would have deprived the corporate claimants of

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[993] *Micula, SC European Food SA, SC Starmill SRL, and SC Multipack SRL v Romania (I)*, ICSID Case No ARB/05/20 ("*Micula v Romania (I)*").
[994] *Ibid*, Award (11 December 2013) at paras 2–5, 156, 936–943.
[995] *Ibid* at para 1.
[996] *Ibid* at paras 1229–1230, 1247.
[997] *Ibid* at para 1240.
[998] *Ibid* at paras 1240, 1246–1247.

compensation), and on the other hand it could not award all the damages to the corporate claimants only (because other companies that were part of the investment vehicle group but that were not party to this proceeding would have been left uncompensated).[999] The tribunal found that all the claimants had suffered damage, but that the claimants did not provide evidence for the basis on which damages could be apportioned, and it was not "for a tribunal to determine which Claimant is entitled to what."[1000]

III.276. According to the tribunal, the individual claimants could have received the entire damages, but only if the corporate claimants and the respondent had followed Rule 44 of the ICSID Arbitration Rules: i.e. if the corporate claimants had withdrawn from the case, and the respondent had consented to the withdrawal; however, none of those requirements were fulfilled here.[1001] The respondent's application for annulment of the award was rejected, including its argument that the tribunal's reasoning as to the collective allocation of damages was contradictory.[1002]

viii. *Ampal v Egypt*[1003]

III.277. This ICSID arbitration was launched based on the US-Egypt BIT and the Germany-Egypt BIT, by five claimants: four US companies and a German national, which together and with other entities, owned an investment vehicle in Egypt (called EMG).[1004] EMG was formed for the two purposes of purchasing gas from Egypt to export it to Israel as well as building/operating a pipeline from Egypt to Israel.[1005] EMG had signed an agreement with two Egyptian state-owned

[999] *Ibid* at paras 1236–1238, 1242.
[1000] *Ibid* at paras 1243, 1245, 1248.
[1001] *Micula v Romania (I)*, Award (11 December 2013) at paras 1231–1236, fn 257 (at 333).
[1002] *Micula v Romania (I)*, Decision on Annulment (25 February 2016) at paras 291–306, 355.
[1003] *Ampal-American Israel Corp, EGI-FUND (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC, and Fischer v Egypt*, ICSID Case No ARB/12/11 ("*Ampal v Egypt*").
[1004] *Ibid*, Decision on Jurisdiction (1 February 2016) at paras 1–2, 4.
[1005] *Ibid* at para 5.

entities (EGAS and EGPC) and an agreement with an Israeli state-owned entity (IEC).[1006] The tribunal found that it did not have jurisdiction over the German national and continued the proceeding with the four US companies.[1007]

III.278. Other than this ICSID arbitration, there were four other arbitrations:

- A parallel investment arbitration before the PCA under the UNCITRAL rules, which was launched by the ultimate investor (Mr. Maiman) along with, *inter alia*, two of his companies which were also the subsidiaries of the lead claimant (Ampal) in the ICSID arbitration.[1008] By the time the Decision on jurisdiction was issued in the ICSID arbitration, the PCA tribunal had already found that it had jurisdiction.[1009]
- Three inter-related commercial arbitrations involving EMG:
  - two arbitrations before the ICC;[1010] and
  - one before an arbitration institution in Cairo.[1011]

III.279. In the ICSID arbitration, the respondent objected to the admissibility of the claims on the ground of abuse of process by the claimants in violation of the principle of good faith.[1012] Of

[1006] *Ibid* at paras 5–6.
[1007] *Ibid* at para 346(b).
[1008] *Ibid* at paras 10(ii), 331. From the corporate-structure perspective, Ampal was in fact the interposed company between Mr. Maiman and his two co-claimants.
[1009] *Ibid* at para 12 (iv). The decisions in the PCA arbitration are not publicly available online. The case is cited as *Maiman, Merhav (MNF), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v Egypt* (PCA Case No 2012/26).
[1010] Both ICC arbitrations were initiated by EMG, one against IEC (the Israeli state-owned company) and one against EGAS and EGPC (the two Egyptian state-owned companies) as well as IEC. The first arbitration was eventually suspended and IEC joined forces with EMG in the second arbitration, where the tribunal had issued its final award in favor of EMG by the time the *Ampal* tribunal rendered its Decision on Jurisdiction. *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016) at paras 10(i), 12(i) – (ii); *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at paras 8, 306, 329.
[1011] The Cairo arbitration was initiated by EGAS and EGPC against EMG as a result of their objection to the jurisdiction of the ICC arbitrations and the belief that only the Cairo arbitration was the proper forum for their contract dispute. The tribunal in the Cairo arbitration had entered the merits phase by the time the tribunal here issued its Decision on Jurisdiction. *Ampal v Egypt,* Decision on Jurisdiction (1 February 2016) at paras 10(i), 12(iii).
[1012] *Ibid* at paras 76, 312.

the respondent's supporting arguments, four are relevant to the issue of double compensation. The first argument was that the state had not consented to be subject to multiple, duplicative and derivative claims with respect to the same alleged loss.[1013] The second argument was that the claimants here and the claimants in the PCA arbitration pursued the same investment claims and sought the same relief with respect to EMG's contracts, which EMG was also pursuing in the commercial arbitrations.[1014]

III.280. The respondent's third relevant argument was in response to the claimants' argument that "compensation granted to EMG in the contractual arbitrations might not ultimately find its way to the shareholders" because of EMG's debts to the National Bank of Egypt and other creditors.[1015] The respondent argued that the claimants' position contradicted their own damages premise that their losses were in proportion to their interest in EMG.[1016] The respondent's fourth argument was that the claimants sought "to multiply their chances of recovery in respect of the same contractual dispute" by creating a situation whereby they needed "to persuade only 2 out of 12 arbitrators" to obtain the claimed compensation, and as such the claimants "improperly sought to instrumentalise the system of international arbitration to achieve an unprecedented abuse of process".[1017]

III.281. The claimants, on the other hand, argued that it was not "unusual or controversial" for investors and their investment vehicle to seek recovery before different fora.[1018] Nevertheless, they accepted that the case involved overlapping claims, but submitted that they did not seek

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[1013] *Ibid* at para 313(v).
[1014] *Ibid* at para 313(vii).
[1015] *Ibid*.
[1016] *Ibid*.
[1017] *Ibid* at para 313(viii).
[1018] *Ibid* at para 321(i).

double compensation and argued that the risk would become an issue only at the enforcement stage and upon payment by the respondent, to the effect that double compensation did not concern the issuance of a favorable award, let alone the tribunal's jurisdiction.[1019]

III.282. The claimants also argued that it would be "unjust" to dismiss Ampal's claims merely on the basis that its subsidiaries were pursuing their own claims in the PCA arbitration, because only Ampal was entitled to the protection offered by the ICSID Convention.[1020] They submitted that there was no basis for the argument that the claims were beyond the scope of Egypt's consent to the BIT.[1021] Finally, they added that there could not be any abuse of process, given that it was the respondent who opposed the consolidation of the investment arbitrations on the one hand and commercial arbitrations on the other.[1022]

III.283. The tribunal, in the Decision on Jurisdiction, found that the actions of the claimants and other shareholders in constituting multiple proceedings were not in bad faith and did not, *per se*, constitute any abuse of process.[1023] The tribunal reasoned that:

> It is possible, as a jurisdictional matter, for different parties to pursue distinct claims in different fora seeking redress for loss allegedly suffered by each of them arising out of the same factual matrix. As a matter of general principle, contract claims are distinct from treaty claims. Further, in the absence of an agreement to consolidation, two treaty tribunals may each consider claims of separate investors, each of which holds distinct tranches of the same investment. … It may not be a desirable situation, but it cannot be characterized as abusive especially when the Respondent has declined the Claimants' offers to consolidate the proceedings.[1024]

[1019] *Ibid* at para 321(ii), fn 318.
[1020] *Ibid* at para 321(iv).
[1021] *Ibid* at para 321(v).
[1022] *Ibid* at paras 321(vii), 13. It should be noted that Egypt was willing to consolidate the investment arbitrations, but only before the PCA tribunal, whereas the claimants wished the consolidation to be before the ICSID tribunal. *Ibid* at para 13(iii).
[1023] *Ibid* at paras 328–329, 331.
[1024] *Ibid* at para 329.

III.284. However, the tribunal ruled that there was an "important exception" to the above finding, because of the overlap between the claims by Ampal here with the claims by its two subsidiaries in the PCA arbitration.[1025] Therefore, according to the tribunal:

> This is tantamount to double pursuit of the same claim in respect of the same interest. In the Tribunal's opinion, while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals.[1026]

Given that both this tribunal and the PCA tribunal ruled that they had jurisdiction, the tribunal found that there was no longer any "risk of a denial of justice occasioned by the absence of a tribunal competent to determine the [overlapping] portion of the claim."[1027] The consequence was that "the abuse of process constituted by the double pursuit" of the same claim had "crystallised".[1028]

III.285. Accordingly, the tribunal held that one of the overlapping claims had to be withdrawn.[1029] It instructed Ampal to "cure the abuse" either through pursuing the claim here only and having its two subsidiaries withdraw their claims from the PCA arbitration or, alternatively, relinquishing the overlapping portion here and pursuing these claims through its subsidiaries in the PCA arbitration only.[1030] The claimants followed the tribunal's instructions.[1031]

III.286. Careful analysis shows that this case involved three risks of double compensation, while the tribunal addressed only the first risk:

[1025] *Ibid* at paras 330–331.
[1026] *Ibid* at para 331 [emphasis added].
[1027] *Ibid* at paras 332–333.
[1028] *Ibid* at para 333.
[1029] *Ibid* at paras 334, 346(h).
[1030] *Ibid*.
[1031] *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at paras 11, 20.

- the first risk arose from the fact that Ampal's subsidiaries were claimants in the PCA arbitration;[1032]
- the second risk arose from the fact the majority shareholder in Ampal was the lead claimant in the PCA arbitration (Mr. Maiman);[1033] and
- the third risk was posed by one of the ICC arbitrations where a final award was rendered in favor of EMG (the investment vehicle).[1034]

III.287. In the Decision on Jurisdiction, the tribunal addressed only the first risk. However, the tribunal's approach in preventing that one risk was effective and could be seen as the sophisticated and elaborated version of the underlying approach adopted in *Waste Management v Mexico (I)* (discussed above). Also, the tribunal's approach was the opposite of that adopted in *von Pezold v Zimbabwe*[1035] where the tribunal held that overlapping claims did not constitute an impediment to the awarding of damages to the claimants in parallel arbitrations.[1036] Here, the tribunal reached the opposite conclusion, finding that, when two treaty arbitrations involve overlapping claims, that overlapping portion must be withdrawn from one of the arbitrations if both tribunals find that they have jurisdiction.[1037]

III.288. Nevertheless, the tribunal's effective approach in avoiding double compensation stopped short of eliminating the other two risks of double compensation set out above. The tribunal

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[1032] See *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016) at para 331.
[1033] See *ibid* at Annex I.
[1034] See *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at paras 8, 306, 328–329. The remaining commercial arbitrations (i.e. the first ICC arbitration and the Cairo arbitration) did not pose any risk of double compensation. This is so because, in the first ICC arbitration, EMG had not sought damages but rather declaratory relief, and that the Cairo arbitration was not initiated by EMG. Nevertheless, the respondent here did request that the tribunal stays the ICSID proceeding pending the issuance of the award in the Cairo arbitration, which the tribunal rejected. See *ibid* at para 13; *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016) at para 12(i).
[1035] Discussed above, in the current Chapter, Subsection "Cases with Justifications of a Substantive Nature".
[1036] See above, para III.134.
[1037] See above, para III.285.

did not even mention the second risk. Regarding the third risk (associated with the ICC award), the tribunal ruled that the ICC arbitration would not affect its jurisdiction or the admissibility of the claims here, but that the ICC award could be relevant to the merits.[1038] In this regard, the tribunal decided two general questions.

III.289. The first general question was as follows: if a contract-based forum has already decided a contract claim between an investor and a state, what is the impact of that decision on an investment tribunal which must answer the same questions of contract law when deciding a treaty claim between the same parties?[1039] The tribunal found that *res judicata* would attach in this scenario because the identity test (same parties, claims, facts, and legal bases) was met and, as such, "the investment tribunal [was] entitled to refer to, and rely upon, the findings of the contract tribunal".[1040]

III.290. The second general question was whether the answer to the above question would remain the same if the parties to the contract-based proceeding were the investment vehicle and the state (instead of the investor and the state).[1041] The tribunal ruled that *res judicata* would still attach in this scenario, as the shareholders must be seen as privy to the investment vehicle.[1042] According to the tribunal, one of the consequences of allowing foreign shareholders to claim independently from their investment vehicle is that:

> [T]he investor/shareholder is treated as a privy to the [investment vehicle] for the purposes of the rule of *res judicata*. Otherwise the investor/shareholder would be able to approbate and reprobate from the same investment treaty. He would take the benefit of an extended right of direct action—looking through the investment [vehicle] at the economic effect of the host State's actions directly upon his shareholding—which would not found the basis

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[1038] *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at para 252.
[1039] *Ibid* at paras 256–259.
[1040] *Ibid* at paras 258–259.
[1041] *Ibid* at para 257.
[1042] *Ibid* at paras 260–268.

> of a claim under customary international law. But he would not bear the burden of being bound by any finding arising out of a claim by the investment [vehicle] itself on the same facts.[1043]

III.291. Accordingly, the tribunal held that those findings by the ICC tribunal that were relevant to the claims here were *res judicata* between the parties, including certain findings of fact and the finding that the agreement between EMG and the state-owned companies was terminated unlawfully.[1044] The tribunal then found that the unlawful termination was in violation of the BIT too and tantamount to expropriation and, accordingly, held that the claimants here were entitled to damages.[1045] The tribunal left the issue of quantum to a separate decision.[1046]

III.292. A closer look at this case shows that, although the tribunal applied the *res judicata* principle, it did not prevent the risk of double compensation that was posed by the ICC award. This is why: the ICC tribunal found that the state-owned companies' termination of the agreement was unlawful and hence awarded damages, and then the tribunal here found that the same termination also violated the BIT and awarded damages on this basis—i.e. two damages awards for the same state act. This occurred because what the tribunal really applied was not *res judicata* in the sense of claim preclusion, but rather *res judicata* in its more limited version of issue preclusion.

III.293. The difference between these two versions of *res judicata* is discussed in detail in Chapter 6.[1047] However, here it is sufficient to state that claim preclusion bars claimants from re-submitting a claim that has already been decided, whereas issue preclusion bars the parties from

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[1043] *Ibid* at para 260.
[1044] *Ibid* at paras 270, 274, 281, 329, 331.
[1045] *Ibid* at paras 335, 347, 351–353.
[1046] *Ibid* at paras 351–353. To date, the decision on quantum has not yet been rendered.
[1047] See below, Chapter 6, Section "*Res Judicata*, *Lis Pendens*, and Issue Preclusion".

re-litigating an issue (of fact or law or a combination thereof) which has already been decided. Thus, the tribunal did not prohibit the claimants from claiming what had been awarded in the ICC arbitration, but rather merely refused to rehear a number of issues that were already decided by the ICC tribunal. That is why the tribunal here failed—at least to this stage—to prevent the risk of double compensation in relation to the ICC award. It remains to be seen whether the tribunal will address the risk in its decision on quantum, which is yet to be issued.

ix. *Renco v Peru (I)*[1048]

III.294. The claimant (a US company) initially brought this ICSID arbitration on its own behalf and on behalf of its wholly-owned local enterprise, but then withdrew the latter part.[1049] The claimant submitted a waiver, as per the US-Peru BIT, but its waiver reserved the right to bring claims in other forums "[t]o the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds".[1050]

III.295. The respondent objected to the tribunal's jurisdiction on the basis that the BIT waiver requirement was not met, given the claimant's reservation of rights and the fact that the claimant had already initiated domestic court proceedings with respect to the same measures.[1051]

III.296. The tribunal applied *Waste Management v Mexico (I)*[1052] and ruled that the claimant's waiver did not meet the BIT's waiver requirements because, *inter alia*, the waiver did not satisfy the objectives of the BIT waiver clause: "to protect a respondent State from having to litigate

[1048] *The Renco Group, Inc v Peru (I)*, ICSID Case No UNCT/13/1 ("*Renco v Peru (I)*").
[1049] *Ibid*, Partial Award on Jurisdiction (15 July 2016) at paras 1, 56–57.
[1050] *Ibid* at para 58.
[1051] *Ibid* at paras 59, 61–62.
[1052] *Ibid* at paras 60, 74–77, 85.

multiple proceedings in different fora relating to the same measure, and to minimise the risk of double recovery and inconsistent determinations of fact and law by different tribunals".[1053]

x. *Orascom v Algeria*[1054]

III.297. The claimant was a Luxembourg company active in the telecommunications industry, whose ultimate shareholder was a famous Egyptian businessman—Naguib Sawiris.[1055] The claimant indirectly owned an Egyptian company (called OTH) which held a license to develop mobile telecommunications networks in Algeria and started to operate in that country through its local investment vehicle (called OTA).[1056] Disputes arose between the parties, and eventually, the claimant sold its indirect shares in OTA to a third party and brought this ICSID arbitration based on the BLEU-Algeria BIT.[1057]

III.298. There were other parallel proceedings afoot. OTH had initiated an investment arbitration based on a different BIT before the PCA (known as the OTH Arbitration), which ran in parallel with the ICSID arbitration until the former resulted in a settlement agreement that was recorded in a consent award in 2015.[1058] Also, OTA had filed several local court proceedings, all of which were discontinued as a result of the settlement in the OTH Arbitration.[1059]

III.299. In the ICSID proceeding, the respondent raised several objections to the tribunal's jurisdiction and the admissibility of claims, five of which are relevant to the discussion here.[1060]

[1053] *Ibid* at paras 80–82, 84, 86–88, 119.
[1054] *Orascom TMT Investments Sà rl v Algeria*, ICSID Case No ARB/12/35 ("*Orascom v Algeria*").
[1055] *Ibid*, Award (31 May 2017) at paras 2, 5, 9.
[1056] *Ibid* at paras 5–9.
[1057] *Ibid* at paras 9, 15, 17, 1.
[1058] *Ibid* at paras 34, 485 (f), 485(h), 422–423.
[1059] *Ibid* at paras 520, 522.
[1060] *Ibid* at para 386.

The first objection was that the respondent's consent to arbitration did not extend to "very indirect" shareholders who were "too far removed" from the investment in question.[1061] The respondent argued for a "need to fix a 'cut-off point' in the corporate chain beyond which a tribunal lacks jurisdiction."[1062] The respondent pointed out that there was a "serious risk" of multiple proceedings because there were several other companies in the corporate chain, two of which had already reserved the right to bring an investment arbitration claim against the respondent (in addition to the OTH Arbitration).[1063]

III.300. The second objection was that the claimant lost standing to bring this arbitration when Mr. Sawiris (the ultimate shareholder) decided to exercise the right to bring an arbitration claim at the OTH level (the Egyptian license holding company) in the OTH Arbitration.[1064] The objection was based on the following premises: (i) that each of the companies between Mr. Sawiris and the local investment vehicle held a theoretical claim against Algeria due to the different available legal bases (i.e. the various BITs as well as the investment agreement), but Mr. Sawiris "chose to crystallize the dispute" at the level of OTH;[1065] and (ii) all the companies that were above OTH in the corporate chain, including the claimant, were made whole as a result of the reflective gain from the OTH Arbitration.[1066]

III.301. The third objection was based on the doctrine of abuse of rights. The respondent argued that Mr. Sawiris had sought to "maximize his chances of success by introducing several

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[1061] *Ibid* at para 391.
[1062] *Ibid* at para 387. The "cut-off-point" solution is discussed in detail in Chapter 6 (on suggested solutions), Section "Restricting the Admissibility of Shareholders' Claims".
[1063] *Orascom v Algeria*, Award (31 May 2017) at paras 389–390, 13.
[1064] *Ibid* at para 411.
[1065] *Ibid* at paras 413–414.
[1066] *Ibid* at para 416.

arbitrations against the Respondent at different levels of the chain of companies".[1067] According to the respondent, in all those proceedings, Mr. Sawiris "needed to succeed only once for the alleged harm to be remedied", and thus he "abused the protection offered by Algeria to foreign investors".[1068] The respondent asserted that when it entered into the BITs that this chain of companies had access to, it "did not intend to protect under different treaties shareholders who belonged to the same group and disputed the same measures."[1069]

III.302. The fourth objection concerned the settlement in the OTH Arbitration.[1070] The respondent argued that allowing an indirect shareholder to challenge the legality of state measures that the direct shareholder and the investment vehicle had already settled, would "circumvent" the arrangement between those parties and would "run counter to the BIT Contracting Parties' intention".[1071] The reason was that, according to the respondent, a state would never choose to settle a dispute with the investment vehicle or one level of shareholders if it knew that the shareholders at another level of the corporate chain could circumvent the settlement.[1072] The respondent concluded that either the claim had "ceased to exist" and the tribunal would not have jurisdiction, or the claim became inadmissible because the claims here were identical to those in the OTH case: the reflective loss for the diminution in the value of the shares and loss of dividends.[1073]

III.303. The fifth and last relevant objection was that the claimant sold its right to bring an

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[1067] *Ibid* at para 417.
[1068] *Ibid*.
[1069] *Ibid* at para 418.
[1070] *Ibid* at para 420.
[1071] *Ibid* at para 424.
[1072] *Ibid*.
[1073] *Ibid* at paras 425, 427.

arbitration claim when it sold its investment to a third company (VimpelCom).[1074] The respondent argued that the claimant failed to produce certain key documents relating to the sale and requested the tribunal to "draw adverse inferences from that refusal".[1075] It also argued that the other relevant documents did not reserve the right to bring a claim, which should be understood as that the right was transferred to VimpelCom.[1076]

III.304. The claimant, on the other hand, submitted that all the objections should be rejected. Regarding the first objection (consent and cut-off point), the claimant referred to the BIT, where the definition of "investment" expressly included minority and indirect shares.[1077] The claimant questioned the idea of fixing a cut-off point for policy concerns in the circumstances where a state had already consented in the BIT to arbitrate disputes with minority/indirect shareholders and had not inserted any provision in the same BIT that would reflect its wish to limit the scope of its consent.[1078] The claimant also noted that "no tribunal [had] ever denied an indirect shareholder's claims based on an asserted 'cut-off point', when the language of the treaty expressly covered indirect investments".[1079] Further, the claimant argued that there was no risk of double compensation because the injury at issue here was distinct from the injury claimed by other companies in the chain and because the claimant did not benefit from the settlement in the OTH Arbitration (given that it was no longer a shareholder of OTH).[1080]

[1074] *Ibid* at para 470.
[1075] *Ibid* at para 743.
[1076] *Ibid*.
[1077] *Ibid* at paras 394–395.
[1078] *Ibid* at para 399.
[1079] *Ibid* at para 397.
[1080] *Ibid* at paras 340–341.

III.305. With respect to the second objection (the crystallization of the dispute at the OTH level), the claimant considered it was irrelevant to admissibility or jurisdiction.[1081] It submitted that it had sold its shares in OTH by the time that the OTH Arbitration was commenced and hence it was not involved in the decision to initiate that arbitration.[1082]

III.306. Regarding the third objection (abuse of rights), the claimant submitted that the doctrine did not apply here. According to the claimant, the doctrine usually would apply in different circumstances, such as where a claimant company was incorporated after the dispute arose.[1083] The claimant added that it was not able to file its claims together with OTH in one proceeding, as the claimant no longer owned OTH after the sale.[1084]

III.307. As to the fourth objection (the impact of the settlement in the OTH Arbitration), the claimant argued that the settlement should not affect the jurisdiction or admissibility of claims in this proceeding.[1085] According to the claimant, jurisdiction and admissibility "must be determined by reference to the date on which judicial proceedings [were] instituted" and not the events that took place at a later time.[1086] The claimant added that it was neither a party nor privy to the settlement agreement to be bound by it and even if the OTH Arbitration tribunal had rendered an award in the usual course (i.e. with no settlement), no *res judicata* would have attached to that award since the triple identity test was not met.[1087]

[1081] *Ibid* at para 444.
[1082] *Ibid* at para 445.
[1083] *Ibid* at para 449.
[1084] *Ibid* at para 450.
[1085] *Ibid* at para 452.
[1086] *Ibid*.
[1087] *Ibid* at paras 453–454.

III.308. Regarding the fifth objection (the sold right to bring an arbitration claim), the claimant argued that the respondent should have procured evidence proving that the claimant had sold or waived its right to bring this arbitration proceeding.[1088] Rather, according to the claimant, it produced all the relevant documents.[1089]

III.309. The tribunal held that the claims were inadmissible[1090] based on four of the five objections, but did not rule on the first objection (consent and cut-off point), as it would not change the outcome.[1091] The tribunal upheld the objection relating to the crystallization of the dispute at the OTH level on several grounds. First, it found that the involved companies "constituted a vertically integrated chain of companies in which the companies higher up in the chain controlled and directed the companies further down," and the claimant (until the sale of its investment) was the controlling company in the chain.[1092] Second, the tribunal noted that the Notices of Disputes in both arbitrations were signed by the ultimate shareholder (Mr. Sawiris - in different executive capacities)[1093] and thus, "the legal protection that was available at the various levels of the corporate chain was activated at the OTH level."[1094] Third, although the parties to the proceedings and the legal bases relied on were not identical, the state measures that were challenged—and hence the dispute—were effectively the same across those proceedings.[1095] According to the tribunal, the availability of different legal bases would not necessarily entitle the shareholders in the same chain to challenge the same measures and recover the same loss.[1096] The tribunal further

[1088] *Ibid* at para 478.
[1089] *Ibid* at paras 479–480, 484.
[1090] *Ibid* at para 496.
[1091] *Ibid* at para 495, fn 764.
[1092] *Ibid* at para 490.
[1093] *Ibid* at paras 485(c), 485(g), 490.
[1094] *Ibid* at paras 496–497.
[1095] *Ibid* at paras 486–487.
[1096] *Ibid* at para 495.

reasoned that:

> Indeed, the purpose of investment treaty arbitration is to grant full reparation for the injuries that a qualifying investor may have suffered as a result of a host state's wrongful measures. If the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the vertical chain in other arbitral proceedings may become inadmissible depending on the circumstances[1097] … To the extent OTH would have restored its company value through arbitration proceedings under the BIT, all of the companies higher up in the corporate chain, including the Claimant, would have been made whole as well.[1098]

The tribunal analysed the loss claimed and found that it was either similar to what was claimed in the OTH Arbitration or should have been factored into the sale to VimpelCom.[1099]

III.310. The tribunal also upheld the objection concerning the impact of the OTH Arbitration settlement: that the dispute had ceased to exist.[1100] The tribunal ruled that the settlement "[put] an end to the dispute arising from Algeria's measures in the same manner as [an] award would have ended the dispute. … the Claimant cannot take over the dispute that OTH [had] settled".[1101] The tribunal further reasoned that "[a] contrary conclusion would lead to unreasonable results", because IIAs encourage disputes to be settled amicably before arbitration, and if states know that shareholders further up the chain could still challenge the same measures despite a settlement, states might never choose the settlement path, which would render those IIA's provision a "dead letter".[1102]

III.311. The tribunal also upheld the objection that the claimant had sold its right to bring a claim. Based on the hearing records and assessment of the documents, the tribunal found that the

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[1097] *Ibid*.
[1098] *Ibid* at para 498 [emphasis added].
[1099] *Ibid* at paras 499–518.
[1100] *Ibid* at para 625.
[1101] *Ibid* at para 524.
[1102] *Ibid* at para 525.

claimant had sold, along with the investment, its right to bring a claim.[1103] It noted that even if the claimant had remained the owner of the investment, it could not bring any claim (given the settlement in the OTH Arbitration) and thus "the sale of the investment [could not] bestow on the seller more rights than it would have had if it had remained as a shareholder."[1104]

III.312. Finally, the tribunal upheld the abuse of rights objection.[1105] It noted that the doctrine mainly applied in circumstances where there had been a corporate restructuring around the time that the dispute arose to obtain BIT protection, yet pointed out that there were other circumstances where the doctrine would apply.[1106] According to the tribunal:

> [A]n investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state. It goes without saying that structuring an investment through several layers of corporate entities in different states is not illegitimate. … [S]everal corporate entities in the chain may be in a position to bring an arbitration against the host state in relation to the same investment. This possibility, however, does not mean that the host state has accepted to be sued multiple times by various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm. … [T]his conclusion derives from the purpose of investment treaties, which is to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development. If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. The purpose is not served by allowing other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm inflicted on the investment. Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered. Thus, where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established.[1107]

[1103] *Ibid* at paras 529–534.
[1104] *Ibid* at para 528.
[1105] *Ibid* at para 539.
[1106] *Ibid* at paras 540–541.
[1107] *Ibid* at paras 542–543 [emphasis added].

Based on the hearing records, the tribunal concluded that Mr. Sawiris used the protection available through different BITs at different levels of the corporate chain "for strategic reasons" in a manner that conflicted with "the purposes of such rights and of investment treaties".[1108]

III.313. In the end, the tribunal emphasized four main grounds for its decision as to the inadmissibility of claims: (i) that the claimant was part of a vertically organized group of companies; (ii) that the group was controlled by the same shareholder; (iii) that the measures challenged across different proceedings were mostly the same; and (iv) that the claimed loss was also the same.[1109]

xi. *Manchester Securities v Poland*[1110]

III.314. The claimant was a US private investment firm[1111] that held mortgages over certain properties in Poland, which would secure its claims to bonds that were issued by a Polish real estate developer.[1112] The claimant alleged that Poland prevented it from enforcing its mortgages in violation of the US-Poland BIT and hence brought this ICSID arbitration.[1113]

III.315. Given that a portion of the claimant's claim was already recognized in an ongoing bankruptcy proceeding in Poland, the respondent raised the risk of double compensation and argued that, should the tribunal award full damages to the claimant, this would lead to double compensation.[1114] It proposed that the tribunal should either defer its decision on quantum until

[1108] *Ibid* at paras 544–545.
[1109] *Ibid* at para 546. The claimant's application for annulment of the Award was rejected. *Orascom v Algeria*, Decision on Annulment (17 September 2020).
[1110] *Manchester Securities Corporation v Poland*, PCA Case No 2015-18 ("*Manchester Securities v Poland*").
[1111] *Ibid*, Award (7 December 2018) at para 1.
[1112] *Ibid* at para 4.
[1113] *Ibid*.
[1114] *Ibid* at para 525.

the conclusion of the bankruptcy proceedings or that the tribunal should deduct the overlapping claims from the total amount claimed.[1115]

III.316. However, the respondent's proposed solutions did not sit well with the claimant. It argued that the risk of double compensation was "remote" and proposed, instead, that—

- If it received compensation in the bankruptcy proceeding prior to an award being issued here, it would notify the tribunal of such developments, and if this tribunal issued the award and the respondent paid the amount in full before the claimant received compensation in the bankruptcy proceeding, the claimant would then reimburse the overlapping portion; or alternatively
- The claimant could withdraw part of its claims from the bankruptcy proceedings, but only up to the amount paid by the respondent in this arbitration.[1116]

III.317. The tribunal first agreed with the position held in *Nykomb v Latvia*[1117] that "the Treaty based right to arbitration is not excluded or limited in cases where there is a possible risk of double payment."[1118] However, the tribunal also found itself committed to "alleviate" the risk of double compensation.[1119] Accordingly, it considered the parties' proposed solutions and found that the respondent's solution as well as the claimant's first solution were "too uncertain".[1120] According to the tribunal, those solutions "would leave these proceedings open for an undetermined period

[1115] *Ibid*.
[1116] *Ibid* at para 526.
[1117] Discussed above, in the current Chapter, Section "Cases Where the Risk was Not Effectively Addressed".
[1118] *Manchester Securities v Poland*, Award (7 December 2018) at para 527.
[1119] *Ibid*.
[1120] *Ibid*.

of time, the amount to be deducted might be estimated too high or too low, or settlement of accounts between the Parties may last for years beyond the closure of these proceedings."[1121]

III.318. The tribunal chose the claimant's second proposed solution on the ground that such a solution had the advantage that it would not "leave these proceedings or settlement of accounts between the Parties open for an indefinite period."[1122] The tribunal eventually ordered the claimant "to withdraw its claims in the bankruptcy and enforcement proceedings up to the amount awarded by this Tribunal save for pre- and post-award interest."[1123]

III.319. A closer look, however, shows that the tribunal's solution is not exactly the same as what the claimant suggested. The similarity between the two solutions is that they both involve withdrawing part of the claims from the bankruptcy proceeding. What is different between the two solutions concerned the timeline of withdrawal of the overlapping claims. The claimant's solution provided for withdrawal upon the respondent's payment of the amount awarded in this arbitration, whereas the tribunal's solution provided for withdrawal of the overlapping portion once the tribunal awarded the damages.

xii. *GÜRİŞ and Others v Syria*[1124]

III.320. The claimants include GÜRİŞ (a Turkish company active in the construction, cement production, and renewable-energy sectors) and three of its shareholders who were Turkish nationals.[1125] The claimants incorporated two local companies in Syria (called Raqqa and

[1121] *Ibid*.
[1122] *Ibid*.
[1123] *Ibid*.
[1124] *GÜRİŞ Construction and Engineering Inc and Others v Syria*, ICC Case No 21845/ZF/AYZ ("*GÜRİŞ and Others v Syria*").
[1125] *Ibid*, Final Award (31 August 2020) at paras 2–3.

Hasakah), which in turn established two cement plants and a factory in the country.[1126] The claimants lost control and use of their investment with the rise of conflicts in Syria and thus brought this ICC arbitration based on the Turkey-Syria BIT.[1127]

III.321. The tribunal found for the claimants[1128] but, with respect to the risk of double compensation, held that:

> The logical corollary of (a) the Claimants' claim that they have "lost their shares", (b) the compensation awarded to them by this Award on the basis that their deprivation should be regarded as permanent as of 1 April 2012, and (c) the principle that there should be no double recovery, is that upon the Respondent's payment of that compensation, the Claimants may also formally cease to have any of the benefits or responsibilities of shareholders in Raqqa and Hasakah. Conversely, the corollary of the Respondent's payment of that compensation is that all such benefits and responsibilities may be transferred to the Respondent. Other tribunals in analogous situations have recognized that a tribunal "has the capacity to render an award tailored so as to minimize the risk of double recovery between the parties". It is indeed within the Tribunal's power to draw the implications attendant upon the relief sought and awarded, especially in order to comply with the principle of avoiding double recovery. A transfer of the Claimants' shares is the implication of the Claimants' pleaded case that they have irretrievably lost the attributes of ownership of their investments and they should be compensated by the Respondent for that loss.
>
> Accordingly, the Tribunal intends to stipulate that following the Respondent's payment of compensation to the Claimants, the Respondent may have the Claimants transfer to the Respondent their shares in Raqqa and Hasakah without additional payment.[1129]

III.322. There are similarities and differences between this case and *CMS v Argentina*. In both cases, the solution that was applied to avoid the risk of double compensation involved the claimants transferring the title of their shares to the respondent. However, in the *CMS* case, the respondent was given an option to purchase what was left of the shares, whereas in the case at bar, the claimants were ordered to transfer the title. This key difference was, in fact, the result of another difference between the two cases: in *CMS*, the local company was still a going concern and thus

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[1126] *Ibid* at paras 108, 111–112.
[1127] *Ibid* at paras 11, 105.
[1128] *Ibid* at para 395.
[1129] *Ibid* at paras 374–375 [emphasis added].

for the transfer to take place, the state had to pay the remaining value of the company (in addition to the damages that it already had to pay), whereas here the claimants lost the entire value of their investment in the local companies and hence no additional payment was required.

CHAPTER 5: INTERNATIONAL DOCUMENTS AND COMMENTARY

III.323. As presented in the previous Chapter, ISDS case law has thus far failed to establish a clear, holistic approach, supported by theory, with respect to the double compensation issue. This Chapter covers how the issue has been reflected upon in other relevant materials. The discussion is organized into two Sections, covering International Documents and Commentary.

A. International Documents

III.324. Normally, when a tribunal or a court faces the risk of double compensation in a case before them, they would like to know whether the issue has been addressed in any international documents. There is no binding international document that expressly addresses the issue. However, there are international documents of a non-binding nature (including rules and reports) that have addressed the issue of double compensation. Those documents, despite their non-binding nature, could play a key role in orienting the analysis presented by arbitrators, judges, lawyers, and scholars. Five of such documents are discussed in this Section: (i) the ILC Draft Articles on State Responsibility, (ii) the report by the ILA Committee on Law of Foreign Investment, (iii) the OECD Working Paper on International Investment No 2013/03, (iv) the UNCITRAL project on the multiplicity of proceedings in investment arbitration, and (v) the two reports by the IBA Subcommittee on Investment Treaty Arbitration.

i. ILC Draft Articles on State Responsibility[1130]

III.325. According to article 46 of the *Draft Articles*, if more than one state has been injured by another state's wrongful act, the injured states may separately invoke the responsibility of that state. However, the commentary section of the *Draft Articles* explains that the injured states are "expected to coordinate their claims so as to avoid double recovery" and to "protect the defendant State in such a case".[1131]

III.326. The commentary section to articles 36(2) and 38(1) also emphasizes the importance of avoiding "double recovery".[1132] However, "double recovery" in those articles was used in the sense of "double counting" and not the issue that is the subject of this thesis. The difference between the two is discussed in detail in Part II, the Section on Double Recovery v. Double Counting.[1133]

III.327. The ILC *Draft Articles* were adopted in 2001, after a lengthy process that began in 1949.[1134] It should be noted that the first version of the *Draft Articles* was more thorough with respect to the issue of double compensation. The report that was presented under the ILC's first special rapporteur in 1961 listed double compensation as one of the factors that would limit the amount of reparation.[1135] The same report also considered the prohibition of double compensation

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[1130] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Document A/56/10, in Yearbook of the International Law Commission, vol II, part Two (United Nations Publication, 2001) 30.
[1131] *Ibid* at para 4 of the commentary to art 46 [emphasis added].
[1132] *Ibid* at para 33 of the commentary to art 36(2), and para 11 of the commentary to art 38(1).
[1133] It was also explained in that Part that the term "double compensation" is preferable to "double recovery". See above, Part II, Chapter 3, Sections "Double Recovery v. Double Payment" and "Double Payment v. Double Compensation".
[1134] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 1130, at 20 (para 30).
[1135] ILC, *Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens*, Document A/CN4/134 & Add 1, in Yearbook of the International Law Commission, vol II (United Nations Publication, 1961) 1 at paras 170–171.

to be in relation to the principles of full reparation and prohibition of unjust enrichment.[1136]

III.328. A similar approach was adopted by Harvard Law School in its draft convention on state responsibility, which was prepared at the suggestion of the UN Secretariat and was issued around the same time that the 1961 report by ILC's first special rapporteur was issued.[1137] According to article 37 of the Harvard draft convention: "Damages which a State is required to pay on account of an act or omission for which it is responsible shall be diminished by the amount of any recovery which has been obtained through local and international remedies". [1138]

III.329. However, in 1962, under the ILC's second special rapporteur, it was decided to limit the scope of the work to "general aspects of state responsibility" [1139] and, as such, the later versions (and eventually the 2001 final version of the *Draft Articles*) did not discuss the issue of double compensation to the extent that the first version did.[1140]

ii. Report by the ILA Committee on Law of Foreign Investment[1141]

III.330. The ILA Committee on Law of Foreign Investment (whose mandate ran from 2003 to 2008) issued its *Final Report* in 2008.[1142] The *Final Report* does not expressly address the double

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[1136] *Ibid* at paras 170–172, 178.
[1137] ILC, 8th session, *Summary Records of 370th Meeting*, Document A/CN/496, in Yearbook of the International Law Commission, vol I (United Nations Publication, 1956) 226 at 228 (para 16).
[1138] *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961), printed in Louis B Sohn & R R Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens" (1961) 55 Am J Int'l L 545 at 548 [emphasis added].
[1139] ILC, *Report of the International Law Commission Covering the Work of its Fourteenth Session*, Document A/5209, in Yearbook of the International Law Commission, vol II (United Nations Publication, 1962) 157 at 189 (paras 47–48).
[1140] See the 1996 version of the draft articles (which was the first full draft after the ILC's decision in 1962 to limit the scope of the work): ILC, *Report of the International Law Commission on the Work of its Forty-Eighth Session*, Document A/51/10, in Yearbook of the International Law Commission, vol II, part Two (United Nations Publication, 1996) 1.
[1141] ILA Committee on Law of Foreign Investment, *Final Report* (Rio de Janeiro Conference, 2008) ("ILA Final Report").
[1142] ILA website, tab "Committees", Section "Index of Former Committees", hyperlink "International Law on Foreign Investment (2003-2008)", online: <https://www.ila-hq.org/index.php/committees> (last visited 9 March 2020).

compensation issue,[1143] but it discusses and expresses concern about the side effects of multiple proceedings.[1144] It lists three possible solutions to avoid those problems: consolidation of proceedings, the principles of *res judicata* and *lis pendens*, and the FITR provision.[1145]

III.331. With respect to consolidation, the *Final Report* notes that the solution has its roots in commercial arbitration and, as such, the parties' consent plays a key role.[1146] Regarding the principles of *res judicata* and *lis pendens*, the *Final Report* encourages the arbitration community to prefer economic reality to legal formalism, and to follow the ILA recommendations on *res judicata* and *lis pendens*.[1147] And finally with respect to FITR provisions, the *Final Report* found that those provisions are subject to the same triple identity test as the test for the principles of *res judicata* and *lis pendens*, which "in reality has been proved complex, inflexible and almost meaningless by its restrictions".[1148]

iii. OECD Working Paper on International Investment No 2013/03[1149]

III.332. The OECD Working Paper No 2013/03 is not an "international document" *per se*, because at the very beginning of the document it makes the following disclaimer: "The opinions

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[1143] It should be noted that the Final Report mentions "double recovery", but not in the sense of the term that is the subject of this thesis, rather in the sense of "double counting". For a discussion on the differences between the two terms, see above, Part II, Chapter 1, Section "Double Recovery v. Double Counting".
[1144] ILA Final Report at 21–22. The report uses the term "parallel proceeding". However, as explained above, in Part II, when there are more than one proceeding involved, for them to be parallel in time is only one of the possible scenarios that could take place, as the proceedings can be, for example, sequential. Therefore, this thesis uses the more inclusive term of "multiple proceeding", which covers all possible scenarios. See above, Part II, Chapter 3, the Subsection discussing categorization based on the timing of different proceedings.
[1145] ILA Final Report at 21–22.
[1146] *Ibid* at 22.
[1147] *Ibid* at 21. See ILA Committee on International Commercial Arbitration, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration* (Toronto Conference, 2006).
[1148] *ILA Final Report* at 22.
[1149] David Gaukrodger, "Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency", in *OECD Working Papers on International Investment* (OECD Publishing 2013) No 2013/03 (the "OECD Working Paper No 2013/03").

expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries". A similar disclaimer exists in other OECD working papers. However, the OECD Working Paper No 2013/03 seems to enjoy official status because of this statement at the beginning of the document: "[t]his work is published on the responsibility of the Secretary-General of the OECD", which does not regularly appear in all OECD working papers. In addition, the author notes that the arbitration community refers to this specific working paper as an OECD paper and not as a regular commentary that is referred to by the name of its author.[1150] Therefore, the OECD Working Paper No 2013/03 is discussed here as an international document.

III.333. The OECD Working Paper No 2013/03 analyses the consequences of allowing shareholders recovery for reflective loss in the ISDS system, and lists double compensation as one of those consequences.[1151] It compares the no reflective loss rule in domestic laws and general international law on the one hand, with the ISDS system's permissive approach of allowing shareholders' recovery on the other hand.[1152] It observes that "arbitral decisions in ISDS have rarely given consideration to the policy implications of allowing shareholder claims … Tribunals

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[1150] See e.g. UNCITRAL, 48th session, A/CN9/848, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (Vienna, 2015) at para 12 ("Recent OECD working papers and intergovernmental discussions at the OECD have highlighted the importance of the distinction between direct and reflective loss in considering concurrent claims in investment arbitration … The OECD works indicate that acceptance of claims for reflective loss is an important aspect of concurrent claims in investment arbitration"); UNCITRAL, 47th session, A/69/17, *Report of the United Nations Commission on International Trade Law* (New York, 2014) at para 126 ("The Commission considered whether to mandate its Working Group II to undertake work in the field of concurrent proceedings in investment treaty arbitrations, recalling that it had identified, at its forty-sixth session, in 2013, that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration. The Commission was informed that … other organizations, including the OECD, had carried out research in relation to certain aspects of that topic") [all emphases added].

[1151] *Ibid* at 9.

[1152] *Ibid* at 15–26.

have apparently considered it unnecessary to consider policy consequences in any detail because they consider that the issue is resolved by the inclusion of shares in the investment definition."[1153]

III.334. The OECD Working Paper No 2013/03 describes the current situation as follows:

> While their rejection of reflective loss claims exempts them from the problem of double recovery, national courts have far more effective powers than an [ISDS] tribunal to address it. National courts could normally bring most if not all of the relevant constituencies together in a single proceeding or in related proceedings. … National court decisions can also bind non-parties. ... [ISDS] tribunals have no such powers because their jurisdiction is based on party consent. If the company and one or more shareholders bring claims, several international tribunals as well as national courts would normally be involved. There is no mechanism for coordination of their decisions. Some ISDS investment tribunals have expressed strong confidence that double recovery is a non-issue. However, these tribunals have generally not explained how the problem would in fact be resolved. In effect, the problem is left to be resolved (or not) by a subsequent court or tribunal. ... ISDS tribunals that have faced the double recovery problem in more concrete terms have used creative remedies [discussing the share-purchase remedy suggested in *CMS*].[1154]

The document (which was published in 2013) is one of the first documents (if not the first) to examine the double compensation issue in the ISDS system in some detail. It traces the issue back to shareholders' claims for reflective loss.

III.335. With respect to a potential solution, the OECD Working Paper in essence suggests that any recovery should be limited to the investment vehicle only, i.e. a blanket ban on shareholders' claims for reflective loss,[1155] and accordingly, the only avenue for shareholders to bring such claims should be similar to the domestic law mechanism of derivative claims: i.e. claims by shareholders made on behalf of the investment vehicle and with recovery for the investment vehicle,[1156] similar to the mechanism in article 1117 of NAFTA (now article 14.D.3.1.b of

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[1153] *Ibid* at 29–30.
[1154] OECD Working Paper No 2013/03, *supra* note 1149, at 35.
[1155] *Ibid* at 3.
[1156] *Ibid* at 19, 52–55.

CUSMA, which is applicable to US-Mexico relations only). This solution will be analysed in the sixth Chapter.[1157]

iv. UNCITRAL Project on Multiplicity of Proceedings

III.336. The phenomenon of multiple proceedings in investment arbitration first caught UNCITRAL's attention in 2013 when its Commission identified the topic as warranting further study.[1158] Accordingly, a new project was launched, which has developed over time. Following the 2013 identification of the topic, the UNCITRAL Secretariat prepared three Notes over three years. The first Note (issued in 2015) listed double compensation as a problem associated with multiple proceedings[1159] and set forth several potential solutions as meriting further study:

- the principles of *res judicata* and *lis pendens* (about which the Note suggested the application of the 2006 ILA recommendations[1160]); and
- treaty provisions in IIAs that would provide for: waiver, consolidation, cut-off point, or "an obligation for the arbitral tribunal to stay its proceedings or take into account in its decision the proceedings (and decisions) of other forums where a claim is being considered also by another forum."[1161]

It is worth noting that the last item (i.e. a treaty obligation to stay proceedings) was subsequently adopted in the Comprehensive Economic and Trade Agreement ("CETA"), article 8.24.

[1157] See below, Chapter 6, Section "Restricting the Admissibility of Shareholders' Claims".
[1158] UNCITRAL, 46th session, A/68/17, *Report of the United Nations Commission on International Trade Law* (Vienna, 2014) at paras 129, 131. See also UNCITRAL, 47th session, A/69/17, *Report of the United Nations Commission on International Trade Law* (New York, 2014) at paras 126–128.
[1159] UNCITRAL, 48th session, A/CN9/848, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (Vienna, 2015) at para 3.
[1160] See above, para 1147.
[1161] UNCITRAL, 48th session, A/CN9/848, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (Vienna, 2015) at paras 16, 23–28 [emphasis added].

III.337. In the second Note (issued in 2016), the Secretariat observed that:

> [A] large majority of those investment treaties do not take into consideration the potential for multiple claims resulting from a wide definition of protected investors and investments. At the time of their conclusion, negotiators of such investment treaties did not foresee the potential for multiple claims, whether by related or unrelated investors, and such treaties lack the mechanisms to appropriately deal with such claims. … Considering the chronology of the decisions in multiple proceedings, if the claim of the local company is decided first and damages awarded, the value of the claimant company is restored and any shareholders' claim for reflective loss (loss in the value of their shares as a consequence of the damage incurred by the company) is no longer relevant.[1162]

Regarding potential solutions, the Note: (i) added FITR clauses to the pool of solutions that were listed in the first Note;[1163] (ii) discussed article 17 of the UNCITRAL Arbitration Rules as reflecting the principle whereby tribunals have an inherent power to stay proceedings when necessary; and (iii) pointed out that the triple identity test requirement in *res judicata* and *lis pendens* may impose challenges to the application of the two principles, but suggested that the EU Regulation No 1215/2012[1164] may provide guidance on the flexible application of *lis pendens*.[1165]

III.338. The Secretariat issued its third Note in 2017, where it elaborated further on the potential solutions listed in the previous two Notes.[1166] The UNCITRAL Commission then mandated its Working Group III to work on a possible reform of the ISDS system.[1167] To assist Working Group III, the Secretariat provided another Note in 2019—this time on shareholders' claims and reflective

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[1162] UNCITRAL, 49th session, A/CN9/881, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (New York, 2016) at paras 11, 16.
[1163] *Ibid* at paras 35–36.
[1164] *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*.
[1165] UNCITRAL, 49th session, A/CN9/881, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (New York, 2016) at para 25–26.
[1166] UNCITRAL, 50th session, A/CN9/915, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (Vienna, 2017).
[1167] UNCITRAL, 52nd session, A/CN9/964, *Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session* (Vienna, 2018) at paras 1–2. See also UNCITRAL, 52nd session, A/CN9/970, *Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session* (New York, 2019) at para 84.

loss.[1168] The Note discussed, among other things, the disproportionate win-lose chances between investors and states in multiple proceedings, in the sense that:

> [A] single economic entity would have multiple chances to raise claims (including through its shareholders), only needing to prevail in one of them, whereas the respondent State would need to defend all such claims. This scenario exposes a State to the risk that makes it necessary to defend itself multiple times against essentially the same alleged injury to the same economic entity, even if it had prevailed in one of them.[1169]

The Secretariat also suggested that Working Group III should consider "whether the availability of reflective loss claims undermines the company's separate legal personality by enabling shareholders to gain access to funds belonging to the company."[1170]

III.339. The topic has remained on UNCITRAL's agenda,[1171] and discussions are progressing, but no particular reform proposal has yet been adopted.[1172] Once the UNCITRAL project comes to fruition, the result is likely to constitute an important document on multiple proceedings and double compensation.

v. Reports by the IBA Subcommittee on Investment Treaty Arbitration

III.340. In 2016, the IBA Subcommittee on Investment Treaty Arbitration issued a report on a survey that it had conducted for a better understanding of the criticisms against investor-state

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[1168] UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 38th session, A/CN9/WGIII/WP170, *Possible Reform of Investor-State Dispute Settlement (ISDS): Shareholder Claims and Reflective loss - Note by the Secretariat* (Vienna, 2019) at paras 1–2.
[1169] *Ibid* at para 15.
[1170] *Ibid* at para 23. For a discussion on the impact of shareholders' claim on the principle of corporate separateness, see Part II, Chapter 2, Subsection "Principle of Corporate Separateness".
[1171] UNCITRAL, 53rd session, A/CN9/1004*, *Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Eight Session* (Vienna, 2019) at paras 10, 25; UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 39th session, A/CN9/WGIII/WP193, *Possible Reform of Investor-State Dispute Settlement (ISDS): Multiple Proceedings and Counterclaims - Note by the Secretariat* (New York, 2020).
[1172] UNCITRAL, 54th session, A/CN9/1044, *Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Ninth Session* (Vienna, 2020) at para 16.

arbitration.[1173] One of the issues that were surveyed was multiple proceedings[1174] for the same dispute.[1175] The report noted that:

> While parties do in some cases resolve the complications arising from parallel proceedings on an ad hoc basis, it's more common for investment treaty arbitrations to continue in parallel with related court proceedings, commercial or even other investment treaty arbitrations. The arbitrators are left to resolve the myriad issues arising from the lack of coordination between investment treaties and the mechanisms through which investment treaty disputes are adjudicated.[1176]

III.341. According to the 2016 report, approximately 75% of those surveyed were "concerned" about "parallel court and arbitration proceedings by related parties against the same state".[1177] Also, about 75% were "concerned" about "multiple arbitration proceedings by the same or related parties under different investment treaties against the same state".[1178]

III.342. In 2018, the Subcommittee issued another report to propose solutions to the issues that were surveyed in 2016.[1179] The 2018 report noted that "[p]arallel proceedings may threaten the credibility of investment arbitration as a public form of adjudication".[1180] It listed double compensation as one of the "adverse consequences" of multiple proceedings.[1181] The 2018 report set forth a number of suggestions for "potential mitigators", being: *res judicata*, *lis pendens*, stay of arbitral proceedings, and consolidation or quasi-consolidation of proceedings.[1182]

[1173] IBA Subcommittee on Investment Treaty Arbitration, *Report on the Subcommittee's Investment Treaty Arbitration Survey* (2016).
[1174] The IBA report uses the term "parallel proceeding". However, this thesis uses the more inclusive term of "multiple proceeding" that covers all possible scenarios. For a discussion on the reason, see *supra*, note 1144.
[1175] *Ibid* at 8.
[1176] *Ibid*.
[1177] Of the 75%, about 55% expressed "some" concern, and about 20% expressed "significant" concern. *Ibid* at 9.
[1178] Of the 75%, about 45% expressed "some" concern, and about 30% expressed "significant" concern. *Ibid* at 10.
[1179] IBA Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018) at 2.
[1180] *Ibid* at 15.
[1181] *Ibid* at 18.
[1182] *Ibid* at 18–20.

III.343. Regarding the principles of *res judicata* and *lis pendens*, the report notes that the application of the two principles requires the triple identity test to be met, and points out that some commentators have argued that the test should be relaxed.[1183] Yet, the report does not offer any insight as to how that could be achieved. Regarding consolidation or quasi-consolidation of proceedings, the report correctly points out that the two mechanisms require the parties' consent, which is not always easy to obtain.[1184]

III.344. With respect to staying arbitral proceedings, the report explains that "the principle of *competence-competence* provides tribunals with the means to stay proceedings before them for reasons that include the mitigation of adverse impacts of parallel proceedings".[1185] It further explains that, in the ISDS system, it is generally accepted that tribunals have the "inherent power" to conduct the proceeding before them as they see appropriate.[1186] However, the report does not explain that the fate of this solution is tied to how the principle of *res judicata* is applied. The reason for this is that, even if a tribunal accepts to stay the proceeding before it (pending the result of the other proceeding), once the other proceeding is concluded, the tribunal would have to decide whether *res judicata* attaches to the concluded proceeding. Given that the report does not offer much guidance on how to overcome the strict triple identity test of the *res judicata* principle, it is not clear how the stay solution could help.

[1183] *Ibid* at 18–19.
[1184] *Ibid* at 20. See e.g. *Ampal v Egypt* where consolidation did not take place because the parties did not reach an agreement on which tribunal should serve as the consolidation tribunal. See above, para III.282 and the accompanying footnotes.
[1185] *Ibid* at 19.
[1186] *Ibid*.

B. Commentary

III.345. The double compensation issue in the ISDS system has largely remained under-developed in commentary. There are not many works that have addressed the issue, and of those that have addressed it, most have done so in a truncated or summary fashion. This Subsection discusses how ISDS commentators have addressed the double compensation issue.

III.346. Even assuming that there is not yet an established principle on the prohibition of double compensation, one would think that the idea that double compensation must be avoided is undisputed among commentators. However, that is not the case and an opposite view exists: that a state paying more than once is not a problem.[1187] According to this view, when there are multiple proceedings (whether brought by investors and their investment vehicle, or by shareholders at different levels of the same corporate chain), those proceedings are not really related because, in the former scenario treaty claims are different from contract claims, and in the latter scenario the parties are considered legally different persons.[1188] As such (the argument goes), there is no need to coordinate those proceedings, and "the State should pay twice", because "[a] different solution would produce a state of insecurity in economic relations apart from being less equitable to creditors and other shareholders."[1189]

III.347. However, the above opinion remains an isolated position. Most other commentators who have discussed the issue of double compensation consider it to be a problem that requires a solution.[1190] Those commentators may have different opinions about how big a problem double

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[1187] Dolores Bentolila, "Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration" (2010) 2:1 Trade L & Dev 87 at 139.
[1188] *Ibid* at 128–131.
[1189] *Ibid* at 130, 139.
[1190] See e.g. Andrea K Bjorklund, "Private Rights and Public International Law", *supra* note 1, at 258; Christopher Dugan et al, *supra* note 1, at 596; Zachary Douglas, *supra* note 98, at paras 785, 791; Elizabeth Wu, "Addressing

compensation is or about what approach should be adopted, but they all share the view that double compensation is a problem and should be avoided. However, not all of those commentators have posited a solution for achieving that goal. The next Chapter sets out the views of those commentators who have set forth solutions and discusses the solutions that have been applied by tribunals.

CHAPTER 6: SUGGESTED SOLUTIONS

III.348. Investment arbitration tribunals and commentators have thus far suggested several solutions to the double compensation problem, some of which have been proposed exclusively in relation to double compensation, while some are designed to address the problems associated with multiple proceedings, including the double compensation issue.

III.349. This Chapter analyses those solutions and categorizes them into seven separate Sections: (1) Consolidation/Coordination of Parallel Proceedings; (2) Purchase of the Claimant Investor's Shares by the Respondent State; (3) Restricting the Admissibility of Shareholders' Claims (which alone is categorized into six different versions); (4) Undertaking not to Seek Double Compensation; (5) Fork-in-the-Road (FITR) and Waiver Clauses; (6) Investment Court System; and (7) *Res Judicata*, *Lis Pendens*, and Issue Preclusion.

Multiplicity of Shareholder Claims in ICSID Arbitrations under Bilateral Investment Treaties: A 'Tiered Approach' to Prioritising Claims?" (2010) 6:2 Asian Int'l Arb J 134 at 135; Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration*, *supra* note 1, at 185; Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes" in Arthur W Rovine, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2013)* (Brill-Nijhoff, 2014) 3 at 6–7; Julien Chaisse & Lisa Zhuoyue Li, *supra* note 99, at 82; Daniela Páez-Salgado, "Settlements in Investor-State Arbitration: Are Minority Shareholders Precluded from Having its Treaty Claims Adjudicated?" (2017) 8:1 JIDS 101 at 116; Charles T Kotuby & Luke A Sobota, *supra* note 1, at 150–151; Gabriel Bottini, *supra* note 789, at 12, 149; Lukas Vanhonnaeker, *supra* note 113, at 212.

III.350. The discussion demonstrates that, overall, the suggested solutions lack a holistic approach and general applicability. Some ignore the underlying policies of international investment law; some of them require fundamental changes to the ISDS system, which are simply not feasible; and some of them are so small in scope that they cover only one scenario in double compensation, leaving out other scenarios.[1191] A few of these solutions, however, have great potential and will be adapted and built upon in Part IV, where the author formulates her comprehensive solution to the double compensation problem.

A. Consolidation/Coordination of Parallel Proceedings

III.351. "Consolidation" and "coordination" of parallel proceedings are popular solutions that have been suggested by—or at least, discussed in—most sources covering the side effects of shareholders' claims (including the issue of double compensation).[1192] "Consolidation" can be defined as "the joinder of two or more proceedings that already are pending before different courts or arbitral tribunals".[1193] Likewise, "coordination" (also known as "*de facto* consolidation") is a mechanism whereby certain procedural aspects of connected parallel proceedings are harmonized

[1191] For example, some solutions apply only to parallel proceedings and not sequential proceedings. Further, some solutions pertain only to the scenario involving contract-based and treaty-based proceedings, and leave out the scenario involving multiple treaty-based proceedings, or vice-versa. For a discussion on different possible scenarios in double compensation, see above, Part II, Chapter 3, Section "Scenarios".

[1192] See e.g. Thomas W Wälde & Borzu Sabahi, "Compensation, Damages and Valuation in International Investment Law", (2007) 4:6 TDM 1 at 42–43; ILA Committee on Law of Foreign Investment, *Final Report* (Rio de Janeiro Conference, 2008) at 22; OECD Working Paper No 2013/03, *supra* note 1149, at 48; "Paris: Concurrent Proceedings in Investment Disputes", Global Arbitration Review (2 December 2013) (reporting on a conference co-organized by the IAI, CIDS, and UNCITRAL – see remarks by Dan Sarooshi); Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes", *supra* note 1190, at 6–7; Julien Chaisse & Lisa Zhuoyue Li, *supra* note 99, at 92; UNCITRAL, 50th session, A/CN9/915, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (Vienna, 2017) at paras 27–28; IBA Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018) at 20. For a recent work discussing the feasibility and desirability of the consolidation of shareholders' claims, see Lukas Vanhonnaeker, *supra* note 113, at 270–279.

[1193] Gabrielle Kaufmann-Kohler et al, "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" (2006) 21:1 ICSID Review - Foreign Investment Law Journal 59 at 64.

(for example, by having the same tribunal for those proceedings), but where separate awards are issued in each proceeding.[1194] However, when considered as a solution to the double compensation problem, consolidation and coordination come with five major limitations.

III.352. The first limitation is that consolidation and coordination are possible only when the proceedings are parallel in time. Thus, they do not cover the scenario where one of the proceedings has already concluded and an award of damages has been rendered.[1195] The second limitation is that, even when the proceedings are parallel, it is difficult to consolidate or coordinate them when one of the proceedings is a treaty-based arbitration and the other is a contract-based proceeding (particularly if it is a local court proceeding): the scenario that constitutes the majority of cases involving the risk of double compensation.[1196] For example, *Suez and Vivendi v Argentina* was coordinated with *AWG v Argentina* and the two investment arbitrations shared the same tribunal,[1197] but the tribunal did nothing with respect to the parallel court proceeding concerning the same state measures,[1198] leaving the double compensation issue to the second deciding forum (the local courts).[1199]

III.353. The third limitation is that, assuming that all the proceedings are parallel and in the form of investment arbitration, it is again difficult to consolidate them if they have been established under different arbitration rules (for example, one under the ICSID rules and the other under the

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[1194] Catherine Yannaca-Small, "Consolidation of Claims: A Promising Avenue for Investment Arbitration?" in OECD, *International Investment Perspectives 2006* (OECD Publishing, 2006) 225 at 227, 232. See also Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International, 2006) at 188 (para 419).
[1195] For a discussion on the difference between parallel proceedings and sequential proceedings, see above, Part II, Chapter 3, the categorization of scenarios Based on Timing.
[1196] See above, Part II, para II.103.
[1197] *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*, Decision on Jurisdiction (3 August 2006) at paras 2–6.
[1198] *Ibid*, Award (9 April 2015) at para 38.
[1199] *Ibid* at paras 38–40. For an analysis of the tribunal's approach, see above, para III.23.

UNCITRAL rules).[1200] In *Ampal v Egypt* (an ICSID arbitration) and its parallel proceeding *Maiman v Egypt* (a PCA arbitration), the claimants offered to consolidate the proceedings and asked for it to be before the ICSID tribunal.[1201] Egypt was willing to consolidate, but wanted the proceeding to be before the PCA tribunal[1202] and, as such, the consolidation did not materialize. It should be noted that both the second limitation (discussed in the previous paragraph) and the third limitation (discussed in this paragraph) can be overcome if all the parties to the proceedings consent to consolidation, which brings us to the fourth limitation.

III.354. The fourth limitation of consolidation is that it is essentially a consent-based mechanism, i.e. investment arbitration tribunals generally lack the authority to consolidate claims on their own motion and, thus, any consolidation depends on the disputing parties' consent.[1203] A brief discussion on the forms of consent in consolidation can shed light on the nature of this limitation. The parties can grant their consent to consolidation in three forms: (i) expressly (i.e. contemporaneous consent upon or after the constitution of the tribunals); (ii) by incorporation (i.e. *ex ante* consent) through choosing an arbitration institution whose rules provides for consolidation; or (iii) by incorporation (*ex ante* consent) through the applicable IIA that provides for consolidation (for the state by signing the IIA and for the investors by relying on that IIA).[1204]

[1200] Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes", *supra* note 1190, at 7.
[1201] *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016) at para 13(iii).
[1202] *Ibid*.
[1203] See e.g. IBA Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018) at 20; Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes", *supra* note 1190, at 7.
[1204] Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes", *supra* note 1190, at 7; *Canfor v United States* consolidated with *Tembec v United States* and *Terminal Forest v United States*, Order of the Consolidation Tribunal (7 September 2007) at para 79 (rejecting the claimants argument that they did not consent to arbitration, and holding that "[b]y consenting to arbitration within the confines of Article 1121 [of NAFTA], the disputing investor accordingly also consents to Article 1126 [which provides for consolidation], with 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 Article 1120 Tribunal"); Irene M Ten Cate, "Multi-Party

However, the reality is that the first form of consent is not easy to obtain[1205] and the other two forms of consent are not common. The following paragraphs elaborate on the latter point.

III.355. Regarding consent through arbitration rules, it should be noted that, under the rules of some of the arbitral institutions (e.g. the ICC, SCC, and LCIA), for a tribunal to consolidate the parallel proceedings, it does not necessarily need all parties to expressly consent at the time.[1206] Thus, so long as one party requests consolidation and certain requirements are met, the tribunal may issue the consolidation order, which means that, even if the other parties do not expressly consent at that point in time, their *ex ante* consent is considered to be established. However, the same does not hold true in relation to the ICSID and UNCITRAL rules, which are in fact the two most-applied rules in investment arbitration.[1207] The current version of the ICSID Arbitration Rules (last amended 2006) does not have any provision that expressly provides for an institutional consolidation mechanism.[1208] Likewise, the UNCITRAL Arbitration Rules (the three versions of

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and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements Under U.S. Law" (2004) 15 Am Rev Int'l Arb 133 at 153 ("where the parties have selected institutional rules which provide for joinder or consolidation, such rules are incorporated into the arbitration agreement and courts should enforce these rules").

[1205] This is so because often one of the parties disagrees (either on the consolidation itself or the mechanics of it). For example, in the parallel proceedings of *Lauder v Czech Republic* and *CME v Czech Republic*, the state refused the claimants' offer of consolidation. *CME v Czech Republic*, Final Award (14 March 2003) at para 427. Likewise, in the parallel proceedings of *Ampal v Egypt* (an ICSID arbitration) and *Maiman v Egypt* (a PCA arbitration), the parties agreed on consolidation, but could not agree on which tribunal to serve as the consolidated tribunal and, as such, consolidation did not take place. See *supra*, note 1201.

[1206] E.g. see, art 10 of the ICC Arbitration Rules (in all the 2021, 2017 and 2012 versions), art 15 of the SCC Arbitration Rules (2017), art 22.1(x) of the LCIA Arbitration Rules (2014).

[1207] By July 2020, of the total of 1061 investment arbitrations cases filed, 562 cases used ICSID arbitration rules, 63 cases used the ICSID Additional Facility rules, and 341 cases used the UNCITRAL arbitration rules, which brings the number of cases using ICSID and UNCITRAL rules to 966 cases (i.e. 91% of all the filed cases). UNCTAD Investment Policy Hub website, section "Investment Dispute Settlement Navigator", tab "Institutions", online: <https://investmentpolicy.unctad.org/investment-dispute-settlement> (last visited 11 March 2021).

[1208] ICSID Arbitration Rules (last amended 2006), online: <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> (last visited 11 March 2021).

1976,[1209] 2010,[1210] and 2013[1211]) have no provision on a consolidation mechanism.

III.356. This is not to say that consolidation is impossible under the ICSID or UNCITRAL rules,[1212] but rather that any consolidation under those rules requires all parties to expressly consent, which in practice brings such consolidations into the scope of the first form of consent.[1213] It should be noted that the latest proposed amendments to the ICSID rules provide for consolidation and coordination of parallel proceedings in the proposed rule 45 of the Arbitration Rules and the proposed rule 55 of the Additional Facility Rules.[1214] However, the proposed rules are also based on a voluntary mechanism that requires all parties' consent. In fact, the proposed rules seem to only officialize the current ICSID practice.

III.357. With respect to the third form of consent (i.e. incorporated consent through the applicable IIA), there are not many IIAs that contain a provision allowing a consolidation mechanism that does not require all parties' express consent. One of the first (if not the first) IIAs that did so was NAFTA. Article 1126 and 117(3) of NAFTA provided a mechanism that would allow consolidation of parallel proceedings without the need for the express consent of all

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[1209] UNCITRAL Arbitration Rules (1976), online: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf> (last visited 11 March 2021).
[1210] UNCITRAL Arbitration Rules (revised 2010), online: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf> (last visited 11 March 2021).
[1211] UNCITRAL Arbitration Rules (with new art 1, paragraph 4, as adopted in 2013), online: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> (last visited 11 March 2021).
[1212] In fact, article 44 of the ICSID Convention vests ICSID tribunals with the power to decide any procedural question that is not addressed by the ICSID Convention or the ICSID Arbitration Rules. In addition, some commentators are of the opinion that article 26 of the ICSID Convention provides a basis for consolidation. See e.g. Antonio Crivellaro, "Consolidation of Arbitral and Court Proceedings in Investment Disputes" in Bernardo Cremades Sanz Pastor & Julian D M Lew, eds, *Dossiers*: *Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing, 2005) 79 at 88; Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2012) at para 13.149.
[1213] See above, para III.354.
[1214] ICSID, *Proposals for Amendment of the ICSID Rules – Working Paper # 4* (February 2020) at 54, 146.

parties.[1215] The mechanism was described as "unusual and innovative" at the time.[1216] Following NAFTA, such consolidation mechanism appeared in several IIAs,[1217] yet it did not emerge as a widespread provision in many IIAs.

III.358. As such, the issue of consent—whether in the express (contemporaneous) form or in the incorporated (*ex ante*) forms through the arbitration rules or the applicable IIA—imposes a significant limitation to the consolidation of parallel proceedings. However, even assuming that all the four limitations discussed in the previous paragraphs are overcome and the proceedings are consolidated, another limitation remains to be addressed.

III.359. The fifth limitation to consolidation is unique to the issue of double compensation. The consolidation of parallel proceedings may in and of itself help with most problems associated with multiple proceedings, but not necessarily with double compensation. As soon as the proceedings are consolidated or even coordinated, problems such as the risk of inconsistent awards are eliminated because there is one tribunal. However, that is not the case with respect to double compensation. Preventing double compensation depends on whether the tribunal considers the claimants and the causes of action to be the same. In other words, if a tribunal considers the claimants in the parallel proceeding to be different persons, or the causes of action relied on in the parallel proceedings to be different, the tribunal will carry that view into the consolidated

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[1215] Article 1126 of NAFTA provided the requirements of consolidation in general, while article 1117(3) concerned only the consolidation of parallel shareholders' claims. Under that article, consolidation was mandatory unless the tribunal found that "the interests of a disputing party would be prejudiced thereby". The equivalent of article 1126 in the new CUSMA is article 14.D.12 (applicable to US-Mexico relations only), but there is no equivalent of article 1117(3) in CUSMA.

[1216] Henri C Alvarez, "Arbitration Under the North American Free Trade Agreement" (2000) 16:4 Arb Int'l 393 at 413.

[1217] See e.g. CAFTA-DR, art 10.25; US Model BIT (both 2012 and 2004 versions), art 33; Canadian Model FIPA (2004), arts 32, 23(3); and the latest investment agreements concluded by the EU (such as CETA, art 8.43 and EU-Singapore Investment Protection Agreement, art 3.24).

proceeding and may grant double compensation. For example, if a consolidation tribunal holds views similar to those held by the tribunals in *CME v Czech Republic*, *Eskosol v Italy*, *Busta v Czech Republic*, and *Standard Charter Bank (Hong Kong) v Tanzania*, it would be likely that the consolidation tribunal grants double compensation.

III.360. The possibility of the tribunal granting double compensation is higher in "coordinated" proceedings (compared to "consolidated" proceedings). The reason is that, in coordinated proceedings, separate awards are issued for each proceeding and, as such, even if the tribunal sees an overlap between the claims submitted to the parallel proceedings, the tribunal can still award full compensation (i.e. without a reduction of the overlapping portion) in the separate awards.

III.361. For example, in *von Pezold v Zimbabwe*, there were two parallel ICSID arbitrations: one initiated by the von Pezold family (the ultimate investors)[1218] and the other arbitration initiated by a part of von Pezolds' investment vehicles in Zimbabwe.[1219] The proceedings were coordinated to have the same tribunal, the same evidence, the same hearings, and were conducted with respect to an overlapping loss.[1220] The tribunal, despite finding that there was a clear overlap between the claims, held that it would be "an injustice" to the claimants of each proceeding not to separately grant them the full compensation.[1221] Then, to alleviate the risk of double compensation, the tribunal added (in the analysis part and not in the operative part of the awards) that the two awards could not be enforced jointly.[1222] Concerns with the tribunal's approach have been previously discussed in detail[1223] and will not be repeated here. Suffice it to say that, although the tribunal

[1218] *von Pezold v Zimbabwe*, Award (28 July 2015) at paras 29–10, 118–120, 126–127, 135–136, 324–325.
[1219] *Ibid* at paras 1, 5–6.
[1220] *Ibid.*
[1221] *Ibid* at paras 936–937.
[1222] *Ibid* at para 938.
[1223] See above, paras III.135 – III.136.

had the advantage of sitting in both arbitrations, and although it noted that the same loss was being claimed in both proceedings, it did not effectively prevent the risk of double compensation. And this was a case where the tribunal held the view that there was an overlap between the claims. Obviously, if the tribunal was of the opinion that the causes of action and claimants were different, it would not even require that the two awards could not be enforced jointly.

III.362. The above discussion illustrates that the double compensation issue has a unique status (as compared to the other problems associated with shareholders' claims), in that consolidation and coordination are not a workable solution to the problem. Preventing double compensation does not depend on the proceedings being consolidated/coordinated, but rather on how a tribunal sees the relationship between the multiple parties and between the causes of action. Certainly, consolidation and coordination can bring the tribunal one step closer to preventing double compensation (by giving the tribunal control over all of the connected claims) and hence the possibility to prevent double compensation, but the actual prevention of double compensation will lie in how the tribunal views and assesses the parties and the causes of action.

B. Purchase of the Claimant Investor's Shares by the Respondent State

III.363. One of the first suggested solutions to double compensation was set forth in *CMS v Argentina*. In that case, the claimant offered to transfer its shares in the local company to the respondent state, in consideration for receiving the post-breach value of the shares in addition to the damages, and the tribunal gave the respondent state a one-year option to buy those shares.[1224] This solution can prevent double compensation, because "[i]f the company subsequently recovers

[1224] *CMS v Argentina*, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) at para 96; Award (12 May 2005) at paras 429, 465, 469.

its full direct loss (which includes the shareholder's reflective loss), the government (now as shareholder) will benefit from the company recovery in proportion to its shareholding."[1225]

III.364. The using of a share-purchase solution to prevent double compensation was innovative at the time, but the idea itself (i.e. the claimant selling its shares to the respondent) was not without precedent. In fact, there are earlier investment arbitration awards where the parties were given the option to effect the share transfer (e.g. to free the state from future investment claims),[1226] or the claimants (in expropriation cases) were ordered to transfer their shares to the respondent state upon receiving the compensation.[1227] It might be that the *CMS* claimant and tribunal found that the idea of transferring the shares to the state could also be used to prevent the double compensation problem.

III.365. In any event, the share-purchase solution has a major limitation, as its viability depends on both sides' consent: the shareholder must be willing to sell its shares, and the state would have to accept to pay the residual value of the shares in addition to the damages that it already must pay. Even if the shareholder's consent is obtained (which is possible, especially in cases where the parties' relationship has deteriorated and the investor wishes to withdraw from the host state), the state's consent to pay the sum for the shares in addition to the damages is less likely to be obtained. In fact, it was reported that in the *CMS* case, Argentina did not purchase the shares and CMS sold

[1225] OECD Working Paper No 2013/03, *supra* note 1149, at 35–36.
[1226] See e.g. *SPP v Egypt*, Award (20 Ma7 1992) at 173 (the claimant offered and the state accepted the share transfer so as to free the state from future investment claims); *AAPL v Sri Lanka*, Award (27 June 1990) at paras 109–111 (giving the parties the option that the claimant—after receiving the damages—would transfer all its shares to the state in return for the claimant to be released from a potential liability it could have under the guarantee that it had given as shareholder for the company's loan).
[1227] See e.g. *Santa Elena v Costa Rica*, Final Award (17 February 2000) at paras 111(1), 111(5); *Metalclad v Mexico*, Award (30 August 2000) at paras 112, 127; *Tecmed v Mexico*, Award (29 May 2003) at paras 151, 199.

them to a third party.[1228]

III.366. Where the state measures almost destroy the investment vehicle's value, the post-breach value of the shares is often insignificant, and the state would be more likely willing to buy them.[1229] However, where the investment vehicle is still a going concern, the residual value of the shares could be still substantial—and even be worth more than the total damages the state must pay[1230]—which makes it less of an attractive option for the state, which is then less likely to consent.

III.367. Furthermore, a valid concern has also been raised with respect to the share-purchase solution: that "this approach is in effect a process of the nationalization of companies. Nationalization is an important political and economic policy for a state, and it often attracts heated debate. It is unwise for arbitral tribunals to interfere in this area."[1231] The reason for requiring tribunals to obtain the parties' consent to go forward with the share-purchase solution seems to be that this solution goes beyond the tribunals' jurisdiction in awarding compensation: hence, the parties' consent is required.[1232] These limitations might be the reason why the share-purchase solution was not adopted by later ISDS tribunals that faced the issue of double compensation.[1233]

[1228] OECD Working Paper No 2013/03, *supra* note 1149, at fn 75.
[1229] See e.g. *GÜRİŞ and Others v Syria* (discussed in Chapter 4) in which the tribunal ordered the claimants to transfer the title to the respondent because the tribunal found that the claimants had lost their entire investment in the local companies.
[1230] *Ibid* at 36.
[1231] Julien Chaisse & Lisa Zhuoyue Li, *supra* note 99, at 92.
[1232] *Ibid* at 35.
[1233] There is one investment arbitration award where the tribunal applied the share-purchase solution for reasons not relevant to double compensation (i.e. the parties' troubled relationship and the claimant's wish to fully withdraw from the host state). However, the tribunal noted that the solution could help with preventing a potential risk of double compensation because, according to the tribunal, if the shares were not transferred to the state, the shareholder could sell those shares to a third party who might then "acquire a right to litigate with respect to the same conduct considered by this Award". *Railroad Development v Guatemala*, Award (29 June 2012) at paras 263–265. It should be noted that the tribunal's concern about the potential risk of double compensation in that case was not valid. First, a new shareholder could not acquire a right that the current shareholder had already fully used (when the claim became *res judicata* once the award was issued). Second, the parties had not raised any objection with respect to the risk of double compensation because there was no risk of double compensation in this case (i.e. there were no other claims submitted

C. Restricting the Admissibility of Shareholders' Claims

III.368. Given the relationship between double compensation and shareholders' claims,[1234] it has been suggested that to avoid the problems associated with multiple proceedings (including the double compensation problem), shareholders' claims should be restricted. This solution has different versions, which can be named and categorized (based on the degree of restriction they impose on the admissibility of claims) into six versions: (i) Blanket Ban, (ii) Default Ban, (iii) Proximity-Based Restriction (Known as the "Cut-Off Point"), (iv) Circumstances-Based Restriction, (v) Tier-Based Restriction, and (vi) Option-Based Restriction. This Section discusses these six versions in turn.

i. First Version: Blanket Ban

III.369. The OECD Paper (discussed earlier as one of the international documents) regards shareholders' claims for reflective loss as the root of the problems associated with multiple proceedings in the ISDS system.[1235] Thus, it promotes the idea of going back to the no reflective loss principle (as applied in general international law and domestic laws of advanced jurisdictions).[1236] The OECD Paper argues that this solution is "more efficient and fairer to all interested parties", including other shareholders and creditors.[1237] It also considers that national courts—in comparison to arbitral tribunals—are far better equipped to handle cases involving multiple parties and proceedings.[1238]

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by any other party with respect to the same measures). As such, this case could not be counted as a case where a tribunal tackled the risk of double compensation with the share-purchase solution.

[1234] Discussed above, Part II, Chapter 2.

[1235] OECD Working Paper No 2013/03, *supra* note 1149, at 32–51.

[1236] *Ibid* at 3, 11, 13, 21–22, 30.

[1237] *Ibid* at 3.

[1238] *Ibid* at 35.

III.370. Therefore, the OECD Paper suggests that any recovery should be limited to the investment vehicle only, i.e. a blanket ban on shareholders' claims for reflective loss (the "First Version").[1239] And accordingly, the only avenue for shareholders to bring claims would be similar to the domestic law mechanism of derivative claims i.e. claims by shareholders on behalf of the investment vehicle and with recovery for the investment vehicle,[1240] similar to article 1117 of NAFTA (now article 14.D.3.1.b of CUSMA, which is applicable to US-Mexico relations only). In line with promoting the idea of limiting the recovery to the investment vehicle, the OECD Paper also discusses article 25(2)(b) of the ICSID Convention, which provides local investment vehicles under foreign control with access to investment arbitration if both states have so consented in the applicable IIA.[1241]

III.371. At first glance, one might think that the First Version has adopted the right approach in solving the problem. However, targeted analysis proves a number of shortcomings in this solution, which render it virtually impossible to implement. First, a blanket ban on shareholders' claims for reflective loss does not take into account the general underlying policy in international investment law to provide a higher level of protection (compared to what domestic law and the law of diplomatic protection offer) to investors and their investments.[1242] It is true that the no reflective loss principle in domestic law is based on policies such as "consistency, predictability, avoidance

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[1239] OECD Working Paper No 2013/03, *supra* note 1149, at 3. The origin of this solution seems to go back to the 2008 article by Gabriel Bottini, where he argued that shareholders' claims for reflective loss were inadmissible under the ICSID Convention, particularly given the mechanism available in article 25(2)(b). However, with respect to non-ICSID arbitrations, he noted that the inadmissibility restriction would not necessarily apply. He also argued that the derivative claims mechanism (claims brought by shareholders, but on behalf of the investment vehicle) could also be available to shareholders if the applicable IIA expressly provided for this, as did NAFTA article 1117. Gabriel Bottini, "Indirect Claims Under the ICSID Convention", *supra* note 782, at 637, 569–672, fn 24. Later, Bottini suggested a more flexible solution which is discussed below, under the Fourth Version.

[1240] *Ibid* at 19, 52–55.

[1241] OECD Working Paper No 2013/03, *supra* note 1149, at 56–58.

[1242] For a discussion on the underlying policy in international investment law, see above, Part I, para I.16.

of double recovery and judicial economy",[1243] all of which should be taken into account when formulating a solution to double compensation. However, another policy that should equally be considered is the international investment law policy of offering effective protection to investors. Any solution to the double compensation problem must strike a balance between these policies.

III.372. The second shortcoming is that the First Version is indifferent to the fact that not all shareholders' claims involve the risk of double compensation or other problems associated with multiple claims. In fact, the multiplicity of claims/proceedings—although a byproduct of shareholders' claims—is not an inseparable feature that manifests itself in every single shareholders' claim.[1244] As such, a blanket ban is not justified.

III.373. The third shortcoming is that the underlying assumption in the First Version does not correspond to the assumption in international investment law. The First Version promotes the domestic law principle of no reflective loss,[1245] which is based on the assumption that a company "has the power to recover the loss … and is better placed to do so".[1246] As noted in the OECD Paper, there is no such assumption in international investment law, because the host state can wind up the investment vehicle or effectively block its recourse to justice (by either freezing its assets or interfering with local proceedings).[1247] We cannot borrow a solution from domestic corporate law and apply it to international investment law when the two fields have different (if not opposite) assumptions on the issue.

[1243] OECD Working Paper No 2013/03, *supra* note 1149, at 3.
[1244] See above, para II.69 (setting out the requirements of double compensation).
[1245] See above, para III.369.
[1246] OECD Working Paper No 2013/03, *supra* note 1149, at 8, 19.
[1247] *Ibid* at 9, 58.

III.374. The fourth shortcoming concerns the derivative claims mechanism. As noted in the OECD Paper, the majority of BITs do not offer a derivative claim procedure such as NAFTA article 1117. Further, even if they did, minority shareholders would be left out of such a procedure.[1248] The same shortcoming applies to the investment vehicle's recourse to the ISDS system through article 25(2)(b) of the ICSID Convention: not all BITs include a consent provision in relation to article 25(2)(b), and even if they do, minority shareholders do not benefit from the protection.[1249]

III.375. The fifth shortcoming is that, although the First Version correctly criticizes tribunals for not considering the policy consequences of allowing shareholders' claims for reflective loss,[1250] it does not explain how a tribunal that wishes to consider those policy consequences could bar shareholders' claims in practice. Simply put, in cases where there is no access to NAFTA-like derivative claims procedure or article 25(2)(b) of the ICSID Convention, on what legal bases can a tribunal hold the shareholders' claims inadmissible so as to follow and apply those policy considerations? The First Version does not provide an answer to that question.

ii. Second Version: Default Ban

III.376. Another version of the solution involving the restriction of shareholders' claims is the one proposed by Zachary Douglas. His 2009 book, *The International Law of Investment Claims*, sets out the rules he suggests pertaining to jurisdiction, admissibility, and applicable law in

[1248] *Ibid* at 52, 55.
[1249] *Ibid* at 56.
[1250] *Ibid* at 30.

investment arbitration.[1251] With respect to the issue of admissibility of shareholders' claims for reflective loss, he suggests the following:

> Rule 49: A claim founded upon an investment treaty obligation which seeks a remedy for the diminution of value of a shareholding in a limited liability company having the nationality of the host contracting state party is admissible if the claimant can establish a *prima facie* case that: (i) the assets of the company have been expropriated by the host contracting state party so that the shareholding has been rendered worthless; or (ii) the company is without or has been deprived of a remedy to redress the injury it has suffered; or (iii) the company is without or has been deprived of the capacity to sue either under the *lex societatis* or *de facto*; or (iv) the company has been subjected to a denial of justice in the pursuit of a remedy in the system for the administration of justice of the host contracting state party.[1252]

III.377. In fact, Douglas' suggested solution consists of the inadmissibility of shareholders' claims for reflective loss as a default rule while allowing four specific exceptions (the "Second Version"). Unlike the First Version that allows shareholders to bring claims only in the form of derivative claims (which is for the company's loss and not for their reflective loss), the Second Version allows shareholders' claims for reflective loss, but only in four exceptional situations.

III.378. By banning shareholders' claims (as a default rule) on the one hand and providing a number of exceptions on the other hand, the Second Version tries to strike a balance between the need to respect the separate legal personality of the investment vehicle from its shareholders[1253] with the need to protect those shareholders when the host state leaves the investment vehicle with little or no recourse to justice. However, there are some considerations that make it difficult to prefer this solution.

III.379. First, and on a general level, the Second Version does not align well with the current

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[1251] Zachary Douglas, *supra* note 98, at xxiv.
[1252] *Ibid* at 397 [emphasis added].
[1253] *Ibid* at paras 749–751, 786. For a discussion on the impact of shareholders' claims on the principle of corporate separateness, see above, Part II, Chapter 2, Subsection "Principle of Corporate Separateness".

approach in the ISDS system. As previously discussed, the opposite of the Second Version (i.e. recognising the admissibility of shareholder claims for reflective loss as a default rule) is the well-established practice in ISDS case law.[1254] Thus, implementing the Second Version requires a fundamental change in ISDS tribunals' approach to the matter, which does not seem to be feasible at this point in time.[1255]

III.380. Second, on a more technical level, the Second Version only addresses the issue of multiple claims/proceedings by shareholders and their investment vehicle, which means that it offers no solution for the issue of multiple claims/proceedings brought by shareholders at different levels of the same corporate chain.[1256] Third, it is not clear why the Second Version is limited to only one form of reflective loss (i.e. diminution in the value of shares) and does not include other forms such as loss of dividends, even though Douglas discussed those forms in his book.[1257]

iii. Third Version: Proximity-Based Restriction (Known as the "Cut-Off Point")

III.381. Another version of restricting the admissibility of shareholders' claims is based on the proximity of shareholders to the investment vehicle, i.e. the shareholders that are at the upper level of the corporate chain might not get access to investment arbitration (the "Third Version", known as the "Cut-Off Point"). The Third Version was first suggested by the tribunal in *Enron v Argentina*. When addressing the admissibility of shareholders' claims, the tribunal noted that:

> [W]hile investors can claim in their own right under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible

[1254] See above, paras II.35, II.37.
[1255] Furthermore, given that the aim of this thesis is to find a solution to the problem of double compensation without suggesting any fundamental change to present legal doctrines and practice, the Second Version does not align with the methodology that the author has adopted for finding a solution to the problem of double compensation. See above, Part I, Section "Methodology and Theoretical Approach", para I.27.
[1256] For a discussion on different possible scenarios, see above, Part II, Chapter 3, the categorization of scenarios Based on Legal Basis.
[1257] Zachary Douglas, *supra* note 98, at para 759.

> as they would have only a remote connection to the affected company. As this is in essence a question of admissibility of claims, the answer lies in establishing the extent of the consent to arbitration of the host State. If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment.[1258]

The *Enron* tribunal found the claims before it to be admissible because the claimants had been invited by the Argentine government to invest in the country, which meant that this arbitration was within the scope of the host state's consent.[1259]

III.382. The Third Version is among the solutions that are being considered in the UNCITRAL project investigating problems associated with multiple proceedings (including the problem of double compensation).[1260] Some commentators also support the Third Version as a possible solution.[1261] Thomas Wälde and Borzu Sabahi have further developed this solution by suggesting two criteria of a minimum 10% shareholding plus the host state's knowledge (or a reasonable possibility of knowledge) of the investor's identity as the bases for determining the cut-off point and, in fact, the scope of the host state's consent.[1262] The criterion of a minimum 10% shareholding has been adopted in some of the recent BITs signed by Turkey.[1263]

III.383. However, in general, the Third Version was not followed by later tribunals, nor well received by other commentators. It has been correctly pointed out that focusing on a host state's "consent" or "knowledge" could be problematic, because "[i]n most cases, a direct relationship

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[1258] *Enron v Argentina*, Decision on Jurisdiction (14 January 2004) at para 52 [emphasis added].
[1259] *Ibid* at paras 54, 56–57.
[1260] See above, Chapter 5, Subsection "UNCITRAL Project on Multiplicity of Proceedings".
[1261] See e.g. Thomas Wälde & Borzu Sabahi, *supra* note 1192, at 42; Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes", *supra* note 1190, at 10.
[1262] Thomas Wälde & Borzu Sabahi, *supra* note 1192, at 42.
[1263] See e.g. Turkey-Rwanda BIT (2016), art 1.1; Turkey-Columbia BIT (2014), art 1.2; Turkey-Azerbaijan BIT (2011), art 1.1; but see South Korea-Turkey Investment Agreement (2015), art 1.1.

will not be present between the host state and a foreign shareholder, in that *inter alia* such state will not have granted any specific promises to the latter apart from those contained in the BIT. But that factor should not prevent the shareholder to exercise [sic] its rights under the BIT".[1264]

III.384. There are three other concerns with respect to the Third Version. First, the problems associated with multiple claims remain unaddressed where shareholders are at lower levels (i.e. closer to the investment vehicle) in both scenarios of multiple proceedings brought by shareholders and the investment vehicle, and multiple proceedings brought by shareholders at different levels of the corporate chain. Second, on the one hand the *Enron* tribunal discussed the issue of the proximity of a shareholder to the investment vehicle as an "admissibility" issue, on the other hand the tribunal related the matter to the state's "consent",[1265] whereas the parties' consent is generally considered to be an issue of jurisdiction rather than admissibility.[1266]

III.385. Third, as previously explained, the rule of shareholders' standing (regardless of the percentage of shareholding or their proximity with the investment vehicle) is well-established in the ISDS case law.[1267] Changing this rule would require a fundamental shift in the tribunals' approach, which does not seem to be feasible or likely at this point in time.[1268]

[1264] Gabriel Bottini, "Indirect Claims Under the ICSID Convention", *supra* note 782, at 609. See also Christopher H Schreuer, "Shareholder Protection in International Investment Law", *supra* note 40, at 13.
[1265] *Enron v Argentina*, Decision on Jurisdiction (14 January 2004) at para 52.
[1266] See e.g. James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford University Press, 2019) at 667; Veijo Heiskanen, "Note – Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration" (2014) 29(1) ICSID Review – Foreign Investment Law Journal 231 at 237. The distinction between jurisdiction and admissibility is discussed in detail in Part IV, Chapter 8, Section "Admissibility v. Jurisdiction".
[1267] See above, paras II.35, II.37.
[1268] Also, given that the Third Version requires a fundamental change in the tribunals' approach and to case law, it does not neatly align with the methodology that the author has adopted in this thesis for finding a solution to the problem of double compensation. See above, Part I, Section "Methodology and Theoretical Approach", para I.27.

iv. Fourth Version: Circumstances-Based Restriction

III.386. Another version of the restriction on the admissibility of shareholders' claims was proposed by Gabriel Bottini in 2017.[1269] For the scenario of multiple proceedings involving shareholders and their investment vehicle, Bottini suggests shareholders' claims for reflective loss are inadmissible when the following circumstances are present:

- (a) there is substantial overlap between the treaty claims and contract claims, creating a risk of double compensation;
- (c) there is a non-investment arbitration forum available to the investment vehicle that could be considered an "adequate alternative forum" (i.e. a forum that is free from state interference and offers due process) where the investment vehicle is "legally and factually able to pursue its claim";
- (c) the contract claims have been filed prior to the investment arbitration;
- (d) the shareholders' claims rely (even impliedly) on contract breaches, and the contract has an exclusive jurisdiction clause;
- (e) the investment arbitration tribunal is not in a position to adopt measures that could effectively address the risk of double compensation, and it would not be "realistic in the circumstances" to expect the contract-based forum to be able to deduct the compensation that the investment tribunal will grant; and
- (f) even if the contract-based forum could deduct the awarded compensation in investment arbitration, it would be harmful to the interests of third parties; or

[1269] Gabriel Bottini, *supra* note 789.

- (g) the contract claims were waived or settled.[1270]

III.387. Bottini's approach (the "Fourth Version") is more flexible and feasible than his initial approach suggested in 2008, which might be the origin of the First Version (i.e. the blanket ban).[1271] Further, in the Fourth Version, the criteria for inadmissibility are listed, which implies that the default rule is the admissibility of shareholders' claims. This places the Fourth Version in opposition to the Second Version (where the default rule is the inadmissibility of shareholders' claims and a number of admissibility criteria are listed). The Fourth Version is also preferable to the Third Version (i.e. the cut-off point), as the former is based on determining whether there is a tangible risk of double compensation, rather than the latter, which bases this assessment on the location of a shareholder in the corporate chain. Thus, the Fourth Version offers a more viable solution than the other three versions.

III.388. However, there is a number of limitations inherent in the Fourth Version. First, it only covers the scenario that the multiple proceedings include treaty-based and contract-based proceedings, which means that it does not cover the scenario where the multiple proceedings are all treaty-based proceedings.[1272] In addition, the Fourth Version only addresses the risk of double compensation when the proceedings are either parallel or when the "other" proceeding[1273] has not yet been initiated, which means that the scenario of sequential proceedings is left out.[1274]

III.389. The second shortcoming is that the Fourth Version provides the same remedy (i.e.

[1270] *Ibid* at 51–57.
[1271] For Bottini's initial approach, see above, note 1239.
[1272] For a discussion on different possible scenarios, see above, Part II, Chapter 3, the categorization of scenarios Based on Legal Basis.
[1273] The "other" proceeding refers to the proceeding other than the investment arbitration at issue. See above, para II.100.
[1274] For a discussion on different possible scenarios, see above, Part II, Chapter 3, the categorization of scenarios Based on Timing.

inadmissibility) for two different situations: one where the proceedings are parallel, and one when the "other" proceeding has not yet been initiated.[1275] The risk of double compensation in these two situations is considerably different, in that the risk in parallel proceedings is much higher than in a circumstance where no other proceeding has yet been initiated. It would be difficult to accept that a duly established investment arbitration tribunal holds the claims before it as inadmissible, in favor of a contract-based proceeding that has not yet been initiated.

III.390. Third, the Forth Version suggests that, when the specific circumstances that it has listed are present,[1276] the investment arbitration tribunal should accord priority to the contract-based proceeding launched by the company (i.e. the investment vehicle), as this would not only prevent the risk of double compensation but would also protect the third parties' interests.[1277] However, according priority to the investment vehicle (as opposed to shareholders) reflects the policies and principles pursued in domestic corporate law: that the company and its creditors and the principle of corporate separateness come before the shareholders.[1278] As discussed above, international investment law does not apply the same policies and principles on this question: for example, it has an underlying policy to provide enhanced protection for investors and their investment,[1279] and the principle of corporate separateness has already been compromised in the ISDS system.[1280]

III.391. As such, if domestic corporate law and international investment law do not share the same policies and principles, it is unclear how a solution rooted in the former would work in the latter. In other words, in international investment law, it could be that priority should be accorded

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[1275] Gabriel Bottini, *supra* note 789, at 57.
[1276] See above, para III.386.
[1277] Gabriel Bottini, *supra* note 789, at 257.
[1278] See above, Part II, para II.57.
[1279] For a discussion on the underlying policy in international investment law, see above, Part I, para I.16.
[1280] See above, Part II, Chapter 2, the discussion on the Principle of Corporate Separateness.

to shareholders and not the investment vehicle. The question then is how the priority should be given to the investors, without risking double compensation at the state's expense. This issue will be discussed in greater detail in Part IV.

v. Fifth Version: Tier-Based Restriction

III.392. This version of the restriction on the admissibility of shareholders' claims was formulated by Elizabeth Wu in 2010.[1281] Her approach (the "Fifth Version") categorizes claims into different tiers as follows:

> Claimants with standing to bring claims should be classified according to the directness of their relation with the host state breach. The principal claimants would be entities on whom the acts of the host state would have the most immediate and direct effect. These would either be a locally-incorporated company which has been given the status of a foreign national, or a foreign company operating within the host state. Shareholders of these companies will then be ranked according to their respective levels of shareholding. Direct shareholders in these companies will be termed 'first-level' shareholders, shareholders of these shareholders will be termed 'second-level' shareholders, and so on. If the local company has not been accorded foreign nationality, then immediate or 'first-level' shareholders of that local company would be deemed principal claimants, as they are most directly affected by host state action, and have priority to bring claims. This would be irrespective of their status as majority or minority shareholders.
> Claims by indirect shareholders should then only be allowed after local companies or direct shareholders have already brought claims, and in the successive order of their different levels of shareholding. If first-level shareholders have not yet brought claims, then tribunals hearing claims by second-level shareholders should stay proceedings until the resolution of claims by first-level shareholders. Damages awarded to the second-level shareholders can then be calculated by taking into account the increased value of their shareholding that may arise from damages already paid to first-level shareholders.
> …
> The unwillingness of a principal claimant(s) to bring a claim does not allow subsequent levels of shareholders to bring claims. A situation could arise where first-level shareholders bring a successful claim and receive damages. Subsequently, if the litigation strategy of the principal claimant changes, it might bring a claim, allowing the first-level shareholders to receive double recovery of damages. This equally applies for successive levels of shareholders: third-level shareholders may not claim until second-level shareholders have claimed, and so on. …
> The aforementioned approach is subject to two exceptions: First, indirect shareholders may claim without a prior principal claim, if they can show that the principal claimant is unable to bring the claim, or has waived its right to bring a claim. The former could include a

[1281] Elizabeth Wu, *supra* note 1190.

> situation where a principal claimant has been expropriated by the host state. Secondly, indirect shareholders may bring a claim if they can show that manifest injustice may result from their inability to bring their claim.[1282]

III.393. The strength of the Fifth Version is that, unlike the other versions discussed above, it can be applied to all scenarios (whether categorized based on timing or legal bases).[1283] However, the Fifth Version has a shortcoming: it imposes major restrictions on shareholders' ability to bring claims, without providing any legal/policy bases to support these restrictions.

III.394. The first restriction is that shareholders cannot bring claims if the investment vehicle has been accorded foreign nationality (which enables the investment vehicle to launch an investment arbitration on its own). This is a notable restriction to shareholders' claims because approximately 11% of IIAs accord foreign nationality to locally incorporated investment vehicles.[1284] Therefore, under the Fifth Version, shareholders covered by those IIAs would not be allowed to launch investment arbitration proceedings. When state parties to an IIA agree to accord foreign nationality to even local companies (and hence consider them as protected investors), they do so to maximize the level of protection for investors and not to limit their access to the ISDS system. It is not clear why the Fifth Version cuts off the access of those shareholders (which are covered by 11% of IIAs) to the ISDS system.

[1282] *Ibid* at 141, 143–144.

[1283] See above, Part II, Chapter 3, for a discussion on the categorization of scenarios Based on Timing and Based on Legal Basis.

[1284] Of the 3,291 IIAs that have been concluded thus far, the UNCTAD Investment Policy Hub has mapped the content of 2,575 IIAs. Of those that have been mapped, 273 IIAs provide foreign nationality to locally incorporated investment vehicles (approximately 11%). In the author's view, once the remaining IIAs are mapped, it is unlikely that the 11% will drastically change. See UNCTAD Investment Policy Hub website, section "International Investment Agreements Navigator", tab "Mapping of IIA Content", (on the left column) tab "Scope and Definition", sub-tab "Definition of Investor", sub-tab "Specifying Legal Entities Covered", sub-tab "Defines Ownership and Control of Legal Entities", box "Yes", online: <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> (last visited 11 March 2021).

III.395. The second restriction is that shareholders at upper levels must await the conclusion of proceedings brought by those at the lower level, even if no proceeding at the lower level has been initiated. This means that upper-level shareholders must withhold their claims even when no proceeding has been initiated at the lower level. The Fifth Version fails to set a timeframe for a reasonable waiting period after which shareholders at the upper levels could bring claims. This can cause significant delay for those at the upper level to seek justice—a situation that relates to the maxim of "justice delayed is justice denied". Furthermore, what will happen if those at the lower level never file a claim?

III.396. In fact, under the Fifth Version, the unwillingness of those at the lower level to bring a claim can effectively block upper-level shareholders' claims perpetually.[1285] Wu has set only two exceptions where upper-level shareholders can bypass the tiered approach: where the investment vehicle is unable to bring a claim or has waived it, and where there would be a "manifest injustice" in blocking the shareholders' claim.[1286] The question then becomes: why should a shareholder have to prove the existence of "manifest injustice" in order to bring a claim when there is no mirror requirement in the IIAs? Further, the underlying policy in international investment law is to offer a higher level of protection to investors and their investment (compared to domestic law and the law of diplomatic protection).[1287]

III.397. The truth is that the Fifth Version imposes considerable restrictions on shareholders' access to the ISDS system—something Wu noted as being a "weakness" of her solution[1288]—without providing relevant bases for such restrictions. What does it mean to say that no "bases"

[1285] Elizabeth Wu, *supra* note 1190, at 143.
[1286] *Ibid* at 144.
[1287] For a discussion on the underlying policy in international investment law, see above, Part I, para I.16.
[1288] *Ibid* at 160.

support the Fifth Version? For a new solution to be integrated into international law, it needs to be backed either by the sources of international law (namely, treaties, international custom, general principles of law, case law, and commentary)[1289] or the underlying policy of the relevant field (here, international investment law). None of these provide support for the Fifth Version:

- No reading of the existing IIAs (being treaties) supports the tiered-based approach, as there is nothing in IIAs that suggests such a categorization of investors. The protection offered by IIAs covers all protected investors. That is why previous efforts to categorize investors into majority/minority and direct/indirect shareholders failed.[1290] Further, "it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain";[1291]
- No international custom, general principle of law, or ISDS decision provides for a tiered approach; and
- As previously discussed, the underlying policy in international investment law is to offer a higher level of protection to investors and their investment. This policy does not support

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[1289] Article 38(1) of the ICJ Statute reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[1290] See Stanimir A Alexandrov, *supra* note 40, at 393–394; Christopher H Schreuer, "Shareholder Protection in International Investment Law", *supra* note 40, at 6–7; Dolzer & Schreuer, *supra* note 38, at 58; OECD Working Paper No 2013/03, *supra* note 1149, at 25–29; Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at paras 6.123–6.132.

[1291] ILC, "Draft Articles on the Law of Treaties with Commentaries" in Yearbook of the International Law Commission, vol 2, part II (United Nations Publication, 1966) 187 at 220–221. The 1966 Draft Articles is the ILC's final draft of the *Vienna Convention on the Law of Treaties*, which was submitted to the General Assembly and was later adopted at a conference in 1969. See the ILC's website, <https://legal.un.org/ilc/summaries/1_1.shtml> (last visited 28 August 2020).

the Fifth Version, which cuts off the access of shareholders covered by 11% of IIAs and reduces the access of the rest to two limited exceptions.

III.398. In addition to this shortcoming of the Fifth Version (that it restricts shareholders' claims without providing bases for this restriction), it also contains a contradiction. Under the Fifth Version, "[t]he purpose of waiting for the conclusion of the principal claim is that if the subsequent tribunal does determine there was a breach of obligation, then it can pro-rate damages by taking into account the flow-down effect of the damages already awarded in the principal claim".[1292] This means that the subsequent tribunal should deduct the damages awarded by the preceding tribunal. On the other hand, the Fifth Version rejects the position that *res judicata* would attach to the preceding decision on the ground that the triple identity test is not met.[1293] If *res judicata* is not applicable between the two decisions, it is unclear on what basis the subsequent tribunal should deduct the damages previously awarded. In other words, why should a subsequent tribunal deduct the damages awarded in an earlier decision if the parties and the claims in the two proceedings are really different? The Fifth Version does not address this contradiction.

vi. Sixth Version: Option-Based Restriction

III.399. Another version of the restriction on the admissibility of shareholders' claims was set out by the tribunal in *Ampal v Egypt*. In that case, the risk of double compensation was posed by a parallel investment arbitration (*Maiman v Egypt*), which was launched by the ultimate investor along with two of his companies that were the subsidiaries of the lead claimant in the *Ampal*

[1292] Elizabeth Wu, *supra* note 1190, at 143.
[1293] *Ibid*.

case.[1294] The *Ampal* tribunal, when discussing the admissibility of claims,[1295] ruled that there was an overlap of claims between the two investment arbitrations and that, because both tribunals had established their jurisdiction, one of the overlapping claims had to be withdrawn to avoid double compensation.[1296] The tribunal gave the lead claimant the option to either pursue the overlapping claim here only (by having its two subsidiaries withdraw their claims from the parallel arbitration), or to relinquish the overlapping portion here and pursue these claims through its subsidiaries in the parallel arbitration only.[1297]

III.400. The tribunal reasoned that "while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals".[1298] Given that both tribunals had found that they had jurisdiction, there was no longer any "risk of a denial of justice occasioned by the absence of a tribunal competent to determine the [overlapping] portion of the claim."[1299] The consequence of this was that "the abuse of process constituted by the double pursuit" of the same claim had "crystallised".[1300]

III.401. As such, the *Ampal* solution (the "Sixth Version") consists of two elements: (i) the inadmissibility of the overlapping claims in one proceeding in favor of the other proceeding, once both forums find that they have jurisdiction; and (ii) giving an option to the shareholders to choose

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[1294] *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016) at paras 10(ii), 331. From the corporate-structure perspective, Ampal was in fact the interposed company between Mr. Maiman and his two co-claimants.
[1295] *Ibid* at para 312.
[1296] *Ibid* at paras 328–334.
[1297] *Ibid* at paras 334, 346(h).
[1298] *Ibid* at para 331.
[1299] *Ibid* at paras 332–333.
[1300] *Ibid* at para 333.

the proceeding from which they must withdraw the overlapping claims. The Sixth Version protects the state against the risk of double compensation by withdrawing the overlapping claims from one proceeding, and (compared to the Fourth Version and the Fifth Version) is even more closely aligned to the international investment law goal of protecting investors. The reason is that the Sixth Version gives investors the option to choose which proceeding to withdraw and which one to continue, whereas the Fourth and Fifth Versions make the choice for the investors by giving priority to the proceeding in which the investment vehicle is involved.[1301]

III.402. However, the Sixth Version has two limitations. First, it stops short of addressing the double compensation issue in scenarios where the other proceedings is a contract-based proceeding.[1302] Second, even in scenarios where the other proceeding is an investment arbitration, the Sixth Version only covers the scenario of proceedings that are parallel in time and offers no solution if one of the proceedings has already concluded and an award of damages has been rendered.[1303] However, such limitations are normal, given that the Sixth Version was born out of a tribunal's effort to find a solution to a particular scenario that was present in the case before it, rather than designing a solution to all possible scenarios in the future. In any event, the Sixth version is an effective solution that the thesis will build on and will adapt in Part IV when formulating a comprehensive solution.

III.403. It is interesting to note that, as in *Ampal*, in *Micula v Romani (I)* the tribunal considered the withdrawal of one claimant owned by the other claimant to be a potential solution to double

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[1301] See above, para III.390.
[1302] For a discussion on different possible scenarios, see above, Part II, Chapter 3, the categorization of scenarios Based on Legal Basis.
[1303] For a discussion on different possible scenarios, see above, Part II, Chapter 3, the categorization of scenarios Based on Timing.

compensation. However, the facts in *Micula* were different. In that case, the risk of double compensation arose out of one single investment arbitration where the claimants consisted of two individual persons (the Micula brothers) and three companies from the investment vehicle group that was owned by the Micula brothers.[1304] The tribunal found that it could not award damages to the three companies from the investment vehicle group for the direct harm they had suffered while also compensating the Micula brothers for the indirect harm they had suffered, as this would amount to double compensation.[1305] As a result, the tribunal awarded damages to the claimants collectively without proffering any specific allocation.[1306]

III.404. What was similar to the *Ampal* approach (i.e. the withdrawing of overlapping claims) is that the *Micula* tribunal noted that it could have awarded the entire damages to the Micula brothers if the companies from the investment vehicle group had withdrawn from the case and the respondent had consented to the withdrawal (as per Rule 44 of the ICSID Arbitration Rules), but none of those requirements were fulfilled in *Micula*.[1307]

D. Undertaking Not to Seek Double Compensation

III.405. Another solution to double compensation that has been suggested includes the claimants' undertaking not to seek double compensation,[1308] for example, by: (i) offsetting the amount awarded and paid in one proceeding from the amount claimed in the other proceeding(s); (ii) withdrawing from the other proceeding(s) if the damages sought in one of the proceedings is

[1304] *Micula v Romania (I)*, Award (11 December 2013) at paras 2–5, 156, 936–943.
[1305] *Ibid* at paras 1240, 1246–47.
[1306] *Ibid* at para 1240.
[1307] *Ibid* at paras 1231–1236, fn 257 (at 333).
[1308] The undertaking can also be given by the respondent state if the risk of double compensation arises from the respondent state's counterclaims in multiple proceedings. For a discussion on this exceptional scenario, see above, Part II, Chapter 3, Subsection "The Counterclaim Exception".

awarded and paid; or (iii) reimbursing the state for the duplicative amount received (together, the "Undertaking Solution"). The Undertaking Solution has found more support among ISDS tribunals than among commentators. The author's research shows that the solution has been mentioned in at least 11 cases.[1309] However, the Undertaking Solution also has its own limitations.

III.406. First, there are doubts as to the effectiveness of the Undertaking Solution. This is so because it has no clear enforcement mechanism, especially in the scenario where the proceedings are all investment arbitrations and no local court is involved. As Julien Chaisse and Lisa Li correctly pointed out:

> This mechanism is very good in theory. But this mechanism requires tribunals to be granted more power. In domestic courts, an undertaking is an enforceable promise that has the effect of a court order. Thus, undertakings are obligations to the courts. If the party fails to honor the undertaking, the party may be held to be in contempt of court. This obligation that the undertakers have to the courts is what makes undertakings powerful. But arbitrators do not have similar powers to hold any party in contempt of court.[1310]

A notable example of this situation is *Burlington v Ecuador* and its connected proceeding, *Perenco v Ecuador*. Both cases are discussed above, in the fourth Chapter. However, it is helpful to highlight the relevant parts of the two cases here.

III.407. *Burlington* and *Perenco* were two ICSID arbitrations that were brought separately by two consortium partners against Ecuador.[1311] In both arbitrations, Ecuador brought counterclaims for environmental harm, which could lead to double compensation in favor of Ecuador because

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[1309] *British Caribbean Bank v Belize*; *Burlington v Ecuador*; *Chevron and Texaco v Ecuador (I)*; *ConocoPhillips v Venezuela*; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*; *Malicorp v Egypt*; *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*; *Unión Fenosa v Egypt*; *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*).

[1310] Julien Chaisse & Lisa Zhuoyue Li, *supra* note 99, at 92.

[1311] *Perenco v Ecuador*, Decision on Jurisdiction (30 June 2011) at para 13; *Burlington v Ecuador*, Decision on Jurisdiction (2 June 2010) at para 17(2).

the counterclaims were filed on the basis of joint and several liability.[1312] In the *Burlington* case, Ecuador admitted the risk of double compensation and undertook to collect damages only based on the more favorable decision.[1313] However, Ecuador did not honor its undertaking: it did not wait to see which award would be more favorable. Ecuador received damages for its counterclaims from the *Burlington* case[1314] and then, in *Perenco*, went on to argue that the *Burlington* damages should not even be deducted from the *Perenco* counterclaim damages.[1315] The *Perenco* tribunal agreed with Ecuador that the *Burlington* tribunal had failed to accurately estimate the extent of contamination, and that Ecuador remained undercompensated.[1316] Thus, the *Perenco* tribunal again awarded damages for the counterclaims and then to "avoid" double compensation, it deducted the amount that was already paid in *Burlington*.[1317] Although the *Perenco* tribunal deducted the *Burlington* counterclaim damages, it did not really avoid double compensation; rather, it only reduced the amount of it. This is because the basis of the counterclaims was joint and several liability, which was decided and paid in the *Burlington* case. The *Burlington-Perenco* experience makes one wonder how enforceable the Undertaking Solution is, at least in the scenario where all the proceedings are investment arbitrations.

III.408. With respect to the scenario where one of the proceedings is a local court proceeding, the effectiveness of the Undertaking Solution depends on which side of the dispute gives the undertaking. If the claimants give the undertaking, the state should be able (through its courts) to make the claimants live up to their undertaking. However, if the side that has given the undertaking

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[1312] *Burlington v Ecuador*, Decision on Counterclaims (7 February 2017) at paras 6, 52, 64. This was an example of the exceptional scenario where a state could benefit from double compensation. See *supra*, note 1308.
[1313] *Burlington v Ecuador*, Decision on Counterclaims (7 February 2017) at paras 70, 1084.
[1314] *Perenco v Ecuador*, Award (27 September 2019) at para 445.
[1315] *Ibid* at paras 480–481.
[1316] *Ibid* at paras 508, 512, 898.
[1317] *Ibid* at paras 898–899.

is the state itself (as in *Burlington*), it may not be advisable to leave the state in charge of honoring its own undertaking.

III.409. The second limitation in relation to the Undertaking Solution is that it is relevant only when the proceedings are parallel in time, and not where one of the proceedings has already concluded and an award of damages has been rendered. The reason is that, in the latter scenario, the overlapping portion should be deducted from the amount sought in the subsequent proceeding and thus not awarded again. Rules of logic and efficiency do not support the idea of awarding the overlapping portion again (which would lead to double compensation) and then making the claimants undertake to reimburse the state for the duplicative portion. However, this logic was not applied in *Venezuela Holdings v Venezuela*, which led to a bizarre outcome.

III.410. To highlight the relevant aspect of the *Venezuela Holdings* case (an ICSID arbitration): one of the claimants had launched a parallel ICC commercial arbitration against the state's oil company.[1318] The ICC tribunal awarded damages to the claimant in that proceeding, which were paid.[1319] The claimants in the ICSID arbitration then undertook to reimburse the state-owned company for any double compensation.[1320] The tribunal noted that "effectively" the total compensation must be the damages determined in the ICSID arbitration less the damages already paid through the ICC arbitration.[1321] However, in the end, the ICSID tribunal awarded the entire amount of damages without making any deduction, and only noted that the claimants were "willing

[1318] *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*), Award (9 October 2014) at paras 118, 37, 55, fns 59, 28.
[1319] *Ibid* at paras 120, 379.
[1320] *Ibid* at para 380.
[1321] *Ibid* at para 381.

to make the required reimbursement" to avoid double compensation.[1322] Thus, the tribunal left the prevention of double compensation to the claimants' "willing[ness]".

III.411. Given these two limitations to the Undertaking Solution,[1323] we see that it is only effective in the scenario where one of the proceedings is a local court proceeding, and where all the proceedings are afoot in parallel. The question then is: should the Undertaking Solution, in the limited scenario of parallel investment arbitration and local court proceeding, be used by tribunals as the first recourse? In other words, is there any more effective solution to the double compensation issue? As the discussion in Part IV explains, there are more effective solutions that should render the Undertaking Solution as a solution of last resort.

III.412. The last issue to be noted with respect to the Undertaking Solution concerns the question of where in an award should the tribunal incorporate an undertaking for it to be effective? In the majority of the cases where the tribunals welcomed the Undertaking Solution, the tribunal only noted the claimant's undertaking (as though it was a simple statement) without incorporating it in the operative part of the award.[1324] In fact, as the tribunal in *ConocoPhillips v Venezuela* correctly observed: "the official and solemn submission of [the claimants'] undertaking [about double compensation] would have had no meaning" if the tribunal would not do anything about it.[1325] In that case, the tribunal incorporated the undertaking into the operative part of its award.[1326]

[1322] *Ibid* at paras 404(d)–(e).
[1323] See above, paras III.406, III.409.
[1324] See e.g. *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*, Award (9 April 2015) at para 39; *British Caribbean Bank v Belize*, Award (19 December 2014) at para 190; *Chevron and Texaco v Ecuador (I)*, Partial Award on the Merits (30 March 2010) at paras 517, 557; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*, Award (16 June 2010) at paras 12.60.25, 12.61; *Malicorp v Egypt*, Award (7 February 2011) at para 103(a); *Unión Fenosa v Egypt*, Award (31 August 2018) at paras 10.13, 10.142.
[1325] *ConocoPhillips v Venezuela*, Award (9 March 2019) at para 963.
[1326] *Ibid* at para 1010(5).

E. Fork-in-the-Road (FITR) and Waiver Clauses

III.413. Another solution that has been suggested in relation to the double compensation problem is the application of the FITR clauses and waiver clauses (also known as the "no-U-turn" clauses).[1327] The FITR clauses and waiver clauses share the same goal of limiting the number of multiple proceedings, but they achieve this goal in different ways:[1328]

- If an IIA contains a FITR clause, "a choice of a particular dispute resolution procedure [by the investors], once taken, forecloses the possibility of electing any other dispute resolution procedures potentially available".[1329] A typical example of a FITR clause is article 8(3) of the Chile Model BIT;[1330] whereas
- If an IIA has a waiver clause, "the investor[s] may pursue any and all domestic remedies available to [them] in the courts of the host State", but only up until the time that the investors wish to launch an investment arbitration, at which point they must (as a pre-condition to investment arbitration) waive their right to continue those local proceedings

[1327] See e.g. IBA Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018) at 18; Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes", *supra* note 1190, at 6, 10; Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at paras 4.110, 4113; UNCITRAL, 49th session, A/CN9/881, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (New York, 2016) at paras 23, 35–36; "Double Recovery Discussed at Columbia", *Global Arbitration Review* (2 May 2017) (reporting on Columbia Arbitration Day 2017 – see remarks by Marinn Carlson).

[1328] It should be noted that commentators are divided about the relationship of FITR and waiver clauses to the rule of *electa una via*: some commentators consider both FITR and waiver clauses to be expressions of the rule, while other commentators only relate the FITR clauses to the rule of *electa una via*. For the first group, see e.g. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at para 4.53. For the second group, see e.g. Yves Derains & Josefa Sicard-Mirabal, Introduction to Investor-State Arbitration (Kluwer Law International, 2018) at 69, 71; Christoph Schreuer, "Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road" (2004) 5:2 J World Inv & Trade 231 at 240; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2004) at 212–217.

[1329] Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at para 3.67; Catherine Yannaca-Small, "Improving the System of Investor-state Dispute Settlement: An Overview" in OECD, *International Investment Perspectives 2006* (OECD Publishing, 2006) 183 at 205.

[1330] For the text of the Chile Model BIT, see online: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2841/download> (last visited 11 March 2021).

and the right to initiate new ones.[1331] Typical examples of a waiver clause are article 1121 of NAFTA (now article 14.D.5.1.e of CUSMA - with respect to US-Mexico relations only), article 26(2) of both the 2004 and 2012 US Model BITs, and article 8.22 of CETA.

However, as a solution to the double compensation problem, FITR clauses have two major limitations, and waiver clauses have one major limitation, which are discussed here in turn.

III.414. The first limitation to FITR clauses is that, for the clause to be applicable, the common practice of ISDS tribunals requires the investment arbitration and the other proceeding(s) to have identical parties, causes of action, and relief.[1332] The identity requirements are similar to the triple identity test (i.e. the same parties, the same cause of action, and the same relief) that has been applied for the *res judicata* and *lis pendens* principles.[1333] The numbers that follow provide a clearer picture.

III.415. Of the 10,23 reported investment arbitration cases that were filed as of January 2020,[1334] the author's research shows that the issue of FITR clauses was raised in at least 32 cases.[1335] Of those 32 cases:

[1331] Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at para 4.68; Andrea K Bjorklund, "Waiver of Local Remedies and Limitation Periods" in *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 237 at 238.

[1332] "Double Recovery Discussed at Columbia", *Global Arbitration Review* (2 May 2017) (reporting on Columbia Arbitration Day 2017 – see remarks by Marinn Carlson). See Antonio Crivellaro, *supra* note 1212, at 98–99; Christoph Schreuer, "Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road", *supra* note 1328, at 247–248.

[1333] See e.g. *H&H v Egypt*, Excerpts of Award (6 May 2014) at paras 365–367 (while deciding whether to apply the triple identity test to the BIT's FITR clause, noted that the test "originates from the doctrine of *res judicata*"); ILA Committee on Law of Foreign Investment, *Final Report* (Rio de Janeiro Conference, 2008) at 22; "Double Recovery Discussed at Columbia", *Global Arbitration Review* (2 May 2017) (reporting on Columbia Arbitration Day 2017 – see remarks by Marinn Carlson).

[1334] UNCTAD, *Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019*, IIA Issue Note 2 (July 2020) at 1.

[1335] For the list of all 32 cases, see Appendix 2: Table of ISDS Cases on Fork-in-the-Road (FITR) Clause.

- In 30 cases, the tribunals refused to apply the FITR clause, of which:
    - in 24 cases, the tribunals' refusal was based on the lack of the triple identity between the proceedings (mostly the lack of the same parties and the same cause of action requirements);[1336] and
    - in six cases, while the tribunals based their refusal to apply the FITR clause on other reasons, they did not disagree with the triple identity test (or they even approved it).[1337]
- In only two cases, the FITR clauses were applied to bar the claimants from pursuing their claims in investment arbitration.[1338]

III.416. The above numbers demonstrate that the strict application of the triple identity test has,

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[1336] *Greentech v Italy*, Final Award (23 December 2018) at paras 196, 204–205; *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at paras 121–122, 125–126, 133–135; *Charanne v Spain*, Award (21 January 2016) at paras 187, 194–206, 401, 406–408, 410; *AES v Kazakhstan*, Award (1 November 2013) at paras 224–230; *Bogdanov v Moldova (IV)*, Final Award (16 April 2013) at paras 83, 166, 169–176; *Mobil v Argentina*, Decision on Jurisdiction and Liability (10 April 2013) at paras 124, 139, 143–147; *Khan Resources v Mongolia*, Decision on Jurisdiction (25 July 2012) at paras 386, 389-395; *Total v Argentina*, Decision on Liability (27 December 2010) at para 443; *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*, Interim Award on Jurisdiction and Admissibility (30 November 2009) at paras 587–591, 598–600; *Toto v Lebanon*, Decision on Jurisdiction (11 September 2009) at paras 205–206, 211–212; *Chevron and Texaco v Ecuador (I)*, Interim Award (1 December 2008) at paras 198, 207; *Pey Casado v Chile (I)*, Award (8 May 2008) at paras 467, 469, 483–487, 490–491, 495–497; *Desert Line v Yemen*, Award (6 February 2008) at paras 124, 126(a), 136–139; *Pan American Energy v Argentina* consolidated with *BP America v Argentina*, Decision on Preliminary Objections (27 July 2006) at paras 140–149, 154; *Sempra v Argentina*, Decision on Objection to Jurisdiction (11 May 2005) at paras 102, 116, 120–123, 127–128; *Occidental v Ecuador (I)*, Final Award (1 July 2004) at paras 38–39, 51–63; *Enron v Argentina*, Decision on Jurisdiction (14 June 2004) at paras 95–98; *LG&E v Argentina*, Decision of the Arbitral Tribunal on Objections to Jurisdiction (30 April 2004) at paras 28, 34, 75–76; *Azurix v Argentina*, Decision on Jurisdiction (8 December 2003) at paras 37, 89–92; *CMS v Argentina*, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) at paras 77, 80, 131; *Lauder v Czech Republic*, Final Award (3 September 2001) at paras 153, 156, 161–166; *Genin v Estonia*, Award (25 June 2001) at paras 321, 323, 330–334; *Vivendi v Argentina (I)*, Award (21 November 2000) at para 42, 53–55; *Champion v Egypt*, Decision on Jurisdiction (21 October 2003) at 19.

[1337] *Gavazzi v Romania*, Decision on Jurisdiction, Admissibility and Liability (21 April 2015) at paras 127–128, 164–168, 171–174; *Awdi v Romania*, Award (2 March 2015) at paras 203–205; *Chevron and Texaco v Ecuador (II)*, Third Interim Award on Admissibility and Jurisdiction (27 February 2012) at paras 3.58, 3.79, 3.80, 4.74–4.86; *Nordzucker v Poland*, Partial Award (Jurisdiction) (10 December 2008) at paras 115, 117, 126–127; *MCI v Ecuador*, Award (31 July 2007) at paras 171–172, 186–189; *Siemens v Argentina*, Decision on Jurisdiction (3 August 2004) at paras 111, 117, 121.

[1338] *Pantechniki v Albania*, Award (30 July 2009) at paras 61–64, 67 (holding that, instead of the triple identity test, the relevant test is the "fundamental basis" test whereby the investment tribunal should find out whether the fundamental basis of the claim before it is independent of the one before local courts, i.e. "whether the [alleged treaty] claim truly does have an autonomous existence outside the contract"); *H&H v Egypt*, Excerpts of Award (6 May 2014) at paras 364–370, 378 (applying the *Pantechniki* tribunal's "fundamental basis" test).

in practice, paralyzed the FITR clauses. In the words of the ILA Committee on Law of Foreign Investment, the triple identity test has rendered the FITR clauses to be "complex, inflexible and almost meaningless by its restrictions".[1339] Given that the triple identity test in FITR clauses stems from the principles of *res judicata* and *lis pendens*,[1340] the fate of FITR clauses is tied to the approach adopted with respect to those principles. If ISDS tribunals continue with the strict application of the triple identity test in *res judicata* and *lis pendens* principles, the FITR clauses will remain a semi-dormant feature of the IIAs that contain these clauses.[1341] However, if we adopt an approach to the triple identity test that reflects and adapts to the realities of the ISDS system, this could enable tribunals to tap into the potential of FITR clauses to limit multiple proceedings.

III.417. However, even if the first limitation regarding FITR clauses (i.e. the triple identity test) is overcome, there is a second limitation: there are not many IIAs that have a FITR clause in the first place. In fact, of the total of 3,312 IIAs that have been concluded to date,[1342] approximately only one-fifth (i.e. 22%) of them contain a FITR clause.[1343] As such, even if those clauses were fully operational (i.e. without the impediment of the triple identity test), only a small portion of cases could benefit from them.

[1339] ILA Committee on Law of Foreign Investment, *Final Report* (Rio de Janeiro Conference, 2008) at 22.
[1340] See references cited in note 1333 on this point.
[1341] The next Section discusses *res judicata* and *lis pendens* as a suggested solution, and Part IV, Chapter 8 discusses the triple identity test in detail.
[1342] The 3,312 IIAs consist of 2,896 BITs and 416 TIPs. UNCTAD Investment Policy Hub website, section "International Investment Agreements Navigator", the information available on the left column, online: <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited 11 March 2021).
[1343] Of the 3,312 IIAs, the UNCTAD Investment Policy Hub has mapped the content of 2,575 IIAs. Of those that have been mapped, only 577 contain FITR clauses (approximately one in every five IIA). In the author's view, once the remaining IIAs are mapped, it is unlikely that this one-fifth ratio will drastically change. UNCTAD Investment Policy Hub website, section "International Investment Agreements Navigator", tab "Mapping of IIA Content", (on the left column) tab "ISDS", sub-tab "Forums", sub-tab "Relationship Between Forums", box "Fork in the Road", online: <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> (last visited 11 March 2021).

III.418. With respect to waiver clauses, they do not necessarily have the drawback of the first limitation discussed above with respect to FITR clauses:[1344] for waiver clauses to apply, there is generally no need that triple identity exists between the investment arbitration and the other proceeding(s). This is so because, when the applicable IIA has a waiver clause, for the investors to be allowed to initiate an investment arbitration, they (and sometimes their local investment vehicle) must waive the right to continue the other proceedings, regardless of whether the triple identity test is met between them, as long as the proceedings concern the same state measures.[1345] However, an opposing view exists: that the identity test must also be met for waiver clauses.[1346]

III.419. Regardless of whether or not the triple identity test has to be met for waiver clauses, those clauses have a limitation they share with FITR clauses: the small number of IIAs that contain such clauses. Research shows that about only one in every 19 IIAs (i.e. 7% of all IIAs) contains a waiver clause.[1347] As such, waiver clauses—like FITR clauses—seem to be an exception, and not a solution that is readily available in investment arbitration to prevent double compensation.

[1344] See above, para III.414.

[1345] Antonio Crivellaro, *supra* note 1212, at 100. See e.g. *Waste Management v Mexico (I)*, Arbitral Award (2 June 2000) at 236 (holding that the waiver clause barred the claimant because the local proceedings concerned the same state measures that were at issue in the investment arbitration); *Vannessa v Venezuela*, Decision on Jurisdiction (22 August 2008) at 3.4.2–3.4.4 (holding that the waiver requirement was met because the Supreme Court's dismissal of the local case would prevent any claim about the same state measures to be launched in the local courts). See also ILA Committee on Law of Foreign Investment, *Final Report* (Rio de Janeiro Conference, 2008) at 22; Andrea K Bjorklund, "Waiver of Local Remedies and Limitation Periods", *supra* note 1331, at 241.

[1346] See e.g. *Marvin v Mexico*, Award (16 December 2002) at paras 69–70, 78 (refusing to apply the waiver clause on the ground that the law applicable to the local court proceedings was not the same as the law applicable to the investment arbitration); *Supervision v Costa Rica*, Final Award (18 January 2017) at paras 294–300, 308, 310, 315–318, 321–330 (applying the triple identity test, but criticizing the strict application of the test and choosing the *Pantechniki* approach instead).

[1347] Of the 3,312 IIAs that have been concluded to date (see *supra*, note 1342), the UNCTAD Investment Policy Hub has thus far mapped the content of 2,575 (see *supra*, note 1343). Of those IIAs that have been mapped, only 135 contain waiver clauses (approximately one in every 19 IIAs). UNCTAD Investment Policy Hub website, section "International Investment Agreements Navigator", tab "Mapping of IIA Content", (on the left column) tab "ISDS", sub-tab "Forums", sub-tab "Relationship Between Forums", box "No U turn (waiver clause)", online: <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> (last visited 11 March 2021).

F. Investment Court System

III.420. The Investment Court System ("ICS") is the EU Commission's initiative proposed in response to the criticisms that have been leveled at the ISDS system. The idea was developed within the context of the EU's negotiations with the US for the Transatlantic Trade and Investment Partnership ("TTIP").[1348] In the course of developing the idea of the ICS, although the EU Commission noted the issue of multiple proceedings and double compensation,[1349] it focused only on one of the scenarios of the problem: where the multiple proceedings involve treaty-based arbitration and local court proceedings.[1350] Thus, other scenarios (such as where the multiple proceedings consist of all treaty-based arbitrations brought by shareholders at different levels of the same corporate chain, or a combination of a treaty-based arbitration and a commercial arbitration) were never considered.[1351] As a result, that shortcoming persisted when the idea of the ICS materialized in CETA (2016).

III.421. In CETA, the ICS replaces the traditional investment arbitration (article 8.27), yet its main mechanisms to prevent multiple proceedings and double compensation are not really new: a waiver clause (article 8.22.2) and consolidation (article 8.43). CETA's waiver clause has three shortcomings. First, like other waiver clauses, it works only in parallel proceedings or when the other proceeding has not yet been initiated and, as such, sequential proceedings are left out.

[1348] For a discussion on the development of the idea, see Juan Miguel Alvarez, "How Innovative is the EU's Proposal for an Investment Court System: A Comparison Between ICS and Traditional Investor-State Dispute Settlement", European Union Law Working Papers No 43 (Stanford-Vienna Transatlantic Technology Law Forum, 2020) at 9–13.
[1349] European Commission, *Report: Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, Brussels, 13.1.2015 SWD(2015) 3 Final (13 January 2015) at 19–20.
[1350] *Ibid* at 28. For a discussion on the list of possible scenarios, see above, Part II, Chapter 3, Section "Scenarios".
[1351] European Commission, *Concept Paper: Investment in TTIP and Beyond – the Path for Reform, Enhancing the Right to Regulate and Moving From Current Ad Hoc Arbitration Towards an Investment Court* (5 May 2015) at 9–11.

Second, even in parallel proceedings, the CETA's waiver clause applies only to the claimant investors and the investment vehicle and thus does not cover the shareholders at other levels of the same corporate chain. Third, the waiver applies only if the investors "own" or "control" the investment vehicle and thus provides no solution for scenarios in which the investors are minority shareholders that do not control the investment vehicle.

III.422. The last two shortcomings set out above have been addressed in the EU-Singapore Investment Protection Agreement (2018), where the waiver clause (article 3.7.2) has broader scope and applies to "all persons who directly or indirectly have an ownership interest in, or who are controlled by the investor or, where applicable, the locally established company" [emphasis added]. However, the first shortcoming of CETA's waiver clause (i.e. not covering sequential proceedings) is present in the EU-Singapore agreement as well.

III.423. Both CETA and the EU-Singapore agreement also provide a consolidation mechanism (articles 8.43 and 3.24 respectively). However, as discussed in the previous Sections, consolidation is not sufficiently broad to cover all scenarios, nor is it an effective tool to prevent double compensation.[1352]

III.424. Of course, both CETA and the EU-Singapore agreement expressly prohibit double compensation, a position which can be regarded as mandating their ICS to cover scenarios that the waiver and consolidation clauses do not cover.[1353] However, the mandate is formulated vaguely, and the mechanics of its application are not clear. For example, according to CETA article 8.24:

> Where a claim is brought pursuant to this Section and another international agreement and:
>
> a. there is a potential for overlapping compensation; or

[1352] See above, in the current Chapter, Section "Consolidation/Coordination of Parallel Proceedings".
[1353] CETA, arts 8.24, 8.39; the EU-Singapore Investment Protection Agreement, art 3.18.

> b. the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section,
>
> the Tribunal shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award. [Emphasis added].

The article does not set out what will happen after the "stay" of the proceeding. Will *res judicata* attach to the other proceeding once concluded? And, where the "stay" is not an option, how exactly will the ICS "ensure" that the parallel proceeding is "taken into account"? These questions remain to be answered.

III.425. Thus, as innovative as the ICS can be in addressing concerns surrounding lack of consistency, coherence, and predictability in traditional investment arbitration, the ICS has not really offered any innovative mechanisms to prevent double compensation (at least in the two notable EU IIAs where the idea of the ICS has been implemented). The EU has pitched the ICS idea to the UNCITRAL Working Group III ("WGIII") on a broader scale that would go beyond the EU member states, known as the Multilateral Investment Court or the Multilateral Standing Body/Mechanism.[1354] However, its submission to the WGIII does not address any of the shortcomings discussed here.[1355] In the most recent examination of the idea, the WGIII (which has not yet adopted any particular proposal of reform) noted the uncertainties as to whether a Multilateral Standing Body would solve the issues of multiple proceedings and double compensation.[1356]

[1354] UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 37th session, A/CN9/WGIII/WP159/Add1, *Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the European Union and its Member States* (New York, 2019).
[1355] *Ibid*.
[1356] UNCITRAL, 54th session, A/CN9/1044, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Ninth Session* (Vienna, 2020) at paras 16, 41, 52.

G. *Res Judicata*, *Lis Pendens*, and Issue Preclusion

III.426. This Section discusses two other solutions that have been suggested to tackle the double compensation problem in the ISDS system: (i) the principles of *res judicata* and *lis pendens*; and (ii) the rule of issue preclusion (also known as issue estoppel). This discussion shows that there are serious impediments to applying the principles of *res judicata* and *lis pendens* in the ISDS system, yet these two principles also have great potential which could be used if those impediments were to be removed. On the other hand, issue preclusion—while an effective mechanism in terms of procedural efficiency—does not help with addressing the double compensation problem.

i. *Res Judicata* and *Lis Pendens*

III.427. The application of *res judicata* and *lis pendens* has been suggested as a potential solution to the double compensation problem.[1357] The two have generally been recognized as general principles of law.[1358] Under *res judicata*, "an earlier and final adjudication by a court or

[1357] See e.g. IBA Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018) at 19; UNCITRAL, 48th session, A/CN9/848, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (Vienna, 2015) at paras 23–28; UNCITRAL, 49th session, A/CN9/881, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (New York, 2016) at paras 24–28; Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes", *supra* note 1190, at 6, 10; "Double Recovery Discussed at Columbia", *Global Arbitration Review* (2 May 2017) (reporting on Columbia Arbitration Day 2017 – see remarks by Elliot Friedman).

[1358] See e.g. Georg Schwarzenberger, *International Law*, vol 1 (Stevens & Sons, 1945) at 407; Bin Cheng, *General Principles of Law: As Applied by International Courts and Tribunals* (Cambridge University Press, 1953 - reprinted in 2006) at 336; Hersch Lauterpacht, *Development of International Law by the International Court* (Praeger, 1958) at 325; Vaughan Lowe, "Res Judicata and the Rule of Law in International Arbitration" (1996) 8:1 African J of Intl & Comparative L 38 at 39; Hermann Mosler, "General Principles of Law", in Rudolf Bernhardt, ed, *Encyclopedia of Public International Law,* vol II (Max Planck Institute for Comparative Public Law and International Law, North Holland, 1997) at 511, 522; Bernard Hanotiau, "The Res Judicata Effect of Arbitral Awards", in *ICC Bulletin - Special Supplement 2003: Complex Arbitrations, Perspectives on their Procedural Implications* (ICC Publishing, 2003) 43 at para 1; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, *supra* note 1328, at 162–163, 170–171,175; August Reinisch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes", *supra* note 148, at 40, 48; ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) at 2–3; Francisco Orrego Vicuña, "Lis pendens arbitralis", in Bernardo Cremades Sanz Pastor & Julian D M Lew, eds, *Dossiers: Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing, 2005) 207 at 208, 213; Audley Sheppard, "Res Judicata and Estoppel" in Bernardo Cremades Sanz Pastor & Julian D M Lew, eds, *Dossiers*: *Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing, 2005) 219 at 228; ILA

arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called 'triple-identity' criteria)."[1359] Likewise, *lis pendens* is "used by an adjudicator to stay or suspend a proceeding until the conclusion of a parallel proceeding before another adjudicator", and is applicable when the parallel proceedings "involve the same parties (*persona*), cause of action (*causa petendi*) and claims (*petitum*)".[1360]

III.428. *Res judicata* and its sister principle (*lis pendens*) have notable advantages when compared to the other solutions discussed thus far in the previous Sections. First, together, the two principles cover both parallel proceedings and sequential proceedings—a feature that most other solutions lack. Second, the application of the two principles does not require the parties' consent as in the Consolidation or Share-Purchase solutions.[1361] Third, once the two principles are applied, the parties know where they stand with respect to the double compensation issue and thus, unlike the Undertaking solution, this does not leave the issue tied to the claimants' willingness to comply with the undertaking after the proceedings are over. Finally, unlike FITR and waiver clauses, the application of *res judicata* and *lis pendens* (as general principles of law) does not require treaty stipulation and, as such, these principles can be applied in all investment arbitrations.

Committee on International Commercial Arbitration, *ILA Final Report: Lis Pendens and Arbitration* (Toronto Conference, 2006); Charles T Kotuby & Luke A Sobota, *supra* note 1, at 197–199; Patrick Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (Oxford University Press, 2020) at paras 4.68–4.77, 4.89–4.95.

[1359] ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) at 2.

[1360] IBA Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018) at 19.

[1361] Cheng, *supra* note 1358, at 19 ("If a State consented to the settlement of its disputes in accordance with international law, no special consent was necessary for the application of these general principles").

III.429. However, the same sources that have discussed the *res judicata* and *lis pendens* principles as a solution to double compensation were quick to note that there is a major limitation in their application: the triple identity test.[1362] The reason is that ISDS tribunals have generally applied the test strictly, resulting in a few number of cases where *res judicata* or *lis pendens* actually prevented overlapping claims from going forward.

III.430. The numbers demonstrate this: of the 1,023 reported investment arbitration cases that were filed as of January 2020,[1363] the author's research shows that:

- The *res judicata* effect (as between different arbitrations, or between an arbitration and a court proceeding) was discussed in at least 22 cases,[1364] of which:
    - in only two cases, the tribunal applied *res judicata*;[1365]
    - in two cases, the tribunal refrained from deciding the question;[1366] and
    - in 18 cases, the tribunals rejected that *res judicata* would attach to the prior proceeding,[1367] of which, in 15 cases, it was held that the triple identity test was not

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[1362] The same sources that support this proposition were first cited in footnote 1357. The nature of the three elements of the triple identity test (i.e. same parties, same cause of action, same relief) is discussed thoroughly in Part IV, Chapter 8, Section "Identity Test". It should be noted here that some ISDS tribunals have added a fourth element to the test: the same legal order.

[1363] UNCTAD, *Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019*, IIA Issue Note 2 (July 2020) at 1.

[1364] There are in total 44 ISDS cases in which the *res judicata* effect was discussed; however, half of those cases are not relevant to the discussion here, because the issue before them was whether *res judicata* would attach to a previous decision of the tribunal in the same case and not a different arbitration or a court proceeding. For the list of all the 44 cases and the half that are relevant, see Appendix 3: Table of ISDS Cases on *Res Judicata*.

[1365] *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at paras 256–268; *Apotex v United States (III)*, Award (25 August 2014) at paras 7.1–7.2, 7.17–7.18, 7.35, 7.61, 7.22–7.29, 7.32, 7.38, 7.40.

[1366] *Hochtief v Argentina*, Decision on Jurisdiction (24 October 2011) at para 49; *Malicorp v Egypt*, Award (7 February 2011) at para 103.

[1367] *Mobil v Canada (II)*, Procedural Order No 9 (Decision on Scope of Damages Phase) (11 December 2018) at paras 29, 37, 47–50, 53; *Lao Holdings v Laos*, Decision on the Merits of Claimants' Second Material Breach Application (15 December 2017) at paras 101, 105, 109–110, 116–117; *Perenco v Ecuador*, Interim Decision on Environmental Counterclaims (11 August 2015) at paras 1, 5–11, 40–53 and Award (27 September 2019) at paras 447–460, 486, 493–496, 513; *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at paras 138–143, 166–171; *Gavazzi v Romania*, Decision on Jurisdiction, Admissibility and Liability (21 April 2015) at paras 164–168, 171–174, fn 188; *TECO v Guatemala*, Award (19 December 2013) at paras 515–519; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at para 191; *EDF v Argentina*, Award (11 June 2012) at paras 1119–1135; *Helnan v Egypt*, Award (3 July 2008) at paras 121–124, 127, 130; *Desert Line v Yemen*, Award (6

met.[1368] The latter figure is equal to approximately 70% of all those cases where *res judicata* was raised.

- *Lis pendens* was raised in at least ten cases, in none of which the tribunal accepted the application of the principle, reasoning that the triple identity test was not met.[1369]

The above numbers demonstrate that, due to the strict application of the triple identity test, the principles of *res judicata* and *lis pendens* have rarely been applied in the ISDS system. Thus, in practice, the usefulness of the two principles will depend on how the test is interpreted and applied.

III.431. However, as explained earlier, the two principles have notable advantages over the other solutions suggested thus far for tackling the double compensation problem.[1370] As such, the author will, in Part IV, propose changes to the identity test to adapt it to the needs and realities of the ISDS system and, thereby, will use *res judicata* and *lis pendens* to formulate a comprehensive solution to the double compensation problem.[1371]

February 2008) at paras 124, 126(a), 136–139; *Lucchetti v Peru*, Decision on Annulment (5 September 2007) at paras 81, 85–88; *Fraport v Philippines (I)*, Award (16 August 2007) at paras 390–391; *Inceysa v El Salvador*, Award (2 August 2006) at paras 208–217; *Vivendi v Argentina (I)*, Decision on the Argentine Republic's Request for Annulment of the Award (10 August 2010) at paras 213–215; *Petrobart v Kyrgyzstan*, Arbitral Award (29 March 2005) at 38–41, 64–66; *CME v Czech Republic*, Final Award (14 March 2003) at paras 198–201, 205, 212–213, 432–433, 436; *Repsol v Petroecuador*, Decision on Jurisdiction (23 January 2003) at paras 44–46; *Waste Management v Mexico (II)*, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings (26 June 2002) at paras 17, 38–39, 43, 45.

[1368] All the cases that were cited in the preceding footnote, except the following three cases: *Mobil v Canada (II)*; *Perenco v Ecuador*; *Waste Management v Mexico (II)*.

[1369] The total number of cases in which *lis pendens* was discussed is 12; however, in two of those cases, *lis pendens* was not at issue and was only discussed by the tribunal while it analysed another issue. As such, the total number of relevant *lis pendens* cases is ten, and they are as follows: *Gosling v Mauritius*, Award (18 February 2020) at paras164, 68; *Unión Fenosa v Egypt*, Award (31 August 2018) at paras 11.5–11.6, 11.29–11.32, 11.36; *Busta v Czech Republic*, Final Award (10 March 2017) at paras 194–200, 210–215; *British Caribbean Bank v Belize*, Award (19 December 2014) at paras 176, 184, 187–188; *Flughafen v Venezuela*, Award (18 November 2014) at paras 363–365, 369; *Sanum Investments v Laos*, Award on Jurisdiction (13 December 2013) at paras 359, 366; *AMTO v Ukraine*, Final Award (26 March 2008) at paras 71-72; *SGS v Pakistan*, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) at paras 43, 46, 52, 60, 182, 186, 189; *Lauder v Czech Republic*, Final Award (3 September 2001) at paras 167–168, 171; *Benvenuti v Congo*, Award (8 August 1980), (1993) 1 ICSID Report 330 at 340. The other two cases involving a general discussion on *lis pendens* are: *EDF v Argentina*, Award (11 June 2012) at para 1132; *Azurix v Argentina*, Decision on Jurisdiction (8 December 2003) at para 88.

[1370] See above, para III.428.

[1371] See below, Part IV, Chapter 7, Subsection "Identifying the Overlapping Claims" and the subsequent discussion.

ii. Issue Preclusion

III.432. The previous Subsection explained that *res judicata* and *lis pendens* have untapped potential to address the double compensation issue, and that the next Part will carry out the task of unpacking this potential. However, before moving to the next Part, there remains one more possible solution to analyse: the rule of issue preclusion.[1372] This discussion shows that, although issue preclusion can help with some of the problems associated with multiple proceedings (such as inconsistent awards and procedural inefficiency), it does not help tackling the double compensation problem.

III.433. Issue preclusion (also known as issue estoppel)[1373] is a common law doctrine,[1374] which has flourished mainly in US law and is considered to be a subdivision of *res judicata*.[1375] It is a rule under which "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[1376] Issue preclusion covers both "direct estoppel" and "collateral estoppel".[1377]

[1372] See e.g. Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes", *supra* note 1190, at 6, 8; "Double Recovery Discussed at Columbia", *Global Arbitration Review* (2 May 2017) (reporting on Columbia Arbitration Day 2017 - see remarks by Elliot Friedman).

[1373] The term "issue preclusion" is more frequently used in US law, while the term "issue estoppel" is more common in English law. ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) at 6–7, 11.

[1374] *Ibid* at 14.

[1375] *Restatement (Second) of Judgments* (1982) at Chapter 3, Introductory Note ("The term '*res judicata*' is here used in a broad sense as including all three of these concepts [merger, bar, issue preclusion]. When it is stated that 'the rules of *res judicata* are applicable,' it is meant that the rules as to the effect of a judgment as a merger or a bar or as a collateral or direct estoppel are applicable").

[1376] *Ibid*, § 27.

[1377] *Ibid*, § 27(b) (explaining that "direct estoppel" is used when the second proceeding involves the same claim, while "collateral estoppel" is used when the second proceeding involves a different claim and is a more common scenario). Given that "collateral estoppel" is more frequently encountered, some US law sources have used it interchangeably with "issue preclusion". See 50 CJS Judgments § 927 ("The term 'collateral estoppel' is defined as, or considered to be synonymous with, issue preclusion, and many courts treat the two concepts as interchangeable … Issue preclusion has been stated to be the modern term for the doctrine traditionally known as collateral estoppel").

III.434. For the application of issue preclusion, as per the above definition, there is no need for the triple identity test of *res judicata*. The same parties requirement still exists in the definition,[1378] but the other two requirements (i.e. the same cause of action and the same relief requirements) do not. Thus, despite being a subdivision of *res judicata*, issue preclusion has its own test: an issue must be: (i) "actually litigated and determined"; (ii) "essential to the judgment"; (iii) in "a valid and final judgment"; and (iv) "between the parties". That issue preclusion has its own test is important because some ISDS tribunals, when applying issue preclusion, used the triple identity test of *res judicata* instead.[1379]

III.435. The ILA, in its reports and recommendations on *res judicata*, while noting division in the opinions as to the applicability of the rule in international arbitration,[1380] recommended the rule to international arbitral tribunals.[1381] The target audience of the ILA's reports and recommendations were international commercial arbitrators, but the ILA noted that its recommendations "may still have some indirect relevance for BIT arbitrations."[1382] The following numbers offer a clear picture of how ISDS tribunals have treated the rule of issue preclusion. Of

[1378] The same parties requirement is more flexible in issue preclusion than in claim preclusion. In addition to the rules of privity (which applies in both issue preclusion and claim preclusion), the same parties requirement in issue preclusion also covers: (i) those who control the presentation made in a proceeding; (ii) those who agree (expressly or impliedly) to be bound by the adjudication of an issue between others; and (iii) those whose procedural position are aligned on the same side. See *Restatement (Second) of Judgments* (1982) §§ 34, 38–40.
[1379] See e.g. *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at para 171; *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at paras 257–274 (the tribunal, however, did not even use the term "issue preclusion" or "issue estoppel", but rather used the term "*res judicata*"); *Gavazzi v Romania*, Decision on Jurisdiction, Admissibility and Liability (21 April 2015) at paras 164, 166, 171–172, 174.
[1380] ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) at 25.
[1381] ILA Committee on International Commercial Arbitration, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration* (Toronto Conference, 2006) at recommendations 4–5; ILA Committee on International Commercial Arbitration, *ILA Final Report: Res Judicata and Arbitration* (Toronto Conference, 2006) at paras 6–7, 15, 56.
[1382] *Ibid* paras 10, 36.

the 1,023 reported investment arbitration cases that were filed as of January 2020,[1383] the author's research shows that, in at least 10 cases, issue preclusion was discussed.[1384] Of those 10 cases:

- In eight cases, the tribunals recognized (expressly or impliedly) the rule of issue preclusion in international law,[1385] of which, in five cases (i.e. half of the total 10 cases), the tribunals found that the rule would bar rehearing an issue in the case before them.[1386]
- In one case, the tribunal refused to recognise the rule.[1387]
- In one case, the tribunal refrained from making a decision on this issue.[1388]

III.436. The flexibility of the issue preclusion rule (e.g. that it does not require the identity of claims) has prompted some commentators to consider the rule as an ideal candidate for the "relaxed" version of *res judicata* in international law.[1389] This is mainly to overcome the issue of strictness in the triple identity test, particularly the distinction between treaty claims and contract claims. For example, in *RSM v Grenada (II)*, the tribunal upheld the respondent's objection of issue preclusion and rejected the claimants' argument, which distinguished between treaty claims

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[1383] UNCTAD, *Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019*, IIA Issue Note 2 (July 2020) at 1.
[1384] For the list of cases, see Appendix 5: Table of ISDS Cases on Issue Preclusion.
[1385] *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at para 171; *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at paras 270, 274, 281; *Gavazzi v Romania*, Decision on Jurisdiction, Admissibility and Liability (21 April 2015) at paras 164, 166; *Apotex v United States (III)*, Award (25 August 2014) at paras 7.17–7.18, 7.22–7.23; *Malicorp v Egypt*, Award (7 February 2011) at para 130; *RSM v Grenada (II)*, Award (10 December 2010) at para 7.1.2; *Petrobart v Kyrgyzstan*, Arbitral Award (29 March 2005) at 66–68; *Tokios v Ukraine*, Award (26 July 2007) at para 98.
[1386] *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at paras 270, 274, 281; *Apotex v United States (III)*, Award (25 August 2014) at paras 7.1–7.2, 7.17–7.18, 7.22–7.23, 7.38, 7.40; *Malicorp v Egypt*, Award (7 February 2011) at para 130; *RSM v Grenada (II)*, Award (10 December 2010) at paras 7.1.2–7.1.7; *Tokios v Ukraine*, Award (26 July 2007) at para 98.
[1387] *Amco v Indonesia*, Decision on Jurisdiction in Resubmitted Case (10 May 1988) at paras 30–32, 38, 40, 44, 45.
[1388] *Chevron and Texaco v Ecuador (I)*, Final Award (31 August 2011) at paras 272–273, 281.
[1389] See e.g. Jose Magnaye & August Reinisch, "Revisiting *Res Judicata* and *Lis Pendens* in Investor-State Arbitration" (2016) 15:2 The Law and Practice of International Courts and Tribunals 264 at 275–280, 286; Pedro Martinez-Fraga & Harout Jack Samra, "The Role of Precedent in Defining Res Judicata in Investor-State Arbitration" (2012) 32:3 Nw J Int'l L & Bus 419 at 431–433.

and contract claims.[1390] The *RSM (II)* tribunal reasoned that the claimants' argument "confuses issue preclusion and claim preclusion", and agreed with a US case holding that issue preclusion would apply "even if the second suit is for a different cause of action."[1391]

III.437. However, the elevation of issue preclusion from US law into the ISDS system (in order for it to be used as a flexible version of *res judicata*) requires a more careful approach. The reason is that the approach discussed in the previous paragraph is mainly centered on the flexibility that issue preclusion offers in relation to "claims" / "cause of action", whereas it does not pay any attention to the fact that the meaning of those terms in US law is different from their meaning in ISDS case law. The author's research on the 63 cases involving double compensation,[1392] the 22 cases involving *res judicata*,[1393] the 10 cases involving *lis pendens*,[1394] and the 10 cases involving issue preclusion,[1395] shows that the majority of tribunals used the term "cause of action" to refer to the "legal basis" on which the claimants relied, i.e. the treaty or the contract. And that is why the terms "treaty claims" and "contract claims" have been formed in the first place. However, US law attaches a different meaning to the terms "cause of action" and "claim".

III.438. US law ascribes a "transactional" meaning to the term "claim" (a modern term for "cause of action"),[1396] which refers more to the facts and not the legal basis of a case.[1397] As such,

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[1390] *RSM v Grenada (II)*, Award, (10 December 2010) at paras 4.6.4–4.6.6, 5.1.2–5.1.3.
[1391] *Ibid* at para 7.1.3.
[1392] See Appendix 1.
[1393] See above, para III.430.
[1394] *Ibid*.
[1395] See above, para III.435.
[1396] *Restatement (Second) of Judgments* (1982) at Chapter 3, Topic 2, Title D, Introductory Note ("The term claim, or the older cognate term cause of action, appears in a variety of contexts …").
[1397] *Ibid*, § 24(a) (explaining that "in the days when civil procedure still bore the imprint of the forms of action and the division between law and equity, the courts were prone to associate claim with a single theory of recovery, so that, with respect to one transaction, a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief against the defendant. Thus, defeated in an action based on one theory, the plaintiff might be able to maintain another action based on a different theory, even though both actions were grounded upon the defendant's identical act or connected acts forming a single life-situation. … Thus it was held by some courts that

when US law allows issue preclusion to apply even if the "claims" / "causes of action" in two proceedings are different, it refers to different "transactions" and not different legal bases. Those who wish to use issue preclusion to overcome the difference of treaty claim/contract claim might be unfamiliar with these nuances of US law.[1398]

III.439. Furthermore, there is an assumption in US law that does not exist in the current ISDS system. It was explained that, in US law, issue preclusion applies even if the claims in two proceedings are not the same, and that a "transactional" meaning is ascribed to a claim. However, there is a precondition for the transactional approach in US law: that the parties should be allowed to fully develop all possible claims that spring from one transaction in one proceeding.[1399] There

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a judgment for or against the plaintiff in an action for personal injuries did not preclude an action by him for property damage occasioned by the same negligent conduct … The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories"); § 24(c) ("That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims"); Charles E Clark, "The Code Cause of Action" (1924) 33 Yale L J 817 (defining cause of action as "an aggregate of operative facts, a series of acts or events, which gives rise to one or more legal relations of right-duty enforceable in the courts"); Jack H Friedenthal, Mary Kane & Arthur R Miller, *Civil Procedure Hornbook Series*, 4th ed (Thomson West, 2005) at § 5.4, texts accompanying notes 3, 5 (discussing the "aggregate of operative facts" theory advanced by Charles E Clark); *Black's Law Dictionary*, 11th ed (2019) (defining cause of action as "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person") [emphasis added]. For case law, see e.g. *United States v Tohono O'Odham Nation*, 563 US 307 (2011) at 316–317 (holding that "[t]he now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual overlap, barring claims arising from the same transaction", and that "[t]wo suits are for or in respect to the same claim … if they are based on substantially the same operative facts, regardless of the relief sought in each suit"); *Kremer v Chemical Construction Corporation*, 456 US 461 (1982) at 481, fn 22 ("Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes") [all emphases added].

[1398] It should be noted that this is not the only example where US law ascribes a different meaning to a term compared to the meaning of that term in continental Europe. Another example is the term "arbitrability". In continental Europe, the term "arbitrability" refers to the question of whether any public policy rules bar arbitration of the subject matter of the dispute (i.e. whether the dispute is within the exclusive jurisdiction of national courts). However, in US law, "arbitrability" has a considerably broader scope and covers two additional questions: whether there is a valid arbitration agreement between the parties and, if so, whether the scope of the arbitration agreement covers the parties' dispute(s). See Laurence Shore, "The United States' Perspective on Arbitrability", in Loukas A Mistelis & Stavros L Brekoulakis, eds, *Arbitrability: International and Comparative Perspective* (Kluwer Law International, 2009) 69 at para 4(3). For case law, see e.g. *First Options of Chicago, Inc v Kaplan*, 514 US 938 (1995) at 943 (stating that parties' disagreement on whether they agree to arbitrate their dispute concerns the arbitrability question).

[1399] *Restatement (Second) of Judgments* (1982) § 24(a) ("Equating claim with transaction, however, is justified only when the parties have ample procedural means for fully developing the entire transaction in the one action going to the merits to which the plaintiff is ordinarily confined … Because the transactional view set forth in this Section assumes as the present standard a modern system of procedure with the general characteristics described in this

is no such possibility in the ISDS system, as the parties generally have to pursue their contract claims through local courts and commercial arbitration, and their treaty claims through investment arbitration. Given the lack of a centralized system at the international level where parties could pursue all claims in one proceeding, it is not clear how the US law rule of issue preclusion could be used in the ISDS system.

III.440. The above discussion explained that: (i) US law and ISDS case law attach different meanings to the terms "claim" / "cause of action", and (ii) the precondition in US law for the application of issue preclusion does not exist in the ISDS system. However, even if there were no such impediments to the elevation of issue preclusion to the ISDS system, and even assuming that civil law trained arbitrators would voice no objection to the use of a common law rule,[1400] still, the rule of issue preclusion cannot prevent the double compensation problem. It can address the other side effects of multiple proceedings (such as inconsistent awards and procedural inefficiency) but not double compensation. What issue preclusion offers is a way of preventing the parties, in the second proceeding, from re-litigating an issue that has already been decided in the first proceeding,

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Comment, there is a need to allow exceptions to the general rule where the judgment is rendered in a jurisdiction whose procedural system has not been modernized").

[1400] As noted by the ILA Committee on International Commercial Arbitration, "the Civil Law doctrine, by and large, is more restricted than the Common Law perspective on *res judicata*. There is no notion of issue estoppel or preclusion, as in the Common Law. This is because, generally, a more formalistic approach is taken and it is only the operative order of the court, the '*dispositif*', that has *res judicata* effect, and therefore the doctrine applies only to claims". ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) at 14. For ISDS cases in which the tribunal echoed the civil law approach, see e.g. *Chevron and Texaco v Ecuador (I)*, Final Award (31 August 2011) at para 273 (the tribunal—two members of which were civil law trained—held that "in both Dutch and international law, it is disputed whether and to what extent the reasoning of an arbitral award may be vested with *res judicata* effect independently of the *dispositif*"); *Amco v Indonesia*, Decision on Jurisdiction in Resubmitted Case (10 May 1988) at paras 30–32 ("It is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes *res judicata*"). See Emmanuel Gaillard, "Coordination or Chaos: Do the Principles of Comity, Lis Pendens, and Res Judicata Apply to International Arbitration?" (2019) 29:3 Am Rev Int'l Arb 205 at 227 ("A comparative law study would likely show that in a majority of legal systems only the dispositive part of the decision is vested with *res judicata* effect, with the caveat that reasons can be considered to enlighten the meaning of the dispositive part, as the International Court of Justice has accepted. … To the extent, however, that issue estoppel is ignored in civil law systems, it is not sufficiently widely accepted to be recognized as a genuine transnational principle").

but it will not prevent the second forum from re-awarding what has already been awarded by the first forum. A notable example is what unfolded in *Ampal v Egypt*.

III.441. *Ampal* involved multiple risks of double compensation, but the risk that is relevant to this discussion was the one posed by an ICC commercial arbitration where a final award was rendered in favor of the investment vehicle.[1401] The *Ampal* tribunal ruled that the ICC arbitration would not affect its jurisdiction or the admissibility of the claims, but that the ICC award could be relevant to the merits.[1402] The tribunal then decided the question of whether the decision of a contract-based forum about a contract claim between an investment vehicle and the state could have any *res judicata* effect on a treaty-based tribunal deciding the dispute between the shareholding investor and the state.[1403] The tribunal ruled that *res judicata* would attach, as the shareholders must be seen as privy to the investment vehicle.[1404]

III.442. Accordingly, the tribunal held that those findings by the ICC tribunal that were relevant to the claims here were *res judicata* between the parties, including certain findings of fact and the finding that the agreement between the investment vehicle and the state-owned companies was terminated unlawfully.[1405] The tribunal then found that the unlawful termination was also in violation of the BIT and tantamount to expropriation and, accordingly, held that the claimants here were entitled to damages.[1406] The tribunal left the quantum part to a separate decision.[1407]

III.443. A closer look at this case shows that, although the tribunal applied *res judicata*, it did

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[1401] See *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at paras 8, 306, 328–329.
[1402] *Ibid* at para 252.
[1403] *Ibid* at paras 256–259.
[1404] *Ibid* at paras 260–268.
[1405] *Ibid* at paras 270, 274, 281, 329, 331.
[1406] *Ibid* at paras 335, 347, 351–353.
[1407] *Ibid* at paras 351–353. To date, the decision on quantum has not yet been rendered.

not prevent the risk of double compensation posed by the ICC award. The ICC tribunal found that the termination of the agreement by the state-owned companies was unlawful and thus awarded damages, and then the *Ampal* tribunal found that the same termination also violated the BIT and awarded damages—i.e. two damages for the same state act. This occurred because what the *Ampal* tribunal really applied was not *res judicata* in the sense of claim preclusion, but rather *res judicata* in its more limited version of issue preclusion.

III.444. Claim preclusion bars claimants from re-submitting a claim that has already been decided,[1408] whereas issue preclusion bars the parties from re-litigating an issue that has been decided. By applying issue preclusion, the *Ampal* tribunal only saved time by refusing to rehear a number of issues that were already decided by the ICC tribunal. Given that the two legal bases (contract and treaty) were considered different, the *Ampal* tribunal applied the findings of the ICC tribunal (e.g. about the issue that the termination of the agreement was wrongful), this time to the BIT and awarded damages anew.

III.445. In fact, when we talk about the risk of double compensation in the overlapping part of the claims in two proceedings, we still talk about a "claim" not an "issue" and, as such, to prevent double compensation we need to apply claim preclusion, not issue preclusion. For this reason, the author is of the opinion that *res judicata* (in the sense of claim preclusion) is the best option to tackle the double compensation problem.

[1408] *Restatement (Second) of Judgments* (1982) at Chapter 3, Topic 2, Title D, Introductory Note. In US law, the rule of claim preclusion covers both "merger" and "bar". Under the rule of "merger", "[i]f the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment". And under the rule of "bar", "[i]f the judgment is in favor of the defendant, the claim is extinguished and the judgment bars a subsequent action on that claim". *Ibid*, §§ 17–19.

SUMMARY OF THE PART

III.446. This Part set out how the double compensation problem has been dealt with thus far. The Part has three chapters (Chapter 4, 5, and 6). Chapter 4 analysed the relevant ISDS case law. It showed that only a very limited number of tribunals effectively addressed the risk. The majority did not. The ISDS tribunals' failure or unwillingness to address the risk has manifested itself in different forms, including:

- through justifications of a procedural nature, for example, leaving it to the second deciding forum or the enforcement courts to deal with the double compensation issue, or postponing the issue to the merits phase where the tribunals failed to address it;
- through justifications of a substantive nature, such as rejecting the application of *res judicata*, *lis pendens*, and FITR clauses, describing the double compensation issue in the case before them as "theoretical" and "hypothetical", or holding that there were numerous mechanisms to address the double compensation issue, but then not identifying any such mechanisms; or
- through a combination of both procedural and substantive approaches.

III.447. The discussion of the relevant case law shows that the issue of double compensation is not limited to a specific geography, as the home countries of the investors and the host countries came from all parts of the world. The cases also involved a wide range of IIAs (such as different BITs, NAFTA, and ECT). This indicates a system-wide issue, and not something that is restricted to certain specific countries or specific IIAs.

III.448. Chapter 5 discussed how the issue has been reflected in other relevant materials. It explained that there are International Documents of a non-binding nature that have addressed the issue of double compensation, and analysed four of such documents: the 2001 ILC draft articles

on state responsibility, the 2008 report by the ILA Committee on Law of Foreign Investment, the 2013 OECD working paper on international investment, UNCITRAL's ongoing project on multiplicity of proceedings (since 2013), and the 2016 and 2018 reports by the IBA Subcommittee on Investment Treaty Arbitration. The discussion then turned to relevant Commentary. Noting that the issue of double compensation in the ISDS system has remained largely understudied, it was explained that almost all commentators who have discussed the issue of double compensation have considered it to be a problem that requires a solution. However, those commentators have different opinions about how serious the problem of double compensation is, and what solution should be adopted.

III.449. Chapter 6 then turned to the solutions that have been suggested thus far by commentators, tribunals, and international documents. Some of those solutions were exclusively formulated in relation to double compensation, while some were proposed to address all problems associated with multiple proceedings, including the double compensation problem. The solutions were categorized into seven groups as follows.

III.450. Consolidation and Coordination of Parallel Proceedings were discussed first. It was explained that these two solutions have significant limitations: that they can be implemented only when the proceedings are parallel in time; that it would be difficult to consolidate or coordinate the proceedings if one is treaty-based and the other is contract-based; that (even if all the proceedings are treaty-based) it would be difficult to consolidate proceedings if they have been established under different arbitration rules; that consolidation is essentially a consent-based mechanism and it is not easy to obtain express consent from all parties, and that incorporated (*ex ante*) consent (through arbitration rules or the applicable IIA) is not common. However, the most important limitation is that the mere consolidation or coordination of proceedings does not in and

of itself prevent double compensation. Preventing it depends on whether the tribunal considers the claimants to be the same parties, and the causes of action to be the same. If a tribunal considers the claimants or the causes of action to be different, the tribunal will carry that view into the consolidated proceeding and may grant double compensation.

III.451. The second solution was the Purchase of the Claimant Investor's Shares by the Respondent State. It was explained that the limitation to this solution is that its viability depends on both sides' giving consent: the shareholder must be willing to sell its shares, and the state would have to accept to pay the residual value of the shares (which could be significant if the company is still a going concern) in addition to the damages that it already must pay. A valid concern has also been raised with respect to the similarity between this solution and the nationalization of companies, and the resulting politicization of the remedial options.

III.452. The third group of solutions involved restricting the admissibility of shareholders' claims, which was categorized into six different versions:

- (i) Blanket Ban (that any recovery should be limited to the investment vehicle only and thus the only avenue for shareholders to bring claims would be similar to the domestic law mechanism of derivative claims);
- (ii) Default Ban (that shareholders' claims should be inadmissible as a default rule, while allowing certain exceptions);
- (iii) Proximity-Based Restriction (that shareholders at the upper level of the corporate chain should not be given access to investment arbitration – also known as the "cut-off point");
- (iv) Circumstances-Based Restriction (that shareholders' claims should become inadmissible when certain circumstances are present);

- (v) Tier-Based Restriction (that shareholders are categorized into different tiers, and each tier is allowed to launch arbitration only if the preceding tier is unable to bring a claim or has waived it); and
- (vi) Option-Based Restriction (that the overlapping portion of claims in one proceeding should become inadmissible in favor of the other proceeding, once both forums find that they have jurisdiction, but an option should be given to the shareholders to choose the proceeding from which it must withdraw the overlapping claims).

Each of the six versions of the restriction on the admissibility of shareholders' claims was analysed, and the limitations and concerns with respect to them were discussed in detail. The main concern with this group of solutions was that they unnecessarily restrict shareholders' claims, and that, in most cases, their implementation is not practicable. The exception was the sixth version (i.e. the option-based restriction). It was explained that the sixth version is an effective, balanced solution which the author will adapt in Part IV when formulating a comprehensive solution.

III.453. Another solution that was discussed involved the claimants' Undertaking not to Seek Double Compensation. It was explained that there are doubts as to the effectiveness of the solution because it has no clear enforcement mechanism. Further, this solution is relevant only when the proceedings are parallel in time.

III.454. Another suggested solution includes the application of the FITR and Waiver Clauses. It was explained that there are limitations with respect to both types of clauses. For example, there are not many IIAs that contain a FITR clause (approximately only 20% of all IIAs), and when an IIA contains such a clause, for it to be applicable the common practice of ISDS tribunals requires the triple identity test to be met between the investment arbitration and the other proceeding. As such, in only a few number of cases were FITR clauses successfully applied to bar the claimants'

claims.[1409] Although the application of waiver clauses generally does not require the triple identity test, those clauses are available in only a small number of IIAs (5% of all IIAs). As such, even if the strict application of the triple identity test could be overcome, FITR and waiver clauses are not a solution readily available in all investment arbitrations.

III.455. Another solution that was discussed is the EU Commission's proposal to establish an Investment Court System ("ICS"). The ICS allegedly can address a wide range of problems associated with the ISDS system (including the problems of multiple proceedings and double compensation). However, as explained, the two notable EU IIAs in which the idea of the ICS has materialized (namely, CETA and the EU-Singapore agreement) do not really offer any innovative mechanisms to prevent double compensation. This is because they rely on waiver and consolidation clauses, which cover only a limited number of scenarios where double compensation can occur, and leave others out.

III.456. The last group of solutions included *Res Judicata*, *Lis Pendens*, and Issue Preclusion. The discussion explained that the two principles of *res judicata* and *lis pendens* have notable advantages over other solutions, in that: they cover both parallel proceedings and sequential proceedings; their application does not require the parties' consent or any treaty stipulation; and once the two principles are applied, the parties know where they stand with respect to the double compensation issue and thus the issue is not left up to the parties' willingness to comply with an undertaking after the proceedings have concluded. However, the strict application of the triple identity test has created a major barrier against the effective use of these two principles in the ISDS

[1409] For an overview, see Appendix 2: Table of ISDS Cases on Fork-in-the-Road (FITR) Clause.

system.[1410] To overcome this barrier, the author will propose arguments adapting the triple identity test to the needs and realities of the ISDS system in the next Part.

III.457. With respect to issue preclusion, it was noted that the rule has its own test, which is different from, and more flexible than, the triple identity test. It was explained that suggestions to elevate the rule of issue preclusion from US law into the ISDS system (in order for it to be used as a flexible version of *res judicata*, mainly to overcome the distinction between treaty claims and contract claims) have not been made with appropriate care. Specifically, those suggestions do not take into account the difference between the meaning that US law attributes to the terms "claim" / "cause of action" and the meaning of these terms in ISDS case law. There is also a precondition in US law for the application of the rule of issue preclusion (that the parties should be allowed to fully develop all possible claims that spring from one transaction in one proceeding), which does not exist in the current decentralized ISDS system.

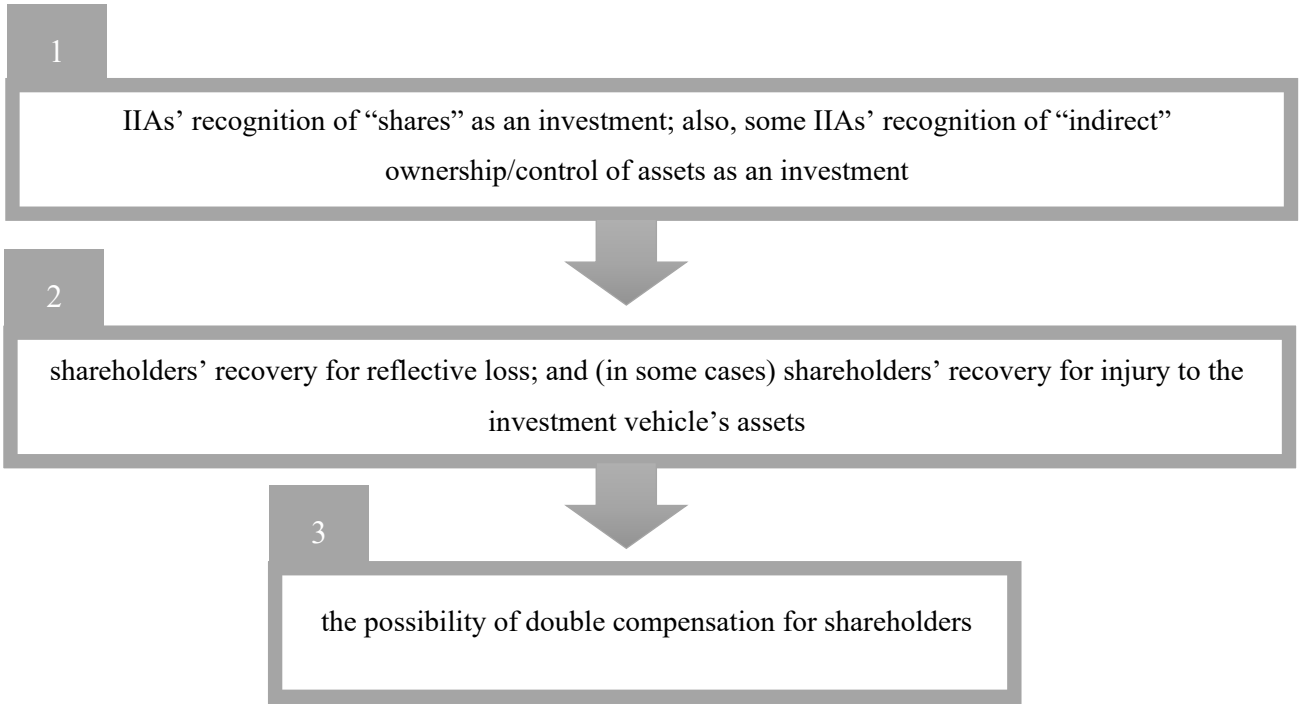
III.458. It was explained that, even if there were no such impediments to the elevation of issue preclusion to the ISDS system, the rule itself cannot address the double compensation problem. What issue preclusion offers is a mechanism to prevent the parties, in the second proceeding, from re-litigating an issue (fact or law or a combination thereof) that has already been decided in the first proceeding. However, it will not prevent the second forum from re-awarding what has already been awarded by the first forum. The risk of double compensation comes from the overlapping portion of claims in multiple proceedings/claims. The overlapping portion of claims—albeit a portion—is still a "claim", not an "issue" and thus to address the risk, we need to apply claim preclusion and not issue preclusion. It was concluded that *res judicata* (in the sense of claim

[1410] For an overview, see Appendix 3: Table of ISDS Cases on *Res Judicata* and Appendix 4: Table of ISDS Cases on *Lis Pendens*.

preclusion) and its sister principle (*lis pendens*) are our best options to tackle the double compensation problem. The next Part explains how we might overcome their limitations and unlock their potential.

PART IV: TACKLING THE DOUBLE COMPENSATION PROBLEM

IV.1. The double compensation problem stems from the multiplicity of claims (often brought in multiple proceedings) arising from essentially the same loss caused by the same state measures.[1411] While it is unlikely that much can be done about the proliferation of claims and proceedings (as this sort of intervention would require fundamental changes in the ISDS system, which seems unlikely at this time), we can work on the rules governing the relations between those claims/proceedings.[1412] To succeed, we need to focus first on the mechanics of how and why double compensation happens, as demonstrated by the following diagram.



[1411] For a discussion on the requirements of double compensation, see above, Part II, para II.69.
[1412] As explained at the outset of this thesis in the discussion on methodology and theoretical framework, "the solution that is set forth in this work neither suggests a fundamental change to present legal doctrines and practice, nor does it require a fundamental change to the regulatory system to take place for the solution to become operative." See above, Part 1, para I.27.

IV.2. To prevent double compensation, we cannot touch Boxes 1 and 2, because Box 1 is situated in IIAs, and Box 2 is the natural result of Box 1. Simply put, if shares and the investment vehicle's assets are considered protected "investment" in the applicable IIA, it naturally follows that a protected investor should be able to recover for an injury to that investment.

IV.3. However, it is possible to cut the link between Boxes 2 and 3. In this way, protected shareholders should be compensated if their investment suffers damage, and they can be paid even before the investment vehicle, but a mechanism must exist so that said privileges of shareholders do not result in double compensation. The question then becomes how should the link between Boxes 2 and 3 be cut?

IV.4. To answer this question, we need to look back into Boxes 1 and 2 to find out why, in international investment law, recovery for reflective loss and injury to the investment vehicle is allowed while in domestic law it is prohibited. Put another way, what considerations exist in one body of law that do not exist in the other? The answer lies in the fact that, in domestic law, there is an assumption that the local company can (and is in a better position to) sue and recover.[1413] In contrast, there is no such assumption in the ISDS system because the host state can wind up the local investment vehicle or effectively block its recourse to justice by, for example, freezing its assets or interfering with domestic proceedings.[1414] That is why shareholders' claims are allowed in the ISDS system.

IV.5. Shareholders have been given standing in investment arbitration to ascertain that they are protected, as it is possible that the investment vehicle cannot or may not be willing to pursue its

[1413] See OECD Working Paper No 2013/03, *supra* note 1149, at 8, 19.
[1414] See *ibid* at 9, 58.

claim. However, the relevant question here is: what if, in an investment arbitration case, it is established that the investment vehicle has indeed recovered or is in the process of recovering? In such a scenario, commonsense and logic require that the overlapping portion of the shareholders' claim be dismissed. The reason is that while shareholders—as protected investors—should be compensated when there is an IIA breach, they may not be compensated twice over. In the words of Lord Millett: "In principle, the company and the shareholder cannot together recover more than the shareholder would have recovered if he had carried on business in his own name instead of through the medium of a company."[1415]

IV.6. In summary, there is no assumption in the ISDS system against shareholders' claims (like the assumption that exists in domestic law), but if the investment vehicle's recovery is proved, the shareholders may not receive double compensation. The same should apply between shareholders' claims at a lower level and those at the upper level of the same corporate chain.

IV.7. The discussion in this Part translates the above commonsense argument into a legal argument. The Part includes two chapters (Chapters 7 and 8). Chapter 7 establishes that a general principle of law on the prohibition of double compensation has already been recognized in general international law. Chapter 8 sets out the legal mechanism to apply that principle. As previously explained, the author's aim is to find a solution by interpreting legal theories and practice that are presently available.[1416] As such, the discussion in Chapter 8 focuses on two already-established principles of law, namely *res judicata* and *lis pendens*, as they can help set the rules on how to

[1415] *Johnson v Gore Wood and Co (No 1)* [2000] UKHL 65, [2001] BCC 820.
[1416] See above, Part I, Section "Methodology and Theoretical Approach", para I.27.

apply the principle of prohibition of double compensation. Finally, there will be a Summary of the Part.

CHAPTER 7: PRINCIPLE OF PROHIBITION OF DOUBLE COMPENSATION

IV.8. This Chapter includes two Sections. Section A explains that a general principle of law on the prohibition of double compensation has already been recognized in general international law, and is associated with two other general principles of law: the principles of full reparation and the prohibition of unjust enrichment. The discussion in Section B then explains that host states have not waived the protection offered by the principle of prohibition of double compensation when they signed IIAs that recognize "shares" as protected "investment".

A. The Principle

IV.9. This Section discusses three matters. Subsection (i) establishes that a principle on the prohibition of double compensation has already been recognized in international law. Subsection (ii) then investigates the relationship of the principle with other principles in international law, i.e. how they are connected to one another. Subsection (iii) discusses the status of the principle in international law. It establishes that the principle of prohibition of double compensation is not (yet) an international custom, but it is a general principle of law.

i. Existence of the Principle

IV.10. Under international case law, documents, and commentary, the notion of the prohibition of double compensation has long been recognized as a principle. In *Factory at Chorzów*—the authoritative case on the principle of reparation in international law—the PCIJ stated that:

> [A] principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals is that reparation must, as far as possible, wipe out all

> the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[1417]

Implied in the above statement is the understanding that, while an injured party is entitled to obtain damages for all the harm it has sustained, it is not entitled to receive any damages above and beyond that. This position is confirmed by the fact that, in the same decision, the PCIJ refused to award one of the remedies that the claimant had sought, on the ground that "the same compensation would be awarded twice over".[1418]

IV.11. The prohibition of double compensation was expressly confirmed later by the ICJ in its 1949 advisory opinion in *Reparation for Injuries Suffered in the Service of the United Nations*.[1419] In that matter, the UN General Assembly had submitted the following two questions to the ICJ:

> I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?
>
> II. In the event of an affirmative reply on point 1(b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?[1420]

Given that the ICJ responded to the first question in the affirmative,[1421] it proceeded to the second

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[1417] *Case Concerning Factory at Chorzów (Germany v Poland)*, PCIJ, Decision on Merits (13 September 1928), Publication of the PCIJ (Series A) No 17 at 47.
[1418] *Ibid* at 59. Even before the *Factory at Chorzów* case, the US-Germany Mixed Claims Commission in the *Lusitania Cases* had discussed the principle of full reparation and implied the concept of the prohibition of double compensation: "It is a general rule of both the civil and the common law that every invasion of private right imports an injury and that for every such injury the law gives a remedy. Speaking generally, that remedy must be commensurate with the injury received." *Lusitania Cases (United States v Germany)*, Opinion (1 November 1923), 7 RIAA 32 at 35. The general principle of full reparation was eventually codified in article 31 of the ILC *Draft Articles on State Responsibility* in 2001. ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 1130, art 31.
[1419] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, Advisory Opinion (11 April 1949), (1949) ICJ Reports 174.
[1420] *Ibid* at 175 [emphasis added].
[1421] *Ibid* at 187.

question where it opined that "competition between the State's right of diplomatic protection and the Organization's right of functional protection might arise … Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over."[1422]

IV.12. In addition to the above case law, two international documents show that international law recognises the principle of prohibition of double compensation. The first document is the 1961 *Draft Convention on the International Responsibility of States for Injuries to Aliens*,[1423] which was prepared by Harvard Law School at the request of the UN Secretariat.[1424] According to article 37: "Damages which a State is required to pay on account of an act or omission for which it is responsible shall be diminished by the amount of any recovery which has been obtained through local and international remedies".[1425]

IV.13. Second, the commentary to article 46 of the 2001 ILC *Draft Articles on State Responsibility* expressly speaks of the need to avoid double compensation.[1426] It provides that, where a state's wrongful act has injured more than one state, the injured states are "expected to coordinate their claims so as to avoid double recovery" and to "protect the defendant State in such a case".[1427] In the codification process, the report that was presented under the ILC's first special rapporteur in 1961 was more thorough with respect to the issue of double compensation and listed

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[1422] *Ibid* at 185–186 [emphasis added].
[1423] *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961), *supra* note 1138.
[1424] ILC, 8th session, *Summary Records of 370th Meeting*, *supra* note 1137, at 228 (para 16).
[1425] *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961), *supra* note 1138, art 37 [emphasis added].
[1426] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 1130.
[1427] *Ibid* at para 4 of the commentary to art 46 [emphasis added]. For a discussion on why the author uses the term "double compensation" instead of "double recovery", see above, Part I, Chapter I, Section "Binaries".

it as one of the factors that would limit the amount of reparation.[1428] However, under the ILC's second special rapporteur, the scope of the work was limited to "general aspects of state responsibility".[1429] As such, the later versions (and eventually the 2001 final version of the *Draft Articles*) did not discuss the issue of double compensation to the extent that the first version did.[1430]

IV.14. In the ISDS system, too, a number of tribunals have referred to the principle of prohibition of double compensation. The tribunal in *ConocoPhillips v Venezuela* recalled "a principle of international law that [the claimants] shall not be permitted to seek double recovery".[1431] Likewise, the tribunals in *Burlington v Ecuador* and *Venezuela Holdings v Venezuela* referred to the principle of prohibition of double compensation as a "well-established" principle.[1432] The tribunal in *Deutsche Bank v Sri Lanka* held that "[t]he State and the State entity are in any case protected by the prohibition of double recovery".[1433] According to the tribunal in *GÜRİŞ and Others v Syria*, "[i]t is indeed within the Tribunal's power to draw the implications attendant upon the relief sought and awarded, especially in order to comply with the principle of avoiding double recovery".[1434] Two other ISDS tribunals have also impliedly referred to the

[1428] ILC, *Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens*, Document A/CN4/134 & Add 1, in Yearbook of the International Law Commission, vol II (United Nations Publication, 1961) 1 at paras 170–171.
[1429] ILC, *Report of the International Law Commission Covering the Work of its Fourteenth Session*, Document A/5209, in Yearbook of the International Law Commission, vol II (United Nations Publication, 1962) 157 at 189 (paras 47–48).
[1430] See the 1996 version of the draft articles, which was the first full draft after the ILC's decision in 1962 to limit the scope of the work: ILC, *Report of the International Law Commission on the Work of its Forty-Eighth Session*, Document A/51/10, in Yearbook of the International Law Commission, vol II, part Two (United Nations Publication, 1996) 1.
[1431] *ConocoPhillips v Venezuela*, Award (9 March 2019) at para 964.
[1432] *Burlington v Ecuador*, Decision on Ecuador's Counterclaims (7 February 2017) at para 1083; *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*), Award (9 October 2014) at para 378.
[1433] *Deutsche Bank v Sri Lanka*, Award (31 October 2012) at para 562.
[1434] *GÜRİŞ and Others v Syria*, Final Award (31 August 2020) at para 374.

principle.[1435]

IV.15. ISDS commentators have noted that international law recognizes a principle against double compensation. Borzu Sabahi has observed that "[o]ne of the established principles (and perhaps a general principle of law) in awarding compensation is the prohibition of double recovery or double counting for the same loss".[1436] Charles Kotuby and Luke Sobota have made a similar observation: that "there is a general principle prohibiting the compensation of the same damages twice. This [is a] well-established principle".[1437] Thus, on the basis of the above international case law, documents, and commentary, it is clear that a principle on the prohibition of double compensation is already recognized in international law.

ii. Relationship with Other Principles

IV.16. The principle of prohibition of double compensation has been linked to three general principles of law as though they are its "parent" principles: the principle of full reparation,[1438] the principle of causation,[1439] and the principle of prohibition of unjust enrichment.[1440] Apart from the theoretical value of the discussion that shows how these principles are connected to one

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[1435] *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*, Award (9 April 2015) at para 38; *Pan American Energy v Argentina* consolidated with *BP America v Argentina*, Decision on Preliminary Objections (27 July 2006) at para 219.
[1436] Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration*, *supra* note 1, at 185.
[1437] Charles T Kotuby & Luke A Sobota, *supra* note 1, at 150–151. See also James Crawford, *supra* note 1266, at 169–170.
[1438] For a discussion on the principle of full reparation, see above paras IV.10 – IV.11.
[1439] The principle of causation works in conjunction with the principle of full reparation in that "the duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act … These are damages which would normally flow from such an act, or which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to result, as well as all intended damages." Bin Cheng, *supra* note 1358, at 253.
[1440] The principle of prohibition of unjust enrichment applies when three requirements are present: "(i) one party has enriched itself; (ii) such enrichment is 'unjust'; and (iii) is detrimental to another party." Patrick Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (Oxford University Press, 2020) at paras 4.185–4.188.

another, the discussion has further practical value: being that the scope of application of the principle of prohibition of double compensation could vary, depending on which principles serve as the parent principles.

IV.17. Sabahi, Duggal, and Birch relate the prohibition of double compensation to the principle of full reparation:

> There are a number of principles in international investment arbitration [including the principle of prohibition of double compensation], which may limit the amount of compensation. These principles seem to be a corollary of the full reparation principle in as much as they require that the compensation awarded not exceed the loss actually suffered as a consequence of the wrongful acts.[1441]

The tribunal in *Suez and Vivendi* expressed the same view. It noted that "[w]hile international law requires full compensation for injury, it does not allow for *more* than full compensation."[1442] On the other hand, Kotuby and Sobota consider the prohibition of double compensation to be a "function" of the principle of causation because "underserved or two-fold compensation holds a defendant liable for more than the direct consequences of its unlawful act."[1443]

IV.18. However, others who speculated about the origins of the principle of prohibition of double compensation have considered it to be a spin-off from the principle of prohibition of unjust enrichment. For example, Bin Cheng characterized the PCIJ's approach of avoiding double compensation in *Factory at Chorzów*[1444] as preventing compensation "to become a source of unjust enrichment for the injured person".[1445] Among recent commentators, Thomas Wälde and Borzu

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[1441] Borzu Sabahi, Kabir Duggal & Nicholas Birch, "Limits on Compensation for Internationally Wrongful Acts" in Marc Bungenberg et al, eds, *International Investment Law: A Handbook* (C H BECK, Hart & Nomos, 2015) 1115 at para 1 [emphasis added].
[1442] *Suez and Vivendi v Argentina*, Award (9 April 2015) at para 38.
[1443] Charles T Kotuby & Luke A Sobota, *supra* note 1, at 151 [emphasis added].
[1444] See above, para IV.10.
[1445] Bin Cheng, *supra* note 1358, at 236.

Sabahi have related double compensation to unjust enrichment.[1446] Further, of the three ISDS tribunals that expressly referred to the principle of prohibition of double compensation,[1447] two linked it to the prohibition of unjust enrichment.[1448] For example, according to the tribunal in *ConocoPhillips v Venezuela*: "a principle of international law that [the claimant] shall not be permitted to seek double recovery and thus cause an illegal enrichment that the international legal order must condemn."[1449]

IV.19. It should be borne in mind that the principle of prohibition of unjust enrichment has two aspects: one as a cause of action and the other as "a basis for assessing the amount of compensation".[1450] It is only the latter aspect that concerns the relationship between the principle of double compensation and the principle of unjust enrichment. This is because any unjust enrichment by investors would be the result of the multiplicity of claims/proceedings and not the result of a wrongful act by investors prior to the proceedings that could serve as a cause of action for the state to launch a proceeding and receive restitution. As will be explained in Chapter 8, any unjust enrichment caused by double compensation could be avoided through a proper degree of coordination and the application of certain principles. In this regard, a relevant question would be whether a tribunal is obliged to prevent unjust enrichment that could result from the very proceeding it administers? The answer is clearly in the affirmative. As the tribunal in *Amoco International Finance v Iran* noted, the tribunal's "duty is to avoid any unjust enrichment or

[1446] Thomas Wälde & Borzu Sabahi, *supra* note 1192, at 40.
[1447] See above, para IV.14.
[1448] *ConocoPhillips v Venezuela*, Award (9 March 2019) at para 964 ("*ConocoPhillips*"); *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*), Award (9 October 2014) at para 378.
[1449] *ConocoPhillips* at para 964.
[1450] Sergey Ripinsky & Kevin Williams, *supra* note 45, at 129–134.

deprivation of either party".[1451]

IV.20. Of the three identified principles (i.e. the principles of causation, full reparation, and prohibition of unjust enrichment), the author is of the view that only the latter two principles can serve as the origin of the principle of prohibition of double compensation. Further, that determining between the principle of full reparation and the principle of prohibition of unjust enrichment is not an either/or scenario: both are the parent principles. This view finds support in a report presented by ILC's first special rapporteur (in the codification process of the ILC *Draft Articles on State Responsibility*).[1452] In that report, the prohibition of double compensation was linked to both the principle of full reparation and the principle of prohibition of unjust enrichment.[1453]

IV.21. On the other hand, to understand why the principle of causation could not serve as one of the parent principles, we have to look into the principle of causation to find out which of its components does not marry well with the principle of prohibition of double compensation. Under the principle of causation, the author of a wrongful act is responsible only for proximate/direct consequences of the act (as opposed to remote/indirect consequences).[1454] Two criteria are applied to determine the "proximity" of a consequence:

- First, an objective criterion, under which a proximate causality exists between—
    - an act and its normal/natural consequence; or
    - the act and its reasonably foreseeable consequences; or

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[1451] *Amoco v Iran*, Award No 310-56-3 (14 July 1987) at para 225.
[1452] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 1130.
[1453] ILC, *Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens*, *supra* note 1135, at paras 170–171, 178.
[1454] Bin Cheng, *supra* note 1358, at 241–243; Charles T Kotuby & Luke A Sobota, *supra* note 1, at 143.

- Second, a subjective criterion, under which the proximate causality exists between the act and the consequences that the author of the act intended (regardless of whether those consequences are normal/natural).[1455]

IV.22. That the shareholders of an investment vehicle would suffer a reflective loss when the host state takes wrongful measures against the investment vehicle is both a "natural" consequence and also "reasonably foreseeable" for the state. That is why IIAs provide protection for shareholders in the first place.[1456] As such, judged solely based on the principle of causation, shareholders' reflective loss should generally be recoverable. Yet, it is the very same shareholders' recovery that, if not administered properly, could lead to double compensation for shareholders.[1457] As such, the principle of prohibition of double compensation does not stem from the principle of causation; on the contrary, it would stand against the principle of causation to prevent recovery for the second time. This is similar to the function of the no reflective loss principle in domestic law, but with some differences.

IV.23. In domestic law, the reason that shareholders are not allowed to recover for reflective loss is not that the loss is considered "remote/indirect", but rather because the principle of no reflective loss interferes and bars recovery.[1458] As explained previously, the no reflective loss

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[1455] Bin Cheng, *supra* note 1358, at 245–251; Charles T Kotuby & Luke A Sobota, *supra* note 1, at 143–144. Bin Cheng initially categorized the "reasonably foreseeable" consequences under the subjective criterion, but eventually noted that it would fit better into the objective criterion category because of the element of "reasonableness". Bin Cheng, *supra* note 1358, at 250–251.

[1456] For a discussion on the underlying policy in international investment law, see above, Part I, para I.16.

[1457] For a discussion on how shareholders' recovery could lead to double compensation, see above, Chapter 2 "Subject Matter of 'Compensation' in 'Double Compensation'".

[1458] See above, Part II, para II.32. See e.g. *Johnson v Gore Wood and Co (No 1)* [2000] UKHL 65, [2001] BCC 820 at 844, 845, 862 (according to Lord Millett, "it is of course correct that the diminution in the value of the plaintiffs' shares was by definition a personal loss and not the company's loss, but that is not the point … [T]here is more to it than causation. The disallowance of the shareholder's claim in respect of reflective loss is driven by policy considerations"; also, according to Lord Cook, "it would appear that only the problems of double recovery or prejudice to the company's creditors would justify denying or limiting the right to recover [reflective loss] which, on ordinary

principle in domestic law is based on an assumption: the company can (and is in a better position to) sue and recover, and through it, shareholders will recover too.[1459] However, there is no such assumption in international investment law.[1460] Consequently, the no reflective loss principle does not apply in international investment law and shareholders have standing to bring claims.[1461] The principle of prohibition of double compensation can fill the gap in international investment law (by playing a similar function to the principle of no reflective loss) in a more limited and targeted way. The no reflective loss principle acts as a blanket ban on shareholders' recovery, whereas the principle of prohibition of double compensation would only apply in cases where there is a risk of double compensation, and not every case that involves shareholders' claims.

IV.24. In conclusion, the principle of causation is not a parent principle of the principle of prohibition of double compensation. However, that conclusion is based on the test that was discussed earlier for proximity (i.e. the objective-subjective test).[1462] If we apply a different test, it could result in a different conclusion. It might be that Kotuby and Sobota (the supporters of the link between the principle of causation and the prohibition of double compensation)[1463] used a different test to determine "proximity/directness", for example, based on physical proximity. This means that losses that are sustained close to the state measures (i.e. losses suffered by the investment vehicle) would be considered "direct", and those that are suffered further up by

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principles of foreseeability, would otherwise arise"); *Waddington Ltd v Chan Chun Hoo Thomas and Others* [2008] HKCFA 63 at para 74 (Lord Millet, this time at the Hong Kong Court of Final Appeal, explained that the bar on shareholders' claim "is a matter of legal policy. It is not because the law does not recognise the loss as a real loss") [all emphases added]. The UK Supreme Court's recent decision on reflective loss (namely, *Sevilleja v Marex Financial Ltd*) partly departs from *Johnson,* but the departure does not concern the issue that was discussed here. See below, para IV.76 and the accompanying footnotes.

[1459] The assumption in domestic law is discussed above, in the current Part, para IV.4.

[1460] *Ibid*.

[1461] See above, Part II, paras II.35, II.37.

[1462] For the objective-subjective test, see above, para IV.21.

[1463] See above, para IV.17.

shareholders would be considered "remote/indirect" consequences and hence not covered by the principle of causation. In this way, one could see a link between the principle of causation and the principle of prohibition of double compensation. However, this hypothesis is not acceptable for two reasons.

IV.25. First, it is unlikely that Kotuby and Sobota applied such a test. This is because they have supported the objective-subjective test (which Bin Cheng distilled from case law) and have confirmed that it has stood the test of time.[1464] Once the objective-subjective test is applied, it was explained that the principle of causation could not be the parent of the principle of prohibition of double compensation.[1465] Further, in another part of Kotuby's and Sobota's analysis of the principle of causation, they agreed with *Lemire v Ukraine* where it was held that, regardless of the number of links in the chain between the act and the consequence, the causal link remains unaffected so long as there is no breach in the chain.[1466] This confirms that Kotuby and Sobota did not support a proximity test based on the notion of physical proximity to the wrongful act.

IV.26. Second, even if Kotuby and Sobota had supported the test (i.e. physical remoteness), the principle of causation could not still be the parent principle of the principle of prohibition of double compensation. The reason is that the physical remoteness test would either significantly increase the scope of application of the principle of prohibition of double compensation or drastically reduce its scope of application. Consider the following two possibilities:

- If a "remote/indirect" loss means any loss beyond the loss sustained by the investment

[1464] Charles T Kotuby & Luke A Sobota, *supra* note 1, at 143–144.
[1465] See above, paras IV.21 – IV.23.
[1466] Charles T Kotuby & Luke A Sobota, *supra* note 1, at 146–147. See *Lemire v Ukraine (II)*, Award (28 March 2011) at para 166.

vehicle, no shareholders' loss would then be covered by the principle of causation. Thus, any principle of prohibition of double compensation stemming from such a principle of causation would effectively ban any shareholders' recovery. This would be a significant, unacceptable increase in the scope of application of the principle of prohibition of double compensation. Chapter 6 discussed the problems associated with a blanket ban on shareholders' recovery.[1467]

- If a "remote/indirect" loss means only losses that are sustained further up the corporate chain, double compensation would then only be prohibited when the shareholders are really up in the chain and would not cover the scenarios where shareholders close to the investment vehicle have brought multiple proceedings. This would be a drastic reduction in the scope of application of the principle. In fact, it would be similar to the cut-off point solution, the shortcomings of which were discussed in Chapter 6.

IV.27. In summary, double compensation is prohibited not because the second compensation represents a remote/indirect loss, but rather because full compensation is achieved by the first compensation (the principle of full reparation) and unjust enrichment would result from a second compensation (the principle of prohibition of unjust enrichment).

IV.28. The above discussion concerns how general international law (including international investment law) views the origin of the principle of prohibition of double compensation. However, it is interesting to note that, in international investment law, the principle of prohibition of double compensation has found a new dimension. It has been linked to another general principle of law (in addition to full reparation and unjust enrichment): the principle of good faith in the exercise of

[1467] See above, Part III, Chapter 6, paras III.371 – III.373.

rights, also known as the principle of prohibition of abuse of rights.[1468] According to the tribunal in *ConocoPhillips v Venezuela*:

> The fundamental legal basis is thus the principle of good faith and it is in this regard that the Claimants, albeit without saying it so precisely, wanted undoubtedly to express their intention not to seek double recovery as a consequence of the two arbitral proceedings that had been launched and that are awarding amounts based at least in part on the same subject matters, albeit not between the same parties. … The Tribunal therefore endorses the Claimants' undertaking and will declare that the Claimants are under a duty of good faith not to seek double recovery when seeking enforcement, in full or in part, of the Award rendered by this ICSID Tribunal.[1469]

The tribunal in *Orascom v Algeria* also elaborated on why, in the ISDS system, the prohibition of double compensation is related to the prohibition of abuse of rights:

> [A]n investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state. … [T]his conclusion derives from the purpose of investment treaties, which is to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development. If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. The purpose is not served by allowing other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm inflicted on the investment. Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered. Thus, where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same

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[1468] The principle of good faith in the exercise of rights has been defined as follows: "[I]n a great number of cases, the law allows the individual or State a wide discretion in the exercise of a right … Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interests of others." Bin Cheng, *supra* note 1358, at 133, 134; Andrew D Mitchell & Trina Malone "Abuse of Process in Inter-State Dispute Resolution" in *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, 2018) at para 8 ("The abuse of rights doctrine flows from the principle of good faith and sets itself against a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different to that for which the right was created, to the injury of another State"). See also Charles T Kotuby & Luke A Sobota, *supra* note 1, at 107–110.

[1469] *ConocoPhillips v Venezuela*, Award (9 March 2019) at paras 964–965 [emphasis added].

> economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established.[1470]

IV.29. In fact, given the proliferation of IIAs in international investment law, states' measures have become increasingly subject to more than one IIA and, as such, different options are available to shareholders and their investment vehicle on how to proceed with their rights. This has posed the question of whether shareholders bringing multiple claims should be considered an act in good faith or an abuse of rights. In the *Orascom* case, the tribunal found that there was an abuse of rights, whereas in *ConocoPhillips* and in *Ampal v Egypt*, the tribunals held that the claimants were acting in good faith.

IV.30. Both *ConocoPhillips* and *Ampal* involved the risk of double compensation but no abuse of rights. This demonstrates that the link between the prohibition of double compensation and the prohibition of abuse of rights is not constant and continuous: some cases involving the risk of double compensation include abuse of rights and some do not. Besides, abuse of rights is not presumed[1471]—it is fact-based and considered an exceptional finding with a high threshold.[1472] Therefore, the principle of good faith/prohibition of abuse of rights could not be seen as a parent principle of the principle of prohibition of double compensation. That said, in exceptional cases where abuse of rights is found in a case, it further supports and perhaps emboldens the prohibition of double compensation. In other words, the principle of good faith is an ally for the principle of prohibition of double compensation, not a parent.

[1470] *Orascom v Algeria*, Award (31 May 2017) at paras 542–543 [emphasis added].
[1471] Bin Cheng, *supra* note 1358, at 136.
[1472] *Levy v Peru*, Award (9 January 2015) at para 186 and the accompanying citations.

iii. Status of the Principle

IV.31. The discussion in the previous Subsection established that (i) a principle on the prohibition of double compensation exists in international law and has been applied by the ISDS tribunals; and (ii) the principles of full reparation and prohibition of unjust enrichment are its parent principles. This Subsection investigates the status of the principle of prohibition of double compensation, i.e. whether it is a principle of customary international law or a general principle of law ("GPL").

IV.32. Both customary international law and GPLs have been recognized as formal sources of international law under article 38(1) of the ICJ Statute (and prior to that, the PCIJ Statute), which reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;[1473]
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. [Emphasis added].

Although article 38(1) does not mention the term "sources", it is considered to have codified the formal sources of international law.[1474] The discussion in this Subsection explains that the

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[1473] Although article 38(1)(c) reads "the general principles of law recognized by civilized nations", that phrase is now understood as "general principles of law recognized by or common to the world's major legal systems". Thomas Buergenthal & Sean D Murphy, *Public International Law in a Nutshell* (Thomson West, 2007) at 25; Malcolm N Shaw, International Law, 6th ed (Cambridge University Press, 2008) at 98 [all emphases added]. See also *Restatement (Third) of The Foreign Relations Law of the United States* (1987) § 102(1): "A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world" [emphasis added]. The revisions that were implemented in 2018 by the release of *Restatement (Fourth) of The Foreign Relations Law of the United States* have left § 102 of the *Restatement (Third)* intact.

[1474] See e.g. Robert Jennings & Arthur Watts, eds, *Oppenheim's International Law*, 9th ed, vol 1 (Oxford University Press, 2008) at 24 ("Although Article 38 does not in terms state that it contains the formal sources of international

prohibition of double compensation has not yet reached the status of international custom, but it is a GPL.

IV.33. Before embarking on the discussion, it is helpful to answer a question: if both customary international law and GPLs are formal sources of international law, what difference would it make to establish that the principle of prohibition of double compensation belongs to one category or the other? Simply put, does identifying the status of the principle have any practical value in addition to a theoretical discussion? Yes, there is an important practical value to the discussion.

IV.34. Article 38(1) uses the term "subsidiary" only with respect to the fourth group (i.e. "judicial decisions and the teachings of the most highly qualified publicists"). As such, theoretically, there is no official hierarchy between the first three sources of international law (i.e. treaties, international custom, and GPLs).[1475] However, in practice, GPLs are often relied on only after treaties and international custom,[1476] to the point that some notable commentators consider only treaties and international custom to be the main sources of international law in practice.[1477] Thus, if it is established that the principle of prohibition of double compensation is customary international law, it would practically enjoy a higher status and a stronger force before international tribunals.

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law, this is usually inferred"); James Crawford, *supra* note 1266, at 20 ("Article 38 is often put forward as a complete statement of the sources of international law").

[1475] James Crawford, *supra* note 1266, at 31; Alain Pellet & Daniel Müller, "Article 38" in Andreas Zimmermann et al, eds, *The Statute of the International Court of Justice: A Commentary*, 3rd ed (Oxford University Press, 2019) 819 at 271; Bin Cheng, *supra* note 1358, at 20, 22 ("[D]uring the discussion in the Committee of the First Assembly, the words 'in the order following' in the introductory phrase of the draft article were deleted thus eliminating any notion of hierarchy from the threefold classification of international law. … The order in which these component parts of international law are enumerated [in article 38(1)] is not, however, intended to represent a juridical hierarchy, but merely to indicate the order in which they would normally present themselves to the mind of an international judge when called upon to decide a dispute in accordance with international law").

[1476] Patrick Dumberry, *supra* note 1440, at paras 1.17–1.19.

[1477] See e.g. Robert Jennings & Arthur Watts, *supra* note 1474, at 36; Alain Pellet & Daniel Müller, *supra* note 1475, at para 297.

IV.35. It should also be noted that the application of sources of international law (as set out in the ICJ and PCIJ Statutes) is not limited to ICJ/PCIJ cases or other public international law matters, as those sources are equally recognized before other international courts and tribunals.[1478] This is so because article 38 did not create the sources of international law, but rather had a declaratory nature and codified the already-existing sources.[1479]

a. Not a Principle of Customary International Law

IV.36. One commentator has argued that the prohibition of double compensation is customary international law given the PCIJ decision in *Chorzów Factory* and the reference to double compensation in the ILC's commentary to its *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.[1480] However, if we apply the methodology that the ICJ and the ILC have adopted—based on the text of article 38(1)—for identifying customary international law rules and principles, it produces a different result. The following paragraphs discuss and apply that methodology, which leads to the conclusion that the principle of prohibition of double compensation is not (at least, yet) an international custom.

IV.37. International custom is referred to in article 38(1)(b) of the ICJ Statute as "evidence of a general practice accepted as law". This shows that for a rule or principle[1481] to be recognized as

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[1478] *Ibid* at para 1.06.
[1479] UN Secretary-General, A/CN4/1/Rev1, *Survey of International Law in Relation to the Work of Codification of the International Law Commission (Memorandum submitted by the UN Secretary-General)* (1949) at 22 ("The codification of this aspect of international law has been successfully accomplished by the definition of the sources of international law as given in article 38 of the Statute of the International Court of Justice"); Bin Cheng, *supra* note 1358, at 22 ("The article introduced nothing new in substance. It only effected a threefold division of existing international law into conventions, international custom, and general principles of law").
[1480] Elizabeth Wu, *supra* note 1190, at 150. The PCIJ decision in *Chorzów Factory* has been discussed above, in the current Part, para IV.10. The reference in the ILC commentary has also been discussed above, in the current Part, para IV.13.
[1481] There is a technical difference between a principle and a rule. A principle is considered to have a more fundamental status than a rule, which applies to and guides a specific situation. In fact, rules are formulated for "practical purposes", whereas principles are the "general prepositions underlying the various rules, which express the general qualities of

customary international law, two conditions must be met: there must be a "general practice" that is "accepted as law". ICJ case law confirms this two-pronged test. In the 1969 *North Sea Continental Shelf Cases*, the court held that:

> [T]wo conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[1482]

The ICJ confirmed the test repeatedly in its later decisions.[1483] Also, in 2018, the ILC completed its work on the methodology for identifying customary international law rules and principles (the "ILC Guide").[1484] It follows the same two-pronged test.[1485]

IV.38. Here, we first examine whether the first prong of the test (i.e. "general practice") has been met in relation to the prohibition of double compensation and, if so, we proceed to the second prong (i.e. "accepted as law"). The discussion shows that, while the first prong is met, the second prong is not.

(1) The First Prong of the Test

IV.39. For a rule or principle to be recognized as customary international law, the first condition is that there must be a "general practice".[1486] The question is: what does it mean for a practice to

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juridical truth itself". Bin Cheng, *supra* note 1358, at 24; Ronald M Dworkin "The Model of Rules" (1967) 35:1 U Chi L R 14 at 23, 25; Robert Kolb, "Principles as Sources of International Law (with Special Reference to Good Faith)" (2006) 53 Neth Int'l L R 1 at 9. See also *Black's Law Dictionary*, 11th ed (2019) *sub verbo* "rule", "principle".

[1482] *North Sea Continental Shelf Cases (Germany v Denmark and Netherlands)*, ICJ, Judgment (20 February 1969), (1969) ICJ Reports 3 at para 77.

[1483] See e.g. *Continental Shelf (Libyan Arab Jamahiriya v Malta)*, ICJ, Judgment (3 June 1985), (1985) ICJ Reports 13 at para 27; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ, Judgment (3 February 2012), (2012) ICJ Reports 99 at para 55.

[1484] ILC, *Draft Conclusions on Identification of Customary International Law with Commentaries*, Document A/73/10, in Yearbook of the International Law Commission, vol II, part Two (United Nations Publication, 2018) 122 ("ILC Guide").

[1485] *Ibid* at conclusions 2, 3(2).

[1486] See above para IV.37.

be "general"? Yet, before answering that question, we must first clarify whose "practice" makes up international custom? Put another way: when discussing double compensation, should we examine the practice of states, tribunals, investors, or all of them together?

IV.40. The ILC Guide provides the following answer:

> 1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.
> 2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.
> 3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.[1487]

As such, when examining "practice" with respect to the prohibition of double compensation, the focus should be on the practice of states. That is: how respondent states have acted when faced with the risk of double compensation, and how other states (including both home states of investors and other states whose interests were not directly involved) have reacted to the acts of those respondent states.

IV.41. Now that we established the meaning of "practice", we return to the initial question of what does it mean for a practice to be "general"? In the *North Sea Continental Shelf*, the ICJ ruled that "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked".[1488] Distilling the ICJ case law, the ILC Guide defines a "general" practice as containing two elements: (i) "sufficiently widespread and representative", and (ii) "consistent".[1489]

[1487] *Ibid* at conclusion 4.
[1488] *North Sea Continental Shelf Cases (Germany v Denmark and Netherlands)*, ICJ, Judgment (20 February 1969), (1969) ICJ Reports 3 at para 74 [emphasis added].
[1489] ILC Guide, *supra* note 1484, at conclusion 8(1) and para 2 of the commentary to conclusion 8.

IV.42. We start with the second element (i.e. consistency). The ILC Guide defines it as not being "divergent", to the point that a "pattern of behaviour can be discerned".[1490] Applying this definition to the practice of states with respect to double compensation, we notice that the element of "consistency" is met. The reason is that, in the 63 investment arbitration cases involving the risk of double compensation (discussed in Chapter 4), all respondent states (in total, 32 states)[1491] acted in the same manner: they all raised objections about the risk of double compensation and requested the tribunals to proceed based on the prohibition of double compensation. Therefore, the second element of "general" practice (i.e. consistency) is met.

IV.43. Regarding the first element of "general" practice (i.e. "sufficiently widespread and representative"), according to the ILC Guide, "universal participation is not required: it is not necessary to show that all States have participated in the practice in question. The participating States should include those that had an opportunity or possibility of applying the alleged rule".[1492] Thus, the question here is whether the 32 states that participated in the practice (i.e. the practice of raising objections in relation to double compensation) represent a sufficient proportion of the 190+ states on the world stage.[1493]

IV.44. The answer is in the affirmative because those 32 states are the only states that had the "opportunity or possibility of applying the alleged rule" and the rest of the 160+ states were not involved in the issue. Also, there is no record that those 160+ states have objected to the practice

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[1490] *Ibid* at para 5 of the commentary to conclusion 8.
[1491] Based on the cases discussed in Chapter 4, the list of states, in alphabetical order, is as follows: Albania, Algeria, Argentina, Belize, Bolivia, Bulgaria, Burundi, Croatia, Czech Republic, Ecuador, Egypt, Estonia, Georgia, Guatemala, India, Italy, Latvia, Mauritius, Mexico, Pakistan, Peru, Poland, Romania, Russia, Spain, Sri Lanka, Syria, Tanzania, Turkey, Ukraine, Venezuela, and Zimbabwe.
[1492] ILC Guide, *supra* note 1484, at para 3 of the commentary to conclusion 8 [emphasis added].
[1493] To date, at least 193 states are members of the UN. See the list of UN member states on its website: <https://www.un.org/en/member-states/> (last visited 11 March 2021).

of the 32 states. This is important because, as the ILC Guide notes, "the objection of a significant number of States to the emergence of a new rule of customary international law [could] prevent its crystallization altogether" as it would show that "there is no general practice accepted as law".[1494] Here, those 160+ states raised no objection to the 32 states that demanded the application of the prohibition of double compensation. In other words, the inaction of the 160+ states is significant.[1495]

IV.45. In conclusion, the first prong of the test (i.e. "general practice") is met because both of its elements (i.e. "sufficiently widespread and representative" and "consistency") are met. Having established the first prong of the test, we now proceed to examine the second prong.

(2) The Second Prong of the Test

IV.46. For a rule or principle to be recognized as international custom, the second condition of the test is that the relevant state practice must be "accepted as law" (known as *opinio juris*).[1496] This is the subjective/psychological prong of the test, which requires that "the practice in question must be undertaken with a sense of legal right or obligation."[1497] In *North Sea Continental Shelf Cases*, the ICJ explained the requirement as follows:

> [States' practice] must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. … There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably,

[1494] ILC Guide, *supra* note 1484, at para 2 of the commentary to conclusion 15.
[1495] According to the ILC Guide, conclusion 6(1): "Practice may take a wide range of forms. ... It may, under certain circumstances, include inaction" [emphasis added].
[1496] See above para IV.37.
[1497] ILC Guide, *supra* note 1484, at conclusion 9. See James Crawford, *supra* note 1266, at 23; Robert Jennings & Arthur Watts, *supra* note 1474, at 27.

> but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty[1498]

The ICJ confirmed the requirement again in the *Nicaragua* case.[1499] Regarding the issue of double compensation, the examination of states' practice shows that *opinio juris* is not met, for the following reasons.

IV.47. First, if we re-read the objections that those 32 respondent states raised in relation to the risk of double compensation,[1500] it is clear that those states did not do so out of a feeling that they were obliged under international law to raise such an objection. Their arguments show that they thought (rightly or not) that there is no clear rule under international law that accounts for the double compensation situation and were hoping that the tribunals would establish the rule.[1501] This position was crystallized in *Impregilo v Argentina*, where the state launched an annulment proceeding and argued that:

> The Tribunal went on to speculate about the possibility of [the issue of double recovery] being resolved in the future by someone … [whereas] the possibility of there being double recovery must be avoided through legal considerations established for these purposes and through the correct interpretation of the applicable instruments. This is not what the Tribunal did."[1502]

If states were under the impression that there is no clear rule on the matter, how could they feel legally obliged to make an objection based on that rule?

IV.48. Second, reading the line of argument put by states in those cases, it seems that those

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[1498] *North Sea Continental Shelf Cases (Germany v Denmark and Netherlands)*, ICJ, Judgment (20 February 1969), (1969) ICJ Reports 3 para 77 [emphasis added].
[1499] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, ICJ, Judgment on Merits (27 June 1986), (1986) ICJ Reports 14 at para 207.
[1500] The 63 ISDS cases involving the risk of double compensation are discussed in Chapter 4. For the list of the 32 states involved, see *supra*, note 1491.
[1501] See Chapter IV for a discussion on the arguments raised by the states.
[1502] *Impregilo v Argentina*, Decision of the *ad hoc* Committee on the Application for Annulment (24 January 2014) at para 48.

states raised the objection not because they sought to conform to a legal obligation, but rather because they did not wish to pay more than once for the same harm and found it unjust to do so. This is not to say that the states' motivation (i.e. not being willing to pay twice) is invalid. Quite the contrary: it is valid, and a legal mechanism must be in place to address that concern. However, there is a difference between raising an objection out of a feeling of injustice and doing so in accordance with a legal obligation.

IV.49. Third, the absence of *opinio juris* in states' practice is evidenced further by the fact that at least one state seemed to be comfortable with disregarding the prohibition of double compensation when it switched sides and was on the receiving end of double compensation. In Part I of the thesis, it was explained that in a typical double compensation scenario, investors are beneficiaries, but that there is an exceptional scenario where a host state could be the recipient of double compensation as a result of bringing counterclaims against the investors.[1503] That scenario occurred in the related cases of *Burlington v Ecuador* and *Perenco v Ecuador*, where the respondent state received double compensation, without suggesting that it was legally prohibited from doing so.[1504]

[1503] See above, Part I, Chapter 3, Subsection "The Counterclaim Exception".

[1504] *Burlington* and *Perenco* were two ICSID arbitration proceedings that were brought separately by two consortium partners against Ecuador. In both arbitrations, Ecuador brought counterclaims for environmental harms, which could lead to double compensation in favor of Ecuador because the counterclaims were filed on the basis of joint and several liability. In the *Burlington* case, Ecuador admitted the risk of double compensation and undertook to collect damages only based on the more favorable decision. However, Ecuador did not honor its undertaking: it did not wait to see which award would be more favorable. Ecuador received damages for its counterclaims from the *Burlington* case and then, in *Perenco*, went on to argue that the Burlington damages should not even be deducted from the *Perenco* counterclaim damages. The *Perenco* tribunal agreed with Ecuador that the *Burlington* tribunal had failed to accurately estimate the extent of contamination, and that Ecuador remained undercompensated. Thus, the *Perenco* tribunal again awarded damages for the counterclaims and then to "avoid" double compensation, it deducted the amount that was already paid in *Burlington*. Although the *Perenco* tribunal deducted the *Burlington* counterclaim damages, it did not really avoid double compensation; rather, it only reduced the amount of it, because the basis of the counterclaims was joint and several liability, which was decided and paid in the *Burlington* case. Both cases are discussed above in Chapter 4.

IV.50. The fourth reason for the lack of *opinio juris* in states' practice on this issue (i.e. the practice of raising objection relating to double compensation) comes from the ICJ's 2007 decision in *Diallo*. In that case, the court revisited its ruling in the 1970 *Barcelona Traction* case (where it held that the Belgian shareholders lacked standing under customary international law to claim for their alleged reflective loss caused by Spain[1505]).[1506]

IV.51. In *Diallo*, the ICJ noted that, in the years following *Barcelona Traction*, there had been a surge in the number of IIAs and that states had mostly adjudicated their disputes with investors through the mechanism available in IIAs, which allows shareholders' claims.[1507] However, the ICJ was not convinced that the widespread practice of states was sufficient to show that a new customary international law had emerged that would allow shareholders' standing for reflective loss.[1508]

IV.52. The focal point in the ICJ's ruling in *Diallo* concerned the lack of *opinio juris* in the states' practice.[1509] According to the court, the very fact that states still feel the need to include the shareholders' rights in IIAs for shareholders to be protected demonstrates that the practice is not yet international custom.[1510] Commenting on *Diallo*, James Crawford explains that: "the Court

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[1505] *Case Concerning Barcelona Traction, Light & Power Co, Ltd*, ICJ, Judgment (5 February 1970), (1970) ICJ Rep 3 at paras 1–2, 9, 32, 38, 42, 44, 47, and at 51 ("*Barcelona Traction*").
[1506] *Case Concerning Ahmadou Sadio Diallo (Guinea v Congo)*, ICJ, Preliminary Objections (27 May 2007), (2007) ICJ Rep 582 ("*Diallo*") at paras 86–87.
[1507] *Ibid* at para 88.
[1508] *Ibid* at paras 89–90.
[1509] According to the ICJ: "The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary". *Ibid* at para 90 [emphasis added].
[1510] *Ibid*.

in *Diallo* took the more exacting approach to custom, and to the requirement of *opinion juris* in particular. The Court noted the inconclusiveness and insufficiency of mere practice".[1511]

IV.53. One could ask why is *Diallo* relevant when that case does not concern the issue of double compensation? It is true that *Diallo* did not involve double compensation *per se*. The issue before the ICJ was whether the practice of states in signing IIAs and allowing shareholders' claims had risen to the level that could form customary international law, which the court did not accept.[1512] Nevertheless, *Diallo* is relevant to the discussion on double compensation, because the issue of double compensation in investment arbitration arises in the context of shareholders' claims, and it was that context that was before the ICJ in *Diallo*. If the practice forming the context in which double compensation takes place has not yet met the *opinio juris* condition to rise to the level of customary international law, how could we argue that a segment of that practice which involves the issue of double compensation has met the condition? Thus, based on the four reasons set out above, the second prong of the test (i.e. *opinio juris*) is not met.

IV.54. In summary, under the ICJ Statute article 38(1) and ICJ case law, as well as the ILC Guide, a two-pronged test must be satisfied to establish whether a rule/principle is international custom: there must be a "general practice" that is "accepted as law". The first prong (general practice) alone has two elements: the practice should be "sufficiently widespread and representative" and "consistent". Regarding states' practice in relation to the prohibition of double compensation, the above discussion has shown that both elements of the first prong are met.

[1511] James Crawford, *supra* note 1266, at 25.
[1512] *Diallo* at paras 87, 90.

However, the second prong of the test (i.e. "accepted as law" - *opinio juris*) is not met. Thus, the state practice fails to meet the test and is not customary international law.

IV.55. However, the above conclusion does not mean that the principle of prohibition of double compensation does not have the potential to rise to the level of international custom. For example, the work of the UNCITRAL Working Group III (on Investor-State Dispute Settlement Reform) seems to be developing in a direction that would propose significant changes to the *status quo* of the ISDS system to avoid problems associated with multiple proceedings, including double compensation.[1513] If the Working Group's final document provides that double compensation ought to be avoided, this will be a significant step towards meeting the second prong of the test.

IV.56. The membership of the Working Group includes all member states of the UNCITRAL (60 states).[1514] This is important because these 60 states not only make up a sizable portion of the 190+ UN member states, but are also representative of "various geographic regions and the principal economic and legal systems of the world".[1515] In addition, there are close to 30 states that participate with "observer" status.[1516] When close to 90 states make their normative position known (i.e. that they think double compensation ought to be avoided as a legal obligation), then the practice of states (which has already met the first prong of the test) can be interpreted in light

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[1513] See above, Part III, Chapter 5, Subsection "UNCITRAL Project on Multiplicity of Proceedings".
[1514] UNCITRAL, *A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law* (United Nations, 2013) at paras 4, 16. For the list of the 60 member states as of 2019, see UNCITRAL, Press Release, *United Nations General Assembly Elects New UNCITRAL Members* (20 December 2018), UNIS/L/270, available on the website of United National Information Service: <http://www.unis.unvienna.org/unis/en/pressrels/2018/unisl270.html> (last visited 11 March 2021).
[1515] UNCITRAL, *A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law* (United Nations, 2013) at para 4.
[1516] See UNCITRAL, 54th session, A/CN9/1044, *Report of the Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Ninth Session* (Vienna, 2020) at para 9.

of that normative position. Thus, one could argue that the second prong of the test (*opinio juris*) will be met as well.

b. A General Principle of Law (GPL)

IV.57. The fact that the principle of prohibition of double compensation is not yet a principle of customary international law does not mean that it has not made its way to another group from the three formal sources of international law, namely GPLs. It is understood from article 38(1) of the ICJ Statute that GPLs stand at the same level (at least theoretically) as the other two formal sources of international law, namely treaties and international custom.[1517] Even if, in practice, GPLs come third (after treaties and international custom), GPLs are often used to fill the gaps where international law has not yet fully developed,[1518] which is precisely the case with respect to the issue of double compensation in the ISDS system.

IV.58. Some commentators have convincingly considered the principle of prohibition of double compensation to be a GPL.[1519] However, they have not elaborated on how they reached such a conclusion, perhaps because the logic behind the principle is so compelling that everyone assumes that it is a GPL. In fact, that approach is not limited to those commentators and this specific principle. As explained by the ILA study group on GPLs, international courts and arbitral tribunals that have relied on GPLs have often done so "without clarifying how those principles were identified and how they [are] to be correctly applied".[1520]

[1517] Discussed above, in the current Chapter, paras IV.33 – IV.34.
[1518] Patrick Dumberry, *supra* note 1440, at paras 1.19–1.21.
[1519] Charles T Kotuby & Luke A Sobota, *supra* note 1, at 150–151; Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration*, *supra* note 1, at 185.
[1520] ILA Study Group on the Use of Domestic Law Principles in the Development of International Law, *Report* (Sydney, 2018) at para 3.

IV.59. An investigation into whether the principle of prohibition of double compensation is a GPL is absent from the current literature. This investigation is therefore the task of this Subsection. The first step is to choose the process that identifies a GPL. Patrick Dumberry has thoroughly investigated this topic in the literature and ISDS case law.[1521] He has identified three general trends among scholars and tribunals:

- First, there are those who consider that GPLs emanate from the domestic law of states.[1522] According to this view, GPLs are "the basis of the municipal law of all or nearly all states", and the path to identifying them is often through examining whether major developed jurisdictions have recognized those principles.[1523] This constitutes the traditional approach to establishing a GPL.
- Second, there are those who consider that GPLs originate only from international law (i.e. domestic law cannot generate GPLs for international law), mostly due to the ideological differences between, for example, capitalist and socialist states.[1524] In other words, according to this view, "since international law derives from the consent and will of sovereign States, principles existing in the domestic law of one group of States cannot be imposed on a group of other States which have adopted a different ideology".[1525]
- Third, the majority who consider that GPLs include both principles that emanate from domestic law and those which originate in international law.[1526] Under this view, GPLs

[1521] Patrick Dumberry, *supra* note 1440, at paras 1.26–1.70.
[1522] *Ibid* at paras 1.27, 1.33, 1.41–1.42 and the accompanying references.
[1523] Bin Cheng, *supra* note 1358, at 25, 392; Robert Jennings & Arthur Watts, *supra* note 1474, at 36; Charles T Kotuby & Luke A Sobota, *supra* note 1, at 1–3, 22–25.
[1524] Patrick Dumberry, *supra* note 1440, at paras 1.27, 1.34 and the accompanying references.
[1525] *Ibid* at para 1.37.
[1526] *Ibid* at paras 1.44–1.45 and the accompanying references.

> should no longer be limited to those stemming from domestic law, given the development of international law over the past century.[1527]

It is worth noting that the question of whether GPLs could only derive from domestic law or have other possible sources as well, is among the issues that the ILC decided in 2017 to include in its long-term program of work concerning GPLs.[1528]

IV.60. To ensure that all views are covered in investigating whether the principle of prohibition of double compensation is a GPL, both domestic law and international law are examined here. The author will first examine international law to find out whether this body of law considers the principle of prohibition of double compensation to be a GPL. In the second step, the discussion will turn to domestic law to discover whether major jurisdictions recognize the principle.

IV.61. The discussion will show that the international law materials that could serve as supporting evidence for the GPL status of the principle of prohibition of double compensation are limited (but developing) at this point in time. However, if we apply logical reasoning, the GPL status of the principle can be established under international law, without the need to investigate domestic law. Nevertheless, the examination of domestic law furnishes further evidence for the GPL status of the principle.

(1) Examining International Law

IV.62. It was explained earlier in this Chapter that international law already recognizes the prohibition of double compensation as a principle,[1529] but the issue here is whether international

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[1527] *Ibid* at paras 1.45–1.46.
[1528] ILC, 69th session, A/72/10, Annex A at para 23.
[1529] See above, in the current Chapter, Subsection "Existence of the Principle".

law considers such a principle to be a GPL.[1530]

IV.63. In terms of case law, the PCIJ decision in *Factory at Chorzów* (impliedly) and the ICJ advisory opinion in *Reparation for Injuries Suffered in the Service of the United Nations* (expressly) discussed the content of the principle of prohibition of double compensation.[1531] Yet, both decisions are silent as to the status of the principle in international law. Also, of the five ISDS tribunals that expressly referred to the principle of prohibition of double compensation, none called it a GPL.[1532] This is not to say that those courts and tribunals were against the GPL status of the principle in international law, only that they made no comment as to the matter.

IV.64. The same holds true in relation to the two international documents that refer to the prohibition of double compensation: the 2001 ILC *Draft Articles on State Responsibility* and the 1961 *Draft Convention on the International Responsibility of States for Injuries to Aliens*.[1533] Both documents discuss the prohibition of double compensation but do not elaborate on its status. However, it should be noted that neither of those two documents nor any of the 63 relevant ISDS cases (discussed in Chapter IV) contains anything that would contradict the GPL status of the principle.

IV.65. The only materials at the international law level that have considered the prohibition of

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[1530] It should be noted that not every principle is a GPL. GPLs are those principles that are considered to be "the basis of the municipal law of all or nearly all states" and are one of the formal sources of international law, as per article 38(1) of the ICJ Statute. Bin Cheng, *supra* note 1358, at 25; Robert Jennings & Arthur Watts, *supra* note 1474, at 36; Charles T Kotuby & Luke A Sobota, *supra* note 1, at 2; Patrick Dumberry, *supra* note 1440, at para 1.05.
[1531] Both cases are discussed above, in the current Chapter, paras IV.10 – IV.11.
[1532] *GÜRİŞ and Others v Syria*, Final Award (31 August 2020) at para 374; *ConocoPhillips v Venezuela*, Award (9 March 2019) at para 964; *Burlington v Ecuador*, Decision on Ecuador's Counterclaims (7 February 2017) at para 1083; *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*), Award (9 October 2014) at para 378; *Deutsche Bank v Sri Lanka*, Award (31 October 2012) at para 562.
[1533] Both documents are discussed above, in the current Chapter, paras IV.12 – IV.13.

double compensation as a GPL are a few commentaries.[1534] However, those commentators have not explained what bases support their conclusion that the principle has GPL status in international law. Given that international investment law (particularly in the area of damages) is not yet fully developed, it is no surprise that there are very limited materials on the status of a principle relevant to this field. As this field develops over time, there will doubtless be more materials addressing the applicable principles, including the principle of prohibition of double compensation.

IV.66. Nevertheless, the author believes that there is one argument that supports the GPL status of the principle of prohibition of double compensation in international law, without the need to investigate domestic law. This is a logical argument based on the relationship between the prohibition of double compensation and its parent principles. Earlier in this Chapter, it was established that two GPLs that are already recognized in international law (namely, the principle of full reparation and the principle of prohibition of unjust enrichment) are the parent principles of the prohibition of double compensation.[1535]

IV.67. If we have two parent principles that are already recognized at the international law level and are considered to be GPLs, then their logical implication (here the principle of prohibition of double compensation) must also be recognized in international law and be considered a GPL.[1536] Applying this logic, we can establish the GPL status of the principle of prohibition of double compensation at the international law level. As such, there is no need to investigate domestic law. However, to err on the side of caution, the next Subsection applies the traditional methodology:

[1534] See e.g. Charles T Kotuby & Luke A Sobota, *supra* note 1, at 150–151; Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration*, *supra* note 1, at 185.
[1535] See above, in the current Chapter, Subsection "Relationship with Other Principles".
[1536] See generally Antonino Rotolo & Giovanni Sartor, "Deductive and Deontic Reasoning" in Giorgio Bongiovanni et al, eds, *Handbook of Legal Reasoning and Argumentation* (Springer, 2018) 243 at 244.

examining domestic law to find out whether it brings us to the same conclusion.

(2) Examining Domestic Law

IV.68. As previously explained, traditionally GPLs are considered to be "the basis of the municipal law of all or nearly all states".[1537] GPLs that derive from domestic law can be elevated to the international law plane. This is because when nearly all states recognize some principles, it indicates that states consider those principles to be "fair and practical",[1538] and so it makes sense to "regulate the conduct of States by applying [the very] principles which are recognized by these States".[1539]

IV.69. At first glance, it might seem to be necessary to survey all jurisdictions to ascertain whether there is consensus about a principle. However, in practice, the process for identifying GPLs often involves examining whether major developed jurisdictions have recognized those principles. For example, *Restatement (Third) of The Foreign Relations Law of the United States* § 102 (which is similar to article 38 of the ICJ Statute) provides that: "A rule of international law is one that has been accepted as such by the international community of states … (c) by derivation from general principles common to the major legal systems of the world".[1540]

IV.70. Limiting the scope of the survey to major jurisdictions is prudent: partly for practical reasons, and partly because unanimous support of all jurisdictions is not required, as this "would

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[1537] Bin Cheng, *supra* note 1358, at 25; Robert Jennings & Arthur Watts, *supra* note 1474, at 36; Charles T Kotuby & Luke A Sobota, *supra* note 1, at 2.
[1538] Michael Akehurst, "Equity and General Principles of Law" (1976) 25:4 ICLQ 801 at 814.
[1539] M Cherif Bassiouni, "A Functional Approach to 'General Principles of International Law'" (1990) 11:3 Mich J Int'l L 768 at 773.
[1540] *Restatement (Third) of The Foreign Relations Law of the United States* (1987) § 102(1) [emphasis added]. The revisions that were implemented in 2018 by the release of *Restatement (Fourth) of The Foreign Relations Law of the United States* have left § 102 of the *Restatement (Third)* intact.

amount to granting veto power to those legal systems incorporating the most isolated tendencies".[1541] The following suggests a sensible approach:

> [T]he direct examination of the various national laws can begin by researching the various "families of law." Despite their unique histories, the world's legal systems have sufficient commonalities that baseline legal principles can be discerned. Aspects of the Anglo-American common law have been incorporated into the law of a number of States through colonialism, whereas the French and Germanic civil law systems have been influential in Latin America and, to a lesser extent, in parts of Africa, Asia, and the Middle East. … Albeit with competing nomenclature, comparative scholars generally identify two legal "families" (Romano-Germanic civil law and the common law), and further divide those families into eight legal systems: common law, Romanistic civil law, Germanic civil law, Nordic law, Socialist law, Far Eastern law, Islamic law, and Hindu law. Whether one compares the selected principle in restatements and scholarly works among the two primary legal families, or goes further and considers all eight of the legal systems, this categorization is still much more efficient than independently researching the law of some 200 different countries. … For good or ill, the civil and common law systems of Germany, France, England, and the United States are referenced most often because "these legal orders are easily accessible and, above all, have influenced the public law systems of many other countries."[1542]

IV.71. Thus, to establish whether the principle of prohibition of double compensation is a GPL, four leading jurisdictions from the common law and civil law families are discussed here: the UK, the US, France, and Germany. Three of these states (the UK, France, and Germany) have played a vital role in the formation and development of civil law and common law families, either as a result of colonialism or because they were considered successful models to follow. As such, these three jurisdictions have significant influence that must be taken into account. The US, on the other hand, is not only a notable common law jurisdiction but also its corporate law has had a significant influence worldwide.

IV.72. However, one could argue that although the above four jurisdictions are good representatives of common law and civil law jurisdictions, they are all Western jurisdictions that

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[1541] Emmanuel Galliard, "Use of General Principles of International Law in International Long-Term Contracts", (1999) 27 Int'l Bus Law 214 at 216.
[1542] Charles T Kotuby & Luke A Sobota, *supra* note 1, at 23–24.

share similar core political, cultural, and economic values. Thus, this sample leaves out jurisdictions that follow other legal traditions such as those applying Islamic law and China. However, these jurisdictions also fall within the civil law family (in that they follow French and Germanic legal traditions), especially with respect to commercial and corporate laws, as is discussed further below.

IV.73. The Muslim-majority nations have often synthesized Islamic law (shariah law) with Western legal traditions. Notable examples include Egypt and the UAE (as jurisdictions implementing Sunni Islam) and Iran (as a jurisdiction implementing Shia Islam). These jurisdictions are considered to be civil law jurisdictions based predominantly on French law and the Napoleonic codes.[1543] The bulk of their civil, commercial, and corporate laws are based on the civil law tradition, while sharia law has manifested itself more in matters of personal status, family law, and criminal law.[1544] As concerns China, although the country's political system officially

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[1543] **For Egypt**, see Richard A Debs, *Islamic Law and Civil Code: the Law of Property in Egypt* (Columbia University Press, 2010) at 3–6; Mohamed S E Abdel Wahab, *An Overview of the Egyptian Legal System and Legal Research* (December 2019), online: New York University School of Law, Hauser Global Law School Program <https://www.nyulawglobal.org/globalex/Egypt1.html>; Library of Congress, *Legal Research Guide: Egypt* (September 2015), online: <https://www.loc.gov/law/help/legal-research-guide/egypt.php> (last visited 11 March 2021 2020); Abdul Ḥamid El Ahdab & Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International, 2011) at 155. See also Chafik Chehata, "Egypt" in K Zweigert & Ulrich Drobnig, eds, *International Encyclopedia of Comparative Law*, vol 1 (National Reports) (Brill, 1974) at secs "Short Historical Survey" and "Principles of Civil And Commercial Procedure".
For the UAE (except for certain free zones within that country), see Hassan Arab, Lara Hammoud & Graham Lovett, eds, *Summaries of UAE Courts' Decisions on Arbitration (1993-2012)* (ICC Publishing, 2013) at 13; Bashir Ahmed, Chatura Randeniya & Mevan Kiriella Bandara, *Litigation and Enforcement in the United Arab Emirates: Overview* (November 2019), online: Thomson Reuters Practical Law <https://ca.practicallaw.thomsonreuters.com/4-501-9686?transitionType=Default&contextData=(sc.Default)> (last visited 11 March 2021).
For Iran, see Gordon Baldwin, "The Legal System of Iran" (1973) 3:2 International Lawyer 492 at 494, 504 (discussing the Iranian legal system before the 1979 Islamic Revolution); Parviz Owsia, "Sources of Law Under English, French, Islamic and Iranian Law: a Comparative Review of Legal Techniques", (1991) 6:1 Arab Law Quarterly 33 at 33 (discussing the changes to the Iranian legal system after the 1979 Islamic Revolution); Maliheh Zare, *An Overview of Iranian Legal System* (August 2015), online: New York University School of Law, Hauser Global Law School Program <https://www.nyulawglobal.org/globalex/Iran_Legal_System_Research1.html> (last visited 11 March 2021).

[1544] *Ibid*. It is worth noting that the field of Islamic finance and banking has developed considerably over the past two decades, and major international banks now have a division dealing with this field. However, the rules of Islamic finance and banking are more concerned with raising capital, permissible investments, and the prohibition of charging

follows a socialist model,[1545] it is a civil law jurisdiction, with most of its laws based on the Germanic legal tradition (except from 1949 to 1953 when the former Soviet Union laws inspired Chinese laws).[1546]

IV.74. Thus, although all those jurisdictions may have cultural, religious, and political values that are different from the West, their legal systems generally follow the civil law tradition and hence are considered to be within the civil law family. Of course, there might be notable differences among jurisdictions within the same legal family (be it civil law or common law). However, here the discussion concerns a GPL and not specific rules (which may differ from one jurisdiction to another, reflecting different cultural, political, and historical circumstances).[1547] GPLs are less likely to vary within the same legal family. That is why investigating the leading jurisdictions in each legal family can provide a picture of where that family stands with respect to a specific principle. As such, France, Germany, the UK, and the US constitute a sensible sample to determine how the principle of prohibition of double compensation is regarded at the domestic law level.

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interest by a lender (known as *riba*), which are not necessarily relevant to the rules of compensation that are at issue in this thesis. See Zamir Iqbal & Abbas Mirakhor, eds, *Economic Development and Islamic Finance* (World Bank Publications, 2013) at 4.

[1545] Constitution of the People's Republic of China of 1982 (last amended 2018), arts 1, 15, online: <http://english.www.gov.cn/archive/lawsregulations/201911/20/content_WS5ed8856ec6d0b3f0e9499913.html> (last visited 11 March 2021).

[1546] See Lei Chen, "The Historical Development of the Civil Law Tradition in China: A Private Law Perspective" (2010) 78:1-2 Leg His Rev 159 at 160, 163, 173–179; Volker Behr, "Development of a New Legal System in the People's Republic of China" (2007) 67:4 Louisiana L Rev 1161 at 1162–1166, 1176–1177; Arthur A Maynard, Benjamin Miao & Helen H Shi, "People's Republic of China" in Michael J Moser & John Choong, eds, *Asia Arbitration Handbook* (Oxford University Press, 2011) 114 at paras 3.01, 3.09; Library of Congress, *Legal Research Guide: China* (August 2016), online: <https://www.loc.gov/law/help/legal-research-guide/china.php> (last visited 11 March 2021).

[1547] For a discussion on the difference between rules and principles, see *supra*, note 1481.

(i) The UK

IV.75. The principle of prohibition of double compensation is well established in English law. There are three notable cases. First, in *Prudential Assurance Co Ltd v Newman Industries Ltd*, the Court of Appeal (Civil Division) set the no reflective loss principle[1548] as well as the content of the principle of prohibition of double compensation.[1549] Then, in *Johnson v Gore Wood and Co*, the House of Lords affirmed *Prudential*[1550] and expressly set out the principle of prohibition of double compensation in English law as follows:

> If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved.[1551]

IV.76. The third relevant case is *Sevilleja v Marex Financial Ltd* which the UK Supreme Court decided recently.[1552] The issue before the court was how far the no reflective loss principle applies to creditors of a company. The court unanimously held that the principle does not apply to creditors.[1553] While the court was divided as to the interpretation that should be given to the no reflective loss principle and its scope,[1554] all the Law Lords confirmed the principle of prohibition

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[1548] *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] Ch 204 (CA) at 222 ("But what [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company").
[1549] *Ibid* ("The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company").
[1550] *Johnson v Gore Wood and Co (No 1)* [2000] UKHL 65, [2001] BCC 820 at 837–839, 859–860.
[1551] *Ibid* (Lord Millett) at 859. Other Law Lords expressed the same view. See e.g. Lord Cook's speech at 845 ("double recovery cannot be permitted") and Lord Goff's speech at 853 ("there remains the need to ensure that there is no double recovery").
[1552] *Sevilleja v Marex Financial Ltd* [2020] UKSC 31.
[1553] *Ibid* at paras 92, 211.
[1554] The majority (led by Lord Reed) distinguished between two scenarios: "(1) cases where claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer, and (2) cases where claims are brought, whether by a shareholder or by anyone else, in respect of loss which does not fall within that description, but where the company has a right of action in respect of substantially the same loss." The majority held that *Prudential* applies only to the first scenario (hence,

of double compensation in English law.[1555]

(ii) The US

IV.77. In the United States, a similar approach to English law has been adopted. However, two points should be noted at the outset. First, the term "reflective loss" is not commonly used in US corporate law and, as such, the discussion on the prohibition of double compensation is found under the topics of shareholders' "standing rule" and shareholders' "derivative and direct actions".[1556] Second, despite an increase in federal laws and regulations affecting corporate governance, corporate law falls mainly under states' jurisdiction, and thus rules might vary from one state to another.[1557] The following discussion shows that US courts (at both the federal and state levels) have recognized and applied the principle of prohibition of double compensation.

IV.78. The US Supreme Court, in a non-corporate-law related case, ruled that "it goes without saying that the courts can and should preclude double recovery by an individual."[1558] That ruling was relied on by the Court of Appeals for the Federal Circuit in *Southern California Federal Savings & Loan Associations v United States*, which held:

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departing from the reasoning in *Johnson*) and, consequently, shareholders'/creditors' claims in the second scenario are allowed, but double compensation should be avoided. *Ibid* at paras 79–89. However, the minority (led by Lord Sales) went further and even questioned the logic behind the no reflective loss principle as set out in *Prudential*. *Ibid* at paras 118, 132, 194, 211.

[1555] For the majority judgment, see *ibid* at paras 3–5, 10, 86–88. For the minority judgment, see *ibid* at paras 119, 162.

[1556] See *RS Investments Limited v RSM US, LLP*, 125 NE3d 1206 (Ill App Ct 2019) (explaining that "the shareholder standing rule followed in the United States is a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment … For purposes of our analysis, the shareholder standing rule has the same effect as the reflective loss doctrine followed in Cayman Islands and other jurisdictions that adhere to the legal principles of the United Kingdom. Under the English common law doctrine of reflective loss, generally, a shareholder cannot claim a loss that is merely reflective of the company's own losses") [emphasis added]; Jonathan R Macey, *Macey on Corporation Laws: Model Business Corporation Act, Delaware General Corporation Law, ALI Principles of Corporate Governance*, vol 1 (Wolters Kluwer, 2020) at 3-34.8.

[1557] Faith Stevelman, "Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law" (2009) 34 Del J Corp L 57 at 58.

[1558] *EEOC v Waffle House, Inc*, 534 US 279 (2002).

> Not only do the Individual Plaintiffs not have standing in this case based on their status as shareholders, but we must also be mindful of the possibility that allowing such a suit would create an impermissible double recovery. The purpose of damages for breach of contract is generally to put the wronged party in as good a position as he would have been had the contract been fully performed. In light of this general purpose, a wronged party is typically not allowed to recover twice for the same harm, here a breach of contract. This limitation applies even where claims exist under both contract and tort, or where a claim exists under a statutory provision and under common law. California, by statute, limits damages in contract cases to those that a party "could have gained by the full performance thereof on both sides," unless additional damages are provided for by statute. Cal. Code § 3358 (2005). Since the compensation awarded the corporation flows to its shareholders through the value of their stock, to allow individuals to recover both through the corporation and as individuals would be to allow duplicative recovery.[1559]

IV.79. Other federal courts, including the Circuit Courts of Appeals (such as the Seventh, Eighth, and Ninth Circuits),[1560] the District Courts (such as the Southern District of New York)[1561] and the Court of Federal Claims,[1562] have all made similar holdings in relation to the prohibition of double compensation. Similarly, US state courts, such as the New York Supreme Court

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[1559] *Southern California Federal Savings & Loan Associations v United States*, 422 F3d 1319 (Fed Cir 2005) at 1332–1333, *certiorari denied*, 548 US 904 (2006) [emphasis added and internal citations omitted].

[1560] *Wooten v Loshbough*, 951 F2d 768 (7th Cir 1991) at 771 ("To allow Wooten [a creditor] to sue would be to permit a double recovery of damages ... We hold, in agreement with the Fifth Circuit, that corporate creditors, like shareholders, cannot sue under RICO [the Racketeer Influenced and Corrupt Organizations Act] when their only injury comes about through the depletion of corporate assets"); *Taha v Engstrand*, 987 F2d 505 (8th Cir 1993) at 507 ("Shareholders, creditors or guarantors of corporations generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation … They are, of course, made whole if the corporation recovers; and so the rule has the salutary effect of preventing the double counting of damages"); *Vinci v Waste Management, Inc*, 80 F3d 1372 (9th Cir 1996) at 1375 ("If shareholders were permitted to recover their losses directly, there would be the possibility of a double recovery, once by the shareholder and again by the corporation"), *certiorari denied*, 520 US 1119 (1997) [all emphases added].

[1561] *In re Optimal US Litigation*, 813 F Supp 2d 351 (SDNY 2011) at 376 ("Under New York law, a shareholder may bring an individual suit if the defendant has violated an independent duty to the shareholder, whether or not the corporation may also bring an action, although damages may be limited so as to avoid a double recovery") [emphasis added].

[1562] *Hometown Financial Inc v United States*, 56 Fed Cl 477 (2003) at 486–487 ("Indeed, courts have been mindful of the possibility of double recovery on the part of shareholder-plaintiffs, and have consistently barred lawsuits by shareholders for damages to the corporation for precisely that reason. The diminution in value of a stockholder's investment is a concomitant of the corporate injuries resulting in lost profits. A fortiori, any redress obtained by the corporations would run to the benefit of their stockholders, and to permit the latter to proceed with those claims would permit a double recovery") [emphasis added].

(Appellate Division),[1563] the Texas Courts of Appeals,[1564] the Nebraska Supreme Court,[1565] and the Delaware Supreme Court, have recognized the prohibition of double compensation.[1566] Finally, Rule 19(a) of the *Federal Rules of Civil Procedure* should also be noted here, which reads:

> "(1) A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> (A) …
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) …
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.[1567]

(iii) France

IV.80. There has not yet been a specific legislative text or case in French law that expressly discusses the principle of prohibition of double compensation in the context of shareholders'

[1563] *Herman v Feinsmith*, 39 AD3d 327 (NY App Div 2007) at 328 ("The award to the corporation on plaintiff's derivative action is not a double recovery because the claims belong to the corporation, and damages are awarded to the corporation rather than directly to the derivative plaintiff") [emphasis added].

[1564] *United Enterprises, Inc v Erick Racing Enterprises, Inc*, 2002 WL 31899067 (Tex App 2002) at 3 ("A corporate shareholder cannot recover damages personally for a wrong done solely to a corporation, even if his earnings are impaired by that wrong. Thus, a cause of action for injury to property or impairment of business is vested in the corporation. However, this rule does not prevent a shareholder from recovering for wrongs to him individually arising from contract or otherwise … Thus, Erick incurred these costs as personal losses resulting from appellants' actions. Further, the corporation was not awarded any damages for these advances which the corporation was unable to repay to Erick, so there is no double recovery") [emphasis added].

[1565] *EK Buck Retail Stores v Harkert*, 157 Neb 867 (1954) at 900 ("If a stockholder is permitted to bring an action personally to recover his proportionate share of the damages suffered by the corporation, a subsequent recovery by or for the corporation would be equivalent to a double recovery by him. To permit such an action by the stockholder individually could possibly injure the rights of creditors and taxing authorities") [emphasis added].

[1566] *Tooley v Donaldson, Lufkin & Jenrette, Inc*, 845 A2d 1031 (Del 2004) at 1033, 1039 (impliedly confirming the prohibition of double compensation by explaining that the issue of whether a shareholder's claim is derivative or direct "must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)? … The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation") [emphasis added].

[1567] Fed R Civ P 19, online: <https://uscode.house.gov/view.xhtml?path=/prelim@title28/title28a/node87&edition=prelim> (last visited 11 March 2021).

claims. However, the recognition of the principle in French law can be inferred when three factors are considered together:

- First, French law, in general (i.e. beyond corporate law), recognizes that double compensation for the same harm (known as "*double réparation*" or "*double indemnisation*") is prohibited;[1568]
- Second, avoiding double compensation is one of the underlying policies in the no reflective loss principle;[1569] and
- Third, French corporate law recognizes a concept similar to the no reflective loss principle.[1570]

[1568] See e.g. Cour de cassation, Chambre civile 1, 9 novembre 1981 (« Attendu, enfin, qu'en énonçant que M. Maurice Cazaubon a manifesté son intention de fraude tant pour le premier sinistre que pour le second, en ne révélant pas à chaque assureur qu'il réclamait, pour chaque sinistre, une double indemnisation, les juges du second degré ont motivé leur décision en ce qui concerne la mauvaise foi de l'assuré ; que le premier moyen ne peut donc être accueilli en aucune de ses branches ») ; Cour d'appel, Douai, Chambre 2, section 2, 10 mai 2007, n° 05/06038 (« Le juge pénal ayant déjà statué sur la responsabilité du gérant de la SOCOVAB et le préjudice de la société CONTINENTALE NUTRITION, cette dernière société est irrecevable à demander au juge civil réparation à la SOCOVAB du même préjudice sauf à porter atteinte au principe de la réparation intégrale du préjudice et à créer un enrichissement sans cause par une double réparation. Il ne pourrait en être autrement que s'il existait un dommage différent imputable à la seule société SOCOVAB ») ; Cour d'appel, Poitiers, Chambre civile 1 22 janvier 2016, n° 15/04109 (« Dans cette dernière hypothèse, il n'y a d'ailleurs pas lieu de craindre une double réparation puisque toute double demande indemnitaire portant sur les mêmes chefs de préjudice serait jugée nécessairement irrecevable par l'une ou l'autre des juridictions saisies ») ; Cour d'appel, Aix-en-Provence, Chambre 2, 12 octobre 2011, n° 2011/ 379 (« Attendu que le premier juge était fondé sur la base de l'article 873 alinéa 2 du code de procédure civile à allouer à la S.A.S. Pascal Coste Coiffure une provision à valoir sur la réparation de son préjudice résultant de faits de concurrence déloyale, tant la réalité de ces faits est avérée ; que cependant, il ne pouvait être alloué une double réparation pour des faits de concurrence déloyale et pour des agissements parasitaires ; qu'il n'existe en réalité qu'une seule contravention de la S.A.R.L. New Concept Coiffure aux dispositions de l'article 1382 du Code Civil : un comportement contraire à la loyauté devant présider aux relations commerciales ; que les comportements susceptibles d'être sanctionnés au titre de la concurrence déloyale sont protéiforme et gratifiés de diverses appellations, mais ne sont justiciables que d'une seule réparation ») ; Cour de cassation, Chambre commerciale, 17 juin 2003, n° 01-12.307 (« Et attendu, en second lieu, qu'ayant décidé que le préjudice résultant de la contrefaçon serait entièrement réparé par l'allocation d'une somme de 150 000 francs, la cour d'appel a pu, sans accorder une double réparation, prononcer la confiscation des produits contrefaits, cette mesure, qui ne tend qu'à faire cesser les faits, n'ayant pas le même objet ») [all emphases added].

[1569] See above, Part II, para II.32.

[1570] The French *Code civil* provides for derivative action whereby any recovery would only go to the company and not the shareholders. Article 1843-5 reads: « Les demandeurs sont habilités à poursuivre la réparation du préjudice subi par la société; en cas de condamnation, les dommages-intérêts sont alloués à la société » [emphasis added]. Also, French case law has not allowed shareholders to recover for harm inflicted on the company personally. See e.g. Cour de cassation, Chambre commerciale, 15 janvier 2002, n° 97-10.886 (« Attendu, d'autre part, que l'action individuelle mentionnée à l'article 225-252 du Code de commerce peut être exercée par les actionnaires ayant subi, en raison des fautes commises par les administrateurs dans leur gestion, un préjudice personnel distinct du préjudice subi par la société … ; qu'il en résulte que le préjudice invoqué par M. X... qui en raison de ses droits et devoirs sociaux, a été appelé à supporter les pertes sociales n'étant que le corollaire de celui causé à la société, n'avait aucun caractère

Therefore, it can be concluded that French corporate law recognizes the prohibition of double compensation with respect to shareholders' claims.

(iv) Germany

IV.81. Under the German Stock Corporation Act (*Aktiengesetz* - AktG), shareholders' derivative action is allowed (§§ 147, 148), but shareholders' direct action is permitted only if they sustain a loss separate from that of the company (§§ 117, 317).[1571] Interpreting those provisions, the country's highest court of civil and criminal jurisdictions (*Bundesgerichtshof* - BGH) has expressly recognized the prohibition of double compensation (known as "*Doppelschäden*") in relation to shareholders' claims and the principle on no reflective loss (known as "*Reflexschaden*").[1572]

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personnel») ; Cour de cassation, Chambre criminelle, 13 décembre 2000, n° 99-80.387 (« Qu'en effet, la dépréciation des titres d'une société découlant des agissements délictueux de ses dirigeants constitue, non pas un dommage propre à chaque associé, mais un préjudice subi par la société elle-même ») (all emphases added). See also Philippe Merle, *Droit commercial : Sociétés commerciales*, 7th ed (Dalloz, 2000) at § 409; Julien Chaisse & Lisa Zhuoyue Li, *supra* note 99, at 55–56.

[1571] *AktG*, available on the joint website of the German Federal Ministry of Justice and Consumer Protection (BMJV) and the Federal Office of Justice (BFJ), in German: <http://www.gesetze-im-internet.de/aktg/index.html> (last visited 11 March 2021).

[1572] See e.g. BGH, 10.11.1986 - II ZR 140/85 („Der in all diesen Fällen nach dem Vortrag der Klägerin somit unmittelbar bei der IMS entstandene Schaden kann bei der Klägerin allenfalls zu einem mittelbaren Schaden dadurch geführt haben, daß sich der Wert ihrer Beteiligung an diesem Unternehmen entsprechend verringert hat. Damit wäre aber - bei Anwendung deutschen Rechts - ein ersetzbarer Schaden der Klägerin nicht dargetan; in dem Wertverlust der Aktien würde sich nur die Schädigung der IMS wiederspiegeln. Es stellt sich hier die Frage nach der Ersatzfähigkeit sogenannter Doppelschäden, also des Ausgleichs von Schäden des Gesellschaftsvermögens, die zugleich die Aktien des Gesellschafters entwerten. Der Gesetzgeber hat den Konflikt, der sich zwischen den Ansprüchen des Aktionärs und der Gesellschaft ergeben kann, gesehen, als er die Ersatzpflicht derjenigen regelte, die ihren Einfluß zum Nachteil der Gesellschaft benutzen; er hat ihn in der Weise gelöst, daß er in § 117 Abs. 1 Satz 2 AktG den Anspruch des Aktionärs auf den Ersatz unmittelbarer Schäden beschränkt und die mittelbaren ausgeklammert hat ... Wiedemann … entnimmt dem ähnlich lautenden § 317 Abs. 1 Satz 2 AktG dieselbe Rechtsfolge. Auch nach Auffassung von Winter … enthalten die §§ 117 Abs. 1 Satz 2, 317 Abs. 1 Satz 2 AktG einen in dem Sinne verallgemeinerungsfähigen Rechtsgedanken, daß der Ausgleich mittelbarer Schäden in das Privatvermögen des Gesellschafters nicht in Betracht kommt. Das neuere Schrifttum ist - wenn auch mit zum Teil unterschiedlicher Begründung - insbesondere im Anschluß an das Senatsurteil vom 5. Juni 1975 … einhellig der Meinung, daß der mittelbar geschädigte Gesellschafter nur einen Anspruch auf Ersatzleistung an die Gesellschaft hat"); BGH, 04.03.1985 - II ZR 271/83 („Darin würde sich nur die Schädigung der Gesellschaft widerspiegeln. Durch § 117 Abs. 1 Satz 2 AktG soll es gerade ausgeschlossen werden, daß der Aktionär eine solche mittelbare Auswirkung der Schädigung der Gesellschaft auf sein Vermögen geltend machen und mit einem darauf gestützten

IV.82. As such, two leading common law jurisdictions (the UK and the US) and two leading civil law jurisdictions (France and Germany) recognize the principle of prohibition of double compensation. This confirms the position that the principle is a GPL and can be elevated to the international law plane,[1573] and hence a formal source of international law.[1574]

IV.83. One might argue that, if the above discussion shows that the principle of prohibition of double compensation is a GPL, it also shows that the no reflective loss principle is a GPL and thus should equally be elevated to the international law plane. However, that argument misses the point. The no reflective loss principle has already been elevated to and applied in general international law (for example, the ICJ decision in the *Barcelona Traction* case),[1575] but its application in international investment law has been blocked. The reason is that, as explained previously, shareholders are considered protected investors in the majority of IIAs[1576] and there is an underlying policy in international investment law to provide further protection to shareholders (comparing to what domestic law offers).[1577]

IV.84. The position that an underlying policy in a field of law could block the application of a principle in that field is not unprecedented. Indeed, as previously explained, in domestic corporate

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Schadensersatzanspruch zu dem Ersatzanspruch der Gesellschaft selbst in Konkurrenz treten kann"); BGH, 14.5.2013 – II ZR 176/10 („Diese Ausführungen halten in einem wesentlichen Punkt der revisionsgerichtlichen Nachprüfung nicht stand. Bei dem vom Kläger geltend gemachten Schaden durch Verlust von Gewinnausschüttungen ab dem Jahr 2001 handelt es sich entgegen der Auffassung des Berufungsgerichts um einen nur mittelbaren Schaden, 'Reflexschaden', der allein aus einer Schädigung der Schuldnerin folgt … Nach ständiger Rechtsprechung des Bundesgerichtshofs schließen der Grundsatz der Kapitalerhaltung, die Zweckwidmung des Gesellschaftsvermögens sowie das Gebot der Gleichbehandlung aller Gesellschafter einen Anspruch des Gesellschafters auf Leistung von Schadensersatz an sich persönlich wegen einer Minderung des Werts seiner Beteiligung, die aus einer Schädigung der Gesellschaft resultiert, im Regelfall aus. Vielmehr kann ein Ausgleich dieses mittelbaren Schadens nur dadurch erfolgen, dass der Gesellschafter die Leistung von Schadensersatz an die Gesellschaft verlangt") [all emphases added]. See also BGH, 29.06.1987 - II ZR 173/86.

[1573] See above, para IV.58.

[1574] For a discussion on the hierarchy among sources of international law, see above, paras IV.33 – IV.34.

[1575] Discussed above, in Part II, para II.33.

[1576] See above, Part II, paras II.43 – II.45.

[1577] For a discussion on the underlying policy in international investment law, see above, Part I, para I.16.

law, certain public policies manifest themselves in the form of the no reflective loss principle to block the application of the principle of causation that would otherwise allow shareholders to recover for reflective loss.[1578] Similarly, the underlying policy in international investment law (i.e. protecting foreign investors) blocks the application of the no reflective loss principle. Whether the underlying policy in international investment law is good policy is another discussion, but so long as that policy exists, the no reflective loss principle's path to international investment law remains blocked. However, there is no underlying policy in international investment law that bars the application of the principle of prohibition of double compensation in that field and, as such, the principle has been applied by ISDS tribunals.[1579]

IV.85. If the underlying policy in international investment law changes over time (for example, if the international community decides that it no longer wishes to offer a higher level of protection to foreign shareholders),[1580] the bar to the application of the no reflective loss principle in international investment law will be lifted. As a result, shareholders would no longer, at least on a general basis, be able to file claims for reflective loss or injury to the investment vehicle assets,[1581] and thus the problem of double compensation would be avoided altogether. However, so long as the current policy in international investment law stands, the no reflective loss principle does not apply in the field, even though the principle has been recognized in general international law. Any risk of double compensation can instead be avoided by the application of the principle of prohibition of double compensation.

[1578] See above, Part II, para II.32 and then Part IV, paras IV.22 – IV.23.
[1579] See above, paras IV.14 – IV.15.
[1580] Similar to the approach that the UNCITRAL Working Group III seems to be taking. See above, Part III, paras III.338 – III.339.
[1581] For a discussion on the difference between the two types of losses, see above, Part II, paras II.39 – II.40.

B. Waiver of the Protection Offered by the Principle

IV.86. It was established in the previous Section that the prohibition of double compensation is a GPL that has been recognized in international law and applied by ISDS tribunals. The discussion in this Section turns to the question of whether, by signing IIAs that recognize "shares" as protected "investment", states have in effect consented to double compensation and hence waived the protection offered by the principle of prohibition of double compensation.[1582]

IV.87. To answer that question, we first need to unpack the assumption that is embedded in it. When we ask the question *whether states have consented to pay double compensation merely by signing IIAs*, we have already assumed that states have consented (impliedly) to be exposed to multiple claims by shareholders at different levels of the same corporate chain. And when faced with such multiple claims, we ask whether that implied consent by states would also extend to the payment of compensation more than once. We can make such an assumption (about states' consent to multiple claims) because the investigation of the relevant ISDS case law in Chapter 4 showed that nearly all tribunals either approved or (at least) did not take issue with the fact that shareholders at different levels had brought multiple claims over essentially the same loss. A few of the tribunals did take specific measures to avoid double compensation, but none (except one) took the position that multiple claims should not have been filed in the first place.[1583]

IV.88. The one tribunal that rejected the assumption that states have consented to be exposed to multiple claims was *Orascom v Algeria*. The tribunal, when faced with a situation where

[1582] Elizabeth Wu, *supra* note 1190, at 149.
[1583] See above, Chapter 4, Section "Cases Where the Risk was Effectively Addressed".

shareholders at different levels of the same corporate chain had launched investment claims based on different IIAs,[1584] held that:

> It goes without saying that structuring an investment through several layers of corporate entities in different states is not illegitimate. … [S]everal corporate entities in the chain may be in a position to bring an arbitration against the host state in relation to the same investment. This possibility, however, does not mean that the host state has accepted to be sued multiple times by various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm. … [T]his conclusion derives from the purpose of investment treaties, which is to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development. If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. The purpose is not served by allowing other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm inflicted on the investment. Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered. Thus, where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established.[1585]

However, given that the other tribunals that were discussed in Chapter 4 effectively sanctioned the assumption that states have consented (impliedly) in IIAs to be exposed to multiple claims, we proceed based on that assumption.

IV.89. Now that we understand the underlying assumption, we return to the main question: whether such consent in IIAs extends to the payment of double compensation? The answer is no. The interpretation of IIAs, being treaties, is governed by article 31 of the *Vienna Convention on the Law of Treaties* ("VCLT"), which reads:

> (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> (2) …

[1584] *Orascom v Algeria*, Award (31 May 2017) at paras 34, 485 (f), 485(h), 422–423, 520, 522.
[1585] *Ibid* at paras 542–543 [emphasis added].

> (3) There shall be taken into account, together with the context:
> (a) …
> (b) …
> (c) Any relevant rules of international law applicable in the relations between the parties.[1586]

The analysis in the following paragraphs explains that, if IIAs are interpreted (i) in good faith, (ii) in light of IIA's "objective and purpose", and (iii) considering "relevant rules of international law", the IIA's recognition of "shares" as a protected investment should not be interpreted as the states' consent to contract out of the protection recognized by international law against double compensation.[1587]

IV.90. Obviously, interpretation of treaties only comes into the picture when there is ambiguity in a treaty. As such, if there is a provision in an IIA that expressly allows for double compensation in favor of investors, the answer to the question in the previous paragraph would be in the affirmative and there would be no need to interpret the IIA in this regard. However, given that, to the authors' knowledge, no IIA signed thus far expressly allows double compensation, we should examine whether interpreting IIAs under VCLT article 31 would provide for a reading of IIAs according to which states have consented to double compensation.

i. Good Faith Interpretation of IIAs

IV.91. The first basis for the argument that states have not consented to double compensation concerns "good faith" interpretation of IIAs based on article 31(1) of the VCLT. Under the ILC's commentary to its final draft of the VCLT, the "good faith" in article 31(1) is the codified version

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[1586] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.
[1587] Elizabeth Wu, *supra* note 1190, at 149.

of the general principle of good faith in treaty interpretations,[1588] according to which the parties cannot be assumed to have intended anything "unreasonable".[1589] In other words, in case of doubt, treaty words should be interpreted to include the meaning that the parties reasonably understood.[1590] In the context of states' consent in IIAs to "shares" be considered protected "investment", it is difficult to accept that states have "reasonably" understood that shareholders' claims would result in double compensation and then consented to it. In the words of the UNCITRAL Secretariat:

> [A] large majority of those investment treaties do not take into consideration the potential for multiple claims resulting from a wide definition of protected investors and investments. At the time of their conclusion, negotiators of such investment treaties did not foresee the potential for multiple claims, whether by related or unrelated investors, and such treaties lack the mechanisms to appropriately deal with such claims.[1591]

Yuval Shany discusses the same with respect to the ICSID Convention:

> In addition, it often did not occur to the drafters of the constitutive instrument of veteran judicial bodies, created before the institutional proliferation of the 1980s and 1990s, that other [judicial bodies] with overlapping jurisdiction might be created in the future. This

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[1588] ILC, 18th session, *Report of the International Law Commission on the Work of its Eighteenth Session*, Document A/6309/Rev1, in Yearbook of the International Law Commission, vol II (United Nations Publication, 1966) 172 at 221. See also Charles T Kotuby & Luke A Sobota, *supra* note 1, at 92.

[1589] Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed (Manchester University Press) at 120; Bin Cheng, *supra* note 1358, at 106. For examples in ISDS case law, see *Amco v Indonesia*, Award on Jurisdiction (25 September 1983) printed in (1984) 23 ILM 351 at para 14 ("Moreover - and this is again a general principle of law - any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged"); *Poštová Banka v Greece*, Award (9 April 2015) at 284 ("In the view of this Tribunal, an interpretation in good faith … also means that the interpretation requires elements of reasonableness that go beyond the mere verbal or purely literal analysis"); *Yukos Universal Limited (Isle of Man) v Russia*, in conjunction with *Hulley Enterprises Limited (Cyprus) v Russia*, and *Veteran Petroleum Limited (Cyprus) v Russia*, Judgment (No II) of The Hague Court of Appeal (18 February 2020) (holding, with respect to the good faith interpretation under article 31 of the VCLT, that "Dat de uitleg te goeder trouw moet plaatsvinden, betekent dat deze moet beantwoorden aan het fundamentele beginsel van redelijkheid en dat de uitleg niet mag leiden tot een betekenis die duidelijk ongerijmd of onredelijk is"); *Daimler v Argentina*, Award (22 August 2012) at fn 317 ("the Tribunal agrees, that the good faith principle is also 'meant to encapsulate well-established principles such as *effet utile*, honesty, fairness and reasonableness in interpreting a treaty") [all emphases added].

[1590] Ian Sinclair, *supra* note 1589, at 119 ("Whose good faith is in issue in the process of interpretation? … it is primarily the good faith of the parties to the treaty"); Bin Cheng, *supra* note 1358, at 108.

[1591] UNCITRAL, 49th session, A/CN9/881, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (New York, 2016) at para 11 [emphasis added].

> explains why the architects of courts and tribunals such as the ICJ and ICSID did not feel the need to regulate the jurisdictional relations between them and other judicial bodies.[1592]

IV.92. Thus, states could hardly be even considered to have "reasonably" understood the risk of multiple claims and consented thereto, let alone the risk of double compensation. This challenges the assumption we accepted at the outset (that states have impliedly consented to be exposed to multiple claims).[1593] However, it was explained that the practice of ISDS tribunals reflects that assumption. Given that the methodology adopted for this thesis is not to propose a fundamental change to the current practice, the author proceeded based on the assumption that states have impliedly consented to multiple claims. However, the point of the discussion in this Subsection is that: even if we assume that states have impliedly consented to multiple claims, this does not lead to states' consent to pay more than once for those claims.

IV.93. In fact, the absence of provisions in the majority of IIAs that would protect states against the risks associated with multiple claims (including the risk of double compensation) shows that the majority of states did not even envisage such implications. A small fraction of IIAs include FITR and waiver clauses to protect states from the consequences of multiple claims, but, as previously discussed, even those provisions have not been applied effectively in practice.[1594] The fact that some recently signed IIAs include provisions guarding states against double compensation[1595] indicates that the states' contemplation of the risk is a new development. As

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[1592] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, *supra* note 1328, at 213.
[1593] See above, para IV.87.
[1594] See above, Part III, Chapter 6, Section "Fork-in-the-Road (FITR) and Waiver Clauses".
[1595] See e.g. the 2016 CETA, art 8.24 (on the stay of proceeding when there is a risk of overlapping compensation) and art 8.39 (on the deduction of any prior compensation); the 2018 EU-Singapore Investment Protection Agreement, art 3.7.2 (on claims by shareholders at different levels of the same corporate chain) and art 3.18 (on the deduction of any prior compensation).

such, the "good faith" interpretation of IIAs does not extend states' consent (to shares being protected investment) to consent to payment of double compensation.

ii. Interpretation in Light of IIAs' "Object and Purpose"

IV.94. The second basis for the argument (that states' consent does not extend to double compensation) concerns the last part of article 31(1) of the VCLT: that interpretation should be "in light of [a treaty's] object and purpose". The objects and purposes of treaties are often found in their preamble.[1596] Some notable examples relating to IIAs are as follows.

IV.95. The preamble of the US Model BIT (2012) reads:

> The Government of the United States of America and the Government of [Country] (hereinafter the "Parties");
> Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;
> Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;
> Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;
> …
> Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;
> Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment; Have agreed as follows: …[1597]

Likewise, the preamble of the French Model BIT (2006), partly reads: "Persuadés que

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[1596] ILC, 16th session, *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur*, Document A/CN4/167 and Add1-3, in Yearbook of the International Law Commission, vol II (United Nations Publication, 1964) 5 at 56 ("the Court [ICJ] has more than once had recourse to the statement of the objects of the treaty in the preamble for the purpose of interpreting a particular provision"). See e.g. *Case Concerning Rights of Nationals of the United States of America in Morocco (France v United States)*, ICJ, Judgment (27 August 1952), (1952) ICJ Reports 176 at 197 ("the interpretation of the provisions of the Act must take into account its purposes, which are set forth in the Preamble"). For an example of an ISDS tribunal looking into a BIT's preamble to examine the BIT's object and purpose, see *Muhammet v Turkmenistan*, Decision on Respondent's Objection to Jurisdiction (13 February 2015) at 235, 241.

[1597] Available on the website of the Office of the United States Trade Representative: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last visited 11 March 2020) [emphasis added].

l'encouragement et la protection de ces investissements sont propres à stimuler les transferts de capitaux et de technologie entre les deux pays, dans l'intérêt de leur développement économique".[1598] And the ECT, Title 1 "Objectives", partly reads: "The signatories are desirous of improving security of energy supply and of maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis."[1599]

IV.96. The question is whether an interpretation that extends states' consents in IIAs to payment of double compensation would be in line with the objects and purposes listed in IIAs? Let us apply the question to the underlined parts in the examples set out in the previous paragraph. If states pay double compensation—

- would it "stimulate" their "economic development"?
- would it "improve living standards" in those states?
- would it encourage them to take further steps toward "greater economic cooperation" with home states of investors? or
- would it be "an acceptable economic basis" to proceed with?

It is unlikely that anyone would give an affirmative answer to the above questions.

IV.97. One could, in fact, see a psychological equation in the relationship between investors and states in international investment law under modern IIAs: on one side, investors take the risks of investing in host states because they rely on the protections offered by those states in IIAs, and on

[1598] Available on the website of UNCTAD Investment Policy Hub: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5875/download> (last visited 11 March 2021) [emphasis added].
[1599] Available on the Website of the ECT Secretariat: <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1991_European_Energy_Charter.pdf> (last visited 11 March 2021) [emphasis added].

the other side, states undertake those obligations because they hope for economic development.[1600] Payment of double compensation does not help the economic development of countries (if not harming it) and could, in the long-term, upset the equation. In conclusion, an interpretation of states' consent in IIAs that extends the consent to payment of double compensation is not in line with the objects and purposes of IIAs.

iii. Interpretation of IIAs Considering "Rules of International Law"

IV.98. The last basis for the argument (that states' consent does not include the payment of double compensation) concerns article 31(3)(c) of the VCLT: "There shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties" [emphasis added]. James Crawford explains that article 31(3)(c) "places treaties within the wider context of general international law" to avoid "fragmentation" of international law and promote "systemic integration between different, more or less specialized, areas of law".[1601] To find out why article 31(3)(c) is relevant here, we should answer two questions:

- First, what did the drafters of the VCLT mean by "rules of international law"? We ask this question to discover whether the phrase "rules of international law" includes

[1600] See Dolzer & Schreuer, *supra* note 38, at 20–22. It should be noted that the notion of "psychological equation" between investors and states is different from the notion of "reciprocity and mutuality" of rights and obligation between the two sides. See *ibid* at 20 (explaining that "[t]here have been speculations relating to the reciprocity of obligations in investment treaties … All these concerns relate to a common underlying theme which suggests that treaties on foreign investment in their traditional and current version place obligations solely on the host state without equal commitments on the part of the foreign investor. Such concerns reflect the assumption that all types of treaties are necessarily based upon a similar structure and upon a pattern of reciprocity and mutuality which must be reflected in the terms of the treaty itself. However, the very nature of the law of aliens, being at the origin of foreign investment law, indicates that the *raison d'être* of this field of law does not reflect the traditional themes of reciprocity and mutuality, but instead sets accepted standards for the unilateral conduct of the host state. ... Notions of mutuality and reciprocity are not absent from the regime of an investment treaty, but they do not operate in the same manner as in a classical agreement").

[1601] James Crawford, *supra* note 1266, at 368.

GPLs.[1602] This interpretation would pave the way for the application of the principle of prohibition of double compensation in treaty interpretation.[1603]

- Second, how should one apply the "rules of international law" when interpreting a treaty? We ask this to find out how we can apply GPLs (in this case, the principle of prohibition of double compensation) when interpreting IIAs.

IV.99. With respect to the first question, the VCLT's *travaux préparatoires* shows that it was proposed, in the ILC's meetings, to replace the phrase "relevant rules of international law" with "principles of international law".[1604] However, this proposal was rejected because the drafters wanted the phrase to be broad enough to include not only the "general principles", but also "regional rules, such as those that existed between Latin American countries, and even local customs between the States concerned".[1605] Thus, the drafters of VCLT intended for GPLs to be included within the scope of article 31(3)(c). In 2006, the ILC issued the final work of its Study Group on the Fragmentation of International Law, which confirmed that the phrase "rules of international law" in VCLT article 31(3)(c) refers to the formal sources of international law: treaties, international custom, and GPLs.[1606] Commentators have expressed the same view.[1607] As

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[1602] It was explained that generally there is a difference between rules and principles, in that principles are more fundamental while rules guide action in a specific situation. See *supra*, note 1481. Based on those definitions, "rules of international law" could not include general principles of law. However, here, we are not interested in general meanings of the terms, but rather the specific intention of the drafters of the VCLT. We would like to know whether they intended for the phrase "rules of international law" to cover "general principles" as well.

[1603] That the prohibition of double compensation is a general principle of law was established earlier, in the current Chapter, Subsection "A General Principle of Law".

[1604] ILC, 16th session, *Summary Records of the 770th Meeting*, in Yearbook of the International Law Commission, vol I (United Nations Publication, 1964) 315 at 316 (para 16).

[1605] *Ibid* at 316 (paras 13, 17) [emphasis added].

[1606] ILC, 58th session, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Document A/61/10, in Yearbook of the International Law Commission, vol II, part Two (United Nations Publication, 2006) 175 at 180 (para 18).

[1607] See e.g. Ulf Linderfalk, *On The Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, 2007) at 177 (explaining that the phrase "rules of international law" include "all rules which spring from any of the formal sources of international law, that is to say,

such, article 31(3)(c) covers GPLs, including the principle of prohibition of double compensation.

IV.100. With respect to the second question (i.e. how one should apply the "rules of international law" when interpreting a treaty), the VCLT's *travaux préparatoires* provides the following answer: "In cases where a treaty did not expressly say whether its provisions should be interpreted in a manner derogating from or consistent with a rule of international law in force, the interpretation should be in conformity with the rule in question, for States were presumed to be under a duty to conform with international law, even where it was a case of *jus dispositivum*."[1608] In this regard, the ILC's 2006 report on the fragmentation of international law set outs the following assumptions:

> (a) the parties [to a treaty] are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms;
> (b) in entering into treaty obligations, the parties do not intend to act inconsistently with generally recognized principles of international law.
> Of course, if any other result is indicated by ordinary methods of treaty interpretation, that should be given effect, unless the relevant principle were part of *jus cogens*. [1609]

Thus, if the parties to a treaty wish to derogate from "rules of international law" (including GPLs), there has to be either an "express" provision in the treaty to that effect, or the "ordinary methods of interpretation" should reflect such an intention.

IV.101. Here, regarding IIAs and the issue of states' consent to double compensation, there is neither express consent by states to derogate from the principle of prohibition of double compensation,[1610] nor does the interpretative method under article 31(1) discern such consent from

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from international agreements, from customary international law, or from 'the general principles of law recognized by civilized nations'"); Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) at 366 ("Article 31(3)(c) covers all relevant sources of international law, whether treaties, customary norms or general principles of law").

[1608] ILC, 16th session, *Summary Records of the 770th Meeting*, *supra* note 1604, at 316, 317 (paras 23, 29–30).

[1609] ILC, 58th session, *Fragmentation of International Law*, *supra* note 1606, at 180 (para 19).

[1610] Discussed above, in the current Chapter, para IV.90.

IIAs (see the discussion in the previous two Subsections on good faith interpretation in light of IIA's object and purpose). As such, under article 31(3)(c) of the VCLT, states have not derogated from the principle of prohibition of double compensation by signing IIAs and, hence, they have not waived the protection offered by the principle (the "Waiver Issue").

IV.102. The fact that states have not consented to double compensation can have another consequence in addition to the Waiver Issue. The absence of states' consent could affect the scope of ISDS tribunals' authority in awarding damages. In other words, if a state has not consented to pay double compensation, a tribunal (whose scope of authority is defined based on the parties' consent) does not have the authority to award damages in an amount that leads to double compensation in favor of shareholders. It should be noted that the issue does not concern the tribunal's jurisdiction, but rather the compensation that it can award.

IV.103. A similar type of restriction on tribunals' authority was raised in the previous Part when discussing the share-purchase solution (whereby tribunals give states the option to purchase the shareholders' interest in the local company to avoid double compensation).[1611] That Part explained that the tribunal must obtain the parties' consent to go forward with the share-purchase solution (instead of ordering them to do so) because this solution goes beyond the tribunal's authority in awarding compensation and thus the parties' consent is required.[1612] Likewise, in the case of double compensation, in the absence of the state's consent, awarding damages that would lead to double compensation goes beyond the tribunal's mandate.

[1611] See above, Part III, Chapter 6 (on suggested solutions), Section "Purchase of the Claimant Investor's Shares by the Respondent State".
[1612] See above, Part III, para III.367.

IV.104. In summary, this Chapter established that: (i) the prohibition of double compensation is a GPL that has been recognized by international law and applied in international investment law; and (ii) a host state, by signing an IIA that recognizes "shares" as protected "investment", has not waived the protection offered by the principle. The next necessary step is to set out a legal mechanism so that arbitral tribunals (ISDS and commercial) as well as state courts can apply the principle and avoid double compensation.

CHAPTER 8: LEGAL MECHANISM TO APPLY THE PRINCIPLE

IV.105. This Chapter proposes a legal mechanism to apply the principle of prohibition of double compensation. The mechanism takes a holistic approach covering all potential scenarios of the double compensation problem. To ensure maximum feasibility, it neither suggests a fundamental change to present legal doctrines and practice, nor does it require a fundamental shift in the regulatory system for the solution to become operative.[1613] The goal of the mechanism is to provide a practical tool, supported by theory, for tribunals/courts and counsel.

IV.106. The Chapter first discusses the Fundamentals of the proposed mechanism. It then turns to Possible Scenarios where the double compensation problem may arise, to explain how the mechanism plays out in each scenario. Lastly, the discussion covers the Exceptions, i.e. those exceptional situations which require the tribunals/courts to take specific steps before they fall within the category of typical scenarios.

[1613] See above, Part I, Section "Methodology and Theoretical Approach", para I.27.

A. Fundamentals of the Mechanism

IV.107. To find the best mechanism for dealing with a problem, one should first establish what is expected of that mechanism (i.e. what the optimal outcome should look like) and then formulate a mechanism that could deliver such an outcome. To that end, Subsection (i) explains that the optimal outcome in dealing with double compensation is to avoid the risk of double compensation early in the proceeding, by focusing on the admissibility of overlapping claims. Subsection (ii) explains that the principles of *res judicata* and *lis pendens* can deliver such an outcome. The Subsection then argues that the identity test employed in the application of those principles should be adapted to the realities of the ISDS system.

i. Effect of the Mechanism on the Proceedings

IV.108. Earlier in the thesis, it was explained that a tribunal's obligation is not just to avoid actual double compensation but also the risk of double compensation.[1614] The discussion showed that the risk could be contained either early in the proceeding or towards its end.[1615] Based on that discussion, this Subsection now asks whether the proposed mechanism to avoid double compensation should be formulated to affect the proceedings at the Preliminary Phase or Later Phases (Merits/Damages). The discussion will show that it would be ideal to tackle the double compensation problem as early as possible. This then begs the question: should the mechanism aim for the inadmissibility of the overlapping claims or for the tribunals' jurisdiction over the overlapping claims (Admissibility v. Jurisdiction)?

[1614] See above, Part II, Chapter 1, Section "Actual Double Compensation v. The Risk of Double Compensation".
[1615] *Ibid*.

a. Preliminary Phase v. Later Phases (Merits/Damages)

IV.109. Before embarking on the substantive discussion, it should be noted that the term "preliminary phase" in this thesis is not limited to the first part of a bifurcated proceeding, but rather is a general term referring to the initial phase of a proceeding (whether bifurcated or not). In other words, even where a proceeding is not bifurcated, the tribunal still follows a sequence of phases in its decision making: it first decides its jurisdiction (and perhaps the admissibility of the claims), then the merits of those claims, and then the quantum and damages—even if all of them are presented in one single award. Thus, the term "preliminary phase" refers to the first part of that sequence (regardless of the proceeding being bifurcated or not).[1616]

IV.110. As explained in the introductory part of the thesis, a notable number of tribunals preferred to deal with the risk of double compensation at later stages in the proceedings. To be exact, of the 63 tribunals discussed, 16 tribunals rejected the double compensation objection to jurisdiction/admissibility of claims and held that the issue properly belonged to the merits/damages phases.[1617] In the end, none of those tribunals could address the risk effectively.[1618]

[1616] For a discussion on the advantages and disadvantages of bifurcation in investment arbitration, see Jeffery Commission & Rahim Moloo, *Procedural Issues in International Investment Arbitration* (Oxford University Press, 2018) at 70.

[1617] *Gosling v Mauritius*, Award (18 February 2020) at para 164; *United Utilities v Estonia*, Award (21 June 2019) at para 465; *Busta v Czech Republic*, Final Award (10 March 2017) at para 217; *RREEF v Spain*, Decision on Jurisdiction (6 June 2016) at para 126; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at para 253; *Hochtief v Argentina*, Decision on Jurisdiction (24 October 2011) at paras 121–122 and Decision on Liability (29 December 2014) at paras 151, 180; *Inmaris v Ukraine,* Decision on Jurisdiction (8 March 2010) at para 112; *AMTO v Ukraine*, Final Award (26 March 2008) at paras 26(e), 26(i), 71; *EDF v Argentina*, Decision on Jurisdiction (5 August 2008) at paras 219–220; *Pan American Energy v Argentina* consolidated with *BP America v Argentina*, Decision on Preliminary Objections (27 July 2006) at para 219; *Suez and InterAguas v Argentina*, Decision on Jurisdiction (16 May 2006) at para 51; *Bayindir v Pakistan*, Decision on Jurisdiction (14 November 2005) at para 270; *Camuzzi v Argentina (I)*, Decision on Jurisdiction (11 May 2005) at para 91; *Sempra v Argentina*, Decision on Objection to Jurisdiction (11 May 2005) at para 102; *Azurix v Argentina*, Decision on Jurisdiction (8 December 2003) at para 101.

[1618] See above, Part I, para I.7 (the discussion on Group No 7).

IV.111. Although the double compensation problem is a "damages" issue, it does not mean that the issue must be tackled towards the end of the proceeding, for two reasons. The first reason concerns procedural economy and efficiency. As previously explained, states have not consented in the IIAs to pay double compensation and, as such, a tribunal (whose scope of authority is defined based on the parties' consent) does not have the authority to award damages in an amount that leads to double compensation in favor of shareholders.[1619] It was also explained that such limitation does not concern the tribunal's jurisdiction over the claims, but rather the amount of compensation it can award for those claims.[1620] If the tribunal does not have the authority to award damages that would lead to double compensation (even if facts are established and liability proved), surely it would be more sensible to save time and resources and dismiss the overlapping portion of the claims at the outset. Simply put, what would be the point of going through a lengthy process of establishing facts and liability for the overlapping portion of the claims, only to reach the damages phase and rule that compensation cannot be awarded for that portion?

IV.112. The need for efficiency and procedural economy in arbitration proceedings is well-known in the arbitration community. International organizations and ISDS commentators have emphasized it. For example, the 2006 ILA reports and recommendations on *lis pendens* and *res judicata* recognized and emphasized the need for factoring in efficiency when conducting arbitral proceedings.[1621] So did the UNCITRAL Secretariat in its 2017 *Note on Concurrent Proceedings*

[1619] See above, Chapter 7, para IV.102.
[1620] See above, Chapter 7, paras IV.102 – IV.103.
[1621] ILA Committee on International Commercial Arbitration, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration* (Toronto Conference, 2006) at 1; ILA Committee on International Commercial Arbitration, *ILA Final Report: Lis Pendens and Arbitration* (Toronto Conference, 2006) at paras1.11, 4.52, 5.7.

in Investment Arbitration.[1622] Likewise, August Reinisch points out that:

> [*Res judicata*] protects defendants from having to defend themselves twice in the same matter. At the same time *res judicata* is a principle of judicial economy aimed at preventing (costly) re-litigation of already decided cases. Further, it serves the purpose of legal security by avoiding the potential of divergent decisions in identical cases.[1623]

IV.113. Of course, not all commentators find procedural economy a compelling reason to regulate the relationship between arbitral tribunals. For example, Emmanuel Gaillard is of the opinion that:

> While the relationship between courts and tribunals can be rationalized by principles such as competence-competence, the same is not true of parallel arbitral proceedings in which both tribunals will presumably have the power to have the first word on their competence. Nor will considerations of hierarchy, procedural efficiency, legitimacy, or expertise necessarily provide the answer. The relationship between arbitral tribunals therefore does not lend itself to rule-based coordination, and instead relies on the discretion of the arbitrators, whether one considers issues of (A) *lis pendens* and deference to parallel proceedings, (B) anti-suit injunctions, or (C) issues of *res judicata*.[1624]

However, this view may be challenged, given that so far ISDS tribunals have not been particularly effective in dealing with multiple proceedings through the exercise of discretion.[1625] Each tribunal has indeed "the first word on its competence", but this does not mean that there should not be any rules in place to regulate how tribunals ought to proceed with respect to overlapping claims. As independent as tribunals are, they are not constituted in a vacuum. If two tribunals deal with overlapping claims in relation to the same harm, the way they conduct the proceedings should reflect the reality of the overlapping claims. Therefore, the phenomenon of overlapping claims requires rule-based coordination, which will not compromise tribunals' discretion—just as the

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[1622] UNCITRAL, 50th session, A/CN9/915, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (Vienna, 2017) at para 14.
[1623] August Reinisch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes", *supra* note 148, at 43 [emphasis added].
[1624] Emmanuel Gaillard, "Coordination or Chaos", *supra* note 1400, at 220–221.
[1625] See above, Chapter 4 (discussing the relevant ISDS case law on double compensation).

rules that are already in place to govern arbitration proceedings have not compromised that discretion.

IV.114. The second reason (for addressing the double compensation issue in the preliminary phase instead of merits/damages phases) concerns the difficulties that may otherwise arise. As explained previously, the majority of double compensation cases involve more than one proceeding.[1626] Once there are two or more proceedings involved, and the risk of double compensation is not addressed early on, the task of preventing double compensation can become more difficult and complicated as the proceedings progress.

IV.115. A notable example of such a situation is *Burlington v Ecuador* and its connected proceeding, *Perenco v Ecuador* (both cases were discussed in Chapter 4). When the *Burlington* tribunal awarded damages on the counterclaims (without addressing the risk of double compensation at the early stages of the proceeding), the *Perenco* tribunal was faced with a difficult choice:

- accepting the *res judicata* effect of the *Burlington* decision, which would go against the *res judicata* effect of its own Interim Decision; or
- insisting on the *res judicata* effect of its own Interim Decision, which meant allowing the same counterclaims being pursued twice.

The *Perenco* tribunal took the second path, which eventually led to double compensation. Had the parties and the two tribunals addressed the double compensation issue early in the proceedings, the *Perenco* tribunal would not have been in the difficult position it was in at the end.

[1626] See above, Part II, para II.100.

IV.116. In summary, tribunals should contain the risk of double compensation at the preliminary phase of the proceedings, not only for reasons of efficiency and procedural economy, but also to avoid complications that are likely to arise when the risk is left unaddressed. Of course, if for any reason, a tribunal cannot contain the risk at an early stage, the matter will have to be addressed later, whether that would be at the stage of rendering the award or the enforcement stage. Double compensation must be avoided—the sooner the better.

b. Admissibility v. Jurisdiction

IV.117. In the previous Segment, we established that the risk of double compensation should be dealt with at the preliminary phase. The question now becomes: does it concern the tribunal's jurisdiction or the admissibility of the claim? To answer this question, we first need to briefly look into the Differences between admissibility and jurisdiction to determine which of those should be the Target of the double compensation objection.

(1) Differences

IV.118. The difference between the nature of jurisdiction and that of admissibility can be described as:

> If jurisdiction reflects legal power – that is, the power to adjudicate a dispute – then … rules of admissibility [pertain 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.[1627]
> [T]he conferral upon an international court of the power to [dismiss] cases as inadmissible equips it with independent case-selection capabilities which may help it to protect its reputation and adjudicative functions. In addition, the actual dismissal of cases by international courts as non-admissible is indicative of judicial perceptions of the

[1627] Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge University Press, 2015) at 47.

> circumstances under which adjudication would be disruptive of the judicial function or undesirable for other reasons.[1628]

Much scholarly work has been written on jurisdiction and admissibility, and also every international decision includes a section that deals with objections to jurisdiction and perhaps admissibility. As such, there is no shortage of material on these two topics. Based on an analysis of the case law and commentary, three main differences can be established between jurisdiction and admissibility.

IV.119. First, objections to jurisdiction and admissibility target different things. In the words of Ian Brownlie:

> Objections to the jurisdiction, if successful … strike at the competence of the Tribunal to give rulings as to the merits or admissibility of the claim [whereas, 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 … may be closely connected with the merits of the case.[1629]

In other words, admissibility neither concerns the tribunal's jurisdiction over the claims nor the merits of those claims, yet it can be connected with the merits. Here, one might find it confusing that an objection to admissibility does not concern the merits of the case, yet it can be connected to those merits.

IV.120. To avoid such confusion, Sir Gerald Fitzmaurice uses the term "ultimate merits" instead.[1630] According to him, it is best to say that admissibility does not concern the "ultimate merits" of the claims rather than the "merits" because admissibility can still be "connected with, and not entirely without relevance to, the substantive merits, and is often more closely related to

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[1628] *Ibid* at 9–10.
[1629] Ian Brownlie, *Principles of Public International Law*, 3rd ed (Clarendon Press, 1990) at 478 [emphasis added].
[1630] Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure" (1958) 34 BYIL 1 at 12 (fn 6) [emphasis added].

these than purely jurisdictional issues."[1631] This view finds support in ISDS case law.[1632] However, it should be noted that, unlike the ICJ (which has adopted a clear approach to the distinction between admissibility and jurisdiction),[1633] ISDS tribunals have not reached a consistent approach.[1634] Thus views might vary from one ISDS tribunal to another.

IV.121. The second and perhaps the most practically important difference between admissibility and jurisdiction is that an international tribunal's decision on jurisdiction can be reviewed, but decisions on admissibility may not (save for matters involving due process and public policy exceptions).[1635] Awards of international investment tribunals can be subject to review: ICSID awards can be reviewed by annulment committees through the procedures set out in article 52 of the ICSID Convention, and awards of non-ICSID tribunals can be reviewed either through annulment proceedings in local courts or through proceedings for recognition/enforcement within the framework of the New York Convention.[1636] However, the same does not apply to the ICJ whose decisions are not subject to review by another forum and, as such, when it comes to the ICJ, "[t]he classification of an issue as one of jurisdiction or admissibility may serve to explain the ICJ's ordering of its own procedure."[1637]

[1631] *Ibid*.
[1632] See e.g. *Enron v Argentina*, Decision on Jurisdiction (14 June 2004) at para 33 ("a successful admissibility objection would normally result in rejecting a claim for reasons connected with the merits") [emphasis added].
[1633] As observed by the ILA Committee on Law of Foreign Investment, the ICJ approach has been that: "an 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". ILA Committee on Law of Foreign Investment, *Final Report* (Rio de Janeiro Conference, 2008) at 19.
[1634] *Ibid*. Some ISDS tribunals were even of the opinion that the concept of admissibility does not exist within the ICSID framework. See e.g. *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at para 126; *Enron v Argentina*, Decision on Jurisdiction (14 June 2004) at para 33. For a critique of this view, see Jan Paulsson, "Jurisdiction and Admissibility", (2009) 6:1 TDM 601 at 608.
[1635] Jan Paulsson, *supra* note 1634, at 601, 603.
[1636] *Ibid* at 604–605. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 3 (also known as the New York Convention).
[1637] Jan Paulsson, *supra* note 1634, at 603.

IV.122. It has also been argued that there is a third difference between admissibility and jurisdiction: that defects in admissibility (unlike jurisdiction) can be waived or cured.[1638] As the tribunal in *Hochtief v Argentina* described it:

> Questions of admissibility, on the other hand, are different from questions of jurisdiction. The disputing parties are entitled to raise objections based upon questions of admissibility, but they are not bound to do so; and if they do not raise those objections, they will have acquiesced in any breach of the requirements of admissibility and that acquiescence will 'cure' the breach. The tribunal, if it has jurisdiction, will proceed to hear the case … Defects in admissibility can be waived or cured by acquiescence: defects in jurisdiction cannot.[1639]

IV.123. After setting out the three differences between admissibility and jurisdictions, it is helpful to consider a test for how to quickly determine whether an objection concerns jurisdiction or admissibility. Jan Paulsson suggests the following test:

> [I]s the objecting party taking aim at the tribunal or at the claim? … [i.e.] was it the parties' intention that the relevant claim should no longer be arbitrated by [this] arbitration but rather in some other forum [i.e. objection to jurisdiction], or was it that the claim could no longer be raised at all [i.e. objection to admissibility]."[1640]

An even simpler test was proposed by Sir Gerald Fitzmaurice in his separate opinion in the *Northern Cameroons* case: an objection is an objection to jurisdiction if it involves the interpretation of the jurisdictional clause, otherwise it concerns the admissibility of the claim.[1641]

(2) Which one Should be the Target?

IV.124. Based on the above discussion (on the differences between jurisdiction and admissibility as well as the test to distinguish them), an objection relating to double compensation

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[1638] Chittharanjan F Amerasinghe, *International Arbitral Jurisdiction* (Martinus Nijhoff Publishers, 2011) at 70–71; David A R Williams, "Jurisdiction and Admissibility" in Peter Muchlinski, Federico Ortino & Christopher Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 869 at 872.
[1639] *Hochtief v Argentina*, Decision on Jurisdiction (24 October 2011) at paras 94–95.
[1640] *Ibid* at 616.
[1641] *Case Concerning the Northern Cameroons (Cameroon v United Kingdom)*, ICJ, Judgment on Preliminary Objections, Separate Opinion of Judge Sir Gerald Fitzmaurice (2 December 1963), (1963) ICJ Reports 97 at 102–103.

generally cannot be considered an objection to jurisdiction. The reason for this is that an objection relating to double compensation neither aims at the tribunal nor involves the interpretation of the jurisdictional clause (namely, in the context of the ISDS system, the agreement to arbitrate), but rather concerns the overlapping claims.

IV.125. For example, within the context of ICSID cases (which constitutes the majority of ISDS cases),[1642] article 25 of the ICSID Convention sets out three jurisdictional requirements: consent, *ratione personae*, and *ratione materiae*.[1643] None of those requirements relates to the issue of double compensation. As explained by Zachary Douglas, the issue of shareholders' claims generally concerns the admissibility of those claims because "[t]here is no difficulty in confirming the tribunal's jurisdiction *ratione personae* over a shareholder with the requisite nationality. There is also no difficulty in confirming a tribunal's jurisdiction *ratione materiae* over claims by that shareholder in relation to its investment in a company incorporated in the host state".[1644]

IV.126. Further, to establish an ICSID tribunal's jurisdiction, article 25 should be read together with the relevant provision of the applicable IIA that sets out the conditions under which the state has consented to the ICSID jurisdiction.[1645] Those IIA consent provisions list conditions such as: the scope of consent (e.g. covering treaty disputes only[1646] or "any dispute relating to the

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[1642] As of July 2020, of the 1061 investment arbitration cases filed, 625 cases were administered by ICSID. UNCTAD Investment Policy Hub website, section "Investment Dispute Settlement Navigator", tab "Institutions", online: <https://investmentpolicy.unctad.org/investment-dispute-settlement> (last visited 11 March 2021).
[1643] Article 25(1) of the ICSID Convention reads: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment [the *ratione materiae* requirement], 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 [the *ratione personae* requirement], which the parties to the dispute consent in writing to submit to the Centre [the consent requirement]. When the parties have given their consent, no party may withdraw its consent unilaterally."
[1644] Zachary Douglas, *supra* note 98, at para 743.
[1645] *AES v Argentina*, Decision on Jurisdiction (26 April 2005) at para 38; David A R Williams, *supra* note 1638, at 872.
[1646] See e.g. the Canada-Argentina BIT, art 10.

investment"[1647]) or the condition to seek amicable settlement of the dispute before commencing the arbitration process.[1648] Therefore, there is generally no connection between double compensation and the tribunal's jurisdiction.

IV.127. The only exceptions are when the consent provision in an IIA includes a FITR clause or a waiver clause. Given that such clauses are listed among the conditions of the states' consent for submission of a dispute to investment arbitration, and given that they concern the overlapping claims, any objection concerning double compensation (hence, the overlapping claims) will target the tribunal's jurisdiction in such scenario.

IV.128. In conclusion, as a general rule, an objection concerning double compensation targets the admissibility of the overlapping claims and not the tribunal's jurisdiction (except when the applicable IIA contains a FITR clause or a waiver clause).

IV.129. However, while we might reasonably assume that the double compensation objection should be connected with admissibility, it is another thing entirely to establish whether there are any bases allowing such a connection. To find out, we must examine the bases of inadmissibility objections. Yuval Shany's investigation of the matter has identified three sources as the bases for the inadmissibility objections:[1649]

- First, a provision in the constitutive instrument of an international court/tribunal that allows that court/tribunal to dismiss certain claims for being inadmissible;[1650]

[1647] See e.g. the Netherlands-Nigeria BIT, art 9.
[1648] See e.g. the Israel-Albania BIT, art 8.
[1649] Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts*, *supra* not 1627 at 47, 49–50.
[1650] For example, article 35 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* for the ECtHR, and article 17 of the *Rome Statute of the International Criminal Court*.

- Second, general principles of law;[1651] and
- Third, the inherent power of international courts and tribunals to decline to exercise jurisdiction where doing otherwise would jeopardize the legitimacy or effectiveness of the court/tribunal.

IV.130. Both the second and third bases can be relied on to establish the connection between an objection relating to double compensation and the inadmissibility of overlapping claims. The second basis can be relied on because, as discussed in the previous Chapter, the prohibition of double compensation is a general principle of law. The third basis (the tribunal's inherent power) can also be relied on because, as explained earlier in this Chapter, improving the procedural economy and efficiency of proceedings is one of the reasons for addressing the double compensation issue at the preliminary phase (instead of at the merits or damages phases).[1652]

IV.131. In summary, we have established that the optimal result—when addressing the double compensation problem—is the inadmissibility of the overlapping claims, for which we can rely on two bases: the general principle of prohibition of double compensation and the tribunals' inherent power to decline to exercise jurisdiction. However, how could one identify the "overlapping claims"? This is where the principles of *res judicata* and *lis pendens* and their identity test come into the picture.

[1651] For example, the principles of *pacta sunt servanda* and equitable estoppel for situations where the parties have previously agreed to adjudicate their dispute in another forum. See e.g. *SGS v Philippines*, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) at paras 154–155.
[1652] See above, paras IV.111 – IV.113.

ii. Identifying the Overlapping Claims

IV.132. The discussion in the previous Subsection showed that tribunals should contain the risk of double compensation at the preliminary phase of the proceedings[1653] by holding the overlapping claims inadmissible (except where there is a FITR clause or a waiver clause, in which case the tribunal would not have jurisdiction over the overlapping claims). The principles of *res judicata* and *lis pendens* have an identity test that helps to identify the overlapping claims. Together, the two principles also have the potential to offer a comprehensive solution covering both parallel and sequential proceedings.

IV.133. *Res judicata* and *lis pendens* are not the only concepts for which the identity test is applied. The test has generally been applied in respect of FITR clauses as well.[1654] Regardless of whether the FITR rule was inspired by the principles of *lis pendens* and *res judicata* (and hence has borrowed the identity test from those principles), it applies the same test. As explained by the tribunal in *Toto v Lebanon*:

> In order for a fork-in-the-road clause to preclude claims from being considered by the Tribunal, the Tribunal has to consider whether the same claim is 'on a different road,' i.e., that a claim with the same object, parties and cause of action, is already brought before a different judicial forum.[1655]

IV.134. The discussion in Chapter 6 (on suggested solutions) has already covered the basics of *res judicata* and *lis pendens*, including: the definitions, their status as general principles of law,

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[1653] For a discussion on the meaning of "preliminary phase" in this thesis, see above, para IV.109.
[1654] A comprehensive table presenting an overview of how ISDS tribunals have applied the identity test in the context of FITR clauses is annexed to the thesis.
[1655] *Toto v Lebanon*, Decision on Jurisdiction (11 September 2009) at para 211. See also *Khan Resources v Mongolia*, Decision on Jurisdiction (25 July 2012) at paras 386, 390 (holding that, with respect to the respondent's FITR clause objection, "the Tribunal sees no reason to go beyond the triple identity test. There is ample authority for its application"). But see *Pantechniki v Albania*, Award (30 July 2009) at paras 62, 67 (applying a different test, known as the "fundamental basis" test).

and their practical advantages over other solutions (such as FITR and waiver clauses, consolidation, and the issue preclusion doctrine) in addressing the double compensation problem.[1656] What makes the application of *res judicata* and *lis pendens* even more attractive in the context of the double compensation problem is that the two principles deliver the desired result: the inadmissibility of the overlapping claims. ISDS tribunals that have considered the impact of *res judicata* and *lis pendens* on investment claims have noted that the two principles affect admissibility and not jurisdiction.

IV.135. For example, the tribunal in *Desert Line v Yemen* set out the respondent's jurisdictional objections based on *res judicata* and made the following observation: "the Arbitral Tribunal believes that this issue is more properly classified as one of admissibility rather than jurisdiction".[1657] Likewise, in *Hochtief v Argentina*, the tribunal noted that: "A tribunal might decide that a claim of which it is seised and which is within its jurisdiction is inadmissible for example, on the ground of *lis alibi pendens* or forum non conveniens."[1658] A similar point was observed by the tribunal in *SGS v Philippines*: "This is a matter of admissibility rather than jurisdiction … An analogy may be drawn with the practice of national courts faced with claims such as *lis alibi pendens* and forum non conveniens, which are likewise not jurisdictional."[1659]

IV.136. Thus, the identity test of *res judicata* and *lis pendens* is ideal for identifying the overlapping claims that could lead to double compensation. This Subsection focuses on the identity test. As explained in Chapter 6, ISDS tribunals' strict application of the identity test (the

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[1656] See above, Part III, Chapter 6, Section "*Res Judicata* and *Lis Pendens*".
[1657] *Desert Line v Yemen*, Award (6 February 2008) at paras 124, 128. See also *Gavazzi v Romania*, Dissenting Opinion (14 April 2015) at para 37 (agreeing with French courts that "the effects of *res judicata* are an issue of admissibility of the claim").
[1658] *Hochtief v Argentina*, Decision on Jurisdiction (24 October 2011) at para 90.
[1659] *SGS v Philippines*, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) at para 170, fn 95.

same way that local courts have applied the test) has been a major impediment to the effective application of *res judicata* and *lis pendens* in investment arbitration.[1660] To find a way forward, the first Segment discusses the requirements of the Identity Test, and then the second Segment explains that instead of "relaxing" the test, the effort should focus on "adapting" the test to the realities of the ISDS system (Relaxing v. Adapting).

a. Identity Test

IV.137. Courts and tribunals apply the identity test when comparing two or more proceedings to determine whether those proceedings share sufficient similarity to justify the application of *res judicata* or *lis pendens*. The requirements of the identity test have changed over time. In the first international cases where *res judicata* was applied, the identity test involved two requirements: "same parties" and "same issue" (also known as "same subject matter").[1661] However, in later decisions, international courts and tribunals applied the approach that breaks down the second requirement (same issue) into two requirements: "same *causa petendi*" (same cause of action) and "same *petitum*" (same relief/object).[1662] And, hence, the test became known as the triple identity test: same parties, same cause of action, and same relief.

IV.138. Research shows that most ISDS tribunals that faced the question of *res judicata* or

[1660] See above, Part III, Chapter 6, para III.430.
[1661] See e.g. *Pious Fund of the Californias (United States v Mexico)*, PCA Case No 1902-01, Award (14 October 1902) at 3; *China Navigation Co Ltd (Newchwang Case)*, Great Britain-United States Arbitral Tribunal, Decision (9 December 1921), (2006) 9:1 RIAA 64 at 65. See also *Polish Postal Service in Danzi*, PCIJ, Advisory Opinion No 11 (16 May 1925) at para 86.
[1662] See e.g. *Case Concerning the Factory at Chorzów (Germany v Poland)*, PCIJ, Interpretation of Judgments Nos 7 and 8, Dissenting Opinion by M Anzilotti (16 December 1927) Publication of the PCIJ (Series A) No 13, 23 at 23; *Trail Smelter Arbitration (United States v Canada)*, Decision (11 March 1941), (2006) 3 RIAA 1905 at 1952. See Bin Cheng, *supra* note 1358, at 340; Charles T Kotuby & Luke A Sobota, *supra* note 1, at 201.

lis pendens applied the triple identity test.[1663] However, a few found the triple identity test stringent and preferred to apply the initial two-requirement test instead.[1664] On the other hand, some tribunals applied an identity test that had one requirement in addition to the triple identity test: the "same legal order" requirement.[1665] Now, let us examine how ISDS tribunals have applied all those four requirements.

IV.139. For the first requirement (i.e. the same parties), the overwhelming majority of tribunals ruled that neither the investment vehicle and its shareholders, nor the shareholders at different levels of the corporate chain, can be considered the same parties.[1666] The tribunals' approach to the second requirement (i.e. the same cause of action) will be discussed in the next paragraph, as it requires further elaboration. Regarding the third requirement (i.e. the same relief), the majority of tribunals did not discuss whether or not it was met—despite mentioning it as a requirement of the test. This could be because they had already rejected the similarity in the first two requirements, and discussing the third requirement would not have changed the outcome.[1667] As to the fourth requirement (i.e. the same legal order), the majority did not expressly mention it as a requirement of the test,[1668] and the few that did, held that it was not met.[1669]

[1663] Appendix 3 and Appendix 4 provide a list of ISDS cases dealing with *res judicata* and *lis pendens* and how those tribunals have treated the identity test and what terminology they used for each requirement of the test.
[1664] See e.g. *Apotex v United States (III)*, Award (25 August 2014) at paras 7.12–7.16; *Waste Management v Mexico (II)*, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings (26 June 2002) at para 39.
[1665] *Helnan v Egypt*, Award (3 July 2008) at para 124; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at para 191; *Lucchetti v Peru*, Decision on Annulment (5 September 2007) at paras 85–87; *Fraport v Philippines (I)*, Award (16 August 2007) at paras 390–391; *Inceysa v El Salvador*, Award (2 August 2006) at paras 208–212; *Busta v Czech Republic*, Final Award (10 March 2017) at paras 211–212; *Flughafen v Venezuela*, Award (18 November 2014) at para 369; *TECO v Guatemala*, Award (19 December 2013) at paras 516–519.
[1666] See Appendix 3 (on *res judicata*), Appendix 4 (on *lis pendens*), and Appendix 2 (on FITR clauses).
[1667] *Ibid*.
[1668] See Appendix 3 (on *res judicata*), Appendix 4 (on *lis pendens*).
[1669] See *supra*, the cases cited in note 1665.

IV.140. With respect to the second requirement of the test (i.e. the same cause of action), most tribunals held that it was not met.[1670] However, comparing the ISDS tribunals' approach to the second requirement presents some challenges. The reason is that ISDS tribunals have not adopted a unanimous meaning for the term "cause of action". For some tribunals it meant "factual and legal bases";[1671] for some it meant "claims and issues";[1672] but, the majority of tribunals understood the term to refer to the "legal bases" on which the claimants relied, i.e. the treaty, the contract, or the investment law of the host state. This is why the terms "treaty claims" and "contract claims" came to be contrasted.

IV.141. The absence of a uniform understanding of the term "cause of action" is not limited to ISDS tribunals. For example, under European Union law, "cause of action" generally includes both the facts and the legal bases,[1673] and this is also the definition under French law.[1674] By contrast, in US law, the term refers more to the facts than the legal bases of a case,[1675] while in the ICJ case law, the term is understood to refer to the legal bases of a case.[1676]

IV.142. The reason why ISDS tribunals have placed more emphasis on the legal bases (and not the facts) could be because the multiple proceedings that are brought by the investment vehicle and its shareholders (or by the shareholders at different levels of the same corporate chain) arise

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[1670] See Appendix 3 (on *res judicata*), Appendix 4 (on *lis pendens*), and Appendix 2 (on FITR clauses).
[1671] See e.g. *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at para 258 (citing *Malicorp v Egypt*, Award, 7 February 2011, with approval).
[1672] *Fraport v Philippines (I)*, Award (16 August 2007) at para 390; *Inceysa v El Salvador*, Award (2 August 2006) at paras 214–217.
[1673] *Tatry (the owners of the cargo) v Maciej Rataj (the owners of the ship)*, ECJ, Case C-406/92, Judgment of the Court (6 December 1994) para 38 ("the 'cause of action' comprises the facts and the rule of law relied on as the basis of the action").
[1674] *JurisClasseur Procédure Civile*, Fasc 900-30: II.A.3 (Juillet 2018) at para 169.
[1675] Discussed above, in Part III, Chapter 6, Subsection "Issue Preclusion", para III.438.
[1676] See e.g. *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles From the Nicaraguan Coast (Nicaragua v Colombia)*, ICJ, Judgment (17 March 2016), (2016) ICJ Reports 100 at para 59 ("for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground") [emphasis added].

from the same factual matrix. As such, the requirement for similarity in the factual element of cause of action is already met, and it is the sameness of the legal bases that has to be decided: whether two different treaties (or a treaty and a contract) can be considered the same. Thus, in this thesis, to avoid any confusion, the term "same legal basis" is used instead of "same cause of action" to demonstrate where the focus is.

IV.143. In summary, the requirements of the identity test are as follows:

- (1) Same parties
- (2) Same issues, which consists of:
  - (a) Same cause of action, which in turn consists of:
    - (i) Same facts
    - (ii) Same legal basis
  - (b) Same relief
- (3) Same legal order.

As explained earlier, the identity test holds the key to the double compensation problem.[1677] However, the way that ISDS tribunals have applied the test thus far has done more harm than good. Should the test be "relaxed" as some have suggested? The next Segment will focus on that question.

b. Relaxing v. Adapting

IV.144. The fact that ISDS tribunals have applied the identity test in a similar way to domestic courts has, in practice, paralyzed the applicability of *res judicata*, *lis pendens*, and the

[1677] See above, in the current Chapter, para IV.132.

FITR clauses when there are multiple proceedings.[1678] If we would like to see a different result, it is clear that something has to change with respect to how ISDS tribunals have interpreted and applied the identity test. As noted by August Reinisch, "[the] usefulness [of *res judicata* and *lis pendens*] in avoiding the multiplication of international proceedings will thus depend mainly on the way the identity requirements for their operation are interpreted and applied by international courts and tribunals."[1679] A principled change helps with an effective application of *res judicata*, *lis pendens,* and the FITR clauses, which could solve the double compensation problem along the way.

IV.145. A number of international documents (mainly prepared by the ILA),[1680] some ISDS tribunals,[1681] and several commentators[1682] have set forth robust arguments supporting a more "relaxed" application of the identity test. However, a closer look at the dates of the decisions that rejected the application of *res judicata* or *lis pendens* shows that they were decided after the ILA

[1678] For the statistics, see above, Part III, Chapter 6, para III.430 (on *res judicata* and *lis pendens*) and para III.415 (on FITR clauses).
[1679] August Reinisch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes", *supra* note 148, at 55.
[1680] ILA Committee on International Commercial Arbitration, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration* (Toronto Conference, 2006); ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004); ILA Committee on International Commercial Arbitration, *ILA Final Report: Res Judicata and Arbitration* (Toronto Conference, 2006); ILA Committee on International Commercial Arbitration, *ILA Final Report: Lis Pendens and Arbitration* (Toronto Conference, 2006); ILA Committee on Law of Foreign Investment, *Final Report* (Rio de Janeiro Conference, 2008).
[1681] See e.g. *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at paras 260–268; *Apotex v United States (III)*, Award (25 August 2014) at paras 7.38, 7.40. The following two cases discussed the triple identity test, but in the context of FITR clauses: *Pantechniki v Albania*, Award (30 July 2009) at paras 61–64, 67 (holding that, instead of the triple identity test, the relevant test is the "fundamental basis" test whereby the investment tribunal should find out the fundamental basis of the claim, and determine whether it is independent of the one before local courts, i.e. "whether the [alleged treaty] claim truly does have an autonomous existence outside the contract"); *H&H v Egypt*, Excerpts of Award (6 May 2014) at paras 364–370, 378 (applying the *Pantechniki* tribunal's "fundamental basis" test).
[1682] See e.g. August Reinisch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes", *supra* note 148, at 50–72; Audley Sheppard, *supra* note 1358, at 232–233. See Patrick Dumberry, *supra* note 1440, at paras 4.78–4.85, 4.88 (comparing the different approaches).

recommended a more flexible approach in 2006.[1683] This begs the question: why have ISDS tribunals been reluctant to adopt the recommended flexible approach to the identity test? Does the answer have to do with the content of the arguments supporting the flexible approach (e.g. that these arguments are not strong enough), or is it an external factor?

IV.146. The thesis argues that the answer is yes to both questions, in that: (i) there is much room to improve, develop, and build on the content of the arguments supporting a change in the identity test; and (ii) there is also an external factor: a psychological reason pertaining to how the arguments have been presented. The first factor requires a detailed discussion, which will be carried out in the next Section when outlining the possible scenarios. A discussion of the second factor is set out below.

IV.147. Those who have supported or discussed a change in the interpretation and application of the identity test, have used terms such as "relaxing" the test or adopting a "flexible" approach.[1684] Such terminology may give the impression that, in order for a problem to be solved, one has to lower her/his standards or make a compromise. Although the end (i.e. solving a problem) seems appealing, the means to achieve it (i.e. lowering one's standard and making a compromise) is less attractive. As such, psychologically, tribunals may not be comfortable with adopting an interpretation that would involve "relaxing" a test to make it more "flexible". This approach may even seem risky to a tribunal because when it applies *res judicata* or *lis pendens*, it affects the admissibility of the claim or the tribunal's jurisdiction over the claim, leaving the

[1683] See above, Part III, para III.430.
[1684] See e.g. ILA Committee on Law of Foreign Investment, *Final Report* (Rio de Janeiro Conference, 2008) at 21; IBA Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018) at 19; Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes", *supra* note 1190, at 8; *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at paras 136, 138–139 (setting out the arguments submitted by the respondent state).

tribunal's decision susceptible to future recourse by the parties (e.g. annulment proceedings for ICSID awards, and setting-aside proceedings for non-ICSID awards).

IV.148. Therefore, the "flexible" / "relaxed" approach has a branding problem. If supporters of a more liberal approach want their position to be widely supported, their arguments require a better presentation strategy: one that would leave a strong, positive impression on tribunals, making them more comfortable with adopting the offered interpretation. The question then is how should this more nuanced presentation be achieved?

IV.149. To answer the question, first we need to unpack an underlying assumption about *res judicata* and *lis pendens*. Their status as general principles of law[1685] means that they have been widely recognized in major jurisdictions and have been elevated from domestic law to the international law plane.[1686] However, it has also been pointed out that:

> Even when a general principle is deemed to be universally recognized, it is never transposed into international law "lock, stock and barrel." As Sir Gerald Fitzmaurice wrote, "conditions in the international field are sometimes very different from what they are in the domestic," such that domestic rules "may be less capable of vindication if strictly applied when transposed into the international level."[1687]

IV.150. When a legal principle is elevated to the international law plane, it must be adapted to the needs and realities of the international sphere.[1688] In fact, the argument that *res judicata* and

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[1685] Discussed above, in Part III, Chapter 6, Subsection "*Res Judicata* and *Lis Pendens*", para III.427.
[1686] See Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, *supra* note 1328, at 162, 170–171; Bin Cheng, *supra* note 1358, at 391 (explaining that in searching for the GPLs, "we should look to the municipal sphere"). For a survey on how the two principles have been applied in major civil law and common law jurisdictions, see ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) at 2–3; ILA Committee on International Commercial Arbitration, *ILA Final Report: Lis Pendens and Arbitration* (Toronto Conference, 2006).
[1687] Charles T Kotuby & Luke A Sobota, *supra* note 1, at 27 (for the first quotation, citing *Int'l Status of South-West Africa*, Advisory Opinion, 11 July 1950, 1950 ICJ 128 at 148, Separate Opinion of Lord McNair; for the second quotation, citing *Barcelona Traction, Light & Power Co, Ltd*, Second Phase, Judgment, 5 February 1970, 1970 ICJ 3 at 64, Separate Opinion of Judge Fitzmaurice).
[1688] See Bin Cheng, *supra* note 1358, at 392 (explaining that "[m]unicipal law thus provide evidence of the existence of a particular principle of law. But this is not equivalent to the application of municipal law in the international

lis pendens in international law should be "relaxed" and more "flexible"[1689] refers to that adaptation process. The author suggests that the term "adapting" the principles be used instead of the terms "relaxing" and "flexible". The term "adaptation" gives the correct impression that there is a legitimate need for the proposed change in the interpretation of the identity test, and hence this is a more palatable and positive description of this adaptation process. The subsequent question is how to adapt the test. This is addressed in the following Section.

B. Possible Scenarios

IV.151. This Section discusses all the possible scenarios in which the double compensation problem may manifest itself, and explains how the identity test should be adapted and applied in each scenario. As discussed in Chapter 3, for the risk of double compensation to arise, there is no need to have more than one proceeding, and even when there is more than one proceeding: they can be sequential or parallel in time, and they can also have different legal bases (treaty-based proceedings or contract-based proceedings).[1690] With so many factors at play in each scenario (based on the timing of the proceedings and their legal bases), the following categorization provides a clear picture of the possible scenarios:[1691]

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juridical order. The two are always distinct"); James Crawford, *supra* note 1266, at 32 ("[international tribunals] have not adopted a mechanical system of borrowing from domestic law. Rather, they have employed or adapted modes of general legal reasoning as well as comparative law analogies in order to make a coherent body of rules for application by international judicial process. It is difficult for state practice to generate the evolution of the rules of procedure and evidence as well as the substantive law that a court must employ. An international tribunal chooses, edits, and adapts elements from other developed systems. The result is a body of international law the content of which has been influenced by domestic law but which is still its own creation").

[1689] Discussed above, para IV.145.

[1690] For a discussion on the nature of each scenario, see above, Part II, Chapter 3, Section "Scenarios".

[1691] There are examples for all of the above scenarios in the 63 cases that thus far have involved the risk of double compensation. For a discussion on those cases, see Part III, Chapter 4; for detailed statistics on each scenario, see Part II, Chapter 3, Subsection "Scenarios".

- (1) When there is more than one proceeding:
    - (**Scenario A**) the proceedings are sequential, which could be:
        - (scenario A1) all treaty-based arbitrations; or
        - (scenario A2) at least one treaty-based arbitration and one contract-based proceeding (commercial arbitration or state court proceeding).
    - (**Scenario B**) the proceedings are parallel in time, which could be:
        - (scenario B1) all treaty-based arbitrations; or
        - (scenario B2) at least one treaty-based arbitration and one contract-based proceeding (commercial arbitration or state court proceeding).
    - (**Scenario C**) the "other" proceeding[1692] has not yet been initiated, but there are reasons to regard it as likely to be initiated.
- (2) When there is only one proceeding, i.e. the treaty-based arbitration:[1693]
    - (**Scenario D**) there is only that proceeding, but the investment vehicle is in the process of renegotiating a favorable contract with the state or has already done so.
    - (**Scenario E**) there is only that proceeding, and the risk of double compensation arises from that proceeding.

This first Subsection discusses Sequential Proceedings and Parallel Proceedings (i.e. Scenarios A and B), and the second Subsection covers the Other Scenarios (i.e. Scenarios C, D, and E).

i. Sequential Proceedings and Parallel Proceedings

IV.152. In the sequential proceedings scenario, one proceeding has already concluded and (assuming that the state has been found liable) the damages have been quantified. As such, the relevant question would be what legal mechanisms are available to the subsequent forum to avoid

[1692] The "other" proceeding refers to the proceeding other than the treaty-based arbitration at issue, whether lodged by the investment vehicle or another set of shareholders from the same corporate chain. See above, Part II, Chapter 3, para II.100.
[1693] As explained in Chapter 3, the multiplicity of claimants or the multiplicity of legal bases is sufficient for the risk of double compensation to arise, and it does not require the existence of multiple proceedings—although the majority of double compensation cases involve more than one proceeding. See above, Part II, Chapter 3, the Subsection discussing "The First Requirement" for the risk of double compensation.

awarding what has already been awarded. However, in the parallel proceedings scenario, two (or more) proceedings are running in parallel, and thus the question would be what legal mechanisms are available to those forums to avoid awarding the same compensation. *Res judicata* can cover the sequential proceedings, and *lis pendens* can cover the parallel proceedings. Both principles have the identity test in common.

IV.153. As explained previously, for the effective application of *res judicata* and *lis pendens*, the identity test requires some changes, which should take the form of "adapting" the test to the realities of the ISDS system and not "relaxing" it.[1694] Accordingly, Segment (a) discusses how the identity test should be adapted, and then Segment (b) sets out the outcome in each scenario once *res judicata* and *lis pendens* are applied. It is worth noting that sequential and parallel proceedings, together, have thus far constituted approximately 65% of the ISDS cases that involved the risk of double compensation.[1695]

a. Adapting and Applying the Identity Test

IV.154. As explained previously, different tribunals and commentators have set out a different number of requirements for the identity test in international law, but in total, those requirements are as follows:

- (1) Same parties
- (2) Same issues, which consists of:
    - (a) Same cause of action, which in turn consists of:
        - (i) Same facts

[1694] See above, in the current Chapter, Subsection "Adapting v. Relaxing" the test.
[1695] Of the total of 63 cases: 23 cases involved parallel proceedings, 12 cases involved sequential proceedings, and six cases involved both parallel and sequential proceedings (together, 41 cases – equal to 65%). The statistics are set out in detail in Part II, Chapter 3, para II.105.

        - (ii) Same legal basis
    - (b) Same relief
- (3) Same legal order.[1696]

In effect, they can be summarized in five requirements: same parties, same facts, same legal basis, same relief, and same legal order. Research on ISDS cases involving *res judicata, lis pendens*, and FITR clauses shows that, of those five requirements, the difficulty lies with three: same parties, same legal basis, and same legal order.[1697]

IV.155. It was mostly those three elements that the tribunals found not to be the same between the proceedings and hence ruled that *res judicata, lis pendens*, or the FITR clause was not applicable in the case before them. The other two requirements (i.e. same facts and same relief) have not presented major difficulties because the multiple proceedings that involve the risk of double compensation almost always arise from the same factual matrix and involve similar relief (which is why they could lead to double compensation in the first place).

IV.156. This Section focuses on how those three requirements (same parties, same legal basis, and same legal order) can be adapted for application in the ISDS system. To do so, let us take another look at the scenarios involving sequential proceedings and parallel proceedings:

- (**Scenario A**) the proceedings are sequential, which could be:
    - (scenario A1) all investment arbitrations; or
    - (scenario A2) at least one treaty-based arbitration and one contract-based proceeding (commercial arbitration or state court proceeding).
- (**Scenario B**) the proceedings are parallel, which could be:

[1696] See above, in the current Chapter, Subsection "Elements of the Identity Test".
[1697] See Appendix 3 (on *res judicata*), Appendix 4 (on *lis pendens*), and Appendix 2 (on FITR clauses).

- (scenario B1) all investment arbitrations; or
- (scenario B2) at least one treaty-based arbitration and one contract-based proceeding (commercial arbitration or state court proceeding).

It should be noted that two of the three requirements (i.e. same parties and same legal basis) are applied in all the above scenarios (A1, A2, B1, B2), whereas the third requirement (same legal order) is applied only in Scenarios A2 and B2.

(1) Same Parties

IV.157. The discussion here first identifies what in the same parties requirement needs to be adapted and then explains how to adapt it by applying the principle of estoppel. The discussion then proceeds to set out why other options such as the *alter ego* doctrine and the group-of-companies doctrine (also known as the single-economic-reality doctrine) are not suitable.

IV.158. Although the same parties requirement is not the most difficult of the three requirements to be adapted, it is, in practice, the most important. The reason is that it functions like a gatekeeper: in circumstances where the same parties requirement is clearly met, the risk of double compensation becomes so evident that the tribunals are more likely to disregard the other requirements of the identity test. For example, in *Bosca v Lithuania*, the investor (a natural person) had secured a favorable decision in local courts prior to initiating an investment arbitration proceeding.[1698] As such, the exact same person acted as claimant in both proceedings. While noting the difference between treaty claims and contract claims, the tribunal held that the claimant had already been indemnified through the local court proceedings and, therefore, was not entitled to further compensation through a treaty-based proceeding.[1699] Thus, the fact that the same person

[1698] *Bosca v Lithuania*, Award (13 May 2013) at paras 1, 91–93.
[1699] *Ibid* at paras 302–303.

was the claimant in the two proceedings prompted the tribunal to comfortably disregard the difference between the legal bases and the legal orders of the two proceedings. There are other examples.[1700]

IV.159. However, in all those examples, the claimants were literally the same person who had sought compensation based on different legal bases. But, in most cases involving the risk of double compensation, the claimants across the multiple proceedings are legally distinct, as they include the shareholders and the investment vehicle, or the shareholders at different levels of the same corporate chain. The question is whether it is possible to consider them to be the same person.

IV.160. The author's research shows that most ISDS tribunals that faced the same parties requirement of the identity test (whether in the context of *res judicata*, *lis pendens*, or FITR clauses) held that the requirement was not met because of the principle of corporate separateness. And, their ruling was regardless of the shareholding percentage, i.e. irrespective of whether it was between—

- the shareholders and their wholly-owned investment vehicle/subsidiary;[1701]
- the majority shareholder and the investment vehicle;[1702]

[1700] See *Goetz v Burundi (II)*, Award (21 June 2012) at para 211 (finding that the shareholders were entitled to compensation for the state's conduct, but that they could not receive the same compensation based on different legal bases, i.e. the BIT and the Special Agreement); *Kardassopoulos and Fuchs v Georgia*, Award (3 March 2010) at paras 241–242, 452 (finding for Mr. Kardassopoulos in relation to his expropriation claim under the ECT and, accordingly, dismissing his FET claim under the Greece-Georgia BIT, as this would amount to double compensation).

[1701] In the context of *lis pendens*, see e.g. *Busta v Czech Republic*, Final Award (10 March 2017) at paras 213, 183. In the context of FITR clauses, see e.g. *Greentech v Italy*, Final Award (23 December 2018) at paras 197, 204; *Bogdanov v Moldova (IV)*, Final Award (16 April 2013) at paras 1, 45, 77, 175; *Khan Resources v Mongolia*, Decision on Jurisdiction (25 July 2012) at paras 1, 25, 28, 393; *Total v Argentina*, Decision on Liability (27 December 2010) at para 443; *Azurix v Argentina*, Decision on Jurisdiction (8 December 2003) at paras 21–22, 90.

[1702] In the context of *lis pendens*, see e.g., *Gosling v Mauritius*, Award (18 February 2020) at paras 164, 2, 68. In the context of FITR clauses, see e.g. *Eskosol v Italy*, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) at para 168.

- the minority shareholders and the investment vehicle;[1703]
- the ultimate shareholder and the interposed company;[1704] or even
- the state and the state-owned entity.[1705]

So, how do we adapt the same parties requirement?

Principle of Estoppel? Yes

IV.161. Chapter 2 of the thesis examined the relationship between the principle of corporate separateness and shareholders' recovery for reflective loss and injury to the investment vehicle's assets.[1706] It was explained that shareholders' recovery for reflective loss bends the principle of corporate separateness, and their recovery for injury to the investment vehicle's assets breaks the principle.[1707] It was also explained that a compromised principle of corporate separateness seems to be a new reality in international investment law, which then begs the question: if the compromised principle is part of the problem, could it also be part of the solution?[1708] An affirmative answer was given, in that once the principle of corporate separateness is compromised, it creates a two-way street where, just as shareholders could benefit from the compromised principle, others could also use it as a defense against shareholders.[1709] In fact, the logic of the

[1703] In the context of *res judicata*, see e.g., *TECO v Guatemala*, Award (19 December 2013) at paras 6, 7, 517. In the context of *lis pendens*, see e.g., *Benvenuti v Congo*, Award (8 August 1980), (1993) 1 ICSID Report 330 at 330–340. In the context of FITR clauses, see e.g., *Enron v Argentina*, Decision on Jurisdiction (14 June 2004) at paras 98, 21; *CMS v Argentina*, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) at paras 19, 80.
[1704] In the context of *res judicata*, see e.g., *CME v Czech Republic*, Final Award (14 March 2003) at paras 432, 4. In the context of *lis pendens*, see e.g., *Sanum Investments v Laos*, Award on Jurisdiction (13 December 2013) at paras 1, 24, 41, 366.
[1705] In the context of *res judicata*, see e.g., *Gavazzi v Romania*, Decision on Jurisdiction, Admissibility and Liability (21 April 2015) at 60, fn 188 and para 39; *TECO v Guatemala*, Award (19 December 2013) at paras 517, 79; *Helnan v Egypt*, Award (3 July 2008) at paras 127–128. In the context of *lis pendens*, see e.g., *Unión Fenosa v Egypt*, Award (31 August 2018) at paras 11.30, 2.2.
[1706] See above, Part II, Chapter 2, Subsection, "Principle of Caproate Separateness".
[1707] *Ibid*.
[1708] *Ibid*.
[1709] *Ibid*.

two-way street paves the way for the adaptation of the same parties requirement: it allows us to use the principle of estoppel to argue that shareholders and their investment vehicle can be regarded as one.

IV.162. Estoppel is a general principle of law and is often considered to be based on the principle of good faith.[1710] It has two versions: broad and narrow. The broad version of estoppel reflects the maxim *allegans contraria non est audiendus* (a person adducing to the contrary is not to be heard),[1711] in the sense that a party may not benefit from its contradictory measures/statements to the detriment of others.[1712] The narrow version of estoppel (which has flourished in common law jurisdictions)[1713] requires an additional factor: the reliance of one party on the representation made by the other party.[1714] A quantitative and qualitative study of how ISDS tribunals have applied the two versions of the principle demonstrates that the broader version of estoppel has had a higher success rate in application.[1715]

IV.163. It is the broad version of estoppel in international law on which this thesis relies to adapt the same parties requirement of the identity test. The essence of the broad version is that the

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[1710] Patrick Dumberry, *supra* note 1440, at para 4.60; Charles T Kotuby & Luke A Sobota, *supra* note 1, at 119–120; Bin Cheng, *supra* note 1358, at 141–143; Derek Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence" (1957) 33 BYIL 176 at 176; James Crawford, *supra* note 1266, at 406–407.
[1711] Patrick Dumberry, *supra* note 1440, at paras 4.36, 4.37; Thomas Cottier & Jörg Paul Müller, "Estoppel" in *Max Planck Encyclopedias of International Law* (Oxford University Press, 2007) at paras 1–2.
[1712] Emmanuel Gaillard, "L'Interdiction de se Contredire au Détriment d'Autrui Comme Principe Général du Droit du Commerce International", (1985) Rev Arb 241 at 250; Charles T Kotuby & Luke A Sobota, *supra* note 1, at 119.
[1713] Patrick Dumberry, *supra* note 1440, at paras 4.36–4.38; Thomas Cottier & Jörg Paul Müller, *supra* note 1711, at paras 1–2.
[1714] Derek Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence", *supra* note 1710, at 180, 201–202; *North Sea Continental Shelf Cases (Germany v Denmark and Netherlands)*, ICJ, Judgment (20 February 1969), (1969) ICJ Reports 3 at para 30.
[1715] Andreas Kulick, "About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals" (2016) 27:1 Eur J Int'l L 107 at 114 ("Taking a closer look at those 28 decisions that could be categorized following either the broad (13) or the strict view (15), an interesting pattern emerges. … [W]henever tribunals/arbitrators chose the strict view, they always rejected the estoppel claim – there was no other outcome. Second, when the broad view was chosen, the chances of success were much better: a little more than half of the decisions (7 out of 13) endorsing the broad view came out in favour of the estoppel claim").

parties should be consistent in their positions. In the words of the tribunal in *Chevron and Texaco v Ecuador*: "no party to [the] arbitration can 'have it both ways' or 'blow hot and cold', to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment."[1716] Accordingly, shareholders cannot on the one hand compromise the principle of corporate separateness (by claiming for reflective loss and injury to the investment vehicle's assets),[1717] and then on the other hand rely on the same principle of corporate separateness for the position that: they are separate from the investment vehicle and hence the same parties requirement of the identity test is not met.

IV.164. McLachlan, Shore, and Weiniger have employed a similar logic, without expressly relying on the principle of estoppel:

> [T]he strict separation between a company and its shareholders, which is integral to a claim to diplomatic protection in customary international law, is not applicable in investment arbitration, where the definition of investment adopted in investment treaties permits a minority shareholder with different nationality from that of the investment company to pursue his own direct claim against the host State for loss to his investment, even though such investment is held indirectly through the investment company … Otherwise the investor would be able to approbate and reprobate from the same investment treaty. He would take the benefit of an extended right of direct action—looking through the investment company at the economic effect of the host State's actions directly upon his shareholding—which would not found the basis of a claim under customary international law. But he would not bear the burden of being bound by any finding arising out of a claim by the investment company itself on the same facts.[1718]

They also argued that this approach was already adopted in two ISDS cases (namely *RSM v Grenada (II)*[1719] and *Apotex v US (III)*[1720]) in relation to the same parties requirement of *res*

[1716] *Chevron and Texaco v Ecuador (II)*, Second Partial Award on Track II (30 August 2018) at paras 7.89, 7.106.
[1717] See above, Part II, Chapter 2, Subsection, "Principle of Caproate Separateness".
[1718] Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at paras 4.187–4.188.
[1719] *RSM v Grenada (II)*, Award (10 December 2010) at paras 7.1.4–7.1.7.
[1720] *Apotex v United States (III)*, Award (25 August 2014) at paras 7.38–7.40.

judicata.[1721] Based on their reasoning, *Ampal v Egypt*[1722] can now be added to that list as well.

IV.165. However, that is not a precise evaluation of the approach adopted in those three cases, as they did not concern *res judicata* in the sense of claim preclusion, but rather issue preclusion (*RSM* and *Apotex* explicitly,[1723] and *Ampal* impliedly[1724]). Given the differences between issue preclusion and claim preclusion,[1725] the same parties requirement in issue preclusion is more liberal than in claim preclusion. In fact, the approach in those three cases is similar to (and perhaps inspired by) the US law rule. That rule allows the application of privity between a company and its shareholders (who own the company entirely or exercise control in representing it) but only for issue preclusion, and not for claim preclusion.[1726]

IV.166. As such, those three ISDS cases did not apply the adapted version of the same parties requirement (based on the principle of estoppel), but rather they employed the US law rule of issue preclusion. The US law rule and (hence the approach taken in those three ISDS cases) has two limitations: (i) it is limited to issue preclusion, leaving out claim preclusion (and it was explained previously why issue preclusion does not help with the double compensation problem and why we need claim preclusion);[1727] and (ii) for that approach to be applicable, the shareholders

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[1721] Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at paras 4.189–4.193.
[1722] *Ampal v Egypt*, Decision on Liability and Heads of Loss (21 February 2017) at paras 260, 266.
[1723] *RSM v Grenada (II)*, Award (10 December 2010) at paras 7.1.1–7.1.5; *Apotex v United States (III)*, Award (25 August 2014) at paras 7.17–7.18.
[1724] For a discussion on why *Ampal* concerned issue preclusion and not claim preclusion, see above, Part III, Chapter 4, paras III.292 – III.293.
[1725] Discussed above Part III, Chapter 6, Subsection "Issue Preclusion".
[1726] *Restatement (Second) of Judgments* (1982) § 59(3) ("If the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by or against the corporation or the holder of ownership in it is conclusive upon the other of them as to issues determined therein as follows: …); § 39 ("A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party"); comment (b) to § 39 ("The rule stated in the Section applies to issue preclusion, and not to claim preclusion").
[1727] See above, Part III, Chapter 6, paras III.440 – III.445.

must own the company entirely or exercise control in representing it in the proceeding.

IV.167. The reason for such limitations in the US law rule is that it is, in essence, based on respecting and protecting the principle of corporate separateness to the extent possible.[1728] By contrast, the argument proposed in this thesis (for adapting the same parties requirement of the identity test) is based on disregarding the principle of corporate separateness in response to the fact that shareholders have already done so in the ISDS system. As such, the argument proposed here (based on the principle of estoppel) has neither of those limitations: it goes beyond issue preclusion and covers claim preclusion, and it does not need for shareholders to own the company entirely or exercise control in representing it.

Doctrines of *Alter Ego* and Group-of-Companies? No

IV.168. If we disregard the principle of corporate separateness to adapt the same parties requirement, one could ask: why not pierce the corporate veil based on the doctrine of *alter ego*? Different jurisdictions may provide different definitions and requirements for *alter ego*, but the essence of the doctrine is that a person "so strongly dominates the affairs of [a company], and has sufficiently misused such control, that it is appropriate to disregard the companies' separate legal

[1728] According to *Restatement (Second) of Judgments* (1982), comment (e) to § 59:

> The concept that a corporation is a legal entity distinct from its management and stockholders implies that issues determined against a corporation are not conclusive against its directors, officers, and stockholders, and vice versa. … When the [corporate] form is adequately adhered to, the fact that interests of a closely held corporation and its proprietors are usually identical does not efface the separate legal identity of the corporation for such purposes as taxation, regulation, and the limitation of stockholders' liability to their investment in the corporation. For the purpose of affording opportunity for a day in court on issues contested in litigation, however, there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct. On the contrary, it may be presumed that their interests coincide and that one opportunity to litigate issues that concern them in common should sufficiently protect both. [Emphasis added].

forms, and to treat them as a single entity."[1729] As such, a key requirement in *alter ego* is the presence of fraud, i.e. a "fraudulent use of the corporate structure to transfer and allocate resources between companies with the purpose of avoiding liability and defeating the interests of their contractual counterparties". [1730]

IV.169. However, that is not applicable when shareholders claim for reflective loss or injury to the investment vehicle's assets in the ISDS system, as they exercise their treaty rights when filing such claims. Of course, there could be exceptional cases where some shareholders misuse the corporate structure, but that is not generally the case in shareholders' claims within the ISDS system. As such, *alter ego*, being exceptionally applied, cannot offer a general solution for the adaptation of the same parties requirement of the identity test.

IV.170. Another doctrine that one might consider for adapting the same parties requirement is the group-of-companies doctrine (also known as the single-economic-reality doctrine). Some commentators and international reports have suggested adopting the doctrine, without explicitly naming it.[1731] According to August Reinisch:

> The only possibility to avoid this outcome – within the parameters of the *res judicata* and *lis pendens* principles – is to reassess the identity requirement and to examine whether it necessarily demands formal identity or whether a more substantive test looking at the underlying economic realities of modern foreign investment would not offer more satisfactory solutions. … Arbitral tribunals operating under the auspices of the ICSID have also followed an "economic approach" with regard to separate legal personality vs. economic unity. They generally take a "realistic attitude" when identifying the party on the investor's side. They look for the actual foreign investor and are unimpressed by the fact that the consent agreement only names a subsidiary. … If such an "economic approach" is accepted for jurisdictional purposes it would appear that the same standard should also

[1729] Gary B Born, *International Commercial Arbitration*, 2nd ed (Kluwer Law International, 2014) at 1433–1434.
[1730] Stavros L Brekoulakis, "Parties in International Arbitration: Consent v. Commercial Reality", in Stavros Brekoulakis, Julian D M Lew & Loukas Mistelis, eds, *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) 119 at para 8.98.
[1731] See e.g., August Reinisch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes", *supra* note 148, at 56–59; ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) at 21.

> apply for purposes of *lis pendens* and *res judicata*. Otherwise individual companies of a corporate group (constituting a single economic entity) might avail themselves of the possibility to endlessly re-litigate the same dispute under the disguise of separate legal identities.[1732]

As attractive as the group-of-companies doctrine may sound, it is not a viable option for adapting the same parties requirement. To explain why, first the doctrine (and its requirements) should be explained.

IV.171. The idea of considering a group of companies as one unit was initially used for tax and accounting purposes.[1733] However, the doctrine was developed in international commercial arbitration law to extend an arbitration agreement signed by one company in a group to other members of the group.[1734] It was first relied on by the ICC tribunal in the famous *Dow Chemical* case in the 80s.[1735] Since then, the doctrine has been well received in French civil law, but not in English common law.[1736]

IV.172. The group-of-companies doctrine affects only the arbitration agreement to establish jurisdiction over non-signatories and, thus, has no effect on the underlying contract.[1737] For the doctrine to apply, at least three requirements need to be met: (i) the relevant companies must belong to the same group; (ii) the non-signatory companies must have control over the company that has signed the arbitration agreement; and (iii) the non-signatory companies must have

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[1732] August Reinisch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes", *supra* note 148, at 56–59.
[1733] Stavros L Brekoulakis, *supra* note 1730, at paras 8.67–8.68.
[1734] *Ibid* at paras 8.67–8.68.
[1735] *Dow Chemical Company and others v Isover Saint Gobain*, ICC Case No 4131, Interim Award (23 September 1982) reported in Pieter Sanders, ed, *Yearbook Commercial Arbitration*, vol IX (Kluwer Law International, 1984) 131.
[1736] Emmanuel Gaillard & John Savage, eds, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at para 502; Gary B Born, *supra* note 1729, at 1445, 1452.
[1737] Gary B Born, *supra* note 1729, at 1453.

impliedly consented to be bound by the arbitration agreement, and such consent is derived from their involvement in the agreement (either in the negotiations part or the performance part).[1738]

IV.173. It is those requirements that render the doctrine unsuitable for adapting the same parties requirement of the identity test. The first reason is that those requirements limit the scope of application of the doctrine. Shareholders in ISDS cases that involve the risk of double compensation are not necessarily in a controlling position, nor have they necessarily been involved in the negotiations or performance of the contract. In fact, those requirements (control and involvement in the contract) are acceptable when the doctrine is used for the purpose for which it was developed in commercial arbitration; they only become problematic when the doctrine is transplanted to the ISDS system for adapting the same parties requirement.

IV.174. Consider the example of *Charanne v Spain*.[1739] In that case, the claimants (a Dutch company and a Luxembourg company) were indirect minority shareholders in T-Solar (a Spanish solar power plant) through another company (Isolux Corsán SA) and its subsidiary.[1740] T-Solar and Isolux Corsán unsuccessfully pursued administrative claims before the Spanish Supreme Court, where they challenged a royal decree and sought damages.[1741] Further, several subsidiaries of T-Solar filed a case before the ECtHR where they sought damages, which the ECtHR dismissed as being inadmissible.[1742] When the investment arbitration was launched, Spain objected to the

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[1738] Stavros L Brekoulakis, *supra* note 1730, at paras 8.76–8.81, 8.84, 8.89; Gary B Born, *supra* note 1729, at 1448–1450; *Dow Chemical Company and others v Isover Saint Gobain*, ICC Case No 4131, Interim Award (23 September 1982) reported in Pieter Sanders, ed, *Yearbook Commercial Arbitration*, vol IX (Kluwer Law International, 1984) 131 at 136; *Imperial Chemical Industries Ltd v Commission of the European*, ECJ, Case 48/69, Judgment of the Court (14 July 1972) at 132–135, 140; *Akzo Nobel NV and Others v European Commission*, ECJ, Case C-516/15 P, Judgment of the Court (Fifth Chamber) (27 April 2017) at paras 52–54.
[1739] *Charanne v Spain*, Award (21 January 2016).
[1740] *Ibid* at paras 1–2, 4, 6, 8–9.
[1741] *Ibid* at paras 172–173, 203.
[1742] *Ibid* at paras 174–175, 196.

investment tribunal's jurisdiction on the ground that the FITR clause of the ECT—article 26(3)(b)(i)—was triggered because of the local court and the ECtHR proceedings.[1743]

IV.175. With respect to the identity test of the FITR clause, Spain relied on the group-of-companies doctrine and argued that the same parties requirement should be considered met, given that the claimants here and those in the local and ECtHR proceedings constituted a single economic unit.[1744] The tribunal rejected that argument because, for the doctrine to apply, the claimants must control the companies in the other proceedings, which was not the case here, as the claimants were minority shareholders.[1745] The tribunal's rejection of the FITR objection might be unfair, but the tribunal was correct in ruling that the element of control (from the doctrine) was not present. In fact, Spain incorrectly chose the group-of-companies doctrine to frame its argument. The *Charanne* case shows that the group-of-companies doctrine, with its limited scope, cannot cover all shareholders (majority/minority and controlling/non-controlling).

IV.176. The second and more important reason why the group-of-companies doctrine is not suitable for adapting the same parties requirement is that the doctrine seeks to answer a different question from the one we seek to answer in the same parties requirement in the context of double compensation. The group-of-companies doctrine is based on respecting the principle of corporate separateness, and that is why it requires implied consent by non-signatory companies to extend the scope of the arbitration agreement to the non-signatories.[1746] In fact, the question at the center of the group-of-companies doctrine is whether the parent company, by exercising control and being involved in the negotiations/performance of a contract, has impliedly consented to be

[1743] *Ibid* at paras 187, 194–195.
[1744] *Ibid* at paras 198–199, 201.
[1745] *Ibid* at paras 406–408.
[1746] Stavros L Brekoulakis, *supra* note 1730, at paras 8.70–8.73; Gary B Born, *supra* note 1729, at 1450.

bound by the arbitration agreement in that contract. The situation is different in the context of double compensation in the ISDS system. The relevant question in this context is whether shareholders, by claiming damages for reflective loss or injury to the investment vehicle's assets, have disregarded corporate separateness and hence should be considered the same. These are two distinct questions. We cannot simply apply the group-of-companies doctrine in this context when it seeks to answer a different question.

IV.177. In summary, the above discussion has explained that when shareholders claim for reflective loss and/or injury to the investment vehicle's assets, they compromise the principle of corporate separateness. This creates a two-way street: just as shareholders could benefit from the compromised principle, others could also use it as a defense against shareholders. This logic allowed us to apply the principle of estoppel to adapt the same parties requirement of the identity test: by demonstrating that shareholders cannot on the one hand compromise the principle of corporate separateness, while on the other rely on the same principle of corporate separateness to support the position that they are separate from the investment vehicle. The discussion then explained that the three doctrines of issue preclusion, *alter ego*, and group-of-companies are not suitable options for adapting the same parties requirement.

IV.178. The next Subsegment discusses how to adapt the same legal basis requirement of the identity test. If the same parties requirement was the most important requirement (due to its gatekeeping role),[1747] the same legal basis requirement wins the title of being the most difficult to adapt.

[1747] See above, para IV.158.

(2) Same Legal Basis

IV.179. It was explained earlier in this Chapter that "cause of action" consists of two elements (facts and legal basis) and that the focus of most ISDS tribunals has been on the latter element because multiple proceedings often arise from the same factual matrix (meaning that the first element is already met).[1748] That is why the discussion in this thesis focuses on the same legal basis and how to adapt it.

IV.180. Let us first take another look at the possible scenarios when there is more than one proceeding involved:[1749]

- (**Scenario A**) the proceedings are sequential, which could be:
  - (scenario A1) all treaty-based arbitrations; or
  - (scenario A2) at least one investment arbitration and one contract-based proceeding (commercial arbitration or state court proceeding).
- (**Scenario B**) the proceedings are parallel, which could be:
  - (scenario B1) all treaty-based arbitrations; or
  - (scenario B2) at least one treaty-based arbitration and one contract-based proceeding (commercial arbitration or state court proceeding).

The division of Scenarios A and B to A1/A2 and B1/B2 is based on the legal bases of the claims. The statistics set out earlier in the thesis show that Scenarios A2 and B2 (i.e. where there is the combination of treaty-based and contract-based proceedings) are more common than Scenarios A1 and B1 (where the proceedings are all treaty-based).[1750]

[1748] See above, paras IV.140 – IV.142.
[1749] As explained in Chapter 3, the multiplicity of claimants or the multiplicity of legal bases is sufficient for the risk of double compensation to arise, and it does not require the existence of multiple proceedings—although the majority of double compensation cases involve more than one proceeding. See above, Part II, Chapter 3, the Subsection discussing "The First Requirement" for the risk of double compensation.
[1750] See above, Part II, Chapter 3, Subsection "Based on Legal Basis".

IV.181. The question is, how have ISDS tribunals ruled when they were asked to decide whether a treaty and a contract or two treaties can be considered the same for the application of the identity test? The author's research shows that, of the total of 64 ISDS cases involving *res judicata*, *lis pendens*, or the FITR clause, in the majority (i.e. 37 cases), the tribunals held that the same legal basis requirement was not met.[1751] These findings are demonstrated in the following table.

	Number of Cases	Tribunal's holding as to the same legal basis requirement:		
		It was met.	It was not met.	Did not discuss.
Res Judicata	22	2	9	11
Lis Pendens	9	0	7	2
FITR Clauses	33	2	21	10
Total	64	4	37	23

IV.182. However, even if the legal bases of two claims are different, that does not justify the claimants receiving double compensation for the same harm. This was confirmed by the ICJ in its 1949 advisory opinion in *Reparation for Injuries Suffered in the Service of the United*

[1751] The total number of ISDS cases discussing *res judicata*, *lis pendens*, and the FITR clauses is in fact 93 cases. However, two factors cause the number to decrease to 64. First, not all the *res judicata* cases (44 in total) concern *res judicata* as between different proceedings: 22 of those cases discuss the *res judicata* effect of a prior decision that the tribunal made in the same case. This limits the total number to 71 cases. Also, of the 40 cases discussing the FITR clause, 7 cases did not involve any objection related to the FITR clause, but rather the tribunals mentioned the clause while discussing other matters. This then brings the total number down to 64. For the details of these cases, see Appendix 3 (listing cases on *res judicata*), Appendix 4 (listing cases on *lis pendens*), and Appendix 2 (listing cases on FITR clauses).

Nations.[1752] In that matter, the ICJ received the following two questions from the UN General Assembly:

> I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?
>
> II. In the event of an affirmative reply on point 1(b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?[1753]

Responding to the first question in the affirmative,[1754] the ICJ proceeded to the second question and opined that "competition between the State's right of diplomatic protection and the Organization's right of functional protection might arise … Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over."[1755]

IV.183. Thus, the question becomes: how should we adapt the same legal basis requirement of the identity test to reflect the above position? The following discussion: (i) shows that the flexible legal basis requirement in issue preclusion is not a suitable substitution for the legal basis requirement in *res judicata*; and (ii) proposes that, to reflect the realities of the ISDS system, the legal basis requirement should be applied in light of whether the harm that the two proceedings/claims seek to compensate is the same. Once the discussion establishes how the same legal basis requirement should be adapted, it will explain why two other suggested mechanisms are not effective, namely: (iii) the same facts requirement and (iv) the "Fundamental Basis" test.

[1752] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, Advisory Opinion (11 April 1949), (1949) ICJ Reports 174.
[1753] *Ibid* at 175 [emphasis added].
[1754] *Ibid* at 187.
[1755] *Ibid* at 185–186 [emphasis added].

(i) Issue Preclusion Rule? No

IV.184. Given the flexibility of the issue preclusion rule (e.g. that it does not require the identity of claims), there have been suggestions to elevate the rule from US law into the ISDS system, so that it may be used as a "flexible" version of *res judicata*, to overcome the distinction between treaty claims and contract claims.[1756] Chapter 6 explained that such a proposal is not satisfactory, in short because the proposal does not take into account the difference between the meaning that US law attributes to the term "claim" and the meaning of that term in ISDS case law.[1757] There is also a precondition in US law for applying the rule of issue preclusion (that the parties should be allowed to fully develop all possible claims that spring from one transaction in one proceeding), which does not exist in the current decentralized ISDS system.[1758]

IV.185. And most importantly, even if there were no such impediments to the elevation of issue preclusion to the ISDS system, the rule cannot address the double compensation problem. It was explained that issue preclusion offers a mechanism to prevent the parties, in the second proceeding, from re-litigating an issue (fact or law or a combination thereof) that has already been decided in the first proceeding.[1759] However, issue preclusion will not prevent the second forum from re-awarding what has already been awarded by the first forum.[1760] The risk of double compensation arises from the overlapping portion of claims in multiple proceedings/claims. The overlapping portion of claims—albeit a portion—is still a "claim", not an "issue" and thus to address the risk, we need to apply claim preclusion and not issue preclusion. It was concluded that

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[1756] See e.g. Jose Magnaye & August Reinisch, *supra* note 1389, at 275–280, 286; Pedro Martinez-Fraga & Harout Jack Samra, *supra* note 1389, at 431–433.
[1757] See above, Part III, Chapter 6, Subsection "Issue Preclusion".
[1758] *Ibid*.
[1759] *Ibid*.
[1760] *Ibid*.

res judicata (in the sense of claim preclusion) and its sister principle (*lis pendens*) remain our best options for tackling the double compensation problem.[1761] Thus, the adaptation of the same legal basis requirement in *res judicata* and *lis pendens* remains to be dealt with.

(ii) Same Harm Factor? Yes

IV.186. Having established that issue preclusion does not offer a solution, we return to the question of what should change in the same legal basis requirement for it to be properly adapted? The discussion that follows shows that, for the legal basis requirement to be adapted to the realities of the ISDS system, the difference in the legal bases should only be factored in if those legal bases target different harms.

IV.187. In Scenarios A1 and B1 (i.e. when all the proceedings are treaty-based),[1762] each tribunal applies the treaty on the basis of which it is constituted. As such, if we compare the legal bases (the treaties), the result will inevitably be that the two instruments are not the same. This shows that when the same legal basis requirement is applied in its current form, the principles of *res judicata* and *lis pendens* can barely apply between different investment arbitrations. ISDS tribunals are indeed separately-constituted forums, but they all belong to the same legal order (international law). How is it that in domestic law, *res judicata* and *lis pendens* can apply amongst separately-constituted courts of different jurisdictions, whereas in international law, *res judicata* and *lis pendens* cannot apply even amongst tribunals of the same ISDS system?[1763] The answer is not because *res judicata* and *lis pendens* cannot operate in the ISDS system, but rather because the

[1761] *Ibid*.
[1762] For the list of possible scenarios in parallel proceedings and sequential proceedings, see above, in the current Chapter, para IV.179.
[1763] Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at para 4.21.

same legal basis requirement, in its current form, does not correspond to the realities of the ISDS system.

IV.188. The situation is even worse for Scenarios A2 and B2 (i.e. where we have a combination of treaty-based and contract-based proceedings). When we deal with two proceedings that originate from one legal order (whether both are domestic or both are international), we compare apples with apples, and thus it is possible (at least hypothetically) to have two proceedings that share the same legal bases. However, when one proceeding is international and the other is domestic, it is not possible at all for the legal bases to be the same: we are then comparing apples with oranges. This is because treaties are not used in domestic law as agreement-making instruments and, similarly, private contracts are not used among states at the international law level. Thus, we can never have similar legal bases when one proceeding originates from domestic law and the other from international law.[1764] Therefore, applying the same legal basis requirement, in its current form, makes little sense in the ISDS system when there is no likelihood that this requirement will ever be met.

IV.189. In order to account for the realities of the ISDS system, the thesis proposes that the difference between the legal bases of claims/proceedings should only be factored in if those legal bases seek to compensate for different harms. When two legal bases do not target two different harms, the difference between those legal bases should be disregarded. The ensuing paragraphs examine how this proposal plays out in each scenario.

[1764] See *Chevron and Texaco v Ecuador (II)*, Third Interim Award on Admissibility and Jurisdiction (27 February 2012) at para 4.76.

Scenarios A2 and B2

IV.190. We start with the more challenging scenarios of A2 and B2 (i.e. where we have a combination of treaty-based and contract-based proceedings). The idea that the difference between two completely distinct legal bases should be disregarded when the harm at issue is the same is not a revolutionary idea without precedent. There are domestic law decisions to that effect. In *Southern California Federal Savings & Loan Associations v United States*, the US Court of Appeals for the Federal Circuit held, in the context of shareholders' claims, that as long as the harm at issue is the same, it does not really matter that one claim is based on tort and the other based on contract, or one is based on common law and the other based on statutory provisions.[1765] According to the court:

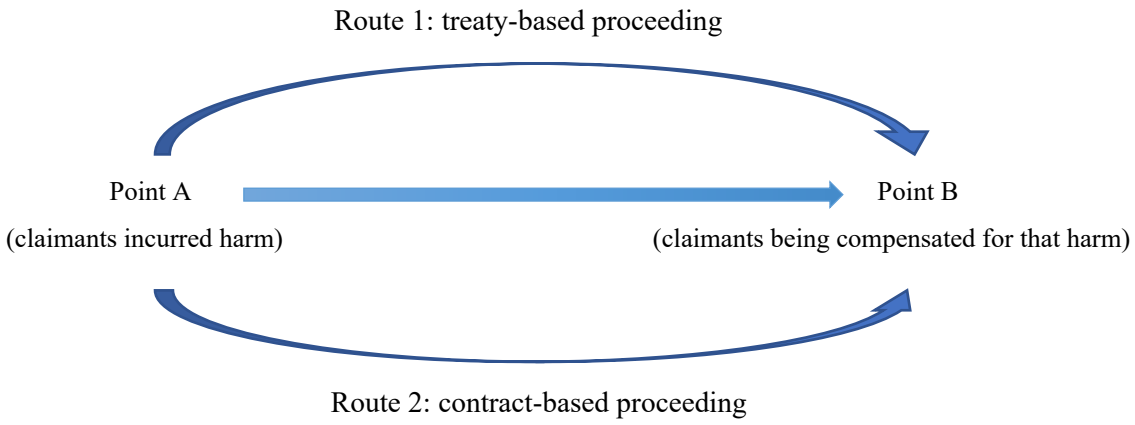
> The purpose of damages for breach of contract is generally to put the wronged party in as good a position as he would have been had the contract been fully performed. In light of this general purpose, a wronged party is typically not allowed to recover twice for the same harm, here a breach of contract. "[I]t goes without saying that the courts can and should preclude double recovery by an individual." This limitation applies even where claims exist under both contract and tort, or where a claim exists under a statutory provision and under common law.[1766]

IV.191. To simplify the matter, imagine two proceedings that share the same starting point (Point A) and the same destination (Point B).

As the next illustration demonstrates:

[1765] *Southern California Federal Savings & Loan Associations v United States*, 422 F3d 1319 (Fed Cir 2005) at 1332–1333, *certiorari denied*, 548 US 904 (2006) [emphasis added and internal citations omitted].
[1766] *Ibid.*

It does not matter whether we take Route 1 (receiving compensation through treaty-based proceedings at the international law level) or Route 2 (receiving compensation through contract-based proceedings at the domestic law level). In both cases, we are still going from point A to point B.



IV.192. The difference between the legal bases should only be factored in if they target different harms. To best understand this, consider the difference that exists in domestic law between a criminal case (e.g. manslaughter) and a relevant civil suit (e.g. wrongful death claim).[1767] The facts of both cases are essentially the same, but the two proceedings are destined to arrive at two different destinations: the civil suit is intended to compensate the victim's surviving family members for the financial damage inflicted on them because of the crime, whereas in the criminal case the prosecutor seeks punishment for the offense against the society as a whole. In this example, the difference between the legal bases matters because they represent two different harms. At the international law level, an equivalent example that illustrates two different harms emanating from the same measure would be material damage (such as "damage to property,

[1767] See e.g. *NY Penal Law* §§ 125.15, 125.20 (on manslaughter in the first degree and second degree); *NY Est, Powers & Trusts Law* § 5-4.1 (on civil action by personal representative for wrongful death).

contracts, or other business interests") and moral damage (such as "personal affront associated with an intrusion on one's home or private life" or damage to a company's reputation).[1768]

IV.193. The question then becomes: is the harm at issue in treaty-based proceedings the same as the harm at issue in contract-based proceedings? As discussed in Chapter 2, shareholders can claim compensation for two types of harms in treaty-based proceedings: reflective loss and injury to the investment vehicle's assets.[1769]

IV.194. When shareholders claim for injury to the investment vehicle's assets, the harm at issue is precisely the same as the harm at issue in the contract-based proceeding.[1770] This is so because the shareholders are claiming (in proportion to their shareholding) directly for what the investment vehicle has suffered.[1771] As such, by bypassing the investment vehicle's separate legal personality, shareholders receive (in proportion to their shareholding) all of the compensation that could have been paid to the investment vehicle itself.[1772] In fact, given the compromised principle of corporate separateness in international investment law,[1773] shareholders and their investment vehicle can have concurrent ownership over the assets of the investment vehicle.[1774] Once harm

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[1768] Under international law, states are responsible to compensate for moral damage that they cause just as they are responsible to compensate for material damage. ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 1130, art 31 and para 5 of the commentary to art 31. For a commentary discussing moral damages in international investment law, see Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration*, *supra* note 1, at paras 6.2.1–6.2.3; Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, 2nd ed (Oxford University Press, 2017) at 5.342–5.345. However, there are not many ISDS cases in which moral damages have been awarded—in fact, only in two cases to date: *Desert Line v Yemen*, Award (6 February 2008) at paras 289–291 and *Benvenuti v Congo*, Award (8 August 1980), (1993) 1 ICSID Report 330 at paras 4.95–4.96.
[1769] See above, Part II, Chapter 2, Subsections "Reflective Loss" and "Injury to the Investment Vehicle's Assets".
[1770] Discussed above, Part II, Chapter 2, Subsection "Amount of Double Compensation".
[1771] *Ibid*.
[1772] *Ibid*.
[1773] Discussed above, Part II, Chapter 2, Subsection "Principle of Corporate Separateness".
[1774] Gabriel Bottini, *supra* note 789, at 7.

is inflicted on those assets, both shareholders and the investment vehicle are entitled to launch proceedings, but the assets and the harm at issue in those proceedings are the same.[1775]

IV.195. Regarding shareholders' claim for reflective loss (often for the diminution in the value of their shares), the harm at issue in the treaty-based proceeding may seem, on the face of it, to be different from the harm at issue in the contract-based proceeding launched by the investment vehicle, as the former is reflective of the latter. However, a closer look at the valuation methods adopted by ISDS tribunals to calculate the loss in the share value reveals that this is not the case. As explained by the International Valuation Standards Council (IVSC),[1776] there are generally three valuation approaches:

- the income-based approach, which determines the investment vehicle's value by examining its anticipated economic benefits, using methods such as discounted cash flow, income capitalization, and option pricing models;
- the market-based approach, which determines the investment vehicle's value by comparing it with similar companies by gathering data from public stock markets, acquisition markets, or prior transactions in the ownership of the company; and
- the asset-based approach (or cost approach), which determines the investment vehicle's value by calculating its assets minus its liabilities to establish how much it would cost to replace or reconstruct the investment vehicle with an equivalent company, using methods

[1775] See *ibid* at 181.
[1776] The IVSC is an organization that acts globally to set the standards for the valuation of assets worldwide. See IVSC's website at <https://www.ivsc.org/> (last visited 12 March 2021).

such as the replacement cost method, reproduction cost method, and summation cost method.[1777]

IV.196. The common denominator among these three approaches is that they all eventually examine the value of the investment vehicle (be it through its cash flow, its value on the stock market, or its assets and liabilities) and assess how that value has been impacted by the harm inflicted by the state. Thus, even when shareholders claim for reflective loss in the treaty-based proceeding, the tribunals examine the same harm that would be examined in a contract-based proceeding launched by the investment vehicle. Therefore, in Scenarios A2 and B2 (i.e. where we have a combination of treaty-based and contract-based proceedings), as long as the harm at issue in the two proceedings is the same, the difference in the legal bases should be disregarded.

Scenarios A1 and B1

IV.197. We now turn to Scenarios A1 and B1 (i.e. when the proceedings are all treaty-based).[1778] If the difference between a contract claim and a treaty claim can be disregarded when the harm at issue is the same (as discussed in the previous paragraphs), it follows *a fortiori* that the difference between two treaty claims can be disregarded when the harm at issue in both proceedings is the same. This is so because two IIAs (unlike a contract and an IIA) guarantee rights that have similar nature.[1779] In fact, the first generation of BITs were mostly patterned on

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[1777] IVSC, *International Valuation Standard 2013: Framework and Requirements* (2013) at paras 55–63; IVSC, *IVS 200: Business and Business Interests* (2016) at sec 50; IVSC, *IVS 105: Valuation Approaches and Methods* (2016) at sec 80. For commentaries discussing the three valuation approaches and how ISDS tribunals have applied them, see Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, *supra* note 1768, at chapters 4, 5; Mark A Kantor, *supra* note 60, at chapter 2.

[1778] For the list of possible scenarios in parallel proceedings and sequential proceedings, see above, in the current Chapter, para IV.179.

[1779] See August Reinisch, "The Issues Raised by Parallel Proceedings and Possible Solutions" in Michael Waibel et al, eds, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) 113 at 123 (arguing that, while the wording of the standards of protection might vary under different IIAs, investment

the provisions of the 1967 OECD *Draft Convention on the Protection of Foreign Property*.[1780]

IV.198. The idea of treating two treaties (with similar provisions) as one legal basis is not revolutionary and has been applied in other fields of international law, such as international human rights law. One might ask: why should we consider international human rights case law when that field seems foreign to international investment law? As explained earlier in the thesis, despite the differences between international human rights law and international investment law, they share two common features that make the case law of the former relevant to the latter.[1781]

IV.199. In short, the first similarity is that both fields have faced the issue of multiple proceedings concerning the same wrongful conduct because in both fields, states' measures have become increasingly subject to more than one treaty or convention.[1782] The second similarity is that both fields give recourse to one side (i.e. "investors" in international investment law and "persons" in international human rights law) that is otherwise unavailable internationally against the other side (i.e. sovereign states). Such similarity in the underlying policy of the two fields reinforces the relevance of international human rights case law in relation to the issue of multiple proceedings concerning the same wrongful conduct by a state.

IV.200. One relevant example is the decision of the European Commission of Human Rights ("ECHR") in *Martin and others v Spain*.[1783] In that case, the applicants were members of

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tribunals have established through their case law a common meaning of the core standards of treatment); ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) at 20 (explaining that treating different IIAs as different legal bases "might be an artificial distinction, for example if the legal obligation (e.g. not to expropriate an investment) is the same") [emphasis added].

[1780] Patrick Juillard, "Bilateral Investment Treaties in the Context of Investment Law" in *OECD Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe* (Dubrovnik, Croatia, 2001) at 5; Dolzer & Schreuer, *supra* note 38, at 9.

[1781] See above, Part I, Section "Methodology and Theoretical Approach", paras I.23 – I.26.

[1782] *Ibid*.

[1783] *Martin and others v Spain*, ECHR, Application 16358/90, Decision on Admissibility (12 October 1992).

a works council at a Spanish factory that had dismissed part of its workforce.[1784] The workers and the members of the works council initiated local court proceedings to reverse the dismissal.[1785] They also complained through their union to the Freedom of Association Committee of the International Labour Organisation (ILO).[1786] The ILO adopted the report of its Committee, finding no infringement on the workforce's freedom of association right.[1787] The applicants then filed this case before the ECHR, relying on the *European Convention on Human Rights* provisions regarding freedom of association.[1788]

IV.201. The respondent state pleaded inadmissibility based on the then article 27(1)(b) of the Convention (now article 35(2)(b) – concerning *res judicata / lis pendens*).[1789] The ECHR rejected the workers' application based on article 27, reasoning that, among other things, the legal bases of this proceeding and the ILO proceeding were similar, as the provisions of the *European Convention on Human Rights* provided rights similar to those in the *Convention No 87 of 1948* that were relied on in the ILO proceeding.[1790]

IV.202. This shows that the idea of treating two treaties that have similar provisions as the same legal bases is already known and applied in international law. Therefore, the thesis proposes that in Scenarios A1 and B1, as long as the harm at issue in the two treaty-based proceedings is the same, the difference between the legal bases should be disregarded. The question to address now is whether the harm at issue in two treaty-based proceedings is the same. There are two

[1784] *Ibid* at 128–129.
[1785] *Ibid* at 130.
[1786] *Ibid* at 131.
[1787] *Ibid*.
[1788] *Ibid*.
[1789] *Ibid* at 132.
[1790] *Ibid* at 133, 135.

possibilities for such proceedings:

- Possibility 1 - both proceedings are launched by shareholders, but at different levels of the same corporate chain. As such, the claimants in both proceedings seek compensation for their reflective loss.
- Possibility 2 - one proceeding is launched by shareholders, while the other is launched by their investment vehicle that has been given foreign nationality (and hence access to the ISDS system). As such, the shareholders claim for their reflective loss, while the investment vehicle claims for injury to its assets.

IV.203. Possibility 2 is similar to the situation discussed earlier for Scenarios A2 and B2 (i.e. where there is a combination of treaty-based and contract-based proceedings),[1791] for which it was shown that the harm at issue in the two proceedings is the same. Regarding Possibility 1, it was explained that, even when tribunals quantify the shareholder' reflective loss, the methods of evaluation are based on the investment vehicle's assets (whether these are its cash flow, its value on the stock market, or its assets and liabilities) and assessing how that value has been impacted by the harm inflicted by the state.[1792] Of course, the amount of harm can vary depending on which level of shareholding the claimants belong to, but the base is always the investment vehicle's assets and the harm inflicted thereon. Thus, the harm at issue in the two proceedings remains the same.

IV.204. The above discussion (regarding Scenarios A1 and B1 as well as Scenarios A2 and B2) showed that the harm at issue is the same across multiple proceedings. This point has been noted by the UNCITRAL Secretariat: "Concurrent proceedings involving entities within the same

[1791] See above, in the current Chapter, paras IV.193 – IV.196.
[1792] See above, in the current Chapter, paras IV.195 – IV.196.

corporate structure … give rise to a risk of multiple recovery of the same damage and may create dissatisfaction among users of investment treaty arbitration, thus undermining predictability more generally."[1793]

IV.205. Even ISDS tribunals (which mostly failed to offer an effective solution to the issue of double compensation) have indirectly confirmed that the harm at issue across multiple proceedings/claims is the same. This is because those tribunals considered it obvious that compensation awarded in one proceeding must be deducted from the compensation awarded in the other proceeding or that receiving compensation in one proceeding precludes the shareholders from receiving compensation through the other proceeding.[1794] This shows that those tribunals must have considered the harm at issue to be the same; otherwise, the rules of set-off do not apply when the claimants have suffered two different harms, such as moral damage and material damage, as discussed earlier.[1795]

IV.206. The ISDS tribunals' failure to properly act on this knowledge (that the harm is indeed the same across multiple proceedings) has led some states to insert clearer provisions in their newly signed IIAs. For example, article 8.39 of CETA reads: "Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided" [emphasis added]. This article

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[1793] UNCITRAL, 50th session, A/CN9/915, *Concurrent Proceedings in Investment Arbitration - Note by the Secretariat* (Vienna, 2017) at para 7.

[1794] See e.g. *Unión Fenosa v Egypt*, Award (31 August 2018) at para 10.142; *Venezuela Holdings v Venezuela* (formerly *Mobil v Venezuela*), Award (9 October 2014) at para 381; *von Pezold v Zimbabwe*, Award (28 July 2015) at para 938; *Impregilo v Argentina*, Award (21 June 2011) at para 139; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at para 253. See also *Suez and Vivendi v Argentina* in conjunction with *AWG v Argentina*, Award (9 April 2015) at para 39 (noting, with approval, the claimants' undertaking not to seek compensation in the local proceeding for the amount that they would be awarded and paid in this arbitration); *British Caribbean Bank v Belize*, Award (19 December 2014) at para 190 (reiterating the claimant's undertaking not to receive compensation in the local court proceedings if it was fully compensated in the investment arbitration).

[1795] See above, in the current Chapter, para IV.192.

and similar examples[1796] indicate two matters: first, the sameness of the loss between the investor and the investment vehicle and, second, the irrelevance of the legal bases involved (when the loss is the same) because the article states "any prior damages or compensation already provided", regardless of the basis on which it was awarded.

IV.207. In summation, it was proposed that, in order to reflect the realities of the ISDS system, the same legal basis requirement should be applied in light of whether the harm that the two proceedings/claims seek to compensate is the same. Accordingly, the difference between the legal bases should only be factored in if they target two different harms. It was demonstrated that, in all forms of parallel and sequential proceedings (i.e. Scenarios A1 and B1 as well as A2 and B2), the harm is indeed the same across the multiple proceedings and, as such, the difference between the legal bases should be disregarded. Now that it is clear how the legal basis requirement should be adapted, we can examine why other suggested mechanisms are not sufficiently inclusive/effective.

(iii) Same Facts Requirement? No

IV.208. As previously explained, "cause of action" consists of two elements (facts and legal basis) and the focus of most ISDS tribunals has been on the latter element, because multiple proceedings often arise from the same factual matrix.[1797] This thesis, too, has focused on the same legal basis and how to adapt it. However, a few ISDS cases[1798] and some recently signed IIAs[1799]

[1796] See e.g. the EU-Singapore Investment Protection Agreement, art 3.18; the EU-Vietnam Investment Agreement, art 3.53.
[1797] See above, paras IV.140 – IV.142.
[1798] See e.g. *Waste Management v Mexico (I)*, Arbitral Award (2 June 2000) at 235–236 (focusing on the same "measures").
[1799] EU-Vietnam Investment Agreement (2018), art 3.34.2 (focusing on the same "measures").

as well as a number of international human rights cases[1800] have focused instead on the factual element to adapt the cause of action. According to these authorities, as long as the multiple proceedings concern the same factual events and state measures, the same cause of action requirement is met.

IV.209. However, this view is not persuasive. While the similarity in facts (i.e. the factual element of "cause of action") is necessary, it is not sufficient because the same facts can give rise to different harms[1801] (as was explained earlier in relation to moral damage and material damage, or a criminal case and its related civil suit).[1802] As such, the same legal basis requirement remains essential. However, as previously explained, the same legal basis requirement must be examined in light of whether the harm at issue across different claims/proceedings is the same.

(iv) Fundamental Basis Test? No

IV.210. Another solution that has been suggested for adapting the same legal basis requirement is known as the "Fundamental Basis" test, which was set forth by Jan Paulsson, as the sole arbitrator, in *Pantechniki v Albania* in the context of FITR clauses.[1803] In that case, the claimant (a Greek company) had two construction contracts in Albania, but its worksite was looted during civil unrest in the country.[1804] The claimant started local court proceedings, but abandoned

[1800] See e.g. *Trébutien v France*, UN Human Rights Committee, Communication No 421/1990, UN Doc CCPR/C/51/D/421/1990 (18 July 1994) at para 6.3 (focusing on the same "facts and events"); *Glaziou v France*, UN Human Rights Committee, Communication No 452/1991, UN Doc CCPR/C/51/D/452/1991 (18 July 1994) at para 7.2 (focusing on the same "facts and events"). For a discussion on why international human rights cases are relevant, see above, Part I, Section "Methodology and Theoretical Approach", paras I.23 – I.26.
[1801] See *Pantechniki v Albania*, Award (30 July 2009) at para 62 ("[t]he same facts can give rise to different legal claims").
[1802] See above, in the current Chapter, para IV.192.
[1803] *Pantechniki v Albania*, Award (30 July 2009).
[1804] *Ibid* at paras 1–2, 6.

them later on when its complaint was not well received.[1805] The claimant then launched the ICSID proceeding, and the respondent objected pursuant to the FITR clause of the BIT.[1806] The claimant argued that the objection should be dismissed because, among other things, the dispute before the local courts was a contract claim whereas the dispute here was a treaty claim.[1807]

IV.211. The sole arbitrator upheld the respondent's objection, reasoning that the claimant's argument that treaty claims were "inherently different" from contract claims was an "argument by labelling - not by analysis".[1808] According to the arbitrator, the relevant test should instead be "whether or not the fundamental basis of a claim sought to be brought before the international forum is autonomous of claims to be heard elsewhere", i.e. "whether claimed entitlements have the same normative source" and "whether the claim truly does have an autonomous existence outside the contract".[1809] Applying that test, the arbitrator found that the claimant's treaty claim had the same normative source as its contract claim and, thus, it was barred by reason of the FITR clause.[1810]

IV.212. At first glance, the Fundamental Basis Test is a suitable candidate for adapting the same legal basis requirement. However, a closer look reveals that it has a major limitation, which was noted by the arbitrator: that the Fundamental Basis Test cannot be applied when the applicable IIA has an umbrella clause.[1811] This is because umbrella clauses can elevate contract claims to treaty claims and blur the sharp distinction between them.[1812] As a result, the claim will have a

[1805] *Ibid* at para 3.
[1806] *Ibid* at para 53.
[1807] *Ibid* at paras 54–55.
[1808] *Ibid* at para 61.
[1809] *Ibid* at paras 61–62, 64.
[1810] *Ibid* at para 67.
[1811] See *ibid* at para 64.
[1812] For a discussion on the impact of umbrella clauses on contract claims and how ISDS tribunals have applied those clauses, see Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at paras 4.127 et seq.

foot in both camps (contract and treaty), and the tribunal cannot simply strike out the claim for having its "fundamental basis" in only the contract. This, in fact, is a major limitation because approximately 43% of the IIAs have umbrella clauses.[1813] The Fundamental Basis Test offers no solution for how to adapt the legal basis requirement in cases arising out of almost half of IIAs. The solution that this thesis proposes (i.e. focusing on whether the harm at issue across multiple proceedings is the same) has no such limitation.[1814]

IV.213. It should also be noted that the Fundamental Basis Test has not yet gained significant traction among ISDS tribunals. Of the many cases involving FITR clauses, *res judicata*, and *lis pendens* that have been decided since 2009 (the year that the Fundamental Basis Test was introduced),[1815] only two cases applied the test.[1816]

IV.214. This Subsegment discussed how the same legal basis requirement of the identity test should be adapted. It was explained that the "flexible" legal basis requirement in the issue preclusion doctrine is not a suitable substitution for the legal basis requirement in *res judicata*. In order to reflect the realities of the ISDS system, it was proposed that the same legal basis requirement should be examined in light of the harm at issue across the proceedings/claims. Accordingly, the difference between the legal bases should only be factored in if they target two different harms. It was demonstrated that, in all forms of parallel and sequential proceedings (i.e.

[1813] Of the 3,312 IIAs that have been concluded thus far, the UNCTAD Investment Policy Hub has mapped the content of 2,575 IIAs. Of those that have been mapped, 1,108 IIAs include an umbrella clause (approximately 43%). In the author's view, once the remaining IIAs have been mapped, it would be unlikely that the 43% changes drastically. UNCTAD Investment Policy Hub website, section "International Investment Agreements Navigator", tab "Mapping of IIA Content", (on the left column) tab "Standards of Treatment", sub-tab "Umbrella Clause", box "Yes", online: <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited 12 March 2021).
[1814] See above, the discussion on "Same Harm Factor? Yes".
[1815] See Appendix 2 (listing cases on FITR clauses), Appendix 3 (listing cases on *res judicata*), and Appendix 4 (listing cases on *lis pendens*).
[1816] *H&H v Egypt*, Excerpts of Award (6 May 2014) at paras 368, 370, 377; *Supervision v Costa Rica*, Final Award (18 January 2017) at paras 308, 310.

Scenarios A1 and B1 as well as A2 and B2), the harm is indeed the same across the multiple proceedings and, as such, the difference between the legal bases should be disregarded. It was also explained that two other suggested solutions (i.e. applying the Fundamental Basis Test, or applying the same facts requirement instead of the same legal basis requirement) are not sufficiently inclusive or effective. The next Subsegment explains how to adapt the same legal order requirement of the identity test.

(3) Same Legal Order

IV.215. The requirement of the same legal order arises only in Scenarios A2 and B2 (i.e. where we have a combination of treaty-based and contract-based proceedings).[1817] A few ISDS tribunals applied an identity test that explicitly includes the requirement of the same legal order.[1818] The other ISDS tribunals that did not expressly mention the requirement, it was implied in their analysis on the differences between contract claims and treaty claims: that not only do treaties and contracts constitute different legal bases, but also they belong to two different legal orders. The ILA reports on *res judicata* and *lis pendens* explain the requirement as follows:

> *Res judicata* in international law relates only to the effect of a decision of one international tribunal on a subsequent international tribunal. International dispute settlement organs are not considered to be bound by decisions of national courts or tribunals.[1819]

[1817] For the list of possible scenarios in parallel proceedings and sequential proceedings, see above, in the current Chapter, para IV.179.
[1818] *Helnan v Egypt*, Award (3 July 2008) at para 124; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at para 191; *Lucchetti v Peru*, Decision on Annulment (5 September 2007) at paras 85–87; *Fraport v Philippines (I)*, Award (16 August 2007) at paras 390–391; *Inceysa v El Salvador*, Award (2 August 2006) at paras 208–212; *Busta v Czech Republic*, Final Award (10 March 2017) at paras 211–212; *Flughafen v Venezuela*, Award (18 November 2014) at para 369; *TECO v Guatemala*, Award (19 December 2013) at paras 516–519.
[1819] ILA Committee on International Commercial Arbitration, *ILA Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) at 19.

> The application of *lis pendens* … assumes that the parallel proceedings are before fora of equal status. *Lis pendens* does not apply as between supra-national tribunals and domestic courts so as to require the supra-national court to suspend its proceedings.[1820]

IV.216. Different reasons have been offered in support of the same legal order requirement, such as that "international law is (in its own terms) supreme"[1821] and that "it cannot be left to each individual State to create, through its own rules of *res judicata*, obstacles to international adjudication."[1822] As such, the general rule is that local court proceedings have no *res judicata* or *lis pendens* effect on international proceedings.

IV.217. However, there is an exception to that rule: when the constituent instrument of the international court/tribunal so permits.[1823] Thus, the relevant question is whether IIAs (as constituent instruments of ISDS tribunals) allow *res judicata* and *lis pendens* to attach to local proceedings once considered before ISDS tribunals? In other words, are there any IIA provisions in which the signatory states have made their position known that the difference between international and domestic legal orders can be disregarded? The answer to that question is in the affirmative because there are at least four IIAs clauses with such effect.

IV.218. The FITR and waiver clauses are two prime examples of such IIA clauses. Regardless of whether the investor has initiated a domestic proceeding or an alternative international proceeding, those proceedings equally block the investor's path to investment arbitration (in case of FITR clauses) or force the investor to make an election (in case of waiver clauses). This shows that, from the signatory states' viewpoint, any proceeding (whether domestic

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[1820] ILA Committee on International Commercial Arbitration, *ILA Final Report: Lis Pendens and Arbitration* (Toronto Conference, 2006) at para 3.2.
[1821] James Crawford, *supra* note 1266, at 55.
[1822] *Lucchetti v Peru*, Decision on Annulment (5 September 2007) at para 87.
[1823] James Crawford, *supra* note 1266, at 55–56.

or international) that can address the harm triggers those clauses. As such, under the "good faith" interpretation of treaties, as per article 31 of the *Vienna Convention on the Law of Treaties* ("VCLT"),[1824] the signatory states to IIAs that include FITR or waiver clauses have made their position known that they allow for the difference between the two legal orders to be disregarded.

IV.219. The other two IIA provisions that have a similar effect are umbrella clauses and broad dispute resolution clauses. The former can be defined as:

> Some treaties provide an additional layer of protection by specifically requiring host states to observe the obligations and honour the commitments that they have undertaken vis-à-vis foreign investors or investments. Known as "umbrella clauses", these provisions appear to provide a route through which investors can seek to transform their contractual rights into treaty rights.[1825]

IV.220. Different interpretations have been given to umbrella clauses, such as: (i) the approach that regards umbrella clauses as capable of transforming any and all contractual claims to treaty claims;[1826] (ii) the approach that limits the transforming effect of umbrella clauses to only the contractual claims that involve states' exercise of sovereign power;[1827] and (iii) the approach whereby umbrella clauses confer jurisdiction to an ISDS tribunal over contract claims, but do not change the applicable law or the parties to the dispute.[1828]

IV.221. The common denominator of those approaches is that umbrella clauses blur the distinction between domestic and international legal orders. This is so because those clauses bring domestic law contract claims within the jurisdiction of an ISDS tribunal, although the degree of

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[1824] See above, Chapter 7, the Subsection on good faith interpretation of treaties.
[1825] Borzu Sabahi, Noah Rubins & Don Wallace, *Investor-State Arbitration*, 2nd ed (Oxford University Press, 2019) at para 15.01.
[1826] See e.g. *Noble v Romania*, Award (12 October 2005) at paras 53–62.
[1827] See e.g. *El Paso v Argentina*, Decision on Jurisdiction (27 April 2006) at paras 79–82.
[1828] See e.g. *SGS v Philippines*, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) at paras 127–128; *CMS v Argentina*, Decision of the *ad hoc* Committee on the Application for Annulment of Argentina (25 September 2007) at paras 89, 95.

blurring varies depending on which of the above three approaches one adopts. Thus, under the "good faith" interpretation of treaties, as per VCLT article 31,[1829] signatory states to IIAs that include umbrella clauses have made their position known that they allow for the difference between the two legal orders to be disregarded.

IV.222. The same applies to IIAs that include broad dispute resolution clauses. When the dispute resolution clause in an IIA provides for arbitration of any dispute relating to the investment, it confers jurisdiction to an ISDS tribunal over contract claims as well (in addition to treaty claims).[1830] Regardless of whether such clauses transform contract claims to treaty claims,[1831] the point is that the signatory states to these IIAs have allowed for a claim that originates in domestic law to land before an international tribunal, which blurs the distinction between the two legal orders. As such, under the "good faith" interpretation of treaties as per article 31 of the VCLT,[1832] signatory states to IIAs that include broad dispute resolution clauses have made their position known that they allow for the difference between the two legal orders to be disregarded.

IV.223. Thus, there are at least four clauses that indicate signatory states' consent to disregard the difference between international and domestic legal orders: FITR clauses, waiver clauses, umbrella clauses, and broad dispute resolution clauses. While the first two clauses are not

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[1829] See above, Chapter 7, the Subsection on good faith interpretation of treaties.
[1830] Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at paras 4.47, 4.130.
[1831] For example, Emmanuel Gaillard seems to favor the view that broad dispute resolution clauses transform contract claims into treaty claims. See Emmanuel Gaillard, "Investment Treaty Arbitration and Jurisdiction over Contract Claims—the SGS Cases Considered" in Todd Weiler, ed, *International Investment Law and Arbitration* (Cameron May, 2005) 325 at 336 ("[I]t may seem odd to interpret a treaty as creating a jurisdictional basis for the BIT tribunal in cases where it is not called upon to rule on an alleged violation of that treaty … This tension does not exist, however, when the treaty contains an observance of undertakings clause pursuant to which the breach of a contract entered into by the State party can also be characterized as a treaty violation"). On the other hand, commentators like McLachlan, Shore, and Weiniger subscribe to the view that broad dispute resolution clauses only give jurisdiction over contract claims to ISDS tribunals without transforming the nature of the claim. See Campbell McLachlan, Laurence Shore & Matthew Weiniger, *supra* note 40, at para 4.130.
[1832] See above, Chapter 7, the Subsection on good faith interpretation of treaties.

present in many IIAs,[1833] broad dispute resolution clauses[1834] and umbrella clauses[1835] are found in the majority of IIAs. In fact, 96% of IIAs include at least one of the four provisions.[1836] Thus, as far as the interpretation of IIAs is concerned, states' consent to disregard the difference between international and domestic legal orders can be established for the overwhelming majority of IIAs. This makes it possible to disregard the difference between the legal orders when the harm at issue across multiple proceedings is the same.

IV.224. The above argument establishes the legal possibility of disregarding the difference between the legal orders. However, in practice, we still have to address the concern that states might influence their local court proceedings in their favor and then rely on *res judicata* and *lis pendens* to block ISDS proceedings.[1837] In fact, one of the reasons offered for the position that *res judicata* and *lis pendens* do not attach to local court decisions is article 27 of the VCLT: "A party

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[1833] Of the 3,312 IIAs that have been concluded thus far, the UNCTAD Investment Policy Hub has mapped the content of 2,575 IIAs. Of those that have been mapped, 577 contain FITR clauses (i.e. 22% of IIAs) and 19 IIAs contain waiver clauses (i.e. 7% of IIAs). UNCTAD Investment Policy Hub website, section "International Investment Agreements Navigator", tab "Mapping of IIA Content", (on the left column) tab "ISDS", sub-tab "Forums", sub-tab "Relationship Between Forums", boxes "Fork in the Road" and "No U Turn (Waiver Clause)", online: <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited 12 March 2021).

[1834] Of the 2,575 IIAs which have been mapped by the UNCTAD, broad dispute resolution clauses exist in 1,837 IIAs (equal to 71%), and only 494 IIAs (equal to 19%) limit their dispute resolution clause to treaty claims. Of the remaining IIAs: 72 IIAs (equal to 2%) list other bases of claim in addition to the treaty, and 173 IIAs (equal to 8%) are subject to interpretation. UNCTAD Investment Policy Hub website, section "International Investment Agreements Navigator", tab "Mapping of IIA Content", (on the left column) tab "ISDS", sub-tab "Scope and Consent", sub-tab "Scope of Claims", online: <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited 12 March 2021).

[1835] Of the 2,575 IIAs which have been mapped by the UNCTAD, umbrella clauses exist in 1,108 IIAs (equal to 43%), and 65 IIAs (equal to 3%) contain clauses that are subject to interpretation. UNCTAD Investment Policy Hub website, section "International Investment Agreements Navigator", tab "Mapping of IIA Content", (on the left column) tab "ISDS", sub-tab "Standards of Treatment", sub-tab "Umbrella Clause", online: <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited 12 March 2021).

[1836] Of the 2,576 IIAs which have been mapped by the UNCTAD, there are only 112 IIAs that do not contain any of the four clauses (i.e. 4% of IIAs), which do not include any of the major IIAs, such as ECT, NAFTA/CUSMA, or CETA. UNCTAD Investment Policy Hub website, section "International Investment Agreements Navigator", tab "Mapping of IIA Content", combining the reverse of all the options mentioned in the previous three footnotes, online: <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited 12 March 2021).

[1837] See e.g. *Lucchetti v Peru*, Decision on Annulment (5 September 2007) at para 87 ("it cannot be left to each individual State to create, through its own rules of *res judicata*, obstacles to international adjudication").

may not invoke the provisions of its own internal law as justification for its failure to perform a treaty."[1838]

IV.225. That is a valid concern. However, logically, it should be limited to a situation where the local courts fail to protect the investment vehicle or the investors by not granting compensation. If courts in the jurisdiction recognize the states' wrongdoings and grant compensation accordingly, why should their decisions be disregarded? Simply put, why should the difference between the two legal orders stand in the way if local courts in a jurisdiction have succeeded in protecting investors and their investment?

IV.226. The question posed in the previous paragraph has nothing to do with—and should not be confused with—the requirement of exhaustion of local remedies (which, by default, is not required in the ISDS system). Rather, the relevant question is: what if an investment vehicle chooses to initiate local proceedings and is granted compensation in that proceeding? Should that compensation be ignored in the treaty-based proceeding only because it was granted under a different legal order?

IV.227. According to the 1961 *Draft Convention on the International Responsibility of States for Injuries to Aliens*, article 37: "Damages which a State is required to pay on account of an act or omission for which it is responsible shall be diminished by the amount of any recovery which has been obtained through local and international remedies".[1839] This shows that it does not make any difference whether it is through local proceedings or international proceedings as long

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[1838] See *GAMI v Mexico*, Award (15 November 2004) at para 41.

[1839] *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961), *supra* note 1138, at 548 [emphasis added]. The Draft Convention was prepared by Harvard Law School at the request of the UN Secretariat. See ILC, 8th session, *Summary Records of 370th Meeting*, *supra* note 1137, at 228 (para 16).

as the harm is compensated. A similar approach can be seen in recent IIAs that guard states against double compensation. For example, article 8.39 of CETA provides that: "Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided" [emphasis added]. It can be seen that the focus in this article is on the loss and there is no attempt to distinguish between local and international proceedings.

IV.228. The above discussion shows that: it is legally possible to disregard differences between the two legal orders, but this can be done only if the local proceedings have actually granted compensation to the investment vehicle or are in the process of doing that. Thus, for adapting the same legal order requirement, two factors must be considered: (i) whether the harm at issue across the proceedings is the same,[1840] and (ii) whether the investment vehicle has been able to receive (or it is in the process of receiving) a favorable decision in local courts. If both factors are met, the difference between the legal orders should be disregarded.

IV.229. In summary, this Subsegment explained that disregarding the difference between domestic and international legal orders is legally possible because the interpretation of IIAs (as instruments that largely define the jurisdiction of ISDS tribunals) allows for it. Four IIA clauses indicate signatory states' consent to disregard the difference between the two legal orders, namely FITR clauses, waiver clauses, umbrella clauses, and broad dispute resolution clauses. The overwhelming majority of IIAs include at least one of those provisions. However, to address the concern that states can effectively block ISDS arbitration by influencing their courts and then

[1840] This factor has already been discussed in the context of adapting the same legal basis requirement. It was explained that the harm at issue in treaty-based and contract-based proceedings is the same and thus the difference between the legal bases should be disregarded. See above, in the current Chapter, paras IV.190 – IV.196.

relying on *res judicata* and *lis pendens*, two conditions have been proposed for the adaptation of the same legal order requirement: that, not only must the harm be the same across the proceedings, but also that the harm must have been (or is in the process of being) compensated in the local proceedings. This means that, if the harm is not the same across the proceedings, or (when harm is the same) if the local proceedings do not grant compensation, the difference between the legal orders stands.

b. Outcome

IV.230. The discussion in the previous Segment addressed how key requirements of the identity test (namely, same parties, same legal basis, and same legal order) should be adapted for application in sequential and parallel proceedings to reflect the realities of the ISDS system. This Segment explains what the outcome will be once *res judicata* and *lis pendens* are applied in those scenarios. The discussion first covers Sequential Proceedings and then Parallel Proceedings.

(1) Sequential Proceedings

IV.231. Sequential proceedings can take the form of two scenarios, which will be discussed in turn: Scenario A1 (when the proceedings are all treaty-based) and Scenario A2 (where there is a combination of treaty-based and contract-based proceedings).[1841]

(i) Scenario A1

IV.232. In Scenario A1, if the adapted version of the same parties requirement and the same legal basis requirement are met,[1842] *res judicata* will attach to the overlapping portion of the

[1841] For the full list of possible scenarios of the double compensation problem, see above, in the current Chapter, para IV.151.
[1842] Discussed above, in the current Chapter, Subsegments "Same Parties" and "Same Legal Basis".

preceding arbitration. As a result, that part should be dismissed on the ground of inadmissibility, unless the applicable IIA contains a FITR clause or a waiver clause, in which case the objection targets the tribunal's jurisdiction over the overlapping claims.[1843]

IV.233. If the shareholders in the preceding arbitration have succeeded in obtaining damages, the application of *res judicata* will prevent any double compensation that could occur through the subsequent arbitration for another level of shareholders. However, if the shareholders in the preceding arbitration did not secure a favorable award, there is no risk of double compensation, yet *res judicata* should still attach so as to avoid the multiplicity of proceedings issue with respect to the overlapping claims.

IV.234. One might be concerned about attaching *res judicata* to an arbitration that has not ended in favor of the investor. However, such a concern is not valid. The preceding arbitration (like the subsequent arbitration) belongs to the international legal order. This means that the preceding arbitration was conducted under similar legal standards as the subsequent arbitration. Also, there is no fear of state interference in those proceeding (unlike Scenario A2, discussed below). As such, *res judicata* can attach to the overlapping claims in the preceding arbitration, regardless of its outcome.

(ii) Scenario A2

IV.235. In Scenario A2 (i.e. where we have a combination of treaty-based and contract-based proceedings), in order for *res judicata* to attach, the adapted version of the same legal order

[1843] An objection relating to double compensation generally affects the admissibility of claims and not the tribunal's jurisdiction, unless the applicable IIA contains a FITR clause or a waiver clause. See above, in the current Chapter, Subsection "Which One Should be the Target?".

requirement[1844] has to be met in addition to the adapted version of the same parties and the same legal basis requirements.[1845] As explained previously, in order to disregard the difference between the domestic and international legal orders, not only must the harm at issue in the proceedings be the same, but that harm must also be compensated in the preceding proceeding.[1846]

IV.236. Therefore, *res judicata* can attach to the preceding proceeding only if the claimant has succeeded in that proceeding. Once *res judicata* applies, it renders the overlapping portion of the subsequent proceeding inadmissible.[1847] The exception to this is where the applicable IIA contains a FITR clause or a waiver clause, in which case (i) the objection affects the tribunal's jurisdiction and not the admissibility of the claims,[1848] and (ii) the contract-based proceeding need not have concluded in favor of the investment vehicle because those clauses apply regardless of the outcome of the other proceeding.

IV.237. In Scenario A2, it is often the case that the preceding proceeding is the contract-based proceeding brought by the investment vehicle. In such a case, the damages obtained in the contract-based proceeding normally flows from the investment vehicle to the shareholders, just as the initial harm did. However, what if the treaty-based proceeding concludes first and becomes the preceding proceeding? If *res judicata* attaches to the treaty-based proceeding, would any damages that shareholders obtain flow in the reverse direction to the investment vehicle? Whatever the answer, this question does not concern the respondent state for two reasons.

[1844] Discussed above, in the current Chapter, Subsegment "Same Legal Order".
[1845] Discussed above, in the current Chapter, Subsegments "Same Parties" and "Same Legal Basis".
[1846] See above, in the current Chapter, Subsegment "Same Legal Order".
[1847] See *supra*, note 1843.
[1848] *Ibid*.

IV.238. First, the purpose of these proceedings (whether international or domestic) is that the harm caused by the state measures do not go uncompensated, which will not be the case if either the treaty-based arbitration or the contract-based proceeding leads to compensation. Second, given the concurrent ownership of shareholders and their investment vehicle over the assets of the investment vehicle,[1849] once compensation is obtained (at any level in the corporate group), the question of how that compensation is allocated to the different levels of the corporate group should be left to the corporate group to decide. As far as the state is concerned, it has paid for its wrongful measures.

IV.239. The author's position on this question—that the issue does not concern the respondent state and should be left to the corporate group to decide—was inspired by the tribunal's correct approach taken in *Micula v Romania (I)* and another tribunal's questionable approach in *GAMI v Mexico*. In *Micula (I)*, the claimants were the Micula brothers (the ultimate shareholders) and three companies from the investment vehicle group.[1850] The tribunal, mindful of the risk of double compensation for the ultimate shareholders, correctly awarded damages to all claimants collectively without allocating the damages among them.[1851] It found that all the claimants had suffered damage, but they did not provide evidence for the basis on which damages could be apportioned, and it was not "for a tribunal to determine which Claimant is entitled to what."[1852]

IV.240. The *GAMI* tribunal took the contrary approach.[1853] The claimant (GAMI) was a minority shareholder in an investment vehicle (GAM)[1854] whose internal policy was not to

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[1849] Discussed above, in the current Chapter, para IV.194.
[1850] *Micula v Romania (I)*, Award (11 December 2013) at paras 2–5, 156, 936–943.
[1851] *Ibid* at para 1240.
[1852] *Ibid* at paras 1243, 1245, 1248.
[1853] *GAMI v Mexico*, Award (15 November 2004).
[1854] *Ibid* at para 1.

distribute dividends to the shareholders.[1855] The investment vehicle pursued the dispute in local courts.[1856] When considering the risk of double compensation for the shareholder as the result of the local court proceeding, the tribunal concluded: "[w]hy should GAMI's [i.e. the shareholder's] recovery be debited on account of a payment to GAM [i.e. the investment vehicle] which [was] perhaps utterly unlikely to find its way to the pockets of its shareholders" because of the investment vehicle's dividend policy.[1857] The *GAMI* tribunal's approach is questionable. We should query why a host state should pay extra damages to account for an internal policy between the investment vehicle and its shareholders. While the state must compensate for all the harm that it has caused, the issue of how that compensation flows up or down in the corporate group should be left to the corporate group to decide.

IV.241. In summary, for sequential proceedings where both are treaty-based arbitrations, *res judicata* will attach to the preceding arbitration (regardless of whether it ended in favor of the shareholders) if the adapted version of the same parties requirement and the same legal basis requirement are met. Accordingly, the overlapping portion of the subsequent arbitration will be dismissed on the ground of inadmissibility (unless the applicable IIA contains a FITR clause or a waiver clause, in which case the objection goes to the tribunal's jurisdiction). However, if the sequential proceedings are a combination of treaty-based arbitration and contract-based proceedings, in order for *res judicata* to attach, the adapted version of the same legal order requirement must also be met, which requires the preceding proceeding to be decided in favor of the investment vehicle/shareholders. The exception to this scenario is where the applicable IIA

[1855] *Ibid* at para 83.
[1856] *Ibid* at paras 38, 43.
[1857] *Ibid* at paras 117–118 [emphasis added].

contains a FITR clause or a waiver clause, in which case the outcome of the preceding proceeding is irrelevant, as those clauses apply regardless of the outcome.

(2) Parallel Proceedings

IV.242. Parallel proceedings can take the form of two scenarios, which will be discussed in turn: Scenario B1 (when the proceedings are all treaty-based) and Scenario B2 (where there is a combination of treaty-based and contract-based proceedings).[1858]

(i) Scenario B1

IV.243. In Scenario B1, if the adapted version of the same parties requirement and the same legal basis requirement are met,[1859] *lis pendens* attaches to one of the arbitrations rendering the overlapping portion of the claims inadmissible, unless the applicable IIA contains a FITR clause or a waiver clause, in which case the objection affects the tribunal's jurisdiction.[1860] The question then becomes: which one of the two treaty-based tribunals should dismiss the overlapping claims? We did not have to answer this question in relation to sequential proceedings, because one of the proceedings had already concluded. Further, even in parallel proceedings, this question only arises where there is no FITR or waiver clause because once any of such clauses exist in the applicable IIA, there is no choice as to which tribunal should dismiss the overlapping claims. The tribunal constituted based on the IIA that contains a FITR clause or a waiver clause has to dismiss

[1858] For the full list of possible scenarios of the double compensation problem, see above, in the current Chapter, para IV.151.
[1859] Discussed above, in the current Chapter, Subsegments "Same Parties" and "Same Legal Basis".
[1860] An objection relating to double compensation generally affects the admissibility of claims and not the tribunal's jurisdiction, unless the applicable IIA contains a FITR clause or a waiver clause. See above, in the current Chapter, Subsection "Which One Should be the Target?".

the overlapping claims for lack of jurisdiction, regardless of any of the considerations set out below.

IV.244. Now we return to the question of which of the two tribunals should dismiss the overlapping claims. The answer to the question depends on whether the claimant in one of the parallel arbitrations controls the claimant in the other arbitration. If one of the claimants is in the position of control, the tribunal (which sits over the case involving that controlling shareholder) should, instead of dismissing the overlapping claims, give the controlling claimant the option to withdraw the overlapping portion of claims from one of the proceedings and pursue the one that it sees as best suiting their interests. This solution is based on the tribunal's approach in *Ampal v Egypt*.

IV.245. In that case, the tribunal found there was an overlap between the claims brought by Ampal with the claims brought by its two subsidiaries in a parallel investment arbitration.[1861] Accordingly, the tribunal held that one of the overlapping claims had to be withdrawn.[1862] It instructed Ampal to either pursue the claim here only and have its two subsidiaries withdraw their claims from the parallel arbitration or, alternatively, to relinquish the overlapping portion here and only pursue the claims through its subsidiaries in the parallel arbitration.[1863] Ampal followed the tribunal's instructions.[1864] This approach protects both the investor and the state: the state will be guarded against double compensation (for only one of the proceedings continues), and the

[1861] *Ampal v Egypt*, Decision on Jurisdiction (1 February 2016) at paras 330–331.
[1862] *Ibid* at paras 334, 346(h).
[1863] *Ibid*.
[1864] *Ampal*, Decision on Liability and Heads of Loss (21 February 2017) at paras 11, 20.

investors' interests are protected (because they can choose the proceeding that they think have a higher chance of success).

IV.246. However, if for any reason, the controlling claimant does not follow the tribunal's instruction, or if neither of the claimants in the parallel treaty-based arbitrations is in a controlling position (e.g. when they are both minority shareholders), the author suggests the following approach should be taken:

- Where the applicable IIAs offer different levels of protection, the tribunal that has been constituted based on the IIA that is less favorable to the investors should declare the overlapping claims inadmissible. This approach is in line with the underlying policy of international investment law that operates to protect investors and their investment.[1865]
- If the two IIAs offer a similar level of protection, the tribunal seized by the shareholders at the upper level of the corporate chain should hold the overlapping claims inadmissible. When the proceeding initiated by the shareholders at the lower level of the corporate chain continues, the compensation that the claimant in that proceeding receives will ultimately flow to the upper levels of the corporate chain, mirroring the direction in which the damage moved in the first place.
- The above two rules only apply if there is not a considerable gap between the two arbitration proceedings in terms of the stage they are at. In other words, if one of the proceedings is near completion, principles of arbitral efficiency and comity require the tribunal that is second-seized to hold the overlapping claims to be inadmissible.[1866]

[1865] For a discussion on the underlying policy in international investment law, see above, Part I, para I.16.
[1866] For a discussion on the principle of comity in international arbitration, see Emmanuel Gaillard, "Coordination or Chaos", *supra* note 1400.

The above approach strikes a balance between the rights of investors and those of states as well as promoting arbitral efficiency.

IV.247. The only question that now remains is: would it be right to dismiss the overlapping portion of one investment arbitration in favor of the other investment arbitration when the outcome of the latter is not yet clear (i.e. it is not clear whether the proceeding would conclude in favor of the investor)? Parallel proceedings differ from sequential proceedings in that in the latter, one of the proceedings has already concluded and the outcome is known. As explained in the discussion on adapting the identity test, knowing the result of one of the proceedings plays a role only with respect to the same legal order requirement (i.e. where the two proceedings belong to different legal orders). Given that in Scenario B1, the parallel proceedings are both treaty-based arbitrations, the legal order is the same and there is no issue of different applicable legal standards or any concern as to state interference in the proceedings (unlike Scenario B2, which will be discussed later in this Subsegment).

IV.248. In *Ampal* (where the tribunal instructed the controlling shareholder to pursue the claim in only one of the proceedings and relinquish the other),[1867] the reasoning was as follows: when two investment tribunals have jurisdiction over the same claim, there is no longer any "risk of a denial of justice occasioned by the absence of a tribunal competent to determine the [overlapping] portion of the claim."[1868] This supports the position that, when the proceedings are in the same legal order (international law), what matters is ensuring that investors have access to investment arbitration and due process, and not a guaranteed outcome in their favor.

[1867] See above, para IV.244.
[1868] *Ampal*, Decision on Jurisdiction (1 February 2016) at paras 331–333 [emphasis added].

IV.249. The same logic can be seen in article 26 of the ICSID Convention, which relevantly provides: "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." This means that avenues other than the ICSID proceeding are excluded once consent to the ICSID proceeding is given (which occurs before the proceeding starts), and not on the condition that a favorable award is obtained in the ICSID proceeding. In other words, regardless of the outcome of the ICSID proceeding, other avenues are excluded.[1869]

IV.250. As such, we see that the answer to the question posed above—whether it would be right to dismiss the overlapping portion from one investment arbitration in favor of the other investment arbitration when the outcome of the latter is not even clear yet—is in the affirmative.

(ii) Scenario B2

IV.251. In Scenario B2 (i.e. where we have a combination of treaty-based and contract-based proceedings), for *lis pendens* to apply, the adapted version of the same legal order requirement[1870] must be met in addition to the adapted version of the same parties and the same legal basis requirements.[1871] As explained previously, in order to disregard the difference between domestic and international legal orders, not only must the harm at issue across the proceedings be the same, but that harm must also be compensated in the contract-based proceeding.[1872] Therefore, *lis pendens* can apply only if the investment vehicle succeeds in the contract-based proceeding. However, the challenge is that, in parallel proceedings (unlike sequential proceedings), the

[1869] See Yas Banifatemi et al, "Jurisdiction of the Centre" in Julien Fouret, Rémy Gerbay & Gloria M Alvarez, *The ICSID Convention, Regulations and Rules* (Edward Elgar Publishing, 2019) 102 at paras 2.255–2.258.
[1870] Discussed above, in the current Chapter, Subsegment "Same Legal Order".
[1871] Discussed above, in the current Chapter, Subsegments "Same Parties" and "Same Legal Basis".
[1872] Discussed above, in the current Chapter, Subsegment "Same Legal Order".

contract-based proceeding has not yet concluded and so we do not know whether the investment vehicle would be able to succeed and obtain damages.[1873] Given this, two situations can be envisaged.

IV.252. The first situation is as follows: the contract-based proceeding has not yet officially concluded, but it has reached its final phase and it is clear that it will conclude in favor of the investment vehicle and it will be able to obtain damages. In such circumstances, the freshly-constituted treaty-based tribunal should stay the investment arbitration pending the conclusion of the contract-based proceeding. Tribunals and courts have an inherent power to stay their own proceeding when there is a legitimate reason to do so.[1874] Once the contract-based proceeding concludes, the two proceedings will fall into the group of sequential proceedings (Scenario A2). Accordingly, if the investment vehicle has succeeded in securing a favorable decision in the contract-based proceeding, the overlapping portion in the treaty-based proceeding will have to be dismissed on the ground of inadmissibility.[1875]

IV.253. The second situation, which is more common (on the basis of the cases discussed in Chapter 4), is where the contract-based proceeding is not yet close to its completion, or where it is not clear what the outcome would be. In such circumstances, we cannot ascertain whether the adapted version of the same legal order requirement is met. This is because, despite the harm at

[1873] The only exception to this is where there is a FITR clause or a waiver clause in the applicable IIA, in which case there is no need for the contract-based proceeding to conclude in favor of the investment vehicle because those clauses apply regardless of the outcome of the other proceeding.
[1874] IBA Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018) at 19; Emmanuel Gaillard, "Coordination or Chaos", *supra* note 1400, at 221–222.
[1875] As explained previously, an objection relating to double compensation affects the admissibility of claims and not the tribunal's jurisdiction, unless the applicable IIA contains a FITR clause or a waiver clause. See above, in the current Chapter, Subsection "Which One Should be the Target?".

issue in both proceedings being the same,[1876] we cannot tell whether the investment vehicle would receive compensation through the contract-based proceeding. Thus, *lis pendens* cannot apply.

IV.254. However, this does not mean that we are left with no recourse to avoid multiple proceedings and the risk of double compensation in this scenario. The investment arbitration (being the superior proceeding based on a treaty) should proceed; however, the state (or the state-owned entity) that is party to the contract-based proceeding can petition the court/tribunal for a stay of that proceeding pending the result of the investment arbitration. It was explained above that courts and tribunals have an inherent power to stay their proceedings.[1877] Once the investment arbitration concludes, both proceedings fall into the category of sequential proceedings (Scenario A2). Accordingly, if shareholders have succeeded in securing a favorable award in the investment arbitration, the overlapping portion will be held inadmissible in the contract-based proceeding. The question of whether the damages that shareholders obtain would flow in the reverse direction to the investment vehicle has already been covered, which need not be repeated here.[1878]

IV.255. One might argue that treaty-based proceedings take longer to conclude than contract-based proceedings (particularly commercial arbitrations)[1879] and thus it is not ideal to stay the latter in favor of the former. In response, it should be noted that, when we have a combination

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[1876] For a discussion on the sameness of the harm across different proceedings, see above, paras IV.193 – IV.195.
[1877] See *supra*, note 1874 and the accompanying text.
[1878] See above, paras IV.237 – IV.240.
[1879] ICSID and UNCITRAL arbitration proceedings, respectively, take on average 3.7 years (1,370 days) and 3.9 years (1,446 days). If an ICSID proceeding includes an annulment proceeding, an additional 2 years (730 days) should be added. Jeffery Commission, "The Duration and Costs of ICSID and UNCITRAL Investment Treaty Arbitrations", (2016) 3 Vannin Capital Funding in Focus 8 at 9. Commercial arbitrations, however, take less time to conclude. For example, ICC arbitrations (if not conducted based on the ICC Expedited Procedure Provisions) take on average 2.1 years (26 months), and LCIA arbitrations take on average 1.6 years (20 months) to conclude. ICC, Press Release, *ICC releases 2019 Dispute Resolution Statistics* (July 2020), online: <https://iccwbo.org/media-wall/news-speeches/icc-releases-2019-dispute-resolution-statistics/>; LCIA, Press Release, *LCIA Releases Costs and Duration Data* (November 2015), online: <https://www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx> (last visited 12 March 2021).

of treaty-based and contract-based proceedings, it is far more common for the contract-based proceeding to be a local court proceeding than a commercial arbitration.[1880] Duration of local court proceedings varies according to jurisdiction, and—even in advanced jurisdictions—going through all levels of appeal is often a lengthy process. As such, the concern about the duration of investment proceedings only arises when the contract-based proceeding is a commercial arbitration, which has been the minority situation thus far.

IV.256. In summary, for parallel proceedings where both are treaty-based arbitrations, *lis pendens* applies if the adapted versions of the same parties requirement and the same legal basis requirement are met. However, if the claimant in any of the parallel proceedings controls the claimant in the other proceeding, the controlling shareholder should be first given the option to withdraw the overlapping portion of claims from one of the proceedings and pursue the one it sees as best suiting its interests. If neither of the claimants in the parallel investment arbitrations is in a controlling position, the question of which claims become inadmissible depends on factors such as: whether the applicable IIAs offer different levels of protection, the shareholding level to which the claimants belong, and how far each proceeding has advanced.

IV.257. It was also explained that where the parallel proceedings are a combination of treaty-based and contract-based proceedings: if the contract-based proceeding has not yet concluded but has reached its final phase and it is clear that it will conclude in favor of the investment vehicle, the treaty-based proceeding should stay pending the conclusion of the contract-based proceeding. If the investment vehicle succeeds in securing a favorable decision in the contract-based proceeding, the overlapping portion will be held inadmissible in the treaty-based

[1880] The author's research shows that the ratio of local court proceedings to commercial arbitration proceedings is approximately 4 to 1. Discussed above, Part II, Chapter 3, Subsection "Based on Legal Basis".

proceeding. However, where the contract-based proceeding is not close to completion or where it is not clear what the outcome will be, the contract-based proceeding should stay pending the result of the treaty-based arbitration. If shareholders succeed to secure a favorable award in the treaty-based arbitration, the overlapping portion in the contract-based proceeding will have to be dismissed.

IV.258. Lastly, it was explained that the exception to the above (applicable to both Scenarios B1 and B2) is where the IIA contains a FITR or a waiver clause, in which case the objection affects the tribunal's jurisdiction (instead of the admissibility of claims) and there will be no choice as to which tribunal should dismiss the overlapping claims: the tribunal constituted based on the IIA that contains a FITR clause or a waiver clause has to dismiss the overlapping claims, regardless of any of the factors set out above.

ii. Other Scenarios

IV.259. Sequential and parallel proceedings are not the only possible scenarios where the risk of double compensation may arise.[1881] There are other scenarios, which have constituted 35% of the ISDS cases that involved the risk of double compensation thus far.[1882] Let us briefly recall the list of possible scenarios:

- (1) When there is more than one proceeding:
    - (**Scenario A**) sequential proceedings.
    - (**Scenario B**) parallel proceedings.

[1881] For the full list of possible scenarios of the double compensation problem, see above, in the current Chapter, para IV.151.
[1882] Of the total of 63 cases, 22 cases (equal to 35%) did not involve parallel or sequential proceedings. The detailed statistics are set out in Part II, Chapter 3, Section "Scenarios".

- (**Scenario C**) the "other" proceeding has not yet been initiated.[1883]

- (2) When there is only one proceeding, i.e. the treaty-based arbitration:[1884]
  - (**Scenario D**) there is only that proceeding, but the investment vehicle has renegotiated a favorable contract with the state or is in the process of doing so.
  - (**Scenario E**) there is only that proceeding, and the risk of double compensation arises from that proceeding.

The discussion in this Subsection covers scenarios C, D, and E.

a. The Other Proceeding Not Yet Initiated

IV.260. This scenario includes the following situation: the treaty-based tribunal is in the process of deciding the admissibility of claims, and there is no other proceeding (treaty-based or contract-based) with overlapping claims, but the respondent state anticipates another proceeding to be initiated (either by the investment vehicle or by the shareholders from a different level of the corporate chain), and such a case (if filed) would meet the adapted version of the identity test.[1885] Of the 63 ISDS cases where the risk of double compensation was raised, 11 cases (equal to 17%) involved this scenario.[1886]

IV.261. As previously explained, tribunals' obligation is to avoid the risk of double

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[1883] The "other" proceeding refers to the proceeding other than the treaty-based arbitration at issue, whether lodged by the investment vehicle or another set of shareholders from the same corporate chain. See above, Part II, Chapter 3, para II.100.

[1884] As explained in Chapter 3, the multiplicity of claimants or the multiplicity of legal bases is sufficient for the risk of double compensation to arise, and it does not require the existence of multiple proceedings—although the majority of double compensation cases involve more than one proceeding. See above, Part II, Chapter 3, the Subsection discussing "The First Requirement" for the risk of double compensation.

[1885] For a discussion on the identity test, see above, Segments "Identity Test" and "Adapting and Applying the Identity Test".

[1886] *SAUR v Argentina*, Award (22 May 2014) at paras 149–150, 156–157, 174; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at paras 81, 87, 91, 199, 219; *Impregilo v Argentina*, Award (21 June 2011) at paras 178, 224; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*, Award (16 June 2010) at paras 4.190–4.201, 12.60; *Daimler v Argentina*, Award (22 August 2012) at para 155; *Nykomb v Latvia*, Award (16 December 2003) at 9.

compensation (in addition to avoiding actual double compensation).[1887] However, in the scenario set out in the previous paragraph, even the risk of double compensation has not yet materialized, as there is no other proceeding (pending or concluded) that concerns the same harm. Rather, there is a possibility of another proceeding. However, the degree of the possibility will vary. In some cases, the possibility is strong, as there are reasonable grounds indicating that an upcoming proceeding is to be lodged, whereas in other situations the possibility might be more speculative. The two should not be treated the same.

IV.262. Reasonable grounds for the likelihood of an upcoming proceeding include the situation where, for example, the investment vehicle has already filed an administrative proceeding, based on the outcome of which (if successful) it could initiate local court proceedings to obtain damages. In such circumstances, the possibility of an upcoming local court proceeding would not be mere speculation, as the investment vehicle has taken concrete steps towards that end. In fact, of the six ISDS cases referred to earlier,[1888] four involved an investment vehicle taking such concrete steps.[1889] This shows that, if the state's concerns relate to a forthcoming proceeding initiated by the investment vehicle, there are ways to determine the likelihood that such a proceeding will be filed.

IV.263. However, the same likelihood does not necessarily apply to the possibility of a proceeding initiated by shareholders at another level of the corporate chain. Unless those shareholders have issued an announcement about their intention to lodge a proceeding, there are

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[1887] See above, Part II, Chapter 1, Section "Actual Double Compensation v. The Risk of Double Compensation".
[1888] See above, para IV.260.
[1889] *SAUR v Argentina*, Award (22 May 2014) at paras 149–150, 156–157, 174; *Urbaser and CABB v Argentina*, Decision on Jurisdiction (19 December 2012) at paras 81, 87, 91, 199, 219; *Impregilo v Argentina*, Award (21 June 2011) at paras 178, 224; *Gemplus v Mexico* in conjunction with *Talsud v Mexico*, Award (16 June 2010) at paras 4.190–4.201, 12.60.

not many measures that could be considered reasonable grounds to indicate that another proceeding is underway. The following paragraphs propose how tribunals and courts should treat upcoming proceedings by (1) the investment vehicle and (2) other shareholders.

(1) Upcoming Proceeding by the Investment Vehicle

IV.264. Treaty-based tribunals should take measures to avoid the risk of double compensation only if there are reasonable grounds indicating that the investment vehicle will file a case for the same harm.[1890] And even when there are such grounds, this does not mean that the treaty-based tribunal should dismiss the overlapping portion of the claims, as there is no other proceeding yet to which *res judicata* or *lis pendens* could attach. The treaty-based arbitration should proceed, but there are options available to avoid the risk of double compensation, depending on whether the shareholding claimants control the investment vehicle.

IV.265. If the shareholders are in the position of control, the treaty-based tribunal should instruct them to have the investment vehicle provide a formal written statement undertaking not to seek damages (once it files the local court proceeding) for the overlapping part of the claims. As discussed in Chapter 6, one of the solutions to the double compensation problem that has been suggested is an undertaking by the claimants not to seek double compensation.[1891]

IV.266. As explained in Chapter 6, the undertaking solution has limitations such as the enforceability issue: it is only effective where one of the proceedings is a local court proceeding whereby the state can (through its courts) make the claimants live up to their undertaking.[1892] The conclusion reached was that the undertaking solution has limited scope and should be used only

[1890] For a discussion on the reasonable grounds, see above, paras IV.262 – IV.263.
[1891] See above, Part III, Chapter 6, Section "Undertaking not to Seek Double Compensation".
[1892] *Ibid*.

as a last resort, where no other options are available.[1893] An example of such a last-resort situation is the scenario described here. An undertaking by the investment vehicle (procured by the controlling shareholders) can be enforced in local courts.

IV.267. However, if the shareholders are not in the position of control, it is not the treaty-based tribunal that should address the risk of double compensation, but rather the local courts once the claim is filed. This is a possible task for the local courts because once the local proceeding commences, the relationship between that proceeding and the treaty-based proceeding will be either sequential proceedings (Scenario A2) or parallel proceedings (Scenario B2), both of which have already been covered above in this Chapter.

(2) Upcoming Proceeding by Shareholders at Another Level of the Corporate Chain

IV.268. Proving the likelihood of a forthcoming proceeding by shareholders at another level of the corporate chain is not as simple as an upcoming proceeding by the investment vehicle. This is because there are not many measures by shareholders that could be regarded as concrete steps toward filing a proceeding that involves overlapping claims, unless those shareholders have issued an announcement of their intention to lodge such a proceeding. For example, in *Daimler v Argentina*, the respondent was concerned that the claimant's parent company had the right to bring a claim separately in a different treaty-based proceeding, which could then create a risk of double compensation.[1894] However, there was no proof of any concrete steps taken by the parent company to indicate any such proceeding was about to be filed.

[1893] *Ibid*.
[1894] *Daimler v Argentina*, Award (22 August 2012) at paras 155.

IV.269. In fact, unlike an upcoming proceeding by the investment vehicle, even if the likelihood of a second treaty-based proceeding could be established, it would not be the task of the present treaty-based tribunal to prevent double compensation. This is because the most the present tribunal could do is apply the undertaking solution which, as previously discussed, has very limited enforceability at the international law level.[1895] As such, if and when the second treaty-based proceeding is launched, the tribunal in that proceeding ought then to determine whether the relationship between the two treaty-based proceedings are sequential proceedings (Scenario A1) or parallel proceedings (Scenario B1) and act accordingly to prevent double compensation.

IV.270. In summary, this Segment discussed the situation where there is no other proceeding (pending or concluded) by the time a treaty-based tribunal decides the admissibility of the shareholders' claims, but at the same time the respondent state anticipates another proceeding will be filed (whether by the investment vehicle or another set of shareholders). Regarding an upcoming proceeding filed by the investment vehicle, it was explained that: if there are reasonable grounds indicating that there is a strong likelihood of a proceeding being lodged, and if the shareholding claimants in the present arbitration control the investment vehicle, then the present treaty-based tribunal should instruct the shareholders to procure a formal undertaking from the investment vehicle that it would not seek damages for the overlapping part. In all other scenarios (i.e. if the shareholders are not in the position of control, or if the investment vehicle's proceeding is not considered to be likely in the first place, or if the future proceeding is to be lodged by shareholders at another level of the corporate chain), preventing double compensation will be the

[1895] See above, paras IV.265 – IV.266 (the discussion on the undertaking solution for an upcoming proceeding by the investment vehicle).

task of the future court/tribunal, which will then have to act based on whether the relationship between that proceeding and the present treaty-based proceeding is parallel or sequential.

b. There is no Other Proceeding, but Rather a Renegotiated Contract with the Investment Vehicle

IV.271. This scenario includes the following situation: the foreign shareholders have launched a treaty-based proceeding while the investment vehicle has renegotiated (or is in the process of renegotiating) the concession contract with the state. The renegotiated contract may settle the dispute with the investment vehicle or include favorable provisions to offset the inflicted harm.

IV.272. Once the sameness between the investment vehicle and the shareholders is established under the adapted version of the same parties requirement of the identity test,[1896] the renegotiated contract begs two questions that are discussed here separately: (1) whether such a contract should have any impact on the treaty-based proceeding (the "If" question); and if so, (2) what form that impact will take (the "What" question)? It is worth noting that, of the 63 ISDS cases involving the risk of double compensation, this scenario occurred in 3 cases (or 5%).[1897]

(1) The "If" Question

IV.273. The question here is whether a renegotiated contract should have any impact on an ongoing treaty-based proceeding. Ultimately, the answer will be: it depends. The renegotiated

[1896] For a discussion on the identity test, see above, in the current Chapter, Subsection "Identifying the Overlapping Claims", and for a discussion on the adapted version of the same parties requirement of the identity test, see Subsegment "Same Parties".
[1897] *Sempra v Argentina*, Award (28 September 2007) at paras 228, 395; *Enron v Argentina*, Award (22 May 2007) at paras 74–75, 79, 202; *CMS v Argentina*, Award (12 May 2005) at paras 83, 96.

contract belongs to the domestic legal order, while the treaty-based proceeding takes place in the international legal order. In the Section discussing how the same legal order requirement of the identity test should be adapted to the realities of the ISDS system, it was explained that the difference between the two legal orders can be disregarded if the harm at issue across the proceedings is the same and the investment vehicle has been able to receive (or it is in the process of receiving) compensation for that harm.[1898]

IV.274. In the scenario at hand, the first factor (i.e., the sameness of the harm between the investment vehicle and shareholders) is met.[1899] Thus, it is the second factor that is determinative: if the renegotiated contract leads to compensation (either in the form of monetary damages or in the form of favorable provisions offsetting the inflicted harm), the difference between the legal orders can be disregarded. Accordingly, the treaty-based tribunal should take the renegotiated contract into account.

IV.275. However, if, in the renegotiated contract the investment vehicle waives its claims without receiving compensation, the second factor is not met and thus the difference between the legal orders will stand. As a result, the renegotiated contract will have no impact on the treaty-based arbitration. There is one exception to this outcome. If the treaty-based proceeding is brought by the controlling shareholders under whose instruction the investment vehicle waived its claims in the renegotiated contract, the shareholders are not allowed to claim for what they have indirectly waived. This is because the sameness between the shareholders and the investment vehicle has

[1898] See above, in the current Chapter, Segment "Same Legal Order".
[1899] Discussed above, in the current Chapter, paras IV.193 – IV.196.

already been established under the adapted version of the same parties requirement of the identity test.[1900]

(2) The "What" Question

IV.276. The above discussion showed that the renegotiated contract can impact the treaty-based proceeding only if the renegotiated contract leads to compensating the harm inflicted on the investment vehicle (either by paying monetary damages or in the form of favorable provisions offsetting the inflicted harm). The discussion now turns to the question of what form that impact will take. The answer depends on: (i) whether the renegotiated contract has been finalized by the time that the treaty-based tribunal decides the admissibility of claims; or (ii) whether the renegotiation continues. The next paragraphs will explore both situations.

(i) Renegotiated Contract Concluded

IV.277. Can a renegotiated contract that settles the dispute between the investment vehicle and the state (or the state-owned entity) have any *res judicata* effect? At the domestic law level, the answer in a common law jurisdiction like the United States[1901] and a civil law jurisdiction like France[1902] is in the affirmative. However, at the international law level and in the ISDS system,

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[1900] Discussed above, in the current Chapter, Subsegment "Same Parties".

[1901] See e.g. *Arizona v California*, 530 US 392 (2000) at 414 ("In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion"); *Heard v Tilden*, 809 F3d 974 (7th Cir 2016) at 978 ("settlement agreements generally do not give rise to issue preclusion—as opposed to claim preclusion—unless it is clear that preclusion is what the parties intended"); *Cell Therapeutics, Inc v Lash Group, Inc*, 586 F3d 1204 (9th Cir 2009) at 1211("The structure of the Settlement Agreement comports with the longstanding principle that settlement agreements generally preclude further litigation on the claims by and against parties to the initial settlement, but issue preclusion generally does not attach to a settlement agreement") [all emphases added and internal citations omitted].

[1902] French *Code Civil*, art 2052 (« La transaction fait obstacle à l'introduction ou à la poursuite entre les parties d'une action en justice ayant le même objet »); for the definition of "transaction", see art 2044 (« La transaction est un contrat par lequel les parties, par des concessions réciproques, terminent une contestation née, ou préviennent une contestation à naître »); *JurisClasseur Procédure Civile*, Fasc 40: II.A (Août 2017) at para 25 (« Le caractère extinctif d'une

the matter is not settled. On the one hand, there are decisions like *Sempra v Argentina* and *Hochtief v Argentina* in which the tribunals held that the investment vehicle's renegotiated contracts had no preclusive effect on the shareholding claimants.[1903] On the other hand, in other decisions like *SAUR v Argentina* and *Chevron v Ecuador (II)*, the tribunals found the renegotiated contract to be applicable to the shareholders in the investment arbitration.[1904]

IV.278. The last case (*Chevron II*) is particularly interesting. It shows that extending the effects of the renegotiated contract to the shareholders does not always benefit the state—it can also serve shareholders' interests. In *Chevron II*, the state concluded a settlement agreement with TexPet (the concession holder) in relation to the environmental impact of TexPet's operation in Ecuador.[1905] The tribunal held that the settlement agreement extended to Chevron (the parent company of TexPet) and thus Chevron was equally freed of any environmental claims that could be launched by the state.[1906] The tribunal also held that the settlement agreement extinguished all such environmental claims and, as a result, Ecuadorian people could not launch any collective claims against TextPet or Chevron based on a law that was enacted after the settlement.[1907]

IV.279. The above discussion showed that in the ISDS system, unlike domestic law, there is no unanimous approach taken to the issue of whether settlement agreements have *res judicata*

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décision de justice signifie que celle-ci met fin à la contestation, implication qui peut également s'appliquer à la transaction. Cette dernière a, en effet, vocation à mettre un terme à un litige déjà né ou à prévenir un risque de contestation. Cette conséquence est clairement évoquée par l'article 2052 du Code civil à travers le principe selon lequel la transaction revêt l'autorité de la chose jugée en dernier ressort. Afin d'approfondir l'effet extinctif attaché à la transaction, il convient d'en apprécier les contours avant d'en préciser les implications ») [emphasis added].

[1903] *Sempra v Argentina*, Award (28 September 2007) at paras 226–227; *Hochtief v Argentina*, Award (19 December 2016) at paras 155–157, 168.

[1904] *SAUR v Argentina*, Decision on Jurisdiction and Liability (6 June 2012) at paras 356–358; *Chevron and Texaco v Ecuador (II)*, First Partial Award on Track I (17 September 2013) at paras 1, 86, 107.

[1905] *Chevron and Texaco v Ecuador (II)*at paras 17, 19, 77.

[1906] *Ibid* at paras 50, 86.

[1907] *Ibid* at paras 58, 107.

effect on the shareholders' claims: some tribunal allowed it and some did not. However, the impact of renegotiated agreements does not have to be through *res judicata*; it can be through other general principles of law. As Kotuby and Sobota explain:

> Settlement agreements may be more ubiquitous, and the policies behind *res judicata* (the advancement of stability and certainty in the legal process) are no less applicable when the parties settle their differences themselves. But although there is no consensus on whether such contracts are *res judicata*, all agree that they are binding and enforceable, and therefore can act to bar subsequent litigation as a general principle of law. In this context, the finality and repose provided by *res judicata* are also provided through other general principles, such as estoppel and *pacta sunt servanda*.[1908]

IV.280. The principle that is particularly relevant here is estoppel, which was discussed thoroughly in terms of adapting the same parties requirement of the identity test.[1909] That discussion explained that estoppel requires the parties to be consistent in their positions. Applying this principle here means that shareholders cannot on the one hand compromise the principle of corporate separateness (by claiming for reflective loss and injury to the investment vehicle's assets),[1910] and then on the other hand rely on the same principle of corporate separateness to support the position that they are separate from the investment vehicle and hence may not be considered party to the renegotiated contract that the investment vehicle has signed.

IV.281. As such, whether through *res judicata* or estoppel, the investment vehicle's renegotiated contract should be taken into account by the treaty-based tribunals (of course, only if the contract has led to compensation, as discussed earlier). As to how it should be taken into account: if the renegotiated contract has been concluded by the time the treaty-based tribunal decides the admissibility of shareholders' claims, the situation would be, in effect, similar to

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[1908] Charles T Kotuby & Luke A Sobota, *supra* note 1, at 202 [emphasis added].
[1909] See above, same Chapter, Segment "Principle of Estoppel? Yes".
[1910] See above, Part II, Chapter 2, Subsection "Principle of Caproate Separateness".

sequential proceedings (Scenario A2, i.e. when there is a combination of treaty-based and contract-based proceedings), which has already been discussed. Accordingly, the tribunal should hold the overlapping claims inadmissible.

(ii) Renegotiated Contract Not Yet Concluded

IV.282. If the renegotiation between the investment vehicle and the state has not yet been finalized by the time that the treaty-based tribunal decides the admissibility of shareholders' claims, the treaty-based proceeding should continue. This is because, not only is there no other proceeding on foot, but further, the renegotiations have not (at least yet) come to fruition to the extent that it would enable the tribunal to examine whether the investment vehicle will receive any compensation through that channel.[1911] However, this is not the end of the story.

IV.283. The treaty-based proceeding continues, but once it reaches the quantum phase (and it can take considerable time to reach that phase),[1912] there must be some result from the renegotiations. It has either—

- (i) collapsed;
- (ii) concluded; or
- (iii) still continues, but given the time passed and how each side has conducted itself up to that point in time, the tribunal is able to assess which direction the negotiations have taken, and whether or not there will be any compensation for the investment vehicle.

[1911] As explained previously, for a renegotiated contract to have any impact on the treaty-based arbitration, it must lead to the investment vehicle receiving compensation (either in the form of monetary damages or in the form of favorable provisions offsetting the inflicted harm). See above, paras IV.273 – IV.274.
[1912] ICSID and UNCITRAL arbitration proceedings, respectively, take on average 3.7 years (1,370 days) and 3.9 years (1,446 days) to conclude. Jeffery Commission, *supra* note 1879, at 9.

IV.284. In the first situation (i.e. when the renegotiations have collapsed), the treaty-based tribunal should proceed as though there were no negotiations at all. In the second situation (i.e. when the renegotiated contract has been finalized), if it compensates the investment vehicle for the inflicted harm, the treaty-based tribunal should offset that amount from the total damages that it would have otherwise awarded to the shareholders.

IV.285. According to the 1961 *Draft Convention on the International Responsibility of States for Injuries to Aliens*, article 37: "Damages which a State is required to pay on account of an act or omission for which it is responsible shall be diminished by the amount of any recovery which has been obtained through local and international remedies".[1913] This shows that it does not make any difference what channel the shareholders receive the compensation through, as long as they receive it. A similar approach has been adopted in recent IIAs that guard states against double compensation. For example, article 8.39 of CETA provides that: "Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided" [emphasis added].

IV.286. In the third situation (i.e. when the renegotiations are still on foot), if despite all the time passed, it is still not clear whether the investment vehicle would receive any compensation, the treaty-based tribunal should proceed to award the damages entirely. If the shareholders control the investment vehicle, the most the tribunal could do is to instruct the shareholders to have the

[1913] *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961), *supra* note 1138, at 548 [emphasis added]. The Draft Convention was prepared by Harvard Law School at the request of the UN Secretariat. See ILC, 8th session, *Summary Records of 370th Meeting*, *supra* note 1137, at 228 (para 16).

investment vehicle provide a formal written statement that it commits not to seek any compensation for the overlapping portion in the ongoing negotiations.[1914]

IV.287. However, (still in the third situation) if it is clear that the investment vehicle will eventually receive compensation through the settlement, the way the treaty-based tribunal should proceed depends on whether the shareholding claimants control the investment vehicle:

- If the shareholders are in the position of control, the tribunal should give them the option of either withdrawing the overlapping portion of claims from the treaty-based arbitration or having the investment vehicle stop pursuing that portion in the renegotiations (whichever option best suits their interests). The logic of this solution was discussed earlier in Scenario B1 of parallel proceedings.[1915]
- If the shareholders do not control the investment vehicle, the tribunal should award the damages entirely, but the overlapping portion may not be collected immediately. The tribunal sets a reasonable timeframe for the negotiations to conclude. If the renegotiated contract is signed within that timeframe, the shareholders will not be allowed to collect the overlapping portion. If the renegotiations are not even finalized within that timeframe, the shareholders may collect the entire damages along with interest for the time that has passed.

IV.288. To sum up, this Segment discussed the scenario where there is no other proceeding other than the treaty-based proceeding, but the investment vehicle has renegotiated the concession contract with the state. If the renegotiated contract contains a settlement agreement and if that

[1914] For a discussion on the undertaking not to seek double compensation, see above, in the current Chapter, para IV.265.
[1915] See above, in the current Chapter, para IV.244.

settlement agreement leads to compensation for the investment vehicle, the settlement will impact the treaty-based proceeding either through the principle of *res judicata* or estoppel. The mechanics of the impact will then depend on factors such as whether the renegotiations have concluded by the time that the treaty-based tribunal decides the admissibility of shareholders' claim, and whether the shareholding claimants control the investment vehicle.

c. There is no Other Proceeding; the Risk Arises From the Same Proceeding

IV.289. As explained in Chapter 3, the multiplicity of proceedings is not required for the risk of double compensation to arise as long as there are multiple claimants (which are from the same corporate group and in a vertical relationship) or multiple legal bases in one proceeding.[1916] Accordingly, the scenario discussed in this Segment includes the following situation: there is only one proceeding (a treaty-based arbitration), but even that single proceeding poses the risk of double compensation because either—

- there is more than one claimant: shareholders at different levels of the corporate chain have joined forces to launch one treaty-based proceeding, or the shareholders at one level together with the investment vehicle (which is under foreign control and has been given access to the ISDS system) file one treaty-based proceeding against the state; or
- there is more than one legal basis: one claimant in a single treaty-based proceeding has relied on more than one legal basis to claim for the same harm.

The two situations will be discussed in turn. It is worth noting that, of the 63 ISDS cases where

[1916] See above, Part II, Chapter 3, Section "Definition", para II.69.

the risk of double compensation was raised, eight cases (equal to 13%) involved this scenario.[1917]

(1) Multiple Claimants

IV.290. When there is a treaty-based proceeding in which the claimants belong to different levels of the same corporate chain, the risk of double compensation will arise. This was the case in *Micula v Romania (I)*, *PSEG v Turkey* and *Suez and InterAguas v Argentina*. In *Suez and InterAguas*, the investment vehicle along with three of its major foreign shareholders filed an ICSID case, which led to a risk of double compensation for those shareholders.[1918] Nevertheless, the risk was later rendered moot because the investment vehicle withdrew from the case.[1919] However, in the other two cases (*PSEG* and *Micula I*), double compensation was avoided due to specific approaches that the tribunals adopted.

IV.291. In *PSEG*, the tribunal granted compensation only to PSEG and refused to award any compensation to Konya (the investment vehicle that was wholly-owned by PSEG).[1920] In *Micula I*, the claimants were the Micula brothers (the ultimate shareholders) and three companies from the investment vehicle group.[1921] To avoid double compensation for the shareholders, the tribunal awarded damages to all the claimants collectively without allocating the damages among them.[1922] The tribunal found that all the claimants had suffered damage, but that they did not

[1917] *Micula v Romania (I)*, Award (11 December 2013) at paras 1240–1241, 1246–1247; *PSEG v Turkey*, Award (19 January 2007) at paras 1, 340; *Suez and InterAguas v Argentina*, Decision on Jurisdiction (16 May 2006) at paras 1, 46; *Goetz v Burundi (II)*, Award (21 June 2012) at paras 167, 168, 171, 211; *Kardassopoulos and Fuchs v Georgia*, Award (3 March 2010) at para 452; *Suez and InterAguas v Argentina*, Decision on Jurisdiction (16 May 2006) at paras 1, 46.
[1918] *Suez and InterAguas v Argentina*, Decision on Jurisdiction (16 May 2006) at paras 1, 46.
[1919] *Ibid* at paras 16, 51.
[1920] *PSEG v Turkey*, Award (19 January 2007) at paras 1, 340.
[1921] *Micula v Romania (I)*, Award (11 December 2013) at paras 2–5, 156, 936–943.
[1922] *Ibid* at para 1240.

provide evidence for the basis on which damages could be apportioned, and it was not "for a tribunal to determine which Claimant is entitled to what."[1923]

IV.292. As such, a tribunal facing the situation of multiple claimants in one treaty-based proceeding has three solutions in its toolbox to avoid double compensation: (1) one level of the corporate group withdraws from the treaty-based proceeding; (2) the tribunal awards damages only to one level of the corporate group; or (3) the tribunal awards damages collectively to all the claimants. All three approaches prevent double compensation, but the first two have limitations. The first approach requires the claimant's consent to withdraw, and the second approach leaves one of the claimants with no compensation. Although the goal is to avoid double compensation, it should be carried out in a way that does not cause adverse side effects, such as leaving out the investment vehicle or the shareholders. The third approach has none of those limitations, as it does not require any of the parties to consent and no claimant would be left out.

(2) Multiple Legal Bases

IV.293. When there is one treaty-based proceeding in which the claimant relies on more than one legal basis to claim for the same harm, this leads to the risk of double compensation. This situation occurred in *Goetz v Burundi (II)* and *Kardassopoulos and Fuchs v Georgia*. In those cases, the tribunals avoided double compensation by correctly awarding damages on only one of the legal bases.

IV.294. In *Goetz (II)*, the claimants brought an ICSID arbitration based on three legal grounds: a BIT and two agreements between the parties that were incorporated in an award issued

[1923] *Ibid* at paras 1243, 1245, 1248.

in the first ICSID arbitration between the parties more than a decade before the second ICSID arbitration.[1924] The tribunal found that, while the shareholders were entitled to compensation, they could not receive compensation based on more than one legal basis, as this would lead to double compensation.[1925] Likewise, in *Kardassopoulos*, the tribunal found for the claimant's expropriation claim under the ECT and, accordingly, the claimant acknowledged it was unnecessary for the tribunal to also find for his FET claim under the Greece-Georgia BIT, as to do so would amount to double compensation.[1926]

IV.295. As such, the solution is that the tribunal awards compensation based on only one of the legal bases. The author suggests that the tribunal chooses the legal basis that is more favorable to the claimant. This would be in line with the underlying policy of international investment law, which provides enhanced protection for investors and their investment (compared to the protection offered by domestic law and the law of diplomatic protection).[1927]

IV.296. To sum up, this Segment discussed the situation where the risk of double compensation arises from a single treaty-based proceeding. It was explained that, if the risk is due to the existence of multiple claimants, the best solution is that the tribunal awards compensation to all the claimants collectively. Two other solutions are also available (namely, that one of the claimants withdraws from the proceeding or that the tribunal awards damages to only one of the claimants), which have limitations. However, if the risk emanates from the fact that one of the claimants has relied on more than one legal basis to claim for the same harm, the solution is that

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[1924] *Goetz v Burundi (II)*, Award (21 June 2012) at paras 1, 171. See *Goetz and others v Burundi (I)*, ICSID case ARB 95/3, Award (10 February 1999) at 518.
[1925] *Ibid* at para 211.
[1926] *Kardassopoulos and Fuchs v Georgia*, Award (3 March 2010) at paras 241–242, 452.
[1927] For a discussion on the underlying policy in international investment law, see above, Part I, para I.16.

the tribunal awards damages based on only one of the legal bases: that which is more favorable to the claimant.

C. Exceptions

IV.297. The previous Section set out the possible scenarios where the risk of double compensation may arise, and proposed a mechanism for avoiding double compensation in each scenario. The discussion also explained how the identity test should be adapted to the realities of the ISDS system so that we can identify the overlapping claims between multiple proceedings/claims. The discussion in this Section turns to two exceptional situations, which require the tribunals/courts to take specific steps before those situations could fall into the category of typical scenarios discussed in the previous Section.

IV.298. The first situation is when the shareholding claimants have already transferred their shares to new shareholders. In this situation, because the ex-shareholders are no longer in the corporate group, the compensation cannot flow up (when paid to the investment vehicle) or trickle down (when paid to the ex-shareholders). The situation of ex-shareholders will be covered in Subsection (i).

IV.299. The second exceptional situation is where the investment vehicle has gone into bankruptcy/insolvency as a result of the state's wrongful measures. The underlying policy in bankruptcy/insolvency law is to protect the interests of creditors (or, at most, creditors plus other stakeholders, such as employees and the community).[1928] In any event, protecting the interests of shareholders is at the very bottom of the list of priorities in bankruptcy/insolvency law (unless a

[1928] Horst Eidenmüller, "Comparative Corporate Insolvency Law" in Jeffrey N Gordon & Wolf-Georg Ringe, *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press, 2018) 680 at 1004, 1013.

shareholder is not just an equity holder and has also made a loan to the company, in which case it would be considered among creditors).[1929] This underlying policy in bankruptcy/insolvency law conflicts with the underlying policy in international investment law, which seeks to protect the shareholders (as investors) and their investment.[1930]

IV.300. As such, when the investment vehicle goes bankrupt/insolvent, the friction between the underlying policies of the two areas of law is a new factor injected into the equation between the investors and the state, which makes the situation different from the typical scenarios discussed in the previous Section. In fact, when the investment vehicle is liquidated, any compensation paid to the bankruptcy/insolvency administrator is unlikely to flow to the shareholders, which means that there would be barely any chance of recovery for the shareholders through a normal flow of compensation. The situation of a bankrupt/insolvent investment vehicle will be discussed in Subsection (ii).

IV.301. The two situations of ex-shareholders and bankrupt/insolvent investment vehicles are exceptional, because in both situations it is very difficult for compensation to flow either up or down within the corporate group. One might argue that this position (that it matters whether the compensation can flow up or down) contrasts with the position taken in the previous Section (that the flow of compensation within the corporate group is not determinative and should be left to the corporate group to decide).[1931]

IV.302. However, such an argument is not valid. There is no contrast between the two positions because the circumstances of the typical scenarios discussed in the previous Section are

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[1929] *Ibid* at 1021–1022, 1024.
[1930] For a discussion on the underlying policy in international investment law, see above, Part I, para I.16.
[1931] See above, paras IV.237 – IV.240.

substantially different from the two exceptional situations discussed here. In the typical scenarios, there is no external legal barrier preventing the compensation from flowing up or down within the corporate group. It was explained that, if the corporate group has any internal policy preventing the flow (such as the one in *GAMI v Mexico* where the investment vehicle's policy was not to distribute dividends to its shareholders), that does not concern the state and is a matter that should be left to the corporate group to resolve. However, in the two exceptional situations, there is no possibility that the compensation will flow up or down when the investment vehicle is liquidated or the shareholder has left the corporate chain. Thus, there is an external barrier to the flow of compensation, and this makes the two situations exceptional and distinct from the scenarios discussed in the previous Section.

i. Former Shareholders

IV.303. The discussion here first analyzes the exceptional situation of ex-shareholders (a), and then sets forth a mechanism to avoid the risk of double compensation (b).

a. Analysis

IV.304. The typical example of claims by ex-shareholders is best illustrated in *EDF v Argentina*. The case was launched by EDF and SAURI (two French companies) and Léon (a Luxembourg company).[1932] The claimants were members of a consortium which purchased 51% of the shares of a local company that entered into a concession contract with a provincial government in Argentina for transmission and distribution of electricity.[1933] After initiating the treaty-based arbitration in 2003, EDF bought SAURI's and Léon's shares in the consortium and

[1932] *EDF v Argentina*, Award (11 June 2012) at para 3.
[1933] *Ibid* at paras 50–61, 68, 71.

became the sole shareholder but, soon after, sold all its shares to a local investment firm in 2004 and 2005.[1934] As such, the three claimants were no longer shareholders in the consortium (and hence no longer the indirect shareholders in the local company), but they retained the right to pursue their claim with respect to their previous ownership of the shares.[1935]

IV.305. While the claimants' ICSID arbitration was pending, the local company pursued three claims locally in relation to the government measures affecting the concession contract.[1936] Two of the claims were dismissed, but one led to a possibility for the local company to receive compensation through a settlement with the local government in Argentina.[1937] The respondent state objected that, if the tribunal awarded compensation to the claimants in the ICSID proceeding, this would lead to double compensation.[1938] The tribunal rejected the objection because, although the respondent would pay more than once, the claimants would not receive more than once, as one of the payments would be made to the local company in which the claimants no longer held shares.[1939]

IV.306. On the one hand, the tribunal made a valid point in noting that any compensation paid to the local company would not find its way to the ex-shareholding claimants. On the other hand, the solution cannot be that the state pays twice for the same harm. To find a solution, we must first determine the exact location of the problem. A precise analysis shows that, here, the problem is neither on the state's end nor on the ex-shareholders' end, but rather on the new shareholder's end. The new shareholder benefited from the lower price of the shares (when

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[1934] *Ibid* at paras 8–9, 172, 174.
[1935] *Ibid* at para 175.
[1936] *Ibid* at paras 1137, 1139–1140.
[1937] *Ibid*.
[1938] *Ibid* at paras 473, 1137.
[1939] *Ibid* at paras 1141–1142.

purchasing them from the ex-shareholders) and will also benefit from the flow of compensation that the local company will receive from the settlement: this is the benefit that should have gone to the ex-shareholders, as those were the ones that suffered the reflective loss and sold their shares at a lower price. As such, the solution should involve the new shareholders. By expecting the state to pay twice, we are looking in the wrong place for the solution.

IV.307. One might argue in reply that it is not the new shareholders who launched the contract-based proceedings against the state; the investment vehicle did that and, thus, the new shareholders have done nothing wrong and are now simply benefiting from a smart deal that they made when they purchased the shares at a lower price. However, that argument is not compelling. We know that when the ex-shareholders retained the right to bring claims, it was to bring claims for the reflective loss that they had sustained. This means that only the ex-shareholders are entitled to the compensation for that loss, be it obtained directly (i.e. through launching a treaty-based proceeding) or indirectly (through a reflective gain from the compensation received by the investment vehicle).

IV.308. The new shareholders are not entitled to that reflective gain. Therefore, once they receive it, they should pass it to the ex-shareholders. Consider the following example. Each share was once worth $50, but due to the state measures, its value fell to $20, following which the shareholders sold theirs at the lower price to the new shareholders. However, later, the investment vehicle receives compensation, and the share price bounces back to $50. The $30 reflective gain should go to the ex-shareholders who suffered the reflective loss in the first place and accordingly retained the right to compensation. The new shareholders did not suffer any reflective loss to be entitled to the corresponding reflective gain. The new shareholders receiving of such reflective gain would be similar to them picking fruit from a tree they never owned.

b. Proposed Mechanism

IV.309. As explained, ex-shareholders are in an exceptional situation because they are no longer in the corporate group and, hence, they are faced with the absence of a channel through which the compensation can flow up or down.[1940] Thus, the aim here is to put in place a channel that ensures (to the extent possible) the flow of reflective gain to the ex-shareholders so that their situation will no longer be categorized as exceptional. The scenario can then fall into the category of typical scenarios discussed in the previous Section.

IV.310. When ex-shareholders retain the right to bring treaty-based claims, the first step to avoid the risk of double compensation is as follows: the ex-shareholders and the new shareholders include a clause in their share-purchase agreement whereby the latter commit to pay the former the equivalent of any reflective gain obtained as a result of the compensation paid to the investment vehicle. Once the ex-shareholders initiate the treaty-based proceeding, it will be easier for the tribunal to tackle the risk of double compensation if the share-purchase agreement contains such a clause. However, regardless of whether that clause exists, Subsegment (1) explains the best approach to be taken in a contract-based proceeding, and Subsegment (2) explains the best approach for a treaty-based proceeding.

(1) Contract-Based Proceedings

IV.311. When an investment vehicle that has foreign shareholders (who have sold their shares but retained the right to bring treaty-based claims) launches a contract-based proceeding, the local court or commercial arbitral tribunal should condition the admissibility of claims to the

[1940] See above paras IV.301 – IV.302.

investment vehicle providing an official written commitment from its new shareholders to pay the equivalent of the reflective gain to the ex-shareholders, unless there is already a clause in the share-purchase agreement to that effect. Two questions arise in relation to this approach: first, why should the court/tribunal condition the admissibility of claims? And second, is it even realistic to expect that the new shareholders would give such a commitment?

IV.312. Regarding the first question—as explained previously—when no other proceeding has been initiated, the current court/tribunal should decide the likelihood of another potential proceeding.[1941] It was explained that, if there are reasonable grounds that another proceeding is underway, the current tribunal/court should take appropriate measures to minimize any risk of double compensation.[1942] Here, by retaining the right to initiate a treaty-based proceeding, the ex-shareholders have taken a concrete measure indicating their intention to lodge a claim. As such, the local court/tribunal should consider that measure to indicate an upcoming proceeding and, accordingly, should make the admissibility of the contract claims conditional on the new shareholders' commitment to pass the reflective gain to the ex-shareholders.

IV.313. With respect to the second question, the answer is that the new shareholders will normally have an incentive to give such a commitment if that is what it takes for the investment vehicle's claims to be admissible. This is so because it would do more to serve the new shareholders' interests if the compensation is paid to the investment vehicle (and then the new shareholders pass the reflective gain to the ex-shareholders) than if the compensation is paid directly to the ex-shareholders (in which case the investment vehicle would receive nothing). Once the compensation is paid to the investment vehicle, there will be a reflective gain (in the form of

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[1941] See above, in the current Chapter, Segment "The Other Proceeding Not Yet Initiated".
[1942] *Ibid*.

the share prices bouncing back or higher dividends being paid), which will reflect better on the corporate group's financial records, even though part of the reflective gain will have to be paid to the ex-shareholders.

(2) Treaty-Based Proceedings

IV.314. When the ex-shareholders launch a treaty-based proceeding, three scenarios may unfold. The first scenario is that, in addition to the treaty-based proceeding, there is a contract-based proceeding (like the one discussed above) that has concluded. If the court/tribunal in that proceeding has obtained a commitment from the new shareholders to pass the reflective gain to the ex-shareholders,[1943] then the ex-shareholder's situation would no longer be exceptional. It would be safe for it to fall into Scenario A2 from sequential proceedings. In short, if the adapted version of the identity test is met (as discussed for Scenario A2, including the condition that the investment vehicle must have received compensation in the contract-based proceeding), *res judicata* applies and the treaty-based tribunal will have to dismiss the overlapping part of the claims.

IV.315. The second scenario is that, in addition to the treaty-based proceeding, there is a contract-based proceeding, but it has not yet concluded. If the court/tribunal in that proceeding has received a commitment from the new shareholders to pass the reflective gain to the ex-shareholders, the treaty-based tribunal should stay the proceeding[1944] pending the outcome of the contract-based proceeding. One might ask why the treaty-based proceeding should be stayed instead of dismissing the overlapping claims? As explained previously, in order for *res judicata*

[1943] For a discussion on shareholders' commitment, see the previous Segment "Contract-Based Proceedings".
[1944] For a discussion on the tribunals' power to stay the proceeding, see above, in the current Chapter, para IV.252.

or *lis pendens* to apply between proceedings at two different legal orders (international and domestic), the domestic proceeding must result in compensation for the investment vehicle.[1945] Given that here the outcome of the contract-based proceeding is not yet known, *lis pendens* cannot apply, and hence the overlapping claims cannot be dismissed from the treaty-based proceeding yet. However, once the contract-based proceeding is concluded, the two proceedings fall into Scenario A2 of sequential proceedings. Accordingly, if the outcome of the contract-based proceeding is in favor of the investment vehicle, the overlapping claims can be dismissed from the treaty-based proceeding.

IV.316. The third scenario is that there is no contract-based proceeding afoot. In that case, the treaty-based tribunal is not required to take any measures to address any potential risk of double compensation. However, if at some point in time a contract-based proceeding is launched by the investment vehicle, the court/tribunal in that proceeding should dismiss the overlapping portion of the claims. This would mean that the investment vehicle would not receive compensation for that portion. The reality is that, from the perspective of international investment law, the ex-shareholders and the investment vehicle had concurrent ownership over the assets of the investment vehicle.[1946] As unfortunate as this might be for the investment vehicle, once the state pays compensation to one of the co-owners (here the ex-shareholders), it is not responsible for the outcome that the other co-owner (here the investment vehicle) will be left with no compensation for that portion of the claims.

IV.317. In fact, it is not possible to undo the exceptional feature of the third scenario so that it could fall into the typical scenarios. This is because there is no contract-based proceeding afoot

[1945] See above, the discussion on the adaptation of the "Same Legal Order" requirement of the identity test.
[1946] Discussed above, in the current Chapter, paras IV.193 – IV.196.

whereby the court/tribunal could obtain a commitment from the new shareholders to restore a channel for the flow of compensation.

IV.318. In summary, this Subsection discussed the exceptional situation of ex-shareholders. It was explained that, when ex-shareholders retain the right to bring treaty-based claims for their reflective loss, only they are entitled to compensation for that loss, be it obtained directly (i.e. through launching a treaty-based proceeding) or indirectly (through a reflective gain from the compensation received by the investment vehicle). As such, the new shareholders are not entitled to any reflective gain from the compensation that the investment vehicle receives. It was also explained that the exceptional feature of the ex-shareholders situation is that they are no longer in the corporate group and hence any compensation awarded cannot flow up or down within the group. However, if a channel can be established between the ex-shareholders and the group to allow the flow of compensation, then the situation can fall into the category of typical scenarios.

IV.319. Accordingly, it was proposed that the ex-shareholders and the new shareholders should include a clause in their share-purchase agreement whereby the latter commit to pay to the former the equivalent of any reflective gain obtained as a result of the compensation paid to the investment vehicle. It was explained that, in the absence of such a clause, the contract-based court/tribunal should condition the admissibility of contract claims to the investment vehicle procuring an official written commitment from the new shareholders that they would pass the reflective gain to the ex-shareholders. It was explained why the new shareholders would have the incentive to do so. Three possible scenarios were then discussed to account for the ex-shareholders' treaty-based proceeding. Once such a commitment by the new shareholders is in place, two of those scenarios will eventually fall into the category of Scenario A2 from sequential proceedings.

ii. Bankruptcy/Insolvency

IV.320. The previous Subsection discussed the exceptional situation of ex-shareholders, while this Subsection discusses the exceptional situation where the investment vehicle has been forced into bankruptcy/insolvency due to the state's wrongful measures.[1947] As explained previously, the challenge with this situation is mainly due to the clash between the underlying policies of bankruptcy/insolvency law on the one hand, and international investment law on the other.[1948]

IV.321. Before embarking on the discussion of how to tackle the risk of double compensation when the investment vehicle is bankrupt/insolvent, a clarification should be made with respect to the terms "bankruptcy" and "insolvency". Approaches to defining these two terms are far from consistent, as they mean different things in different jurisdictions. Therefore, we need to take a brief look at four leading jurisdictions: the UK and the US (from the common law tradition) and France and Germany (from the civil law tradition).[1949]

IV.322. English law uses "bankruptcy" for individuals and "insolvency" for companies, and the applicable law to both is the *Insolvency Act 1986*.[1950] In US law, however, only the term "bankruptcy" is used for related court proceedings (regardless of whether it applies to companies

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[1947] It should be noted that if the bankruptcy/insolvency is the result of the investment vehicle's own mismanagement, it does not fall into the exceptional situation discussed here. The question of whether the bankruptcy/insolvency is the result of the state's measures or the investment vehicle's own mismanagement of course cannot be prejudged. Thus, the tribunal's determination of the matter will be based on preliminary analysis for procedural purposes, which may be compared to the analysis performed for interim measures.

[1948] See above, paras IV.299 – IV.300.

[1949] For a discussion on the methodology that led to choosing those four jurisdictions, see above, Chapter 7, paras IV.69 – IV.74.

[1950] The First Group of Parts (i.e. Parts 1 to 7) of the *Insolvency Act 1986* concerns companies and is titled "Company Insolvency, Companies Winding up", whereas the Second Group of Parts (Parts 7A to 11) concerns individuals and is titled "Insolvency of Individuals, Bankruptcy". Online: <https://www.legislation.gov.uk/ukpga/1986/45/contents> (last visited 12 March 2021).

or individuals) and the applicable law is the *Bankruptcy Code*,[1951] while the term "insolvency" is used to refer only to the status where one's debts outweigh one's assets.[1952] On the other hand, in German law, only the term "Insolvenz" (the German equivalent of insolvency) is used for related court proceedings, regardless of whether it applies to companies or individuals, and the applicable statute is *Insolvenzordnung*.[1953] French law, quite independently, has its own term: procédure collective, which generally includes three procedures (namely, procédure de sauvegarde, redressement judiciaire, and liquidation judiciaire) which are set out in Book VI of the *Code de commerce*.[1954] To accommodate all those approaches (to the extent that this is possible), this thesis uses the combined term "bankruptcy/insolvency".

IV.323. Now that we clarified the meaning of the two key terms, we return to the main issue: how to tackle the risk of double compensation when the investment vehicle is bankrupt/insolvent as a result of the state measures. The response depends on whether the bankrupt/insolvent company is liquidated or rehabilitated, which will be covered in Segments (a) and (b) respectively. The discussion shows that generally the exceptional situation applies only when the investment vehicle is liquidated.

a. Liquidation

IV.324. This Segment discusses the situation where the bankrupt/insolvent investment

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[1951] *US Code, Title 11 (Bankruptcy)*, 11 USC §§ 101–1532, online: <https://uscode.house.gov/view.xhtml?path=/prelim@title11&edition=prelim> (last visited 12 March 2021).
[1952] For the definition of "insolvent", see 11 USC § 101(32).
[1953] Available on the joint website of the German Federal Ministry of Justice and Consumer Protection (BMJV) and the Federal Office of Justice (BFJ), in German: <http://www.gesetze-im-internet.de/inso/index.html> (last visited 12 March 2021).
[1954] Available on *Légifrance*: <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379> (last visited 12 March 2021).

vehicle is being liquidated.[1955] The discussion covers two scenarios: (1) where one of the proceedings is a contract-based proceeding pursued by the investment vehicle's administrator (trustee, receiver, or any other title that such position might hold) and the other proceeding is a treaty-based proceeding launched by shareholders; and (2) where all the proceedings are treaty-based. The discussion shows that only the first scenario qualifies for exceptional treatment.

(1) Combination of Contract-Based and Treaty-Based Proceedings

IV.325. When the investment vehicle is being liquidated, if any compensation is paid to the company's administrator, there is barely any chance of recovery for its shareholders through the natural flow of compensation from the investment vehicle to the shareholders (in the form of share prices bouncing back or distribution of dividends). This is so because the investment vehicle is being dissolved and there will no longer be a company for the compensation to flow up. Also, this is because the protection of shareholders' interests is at the bottom of the list of priorities in bankruptcy/insolvency law.[1956]

IV.326. Here, we face friction between the priorities of international investment law (protecting investors and their investment) and bankruptcy/insolvency law (protecting the interests of creditors). However, this friction was avoidable. In fact, bankruptcy/insolvency law is not a fixture of the investor-state relationship: bankruptcy/insolvency law does not normally come into the picture in every case involving states and investors. The law became relevant here only because the state's measures threw the investment vehicle into bankruptcy/insolvency. For that

[1955] Liquidation is the topic of: Chapter 7 of the US *Bankruptcy Code*; Part IV of the English *Insolvency Act 1986*; Part IV of Book 6 in French *Code de commerce*; and Parts 1–5 of the German *Insolvenzordnung*.
[1956] Discussed above, paras IV.299 – IV.300.

reason, we are left with no choice but to disregard the state's bankruptcy/insolvency law and give priority to international investment law.

IV.327. In fact, this situation is a prime example of where the differences between the international legal order and the domestic legal order cannot be ignored. As the annulment committee in *Lucchetti v Peru* noted: "it cannot be left to each individual State to create, through its own rules of *res judicata*, obstacles to international adjudication."[1957] Simply put, a state may not force an investment vehicle into bankruptcy/insolvency and then rely on its own bankruptcy/insolvency law to hinder shareholders' recovery for their loss at the international law level.

IV.328. Accordingly, when the shareholders launch a treaty-based proceeding, it should continue, and the tribunal should award damages regardless of any contract-based proceeding pursued by the bankruptcy/insolvency administrator for the investment vehicle. This is not to sanction double payment by the state. Rather, this time, it is the local courts/commercial arbitral tribunals that hold the key to avoid double compensation: they should dismiss the overlapping claims as inadmissible[1958] on the basis of *res judicata* or *lis pendens* (assuming that the adapted version of the identity test is met).[1959]

IV.329. There is a difference between the mechanism proposed here on the one hand, and the mechanism that was suggested for typical scenarios of parallel and sequential proceedings on the other. The mechanism set forth here gives priority to the treaty-based proceeding exclusively,

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[1957] *Lucchetti v Peru*, Decision on Annulment (5 September 2007) at para 87 [emphasis added].
[1958] An objection relating to double compensation generally affects the admissibility of claims and not the tribunal's jurisdiction. See above, in the current Chapter, Subsection "Which One Should be the Target?".
[1959] For a discussion on the identity test, see above, Segments "Identity Test" and "Adapting and Applying the Identity Test".

whereas the mechanism proposed for typical parallel and sequential proceedings sometimes gives priority to the treaty-based proceeding and sometimes to the contract-based proceeding, depending on the circumstances.

(2) Treaty-Based Proceedings

IV.330. The above discussion concerned the circumstances where there is a combination of treaty-based proceedings and contract-based proceedings. What if all the proceedings are treaty-based at the international level? To answer this question, let us examine the series of *Yukos* cases, most notably *OAO Neftyanaya kompaniya YUKOS v Russia* (the investment vehicle's case before the ECtHR that was filed on the basis of the *European Convention on Human Rights*)[1960] and *Yukos Universal v Russia* (the three investment arbitration proceedings brought by the majority and controlling shareholders based on the ECT before the PCA, and which were conducted in conjunction with each other).[1961]

IV.331. The investment vehicle was a prominent Russian oil and gas company.[1962] Disputes arose between Russia and the investment vehicle regarding tax assessments, followed by numerous local court proceedings[1963] that eventually forced the investment vehicle into bankruptcy and liquidation.[1964] The ECtHR proceeding was lodged by the investment vehicle in 2004, which was prior to the bankruptcy proceeding and the company's eventual liquidation in 2007.[1965] Once the investment vehicle was liquidated, Russia objected that the ECtHR lost jurisdiction and requested

[1960] *OAO Neftyanaya kompaniya YUKOS v Russia*, ECtHR, Application No 14902/04 ("*OAO YUKOS*").
[1961] *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*.
[1962] *OAO YUKOS*, Judgment (20 September 2011) at paras 1–2.
[1963] *Ibid* at sections A, B, C, D of the Judgement on pages 3, 33, 36, 39.
[1964] *Ibid* at paras 281, 296, 304.
[1965] *OAO YUKOS*, Decision on Admissibility (29 January 2009) at paras 439–440.

to discontinue the case.[1966] In the Decision on Admissibility, the ECtHR rejected the objection, on the basis that holding otherwise "would encourage governments to deprive such entities of the possibility to pursue an application lodged at a time when they enjoyed legal personality."[1967] The ECtHR was right in not allowing the objection because, as mentioned previously, the state may not force an investment vehicle into bankruptcy/insolvency and then rely on its domestic laws to hinder international proceedings.

IV.332. In the merits phase, the issue of the parallel investment arbitration proceedings that were filed by the shareholders was raised, and Russia asked the ECtHR to apply article 35(2)(b) of the Convention (which is in effect the *lis pendens* principle).[1968] The ECtHR, again, rejected the objection on the ground that the same parties requirement was not met: the investment vehicle and the shareholders were not the same.[1969]

IV.333. The court's approach in applying the strict version of the same parties requirement is not in line with the adapted version of the requirement that has been proposed in this thesis.[1970] However, even if we consider the same parties requirement to be met, once we apply the author's proposed mechanism for Scenario B1 of parallel proceedings (i.e. two parallel treaty-based proceedings),[1971] the outcome would eventually be the same as that reached by the ECtHR. This is so because, according to the author's proposed mechanism, it is the investment arbitration

[1966] *Ibid*.
[1967] *Ibid* at 443.
[1968] *OAO YUKOS*, Judgment (20 September 2011) at 516–517.
[1969] *Ibid* at 523–524, 526.
[1970] See above, in the current Chapter, the discussion on the "Same Parties". For a discussion on the identity test, see above, Segments "Identity Test" and "Adapting and Applying the Identity Test".
[1971] See above, in the current Chapter, the discussion on of the parallel proceedings.

tribunal (the PCA) that should have dismissed the overlapping claims and not the ECtHR which was in charge of the investment vehicle's claims.

IV.334. In the investment arbitration case (*Yukos Universal v Russia*), the claimants together constituted the majority and controlling shareholders in the investment vehicle[1972] and brought their claims based on the ECT.[1973] Russia argued that the dispute before the tribunal was the same as that presented to the ECtHR and, as such, the claims were barred pursuant to the ECT's FITR provision (article 26(3)(b)).[1974] In the Interim Award on Jurisdiction and Admissibility, the tribunal rejected the objection, without mentioning which requirement of the identity test was not met.[1975]

IV.335. In the merits phase, the respondent raised the FITR objection once more.[1976] It submitted that the tribunal failed in the Interim Award to discuss the identity test[1977] and that the claimants were seeking the same damages for the same loss before both fora.[1978] In the Final Award, the tribunal summarily dismissed the respondent's objection on the ground that the tribunal had already ruled on this matter in the Interim Award.[1979]

IV.336. From a purely legal perspective, the investment tribunal failed to address the risk of double compensation. The relationship between the investment arbitration and the ECtHR proceeding (as two parallel treaty-based proceedings) falls into Scenario B1 of parallel

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[1972] *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*, Final Award (18 July 2014) at para 69.
[1973] *Ibid* para 9.
[1974] *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*, Interim Award on Jurisdiction and Admissibility (30 November 2009) at paras 587–589, 591.
[1975] *Ibid* at paras 598, 601(a).
[1976] *Yukos Universal v Russia* in conjunction with *Hulley v Russia* and *Veteran Petroleum v Russia*, Final Award (18 July 2014) at para 1258.
[1977] *Ibid* at para 1261.
[1978] *Ibid* at paras 1258, 1260.
[1979] *Ibid* at paras 1271–1272.

proceedings. Based on the proposal for that scenario, given that the claimants here were controlling shareholders, the investment tribunal should have given them the option to withdraw the overlapping claims from one of the proceedings and pursue the proceeding they viewed as best suiting their interests. If they failed to apply the option, the investment tribunal should have then dismissed the overlapping claims as inadmissible, unless it was established that the applicable treaty here provided a higher level of protection than the applicable treaty to the parallel ECtHR proceeding.

IV.337. However, there is a twist in this tale: the ECT contains a FITR clause. As explained previously, an objection relating to double compensation generally affects the admissibility of claims and not the tribunal's jurisdiction, unless there is a FITR clause or a waiver clause.[1980] If any of those clauses exists in one of the applicable treaties, the tribunal constituted based on that treaty must dismiss the overlapping claims for lack of jurisdiction.[1981] Thus, considerations such as whether any of the claimants are controlling shareholders or which treaty is more favorable become irrelevant. Here, the investment arbitrations were based on the ECT, which contains a FITR clause (article 26(3)(b)). Thus, the investment tribunal should have dismissed the overlapping claims for lack of jurisdiction.

IV.338. In conclusion, when both proceedings are treaty-based and pending before international fora, it is not possible for the state to rely on its own bankruptcy/insolvency law to frustrate the international proceedings. As such, the investment vehicle's bankruptcy/insolvency

[1980] See above, in the current Chapter, paras IV.124 – IV.127.
[1981] *Ibid*.

does not cause the situation to be categorized as exceptional and hence it will remain in the typical scenarios discussed above.

b. Rehabilitation

IV.339. When the bankrupt/insolvent investment vehicle is rehabilitated,[1982] it is restructured to continue as a going concern. From a legal perspective, this means that there is still a possibility of recovery for its shareholders through the natural flow of compensation from the investment vehicle to the shareholders. Thus, when the investment vehicle is rehabilitated, this is not an exceptional situation (unlike when it is liquidated). The proceedings involving the shareholders of such an investment vehicle remain within the category of typical scenarios that were discussed earlier in the thesis.[1983]

IV.340. There is one exception to this rule. If it is established that the restructuring of the investment vehicle hinders the likelihood of the flow of damages from the investment vehicle to the shareholders, rehabilitation then becomes an exceptional situation. An example of this would be when, due to the restructuring, it would be unrealistic to expect any flow of damages from the investment vehicle to the shareholders within a reasonable timeframe. In that case, the matter should be treated similarly to the liquidation situation (discussed in the previous Segment).

IV.341. In summary, this Subsection discussed how to avoid double compensation if the wrongful state measures throw the investment vehicle into bankruptcy/insolvency. It was explained that, generally, this exceptional situation applies only to scenarios where the company

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[1982] The process is known as "Reorganization" under Chapter 11 of the US *Bankruptcy Code*; as "Administration" under Schedule B1 of the English *Insolvency Act 1986*; as "sauvegarde" under Part II of Book VI of the French *Code de commerce*; and as "Insolvenzplan" and "Eigenverwaltung" under Parts 6 and 7 of the German *Insolvenzordnung*.
[1983] See above, in the current Chapter, Section "Possible Scenarios".

is liquidated (as opposed to rehabilitated) and only if one of the proceedings is contract-based. In such cases, the shareholders' treaty-based proceeding should continue, and the tribunal can award damages regardless of the contract-based proceeding pursued by the bankruptcy/insolvency administrator for the investment vehicle. To avoid double payment by the state, it was proposed that the local courts/commercial arbitral tribunals should hold the overlapping claims inadmissible on the basis of *res judicata* or *lis pendens*. It was also explained that, when the company is rehabilitated, this is not an exceptional situation, unless it is established that the restructuring of the investment vehicle hinders the likelihood of the flow of damages. In that case, the matter should be treated the same as liquidation.

SUMMARY OF THE PART

IV.342. This Part tackled the double compensation problem in the ISDS system. The Part includes two chapters (Chapter 7 and 8). Chapter 7 discussed the principle of prohibition of double compensation, and Chapter 8 proposed a legal mechanism to apply that principle.

IV.343. In Chapter 7, it was first established (based on international case law, documents, and commentary) that a principle on the prohibition of double compensation has long been Recognized in international law. The discussion then explored the Relationship between that principle and four general principles of law (namely, the principles of full reparation, unjust enrichment, causation, and good faith). The aim of this discussion was to discover the roots of the prohibition of double compensation and its scope of application. It established that:

- only the principles of full reparation and unjust enrichment serve as the parent principles of the prohibition of double compensation;

- not only is the principle of causation not a parent principle to the prohibition of double compensation, but also there is friction between the two; and
- while the principle of good faith supports the principle of prohibition of double compensation in certain circumstances, the former does not serve as the origin of the latter.

IV.344. The discussion then turned to the Status of the principle of prohibition of double compensation in international law. The question at issue was whether the principle is among any of the three formal sources of international law—namely, treaties, international custom, and general principles of law ("GPLs")—as set out in article 38(1) of the ICJ Statute. It was established that the prohibition of double compensation is not yet international custom because the required two-pronged test is not satisfied. In fact, the first prong of the test (i.e. the existence of a "general practice") is met, but the second prong (i.e. "accepted as law" - *opinio juris*) has not yet been met. However, the principle of prohibition of double compensation is a GPL because both international law and domestic law (the UK, the US, France, and Germany were examined) furnish evidence in this regard.

IV.345. The discussion then proceeded to the question of Waiver of the protection offered by the principle. The relevant question was whether, by signing IIAs that recognize "shares" as protected "investment", states have in effect consented to double compensation and hence waived the protection offered by the principle of prohibition of double compensation. The analysis showed that when IIAs (as treaties) are interpreted in accordance with article 31 of the *Vienna Convention on the Law of Treaties*—i.e. interpretation in "good faith", in light of IIA's "objective and purpose", and considering "relevant rules of international law"—the answer to that question is in the negative. That concluded the discussion in Chapter 7.

IV.346. Chapter 8 then proposed a legal mechanism to implement the principle of prohibition of double compensation with a clear, holistic approach that covers all potential scenarios where the risk of double compensation may arise. The Chapter first set out the fundamentals of the mechanism, which proposes that tribunals/courts should (to the extent possible) contain the risk of double compensation at the Preliminary Phase of the proceedings, not only for reasons of efficiency and procedural economy but also to avoid complications that are likely to arise when addressing the risk is postponed to later phases.

IV.347. To that end, it was explained that the target of any double compensation objection should be the Admissibility of the overlapping claims and not the jurisdiction of tribunals/courts. This is the case because any such objection neither aims at the tribunal/court, nor concerns the interpretation of the jurisdictional clause, but rather concerns the existence of the overlapping claims. It was explained that the only exception is when the applicable IIA contains a FITR clause or a waiver clause, in which case the objection targets the tribunal's jurisdiction over the overlapping claims.

IV.348. The discussion then turned to Identifying the Overlapping Claims, and that is where the principles of *res judicata* and *lis pendens* came into the picture. Not only do the two principles have an identity test that helps to identify the overlapping claims, but together they also have the potential to offer a comprehensive solution to cover both parallel and sequential proceedings. Earlier in the thesis, the discussion of suggested solutions covered the basics about *res judicata* and *lis pendens*, including the definitions, their status as GPLs, and their practical advantages over other solutions (such as FITR and waiver clauses, consolidation, and the issue preclusion

doctrine).[1984] As such, the discussion here focused instead on two matters: first, the Requirements of the identity test, which are as follows:

- (1) Same parties
- (2) Same issues, which consists of:
  - (a) Same cause of action, which in turn consists of:
    - (i) Same facts
    - (ii) Same legal basis
  - (b) Same relief
- (3) Same legal order

Second, it was explained that what should be done is not to "relax" those requirements, but rather to "adapt" them to the needs and realities of the ISDS system (Relaxing v. Adapting). It was explained that, of the requirements mentioned above, only three need to go through the adaptation process: same parties, same legal basis, and same legal order.

IV.349. Regarding the Same Parties Requirement, it was explained that, when shareholders claim for reflective loss and/or injury to the investment vehicle's assets, they compromise/violate the principle of corporate separateness. This creates a two-way street: just as shareholders could benefit from the compromised/violated principle, others could also use it as a defense against shareholders. This logic allowed us to apply the principle of estoppel to adapt the same parties requirement by arguing that shareholders cannot on the one hand compromise/violate the principle of corporate separateness, and then on the other hand rely on the very same principle for the position that they are separate from the investment vehicle. The discussion then explained that the

[1984] See above, Part III, Chapter 6, Section "*Res Judicata* and *Lis Pendens*".

three doctrines of issue preclusion, *alter ego*, and group-of-companies are not suitable options for adapting the same parties requirement.

IV.350. With respect to the Same Legal Basis Requirement, it was proposed that the requirement should be examined in light of the harm at issue across the proceedings. Accordingly, the difference between the legal bases should not be factored in if the different legal bases target the same harm. It was demonstrated that, in all forms of parallel and sequential proceedings, the harm at issue is indeed the same across the proceedings and thus the difference between the legal bases should be disregarded. It was also explained why two other suggested mechanisms (namely, the Fundamental Basis Test and comparing the facts instead of the legal bases) are not suitable options.

IV.351. As to the Same Legal order Requirement, it was explained that disregarding the difference between domestic and international legal orders is legally possible because the interpretation of IIAs (as the constituent instrument of ISDS tribunals) allows for this. There are four IIA clauses that indicate signatory states' consent to disregard the difference between the two legal orders, namely the FITR clauses, waiver clauses, umbrella clauses, and broad dispute resolution clauses. The overwhelming majority of IIAs include at least one of those clauses. However, to address the concern about states effectively blocking ISDS arbitration by influencing their own courts and then relying on *res judicata* and *lis pendens*, two conditions were proposed for the adaptation of the same legal order requirement: (i) the harm must be the same across the proceedings and (ii) the harm must have been (or be in the process of being) compensated in the local proceedings. In other words, if the harm is not the same across the proceedings, or (even if the harm is the same) the local court/tribunal does not grant compensation to the investment vehicle, the difference between the legal orders stands.

IV.352. Once the identity test was adapted, the discussion then set out and analysed the Possible Scenarios where the risk of double compensation may arise, and proposed a mechanism to address the risk in each scenario. The scenarios were identified as follows:

- (1) When there is more than one proceeding:
  - (**Scenario A**) the proceedings are sequential, which could be:
    - (scenario A1) all treaty-based arbitrations; or
    - (scenario A2) at least one treaty-based arbitration and one contract-based proceeding (commercial arbitration or state court proceeding).
  - (**Scenario B**) the proceedings are parallel, which could be:
    - (scenario B1) all investment arbitrations; or
    - (scenario B2) at least one treaty-based arbitration and one contract-based proceeding (commercial arbitration or state court proceeding).
  - (**Scenario C**) the other proceeding (whether by the investment vehicle or another set of shareholders from the same corporate chain) has not yet been initiated.
- (2) When there is only one proceeding, i.e. the treaty-based arbitration:
  - (**Scenario D**) there is only that proceeding, but the investment vehicle is in the process of renegotiating a favorable contract with the state or has already done so.
  - (**Scenario E**) there is only that proceeding, and the risk arises from that proceeding.

IV.353. For Scenario A1, it was proposed that *res judicata* should attach to the preceding arbitration (regardless of whether it is favorable to the shareholders) if the adapted version of the same parties requirement and the same legal basis requirement are met. Accordingly, the overlapping portion of the subsequent arbitration should be dismissed on the ground of inadmissibility, unless the applicable IIA contains a FITR clause or a waiver clause (in which case this would affect the tribunal's jurisdiction).

IV.354. However, in Scenario A2, for *res judicata* to attach, the adapted version of the same legal order requirement has to be met as well, which requires the preceding proceeding to have

ended in favor of the investment vehicle. The only exception would be when the applicable IIA contains a FITR clause or a waiver clause, in which case there is no need for the preceding proceeding to have been concluded in favor of the investment vehicle because those clauses apply regardless of the outcome of the other proceedings.

IV.355. For Scenario B1, *lis pendens* applies if the adapted version of the same parties requirement and the same legal basis requirement are met. However, if the claimant in one of the parallel arbitrations controls the claimant in the other arbitration, the controlling shareholder should be first given the option to withdraw the overlapping portion of claims from one of the proceedings to pursue only the one that it sees as best suiting their interests. If the controlling shareholder does not apply the option, or if neither of the claimants in the parallel arbitrations is a controlling shareholder, the question of claims from which proceeding should become inadmissible depends on factors such as: whether the applicable IIAs offer different levels of protection, the shareholding level to which the claimants belong, and how far each arbitration has advanced. The exception to this is where the applicable IIA contains a FITR clause or a waiver clause, in which case the objection affects the tribunal's jurisdiction (instead of the admissibility of claims) and there will be no choice as to which tribunal should dismiss the overlapping claims. The tribunal constituted based on the IIA that contains a FITR clause or a waiver clause has to dismiss the overlapping claims, regardless of any of the factors set out above.

IV.356. For Scenario B2, if the contract-based proceeding has not yet concluded but has reached its final phase, and it is clear that it will end in favor of the investment vehicle, the treaty-based proceeding should be stayed pending the conclusion of the contract-based proceeding. Once it concludes, the two proceedings will fall into Scenario A2 of sequential proceedings and, accordingly, the overlapping portion will be held inadmissible in the treaty-based proceeding.

However, where the contract-based proceeding is not close to its completion, or it is not clear what its outcome will be, the contract-based proceeding should be stayed pending the result of the treaty-based arbitration. Depending on whether the contract-based proceeding is a local court proceeding or a commercial arbitration, the details and options will vary. Lastly, the same point that was discussed for the previous scenario (i.e. Scenarios B1) about FITR and waiver clauses applies here too.

IV.357. For Scenario C, if the upcoming proceeding is to be launched by the investment vehicle, and if the shareholding claimants in the present arbitration control the investment vehicle, then the present treaty-based tribunal should instruct the shareholders to procure a formal commitment from the investment vehicle that it would not seek damages for the overlapping part. In all other possibilities (i.e. if the shareholders are not controlling shareholders, or if the upcoming proceeding is to be lodged by shareholders at another level of the corporate chain—instead of the investment vehicle), preventing double compensation will be the task of the future court/tribunal once that proceeding is filed. That court/tribunal will have to act based on whether the relationship between that proceeding and the present treaty-based proceeding is sequential (which includes Scenarios A1 and A2) or parallel (which includes Scenarios B1 and B2).

IV.358. For Scenario D, it was explained that, if the renegotiated contract between the state and the investment vehicle contains a settlement agreement and if that settlement agreement leads to compensation for the investment vehicle, the settlement will impact the shareholders' treaty claims either through the principle of *res judicata* or estoppel. The mechanics of the impact will then depend on factors such as whether the renegotiations have concluded by the time that the treaty-based tribunal decides the admissibility of the shareholders' claim and whether the shareholding claimants control the investment vehicle that is involved in renegotiations.

IV.359. For Scenario E, it was explained that, if the risk of double compensation arises because the single treaty-based proceeding has been launched by shareholders from different levels of the same corporate group, the best solution is that the tribunal awards compensation to all the claimants collectively, without allocating the damages among them. However, if the risk emanates from the fact that one of the claimants has relied on more than one legal basis to claim for the same harm, the solution is that the tribunal awards compensation based on only one of the legal bases—the one that is more favorable to the claimant.

IV.360. After covering all the possible typical scenarios, the discussion then turned to two Exceptional Situations requiring the tribunals/courts to take specific steps before those situations could fall into the category of typical scenarios. The first exceptional situation involves ex-shareholders: when foreign shareholders transfer their shares to new shareholders (after the wrongful state measures inflict harm to the investment vehicle) but retain the right to bring treaty-based claims. This situation is considered exceptional because the ex-shareholders are no longer in the corporate group and thus the compensation cannot flow up (when paid to the investment vehicle) or trickle down (when paid to the ex-shareholders).

IV.361. The second exception involves a situation where the investment vehicle has been forced into bankruptcy/insolvency as a result of the state's wrongful measures. Its exceptionality is due to the fact that, once the investment vehicle is liquidated, any compensation paid to the investment vehicle's administrator is unlikely to flow to the shareholders. Therefore, it is unlikely for the shareholders to recover through a normal flow of compensation.

IV.362. Regarding the first exception (Ex-Shareholders), it was explained that, when they retain the right to bring treaty-based claims for their reflective loss, it is only them who are entitled to the compensation paid for that loss, be it obtained directly (through launching a treaty-based

proceeding) or indirectly (through a reflective gain from the compensation received by the investment vehicle). As such, the new shareholders are not entitled to any reflective gain that flows from the compensation paid to the investment vehicle. Accordingly, it was proposed that the ex-shareholders and the new shareholders should include a clause in their share-purchase agreement whereby the latter commit to pay to the former the equivalent of any reflective gain obtained as a result of the compensation paid to the investment vehicle. This establishes a channel between the ex-shareholders and the corporate group to restore the flow of compensation.

IV.363. It was explained that, in the absence of such a clause, the contract-based court/tribunal should condition the admissibility of contract claims to the investment vehicle procuring an official written commitment from the new shareholders that they would pass the reflective gain to the ex-shareholders. It was explained why the new shareholders have the incentive to do this. Three possible scenarios were then discussed for the ex-shareholders' treaty-based proceeding. Once such a commitment from the new shareholders is in place, at least two of those scenarios will eventually fall into Scenario A2 from sequential proceedings.

IV.364. With respect to the second exception (Bankruptcy/Insolvency), it was explained that the situation of an investment vehicle that is liquidated should be distinguished from where it is rehabilitated. The exceptional situation applies only to where the company is liquidated and only if one of the proceedings is contract-based. In that case, the shareholders' treaty-based proceeding should continue, and the tribunal can award damages regardless of the contract-based proceeding pursued by the investment vehicle's administrator. However, to avoid double payment by the state, it was proposed that the local courts/commercial arbitral tribunals should hold the overlapping claims inadmissible on the basis of *res judicata* or *lis pendens*. It was also explained that, if the company is rehabilitated, it will not fall into the category of exceptional situations

because its shareholders can still recover through the natural flow of compensation from the investment vehicle, unless it is established that the restructuring of the investment vehicle hinders the likelihood of the flow-through of damages. In that case, the matter should be treated the same as the liquidation situation. And that concluded the discussion in Chapter 8.

PART V: CONCLUSION

V.1. This thesis analysed the double compensation problem in the ISDS system and proposed a comprehensive mechanism to address it. The thesis is comprised of three main Parts: first, it identified the contours of the problem (Part II); then it assessed how the problem has been dealt with thus far (Part III); and finally, it proposed a mechanism to tackle the problem (Part IV). This concluding Part will not summarize the analysis and arguments that were set out in those three Parts because they include their own summaries, which need not be repeated here.[1985] Therefore, this Part aims to set out some general concluding remarks.

V.2. This thesis built upon, and is in dialogue with, the work of ISDS tribunals and commentators as well as international organizations which have addressed the issue of double compensation either directly or indirectly. Although the arbitration community has failed over the past two decades to achieve a comprehensive, effective solution to the double compensation problem, the work of those tribunals, commentators, and organizations has provided a solid base to build upon.

V.3. This thesis examined the relevant ISDS case law in detail. Some of the cases presented inspiring ideas and, perhaps more importantly, exposed shortcomings of solutions that have been suggested to the double compensation problem thus far. This examination of case law helped the author to formulate a practical mechanism that can be added to tribunals'/courts' toolbox. The practicality of this solution is important: given that the theoretical approach adopted by this thesis is to provide a solution that does not suggest a fundamental change to present legal practice and

[1985] See above, the Summary on the contours of the problem; the Summary on how double compensation has been dealt with thus far; and the Summary on how to tackle the problem.

doctrines. A number of lessons drawn from relevant ISDS case law were important in terms of developing a clear understanding of the problem and in formulating the proposed mechanism. Those lessons are as follows:

- That one of the contributing factors to the problem is the usage of an inaccurate title for the problem (namely, "double recovery") and, as such, the thesis proposed changing this description to "double compensation".
- That the issue of double compensation is not limited to a specific geography, as the home countries of investors and host countries are located in all parts of the world. The cases also involve a wide range of IIAs (such as numerous BITs, NAFTA, and ECT). This indicates that double compensation is a system-wide issue, and not restricted to certain specific countries or specific IIAs.
- That it is not always states that fall victim to double compensation—it can happen to investors as well.
- That postponing the handling of the risk of double compensation to later stages of a proceeding only complicates the matter and renders the risk more difficult to address.
- That, just as playing the same notes results in the same melody time after time, so applying the identity test (for *res judicata*, *lis pendens*, and the FITR clause) in the same way as ISDS tribunals have done thus far will not result in different outcomes: this means that the double compensation problem will only persist. Thus, there is a clear need to "adapt" (rather than "relax") the identity test to the realities of the ISDS system.

V.4. The reason why no comprehensive solution to the double compensation problem has been found in the past two decades is that the issue is the combined result of many other unaddressed matters (both substantive and procedural) in the ISDS system. These matters include: the unclear

relationship that exists between ISDS tribunals, the issue of multiple proceedings, the compromised principle of corporate separateness as a result of shareholders' claims for reflective loss, the failure to adapt general principles such as *res judicata* and *lis pendens* to the realities of the ISDS system, and the misguided application of clauses such as FITR clauses. It is as though those unaddressed matters all intersected at one point and created the thorny issue of double compensation. Therefore, to solve the double compensation issue, this thesis had to delve into all those other matters to be able to propose a comprehensive and holistic solution to the issue of double compensation.

V.5. In the ISDS system, it has so far been accepted (or at least, tolerated) that multiple tribunals/courts decide essentially the same dispute (arising from the same state measures, with respect to essentially the same harm) brought by shareholders at different levels of the same corporate chain and by their investment vehicle. It is helpful to recall that the ISDS system was formed partly on the premise that local courts (particularly those of less advanced jurisdictions) might not be able or willing to effectively protect foreign investors to the same standards that are available in international law. As such, ISDS tribunals generally do not defer to local courts' decisions. Perhaps surprising is the finding that ISDS tribunals do not even defer to each other.

V.6. The mechanism proposed by this thesis to prevent double compensation is based on two pillars. The first pillar envisages a connection between ISDS tribunals and the ISDS system as a whole, and the second pillar envisages a connection between ISDS tribunals and domestic law courts/tribunals. The first pillar is based on the idea that, although the ISDS system is decentralized and although the tribunals' mandate is primarily owed to the parties in each case, that does not mean that ISDS tribunals have no duty to protect the integrity of the ISDS system. The author was inspired by certain developments in international commercial arbitration law in this regard. In that

field, since the 1980s (when the majority of disputes arising under public policy rules started to fall into the category of arbitrable matters),[1986] a tribunal's duty is no longer owed only to the parties, but also to the integrity of the commercial arbitration system, i.e. tribunals are expected to apply public policy rules *sua sponte*.[1987] Likewise, in the ISDS system, tribunals should have a duty to protect the system's integrity, which warrants the prevention of double compensation, and which supports the position that ISDS tribunals should defer to each other.

V.7. The second pillar is based on the following idea. Shareholders have been given standing in investment arbitration to ensure that they are protected, as it is possible that the investment vehicle cannot or may not be willing to pursue its claim. However, what if it is established that the investment vehicle has indeed recovered or is in the process of recovering? In such a scenario, logic requires that the overlapping portion of the shareholders' claim be dismissed. In fact, although international and domestic legal orders are distinct and although treaty-based tribunals are generally not supposed to defer to domestic courts'/commercial arbitral tribunals' decisions, the difference between the two legal orders can be disregarded if: (i) the harm at issue is the same across international and domestic proceedings and (ii) the domestic proceeding has provided compensation to the investment vehicle. Therefore, in certain circumstances, ISDS tribunals should defer to domestic courts'/commercial arbitral tribunals' decisions as well.

V.8. From an investor's perspective, the proposed mechanism might seem to be too pro-state, and from the states' perspective, the proposed mechanism might seem to be too pro-investor. With respect, both of these perceptions are wrong. This thesis is not pro-state because, although

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[1986] Leyla Bahmany, *Sustainable Development of International Arbitration: Rethinking Subject Matter Arbitrability* (LLM Thesis, McGill University, 2013) at 1–2.
[1987] Pierre Mayer, "Mandatory Rules of Law in International Arbitration" (1986) 2:4 Arb Int'l 274 at 285.

preventing double compensation mainly protects states' interests, that is not always the case. In the analysis of case law, the main issue to engage with was whether the risk of double compensation was effectively addressed, regardless of who would benefit from double compensation (shareholders or states). Thus, in the counterclaim scenario (where it was the state and not shareholders that would benefit from double compensation), the author was as objective in her criticism of the tribunals' approach as she was in her analysis of other cases where shareholders benefitted from double compensation. In other words, the thesis maintained the position that double compensation must be avoided, regardless of which side would benefit from this avoidance. Further, in her analysis of case law, whenever states raised exaggerated concerns, the author objectively flagged and debunked those concerns. Most importantly, the proposed mechanism is formulated in a way that works in harmony with the underlying policy of international investment law to protect investors and their investment.[1988]

V.9. However, this thesis is not pro-investors either. Although the proposed mechanism accommodates the underlying policy of international investment law to protect investors and their investment, that does not make the mechanism pro-investor. For a mechanism to integrate and work well in a field of law, it must respect and accommodate the underlying policies of that field. In fact, the issue of double compensation is not "about" states nor "about" investors, as much as it is about ensuring the integrity of the ISDS system. Significant effort has been made in this thesis to safeguard that integrity by striking a balance between investors' and states' rights.

[1988] The aim in international investment law is to support and promote economic development, which requires the promotion of rule of law in investor-state relations and the incentivization of foreign direct investment, which in turn requires providing investors with a higher level of protection compared to the protection offered by domestic law and the law of diplomatic protection. Thus, the policy in international investment law to offer a higher level of protection to investors is a means to an end.

V.10. The principles of *res judicata* and *lis pendens*, together with the "adapted" version of their identity test, played a key role in the author's proposed mechanism. If international investment law has managed to shake off of the traditional domestic law rules around the principle of corporate separateness to accommodate the modern approach of protecting investors in the ISDS system, it certainly can also shake off of the traditional, strict requirements of other principles (such as *res judicata* and *lis pendens*) to counterbalance any side effects of the compromised principle of corporate separateness.

V.11. In the end, tackling the double compensation problem really depends on the will of those involved in the ISDS system. If they have the will to face the problem, there is sufficient precedent and commentary—as the author has gathered, presented, and built upon in this thesis—to give them the necessary tools to satisfactorily address it. However, if the ISDS community does not find the collective will to tackle the problem of double compensation, the prevailing chaos in the case law provides a neat excuse for actors to ignore the problem. Yet, as we know: ignoring a persistent problem does not make it disappear—rather it exacerbates it.

V.12. However, the double compensation problem is a kind of problem that the ISDS system cannot afford to ignore. The ISDS system is designed to offer a higher level of protection to investors (as compared to domestic law and the law of diplomatic protection) so as to incentivize them to generate greater investment, which in turn promotes global economic development. The apparatus of the ISDS system (including the many arbitral institutions, tribunals, law firms, arbitral rules, lengthy and expensive arbitral proceedings) exists so that, at the end of the process, investors can obtain compensation for the harm they sustain as a result of states' wrongful measures. Looked at in this way, the whole system revolves around the notion of compensation. And if in the process of granting compensation to investors, flaws in the system cause double compensation, this affects

the heart of the ISDS system. Such a problem cannot be ignored, as states will not sit by and watch.

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APPENDICES

Appendix 1: Table Presenting an Overview of the Double Compensation Problem in the ISDS System

No.	CASE	(BASED ON LEGAL BASIS) THE "OTHER" PROCEEDING IS:			(BASED ON TIMING) THE "OTHER" PROCEEDING IS:		DID THE TRIBUNAL EFFECTIVELY ADDRESS THE DOUBLE COMPENSATION ISSUE?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
1.	*GÜRİŞ Construction and Engineering Inc and Others v Syria*, ICC Case No 21845/ZF/AYZ, Final Award (31 August 2020). Applicable legal instrument: Turkey-Syria BIT	×			Not yet initiated.		Yes.
2.	*Deutsche Telekom AG v India*, PCA Case No 2014-10, Final Award (27 May 2020) Applicable legal instrument: Germany-India BIT		×		×		No.
3.	*Kappes and Kappes, Cassidy & Associates v Guatemala*, ICSID Case No ARB/18/43, Decision on Respondent's Preliminary Objections (13 March 2020) Applicable legal instrument:	×			Not yet initiated. The cliamants claimed for the injury to the local enterprise, but did not provide a waiver.		No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	DR-CAFTA						
4.	*Strabag SE, Raiffeisen Centrobank AG, Syrena Immobilien Holding AG v Poland*, ICSID Case No ADHOC/15/1, Partial Award on Jurisdiction (4 March 2020) Applicable legal instrument: Netherlands-Poland BIT	×				×	No.
5.	*Gosling and others v Mauritius*, ICSID Case No ARB/16/32, Award (18 February 2020) Applicable legal instrument: UK-Mauritius BIT	×				×	No.
6.	*Standard Chartered Bank (Hong Kong) Limited v Tanzania*, ICSID Case No ARB/15/41, Award (11 October 2019) Applicable legal instrument: an investment agreement			×	×		No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
7.	*United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Estonia*, ICSID Case No ARB/14/24, Award (21 June 2019) Applicable legal instrument: Netherland-Estonia BIT	X				X	No.
8.	*Hydro Srl, Costruzioni Srl, Becchetti, De Renzis, Grigolon, Condomitti v Albania*, ICSID Case No ARB/15/28, Award (24 April 2019) Applicable legal instrument: Italy-Albania BIT		X	X	X (the commercial arbitration)	X (the treaty-based proceeding)	No.
9.	*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, ConocoPhillips Gulf of Paria BV, and ConocoPhillips Company v Venezuela*, ICSID Case No ARB/07/30, Award (9 March 2019) Applicable legal instrument: Netherlands-Venezuela BIT		X		X		No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
10.	*Manchester Securities Corporation v Poland*, PCA Case No 2015-18, Award (7 December 2018) Applicable legal instrument: US-Poland BIT	X				X	Yes.
11.	*Gavrilovic and Gavrilovic doo v Croatia*, ICSID Case No ARB/12/39, Award (26 July 2018) Applicable legal instrument: Austria-Croatia BIT	X			Not yet initiated.		No.
12.	*Unión Fenosa Gas, SA v Egypt*, ICSID Case No ARB/14/4, Award (31 August 2018) Applicable legal instrument: Spain-Egypt BIT		X (three proceedings)		X (two of the proceedings)	X (the third proceeding)	Yes.
13.	*Salini Impregilo SpA v Argentina*, ICSID Case No ARB/15/39, Decision on Jurisdiction and Admissibility (23 February 2018)	X				X	No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	Applicable legal instrument: Italy-Argentina BIT						
14.	*Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v Venezuela*, ICSID Case No ARB/12/21, Award (13 November 2017) Applicable legal instrument: Netherlands-Venezuela BIT			×	×		No.
15.	*Perenco Ecuador Ltd v Ecuador*, ICSID Case No ARB/08/6, Decision on Claimant's Application for Dismissal of Respondent's Counterclaims (18 August 2017) [1989] Applicable legal instrument: France-Ecuador BIT			×	×		No.
16.	*Orascom TMT Investments Sà rl v Algeria*, ICSID Case			×	×		Yes.

[1989] This is an exceptional case where the risk of double compensation was raised by the investors against the state due to the counterclaims the state filed in two separate but related investor-state proceedings (the other one is discussed in row 9).

No.	Case	(Based on legal basis) The "other" proceeding is:			(Based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	No ARB/12/35, Award (31 May 2017) Applicable legal instrument: BLEU-Algeria BIT						
17.	*Eskosol SpA in liquidazione v Italy*, ICSID Case No ARB/15/50, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) Applicable legal instrument: ECT			×	×		Given that the claims in the preceding proceeding were denied on the merits, the risk of double compensation was rendered moot.
18.	*Busta v Czech Republic*, SCC Case No V 2015/014, Final Award (10 March 2017) Applicable legal instrument: UK- Czech Republic BIT	×				×	No.
19.	*Burlington Resources Inc v Ecuador*, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017) Applicable legal instrument:			×		×	No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	US-Ecuador BIT						
20.	*CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v India*, PCA Case No 2013-09, Award on Jurisdiction and Merits (25 July 2016) Applicable legal instrument: Mauritius-India BIT		X			X	No
21.	*The Renco Group, Inc v Peru (I)*, ICSID Case No UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) Applicable legal instrument: US-Peru BIT	X				X	Yes.
22.	*RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà rl v Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction (6 June 2016) Applicable legal instrument: ECT	X				X	No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
23.	*Ampal-American Israel Corp v Egypt*, ICSID Case No ARB/12/11, Decision on Jurisdiction (1 February 2016) Applicable legal instruments: • US-Egypt BIT • Germany-Egypt BIT		✕ (two international arbitrations)	✕ [1990]	✕ (the two international commercial arbitrations)	✕ (the treaty-based arbitration)	Yes.
24.	*von Pezold and Others v Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015) Applicable legal instruments: • Swiss-Zimbabwe BIT • Germany-Zimbabwe BIT			✕		✕	No.
25.	*Suez, Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal, SA v Argentina* (formerly *Aguas Argentinas, SA, Suez,*	✕				✕	No.

[1990] The parallel treaty-based proceeding is *Maiman, Merhav (MNF), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v Egypt*, PCA Case No 2012/26. The decisions in *Maiman* are not publicly available.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	Sociedad General de Aguas de Barcelona, SA, and Vivendi Universal, SA v Argentina), ICSID Case No ARB/03/19, Award (9 April 2015) Applicable legal instruments: • France-Argentina BIT • Spain-Argentina BIT						
26.	*AWG Group Ltd v Argentina*, UNCITRAL, Award (9 April 2015) Applicable legal instrument: UK-Argentina BIT	×				×	No.
27.	*British Caribbean Bank Ltd v Belize*, PCA Case No 2010-18/BCB-BZ, Award (19 December 2014) Applicable legal instrument: UK-Belize BIT	×				×	No.
28.	*Venezuela Holdings BV and Others v Venezuela* (formerly *Mobil Corporation and Others v Venezuela*), ICSID Case No		×		×		No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	ARB/07/27, Award (9 October 2014) Applicable legal instrument: Netherlands-Venezuela BIT						
29.	*Yukos Universal Limited (Isle of Man) v Russia*, PCA Case No 2005-04/AA227 in conjunction with *Hulley Enterprises Limited (Cyprus) v Russia*, PCA Case No 2005-03/AA226 and *Veteran Petroleum Limited (Cyprus) v Russia*, PCA Case No 2005-05/AA228 Final Award (18 July 2014) Applicable legal instrument: ECT	✕		✕ (a proceeding before the ECtHR based on the *European Convention on Human Rights*)	✕ (the local proceedings)	✕ (the ECtHR proceeding)	No.
30.	*SAUR International SA v Argentina*, ICSID Case No ARB/04/4, Award (22 May 2014) Applicable legal instrument: France-Argentina BIT	✕				✕	No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
31.	*Guaracachi America, Inc and Rurelec PLC v Bolivia*, PCA Case No 2011-17, Award (31 January 2014) Applicable legal instruments: • US-Bolivia BIT • UK-Bolivia BIT	✕ (administrative proceedings)				✕	No.
32.	*Micula, SC European Food SA, SC Starmill SRL, and SC Multipack SRL v Romania (I)*, ICSID Case No ARB/05/20, Award (11 December 2013) Applicable legal instrument: Sweden-Romania BIT	There was no other proceeding (parallel or preceding), as shareholders—together with some companies from the investment vehicle group—were claimants in one investor-state arbitration.					Yes.
33.	*Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina*, ICSID Case No ARB/09/1	✕ (by the investment vehicles)		✕ (by the claimant's creditors, as the claimants were the subject of liquidation proceedings)	Not yet initiated.		No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	• Decision on Jurisdiction (21 December 2012) • Decision on Provisional Measures (8 April 2016) • Award (21 July 2017) Applicable legal instrument: Spain-Argentina BIT						
34.	*Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) Applicable legal instrument: Spain-Argentina BIT	✕			Not yet initiated. Note: There were administrative proceedings afoot to obtain a ruling on the illegality of the government's measures, based on which the investment vehicle could then initiate a local court proceeding to obtain damages.		No.
35.	*Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/2, Award (31 October 2012) Applicable legal instrument: German-Sri Lanka BIT	✕			Not yet initiated.		No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
36.	*Daimler Financial Services AG v Argentina*, ICSID Case No ARB/05/1, Award (22 August 2012) Applicable legal instrument: German-Argentina BIT			×	A claim by the parent company, not yet initiated at the time.		No
37.	*Goetz and Others v Burundi (II)*, ICSID Case No ARB/01/2, Award (21 June 2012) Applicable legal instruments: • BLEU (Belgium-Luxembourg)-Burundi BIT • Memorandum of Understanding on a Friendly Settlement of the Dispute of 1998 • Special Agreement on the Functioning of AFFIMET SA of 1998 Note: The last two instruments were incorporated in *Goetz and Others v Burundi (I)*, ICSID case No ARB 95/3, Award (10 February 1999).	There was no other proceeding involved. The risk of double compensation arose because the shareholders relied on different instruments for the same claim.					Yes.

No.	Case	(Based on legal basis) The "other" proceeding is:			(Based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
38.	*EDF International SA, SAUR International SA, and León Participaciones Argentinas SA v Argentina*, ICSID Case No ARB/03/23, Award (11 June 2012) Applicable legal instrument: France-Argentina BIT BLEU-Argentina BIT	×			×		No.
39.	*Hochtief AG v Argentina*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) Applicable legal instrument: Germany-Argentina BI	×				×	No.
40.	*Impregilo SpA v Argentina*, ICSID Case No ARB/07/17, Award (21 June 2011) Applicable legal instrument: Italy-Argentina BIT	×				×	No.
41.	*CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Venezuela*, ICSID Case No ARB/08/15, Decision on	There was no other proceeding involved. The risk of double compensation arose because one of the claimants owned the other claimant, and the tribunal failed to address the flow of damages between them.					No.

No.	Case	(Based on legal basis) The "other" proceeding is:			(Based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	Jurisdiction (30 December 2010) Applicable legal instrument: Netherlands-Venezuela BIT						
42.	*Gemplus SA, SLP SA, and Gemplus Industrial S.A. de CV v Mexico*, ICSID Case No ARB(AF)/04/3, Award (16 June 2010) Applicable legal instrument: France-Mexico BIT	×			Not yet initiated. Note: There were administrative proceedings afoot to obtain a ruling on the illegality of the government's measures, based on which the investment vehicle could initiate a local court proceeding to obtain damages.		No.
43.	*Talsud SA v Mexico*, ICSID Case No ARB(AF)/04/4, Award (16 June 2010) Applicable legal instrument: Argentina-Mexico BIT	×			Not yet initiated. Note: There were administrative proceedings afoot to obtain a ruling on the illegality of the government's measures, based on which the investment vehicle could initiate a local court proceeding to obtain damages.		No.
44.	*Chevron Corp and Texaco Petroleum Company v Ecuador (I)*, PCA Case No 2007-02/AA277, Partial Award on the Merits (30 March 2010) Applicable legal instrument:	×				×	No.

No.	Case	(Based on legal basis) The "other" proceeding is:			(Based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	US-Ecuador BIT						
45.	*Kardassopoulos and Fuchs v Georgia*, ICSID Case Nos ARB/07/15 and ARB/05/18, Award (3 March 2010) Applicable legal instruments: • ECT • Greece-Georgia BIT • Israel-Georgia BIT	There was no other proceeding involved. The risk of double compensation arose because one of the claimants relied on two legal bases for essentially the same harm.					Yes.
46.	*Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No ARB/08/8 • Decision on Jurisdiction (8 March 2010) • Award (1 March 2012) Applicable legal instrument: Germany-Ukraine BIT	There was no other proceeding involved. The risk of double compensation arose because two of the claimants owned the third claimant, and the tribunal failed to address the flow of damages among them.					No.
47.	*Duke Energy Electroquil Partners and Electroquil SA v Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008) Applicable legal instruments:	There was no other proceeding involved. The risk of double compensation arose because: (i) the claimants relied on two legal bases for essentially the same harm; and (ii) one of the claimants owned the majority of shares in the other claimant, and the tribunal failed to address the flow of damages between them.					No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	• US-Ecuador BIT • A separate arbitration agreement						
48.	*Limited Liability Company AMTO v Ukraine*, SCC Case No 080/2005, Final Award (26 March 2008) Applicable legal instrument: ECT	✕ (which resulted in a settlement agreement)		✕ (an ECtHR proceeding)	✕ (the settlment agreement)	✕ (the ECtHR proceeding)	No.
49.	*Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Award (28 September 2007) Applicable legal instrument: US-Argentina BIT	The risk of double compensation was mainly due to a favorable agreement that the state renegotiated with the investment vehicle, the benefits of which would flow to the claimant.					No.
50.	*Enron Corporation and Ponderosa Assets, LP v Argentina*, ICSID Case No ARB/01/3, Award (22 May 2007) Applicable legal instrument: US-Argentina BIT	The risk of double compensation here was due to the fact that the state was in the process of renegotiating the contract with the investment vehicle.					No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
51.	*PSEG Global Inc and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case No ARB/02/5, Award (19 January 2007) Applicable legal instrument: US-Turkey BIT	There was no other proceeding, as the shareholders, together with the investment vehicle, were claimants in one treaty-based arbitration.					Yes.
52.	*Zeevi Holdings v Bulgaria and the Privatization Agency of Bulgaria*, Case No UNC 39/DK, Award (25 October 2006) Applicable legal instrument: Israel-Bulgaria BIT	×				×	No.
53.	*Pan American Energy LLC and BP Argentina Exploration Company v Argentina*, ICSID Case No ARB/03/13, Decision on Preliminary Objections (27 July 2006) Applicable legal instrument: US-Argentina BIT			×		×	No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
54.	*BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL, and Pan American Continental SRL v Argentina*, ICSID Case No ARB/04/8, Decision on Preliminary Objections (27 July 2006) Applicable legal instrument: US-Argentina BIT			×		×	No.
55.	*Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentina* (formerly *Aguas Provinciales de Santa Fe SA, Suez, Sociedad General de Aguas de Barcelona, SA, and InterAguas Servicios Integrales del Agua, SA v Argentina*), ICSID Case No ARB/03/17, Decision on Jurisdiction (16 May 2006) Applicable legal instruments: • France-Argentina BIT • Spain-Argentina BIT	There was no other proceeding, as the shareholders, together with the investment vehicle, were claimants in one treaty-based arbitration.					No.

No.	Case	(Based on legal basis) The "other" proceeding is:			(Based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
56.	*Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) Applicable legal instrument: Turkey-Pakistan BIT		X			X	No.
57.	*CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005) Applicable legal instrument: US-Argentina BIT	The risk of double compensation was mainly due to the fact that the state was in the process of renegotiating the contract with the investment vehicle.					Yes.
58.	*Camuzzi International SA v Argentina (I)*, ICSID Case No ARB/03/2, Decision on Jurisdiction (11 May 2005) Applicable legal instrument: BLEU-Argentina BIT	X				X	No.
59.	*GAMI Investments, Inc v Mexico*, UNCITRAL, Final Award (15 November 2004) Applicable legal instrument: NAFTA	X			X		No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
60.	*Occidental Exploration and Production Company v Ecuador (I)*, LCIA Case No UN3467, Final Award (1 July 2004) Applicable legal instrument: US-Ecuador BIT	X (not contract-based, but rather filed based on a local tax law)				X	Yes.
61.	*Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Decision on Jurisdiction (8 December 2003) Applicable legal instrument: US-Argentina BIT	X				X	No.
62.	*Nykomb Synergetics Technology Holding AB v Latvia,* SCC Case No 118/2001, Award (16 December 2003) Applicable legal instrument: ECT	X			Not yet initiated.		No.
63.	*Nagel v Czech Republic*, SCC Case No 049/2002, Final Award (9 September 2003) Applicable legal instrument:	X (which resulted in a			X		No.

No.	Case	(based on legal basis) The "other" proceeding is:			(based on timing) The "other" proceeding is:		Did the tribunal effectively address the double compensation issue?
		Contract-Based		Treaty-Based (including investment agreements)	Preceding	Parallel	
		Local court proceeding	Commercial Arbitration				
	UK-Czech BIT	settlement agreement)					
64.	*CME Czech Republic BV v Czech Republic*, UNCITRAL, Final Award (14 March 2003) Applicable legal instrument: Netherlands-Czech Republic BIT	X	X	X	X (the treaty-based arbitration and the commercial arbitration)	X (the local court proceeding)	No.
65.	*Lauder v Czech Republic*, UNCITRAL, Final Award (3 September 2001) Applicable legal instrument: US-Czech Republic BIT	X	X	X		X	No.
66.	*Waste Management, Inc v Mexico*, ICSID Case No ARB(AF)/98/2, Arbitral Award (2 June 2000) Applicable legal instrument: NAFTA	X	X		X		Yes.

Appendix 2: Table of ISDS Cases on the Fork-in-the-Road (FITR) Clause

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
1.	*Greentech Energy Systems A/S, NovEnergia II Energy and Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v Italy*, SCC Case No V 2015/095, Final Award (23 December 2018) Applicable legal instrument: ECT	No. With respect to the same parties requirement of the identity test, the tribunal: • Rejected the respondent's argument about the group-of-companies doctrine (that the claimants and their subsidiaries should be considered the same, particularly given the presence of the element of control). • Held that "the Tribunal has not been persuaded to adopt a non-literal interpretation" of the ECT's FITR provision. Reasoned that the term "investor" in that provision is "unambiguous", and "the Italian subsidiaries of claimants in this arbitration cannot be understood to be 'Investors' but are, instead, to be treated as 'Investments'". (para 204).	Not met.	Not discussed.	Not discussed.
2.	*Eskosol SpA in liquidazione v Italy*, ICSID Case No ARB/15/50, Decision on Respondent's Application Under Rule 41(5) (20 March 2017)	No. Noted that it would have preferred to consider the issue under *res judicata* than the FITR clause. (paras 134–135).	Not met.	Not discussed.	Not discussed.

[1991] The cases are arranged in reverse-chronological order. Also, there are 40 cases listed in this table, in 33 of which the issue of the FITR clause was raised. The seven remaining cases (marked in blue) did not involve any objection related to the FITR clause, but the tribunal mentioned these clauses.

[1992] This column aims to provide a "yes" or "no" answer. However, for decisions where a simple "yes" or "no" answer could not clearly convey the tribunal's approach, further information has been provided.

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
	Applicable legal instrument: ECT				
3.	*Supervision y Control SA v Costa Rica*, ICSID Case No ARB/12/4, Final Award (18 January 2017) Applicable legal instrument: Spain-Costa Rica BIT	The relevant BIT provision was a waiver clause and not a FITR clause. (paras 299, 300). However, the case appears in online research on FITR clauses because the tribunal made some observations about FITR clauses: that those clauses are one of the means to prevent duplication of proceedings, and that the strict application of the triple identity test "removes all legal effects from fork in the road clauses". (paras 294, 330). With respect to the waiver clause, the tribunal applied the more liberal *Pantechniki* test.[1993]	Met.	Met.	Met.
4.	*Charanne BV and Construction Investments Sarl v Spain*, SCC Case No 062/2012, Award (21 January 2016) Applicable legal instrument: ECT	No. While the tribunal did not dismiss the respondent's argument about the group-of-companies doctrine with respect to the claimants in the two proceedings, held that the doctrine would only apply if the respondent could demonstrate that the entities involved "are in fact the same entity", which would require: • the claimants to have decision-making power in those companies (which was not the case because they were minority shareholders); or • the companies' corporate structure to be fraudulently designed or modified for the	Not met.	Not discussed.	Not discussed.

[1993] The test was introduced by the *Pantechniki* tribunal (see below, row 20).

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
		purpose of avoiding the FITR provision (which was not the case here).			
5.	*Gavazzi v Romania*, ICSID Case No ARB/12/25, Decision on Jurisdiction, Admissibility and Liability (21 April 2015) Applicable legal instrument: Italy-Romania BIT	No. Rejected the respondent's argument that the BIT's dispute resolution provision was a FITR clause. (paras 127–128). However, the triple identity test was still raised in the context of *res judicata* (due to a prior court decision that set aside a relevant commercial arbitral award and decided the matter on the merits). The tribunal rejected the application of *res judicata* on the ground that the triple identity test was not met. (paras 164–168, 171–174).	Not met.	Not met.	Discussed the parties' positions but did not decide the issue.
6.	*Awdi, Enterprise Business Consultants, Inc and Alfa El Corporation v Romania*, ICSID Case No ARB/10/13, Award (2 March 2015) Applicable legal instrument: US-Romania BIT	No. Rejected the FITR objection to its jurisdiction because the dispute was never really adjudicated before the local courts.	Held that, because the dispute was never really adjudicated before the local courts, it "dispenses the Tribunal from examining the applicability of the triple identity test, as contended by claimants to exclude the operation of the fork-in-the-road provision, or of the 'normative source' test, as contended by Respondent to assert the operation of this provision." (para 204).[1994]		
7.	*H&H Enterprises Investments, Inc v Egypt*, ICSID Case No ARB 09/15, Excerpts of Award (6 May 2014) Applicable legal instrument:	Yes. Held that, citing the *Pantechniki* tribunal,[1995] "instead of focusing on whether the causes of action relied upon in the claims brought to the local courts and the arbitration are identical, one must assess whether the claims share the same fundamental basis", and	Noted that "the triple identity test originates from the doctrine of *res judicata*." (para 367). Refused to apply the triple identity test and reasoned that: • The application of the triple identity test would be based on the "reading of arbitral jurisprudence as opposed to the		

[1994] The "normative source" test is likely to refer to the test introduced by the *Pantechniki* tribunal (see below, row 20).
[1995] For *Pantechniki*, see below, row 20.

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	**(ii) same cause of action**	**(iii) same relief**
	US-Egypt BIT	whether the treaty claim has "an autonomous existence outside the contract." (paras 368–377). Found that the claimant's treaty claims and those pursued in commercial arbitration and local proceedings shared the same fundamental bases and the same factual components, and that the treaty claims did not exist independent of the contract.	specific language of the US-Egypt BIT and/or its interpretation." (para 364). • The relevant BIT provision "does not expressly require that the triple identity test be met before the fork-in-the-road provision can be invoked." (para 364). • "[T]he language of Article VII does not require specifically that the parties be the same, but rather that the dispute at hand not be submitted to other dispute resolution procedures; what matters therefore is the subject matter of the dispute rather than whether the parties are exactly the same." (para 367). • The triple identity test "would defeat the purpose of Article VII of the US-Egypt BIT, which is to ensure that the same dispute is not litigated before different fora. It would also deprive Article VII [of] any practical meaning." (para 367).[1996]		
8.	*Guaracachi America, Inc and Rurelec PLC v Bolivia*, PCA Case No 2011-17, Award (31 January 2014) Applicable legal instruments: • US-Bolivia BIT • UK-Bolivia BIT	Did not decide the FITR objection, as it had already ruled that it did not have jurisdiction over that part of the claims on other grounds.	Discussed only by the parties.	Discussed only by the parties.	Discussed only by the parties.
9.	*AES Corporation and Tau Power BV v Kazakhstan*, ICSID Case No ARB/10/16, Award (1 November 2013) Applicable legal instrument:	No. Held that the FITR objection should be dismissed "irrespective of the standard applied, i.e. whether applying the 'triple	Not discussed.	Not discussed.	Not met.

[1996] For an earlier case concerning the FITR clause in the US-Egypt BIT, see *Champion Trading Company v Egypt* (see below, row 36). The tribunal in that case took a completely different approach.

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
	US-Kazakhstan BIT and ECT	identity test' or the 'fundamentally same' test under *Pantechniki*."[1997] (paras 226–227).			
10.	*Bogdanov v Moldova* (IV), SCC Arbitration No V091/2012, Final Award (16 April 2013) Applicable legal instrument: Russian Federation-Moldova BIT	No. Found that the BIT's relevant provision was not expressive as to the preclusive effect of choosing one path over the other and that the tribunal could not assume a preclusive effect. Held that, even if the BIT had a FITR clause, the identity of causes of action and the parties were not met.	Not met.	Not met.	Not discussed.
11.	*Mobil Exploration and Development Inc Suc Argentina and Mobil Argentina SA v Argentina*, ICSID Case No ARB/04/16, Decision on Jurisdiction and Liability (10 April 2013) Applicable legal instrument: US-Argentina BIT	No.	Not discussed.	Not met.	Not met. Note: The tribunal did not use the term "relief", but rather used the term "purpose", and found that the investment arbitration was initiated to seek damages whereas the local proceeding that was pursued (called *amparo*) was not for the purpose of seeking damages.

[1997] For *Pantechniki*, see below, row 20.

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
12.	*Urbaser SA v Argentina*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) Applicable legal instrument: Spain-Argentina BIT	The application of the FITR clause was not at issue here. Found that, having considered the BITs that Argentina has signed, a FITR clause could have met Argentina's expectation rather than the BIT's 18-month-rule precondition of submitting a dispute to local courts before submitting it to international arbitration.	The identity test was not at issue in this decision.		
13.	*Khan Resources Inc, Khan Resources BV and CAUC Holding Company Ltd v Mongolia and MonAtom LLC*, PCA Case No 2011-09, Decision on Jurisdiction (25 July 2012) Applicable legal instrument: ECT	No. Refused the respondent's request to apply the "fundamental basis" test[1998] and held that it "sees no reason to go beyond the triple identity test. There [was] ample authority for its application." (paras 389–390). Regarding the respondent's argument that the triple identity test was too strict, held that— • "the test for the application of fork in the road provisions should not be too easy to satisfy, as this could have a chilling effect on the submission of disputes by investors to domestic fora, even when the issues at stake are clearly within the domain of local law. This may cause claims being brought to international arbitration before they are ripe on the merits". (para 392). • the respondent's argument "may have some persuasive force in cases where only one of the requirements of the triple identity test is not satisfied, while the remaining requirements, as well as other aspects of	Not met.	Not met.	Not met.

[1998] The test was formulated by the *Pantechniki* tribunal (see below, row 20).

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
		the two disputes are identical. But this is not the case here." (para 392).			
14.	*Chevron Corporation and Texaco Petroleum Company v Ecuador* (II), PCA Case No 2009-23, Third Interim Award on Admissibility and Jurisdiction (27 February 2012) Applicable legal instrument: US-Ecuador BIT	No. However, the tribunal's refusal to apply the FITR clause was not due to a lack of identity between the PCA proceeding and the local proceeding. On the contrary, the tribunal expressed serious doubts (without deciding the issue) about applying the triple identify test to the FITR clause. Based on the specific wording of the BIT, the tribunal found that it must be the claimants who submit the dispute to another forum in order for the FITR clause to be triggered. This was not the case here because the claimants were the defendants in the local proceedings. The tribunal then examined whether the defenses presented by the claimants in the local proceedings could be considered counterclaims and hence "submission" of the dispute to another forum. The tribunal answered that question in the negative, and this is why the tribunal did not apply the FITR clause.	Not met.	Not met.	Not met.
15.	*Total SA v Argentina*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010) Applicable legal instrument: France-Argentina BIT	No.	Not met.	Not met. Note: The tribunal used the term "object" instead of "cause of action".	Not discussed.
16.	*AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary*, ICSID Case No	Held that article 26(3) of the ECT (about submitting a dispute to international arbitration) was applicable because:	The identity test was not at issue in this decision.		

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	**(ii) same cause of action**	**(iii) same relief**
	ARB/07/22, Award (23 September 2010) Applicable legal instrument: ECT	• The "cooling off" period in article 26(1) was respected; • The claimants had not submitted the dispute to local courts as per article 26(2)(a); and • There was not any previously agreed mechanism as per article 26(2)(b).			
17.	*Pac Rim Cayman LLC v El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 (2 August 2010) Applicable legal instrument: CAFTA-DR	This case did not involve a FITR clause issue because the applicable IIA was CAFTA-DR, which has a waiver clause and not a FITR clause. However, the decision appears in online research on FITR clauses because the respondent used the terms "fork-in-the-road" while comparing CAFTA-DR's waiver clause with BITs' FITR clauses. (paras 174–176). There was no parallel domestic or international proceeding concerning the same measures.	The identity test was not at issue in this decision.		
18.	*Yukos Universal Limited (Isle of Man) v Russia*, PCA Case No 2005-04/AA227 in conjunction with	No.	Not met.	Not met.	Not met.

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	**(ii) same cause of action**	**(iii) same relief**
	Hulley Enterprises Limited (Cyprus) v Russia, PCA Case No 2005-03/AA226 and *Veteran Petroleum Limited (Cyprus) v Russia*, PCA Case No 2005-05/AA228 Interim Award on Jurisdiction and Admissibility (30 November 2009) Applicable legal instrument: ECT		Note: The tribunal did not discuss each element of the triple identity test separately. It only stated that the test was not met here. (para 598). However, while setting out the claimant's position, it explained that the test included the identity of parties, causes of action, and object of the dispute. (paras 593, 595).		
19.	*Toto Costruzioni Generali SpA v Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009) Applicable legal instrument: Italy-Lebanon BIT	No.	Not discussed but met.	Not met.	Not discussed.
20.	*Pantechniki SA Contractors and Engineers (Greece) v Albania*, ICSID Case No ARB/07/21, Award (30 July 2009) Applicable legal instrument: Greece-Albania BIT	Yes. Held that the relevant test was whether the "fundamental basis" of a claim before an ICSID tribunal is independent of the one before local courts and that it was necessary to find out "whether claimed entitlements have the same normative source." In other words, "whether the [alleged treaty] claim truly does have an autonomous existence outside the contract". (para 62). Found that, here, the claimant's claim "arises out of the same purported entitlement that it invoked in the contractual debate it began with the General Roads Directorate. The claimant chose to take this matter to the Albanian	Not discussed.	Rejected the claimant's argument that treaty claims were "inherently" different from contract claims, regarding it as an "argument by labelling - not by analysis".	Not discussed.

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
		courts. It cannot now adopt the same fundamental basis as the foundation of a treaty claim. Having made the election to seise the national jurisdiction, the claimant is no longer permitted to raise the same contention before ICSID." (para 67). Rejected the claimant's "choice" argument (that the officials deceived it into pursuing local proceedings and as such it did not exercise a "choice"), finding that there was no such promise by the officials.[1999]			
21.	*Nordzucker v Poland*, UNCITRAL, Partial Award (Jurisdiction) (10 December 2008) Applicable legal instrument: Germany-Poland BIT	No. Held that "[t]he Tribunal, without going in the question whether the Polish Courts dealt with the same dispute (in terms of Parties and legal ground of the claim) as this Tribunal has to decide, is of the opinion that there is no evidence that article 11(2) of the BIT is a true 'fork in the road' provision", because the second and fourth sentences of that article concerned the investor's right to withdraw the local court proceeding before or after the local court rendered its decision (called "the right to switch"). Found that "the right to switch" in the second and fourth sentences of the BIT article 11(2) was the opposite of *electa una via*.	The identity test was not at issue in this decision.		
22.	*Chevron Corporation and Texaco Petroleum Company v Ecuador* (I),	No.	Not discussed.	Not met.	Not discussed.

[1999] For similar points about the "choice" between local and international proceedings, see below, *Occidental v Ecuador* (row 30) and *Maffezini v Spain* (row 39).

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
	PCA Case No 2007-02/AA277, Interim Award (1 December 2008) Applicable legal instrument: US-Ecuador BIT				
23.	*Pey Casado and President Allende Foundation v Chile* (I), ICSID Case No ARB/98/2, Award (8 May 2008) Applicable legal instrument: Spain-Chile BIT	No.	Met.	Not met.	Not met.
24.	*Desert Line Projects LLC v Yemen*, ICSID Case No ARB/05/17, Award (6 February 2008) Applicable legal instrument: Oman-Yemen BIT	No.	Not discussed.	Not met.	Not discussed.
25.	*MCI Power Group LC and New Turbine, Inc v Ecuador*, ICSID Case No ARB/03/6, Award (31 July 2007) Applicable legal instrument: US- Ecuador BIT	No. Noted the difference between contract cause of action and BIT cause of action. However, when rejecting the FITR objection, emphasized that the BIT was not yet in force at the time that the claimants' subsidiary initiated the local proceedings, which meant there was no option for the claimants at the time to exercise their choice between local proceedings and international arbitration.[2000]	Not discussed.	Not met.	Not discussed.

[2000] For similar points about the "choice" between local and international proceedings, see below, *Occidental v Ecuador* (row 30) and *Maffezini v Spain* (row 39).

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
26.	*Pan American Energy LLC and BP America Production Company v Argentina*, ICSID Case No ARB/03/13 consolidated with *BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v Argentina*, ICSID Case No ARB/04/8 Decision on Preliminary Objections (27 July 2006) Applicable legal instrument: US-Argentina BIT	No.	Not met.	Not met.	Not discussed.
27.	*Camuzzi International SA v Argentina*, ICSID Case No ARB/03/2, Decision on Jurisdiction (11 May 2005) Applicable legal instrument: Belgo-Luxembourg Economic Unit-Argentina BIT	This case did not involve a FITR issue. However, it appears in online research on FITR clauses because the tribunal (while discussing the forum selection clause in the license) noted that the BIT's dispute resolution clause did not provide for a FITR provision. (paras 117–118).	Not discussed.	Not met. Note: The tribunal discussed it in the context of the difference between treaty claims and contract claims.	Not discussed.
28.	*Siemens AG v Argentina*, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004) Applicable legal instrument: Germany-Argentina BIT	No. The claimant relied on the BIT's MFN provision to avoid the BIT's requirement that the dispute must be submitted first to local courts 18 months before submitting it to international arbitration. Based on the MFN provision, the claimant relied on the Germany-	The identity test was not discussed by the tribunal.		

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
		Chile BIT, which did not have the 18-month requirement. The respondent objected to the tribunal's jurisdiction on the ground that, if the MFN provision was applicable (and hence the favorable provision of the Germany-Chile BIT), the other provisions of that BIT (including its FITR clause) should apply as well. And given that the claimant's local investment vehicle had already launched administrative proceedings in Argentina, the FITR clause would be triggered. The tribunal found that the effects of the MFN provision were limited only to the favorable part of the Germany-Chile BIT (i.e. the part providing for direct access to international arbitration) and as such the FITR provision of that BIT would not apply. The tribunal then found it unnecessary to address the parties' arguments surrounding the FITR clause.			
29.	*Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Decision on Objection to Jurisdiction (11 May 2005) Applicable legal instrument: US-Argentina BIT	No.	Not discussed.	Not met.	Not discussed.
30.	*Occidental Exploration and Production Company v Ecuador* (I), LCIA Case No UN3467, Final Award (1 July 2004) Applicable legal instrument:	No. In addition to the difference between contract claims and treaty claims, another reason that the tribunal set forth was that the claimant "did not have real choice" when it pursued local court proceedings. The tribunal	Not discussed.	Not met.	Not discussed.

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
	US-Ecuador BIT	reasoned that the FITR mechanism "by its very definition assumes that the investor has made a choice between alternative avenues", which in turn "requires that the choice be made entirely free and not under any form of duress", whereas, here, "the Ecuadorian Tax Law requires the taxpayer to apply to the courts within the brief period of twenty days following the issuance of any resolution that might affect it." (paras 60–61).[2001]			
31.	*Enron Corporation and Ponderosa Assets, LP v Argentina*, ICSID Case No ARB/01/3, Decision on Jurisdiction (14 June 2004) Applicable legal instrument: US-Argentina BIT	No.	Not met.	Not met.	Not discussed.
32.	*LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentina*, ICSID Case No ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (30 April 2004) Applicable legal instrument: US-Argentina BIT	No.	Not met.	Not discussed.	Not discussed.

[2001] For similar points about the "choice" between local and international proceedings", see below, *Maffezini v Spain* (row 39).

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
33.	*Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Decision on Jurisdiction (8 December 2003) Applicable legal instrument: US-Argentina BIT	No.	Not met.	Not met. Note: The tribunal used the term "claim" instead of "cause of action".	Not discussed.
34.	*SGS Société Générale de Surveillance SA v Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) Applicable legal instrument: Switzerland-Pakistan BIT	This case did not involve a FITR issue. Yet, it appears in online research on FITR clauses because the tribunal (while discussing its jurisdiction) noted that the BIT's dispute resolution clause did not provide for a FITR provision. (paras 151, 155). However, given the parallel commercial arbitration, the respondent argued that *lis pendens* should be applied, which the tribunal rejected because the causes of action were not identical. (paras 1–2, 46,182).	Not discussed.	Not met.	Not discussed.
35.	*CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) Applicable legal instrument: US-Argentina BIT	No.	Not met.	Not met.	Not discussed.
36.	*Lauder v Czech Republic,* UNCITRAL, Final Award (3 September 2001) Applicable legal instrument: US-Czech BIT	No.	Not met.	Not met.	Not discussed.

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
37.	*Genin, Eastern Credit Limited, Inc and AS Baltoil v Estonia*, ICSID Case No ARB/99/2, Award (25 June 2001) Applicable legal instrument: US-Estonia BIT	No.	Not discussed.	Not met.	Not discussed.
38.	*Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentina (I)* (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentina*), ICSID case No ARB/97/3 • Award (21 November 2000) • Decision on Annulment (3 July 2002) Applicable legal instrument: France-Argentina BIT	In the Award: No. The respondent's objection concerned the forum selection clause in the license and not the FITR clause in the BIT. However, the tribunal (while setting out its reasoning) noted that even if there had been a parallel court proceeding, it would not have triggered the BIT's FITR clause because the causes of action were not the same. (paras 41, 47, 42, 54–55). In the Decision on Annulment: Yes. The annulment committee noted the difference between a treaty cause of action and a contract cause of action. However, it held that the BIT's FITR provision required only the dispute to be "relating to the investments", and not "a breach of the BIT". Therefore, so long as a claim concerned the investment—be it based on the BIT or a contract—it would have fallen, *prima facie*, into the scope of the BIT's FITR provision and thus pursuing one path would foreclose the other. (paras 55, 112–113).	Not discussed.	Not met.	Not discussed.

No.	CASE [1991]	DID THE TRIBUNAL HOLD THAT THE IIA'S FITR CLAUSE WOULD BAR THE CLAIMANT(S) FROM PURSUING THE CLAIMS IN THE INVESTMENT ARBITRATION? [1992]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST		
			(i) same parties	(ii) same cause of action	(iii) same relief
39.	*Maffezini v Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) Applicable legal instrument: Spain-Argentina BIT	Noted that, if a BIT contains a FITR provision, it could not be "bypassed" by invoking the MFN provision. (para 63).	The identity test was not at issue in this decision.		
40.	*Champion Trading Company, Ameritrade International, Inc and Wahbas v Egypt*, ICSID Case No ARB/02/9, Decision on Jurisdiction (21 October 2003) Applicable legal instrument: US-Egypt BIT	No.	Not met.	Not discussed.	Not discussed.

Appendix 3: Table of ISDS Cases on *Res Judicata*

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
1.	*Mobil Investments Canada Inc v Canada (II)*, ICSID Case No ARB/15/6 • Decision on Jurisdiction and Admissibility (13 July 2018); and • Procedural Order No 9 (Decision on Scope of Damages Phase) (11 December 2018) Applicable legal instrument: NAFTA	The decision in *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada (I)*, ICSID Case No ARB(AF)/07/4.[2004]	No. Held that neither cause of action estoppel nor issue estoppel (as two branches of *res judicata*) was applicable here. Reasoned that, although the identity test was a necessary condition for *res judicata* to attach and it was met here, it was not sufficient because the matter should also be definitely decided by the previous court or tribunal, which was not the case here.	Met.	Met.	Met.	Not discussed.
2.	*RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà rl v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Responsibility	Decision on Jurisdiction (in the same case).	Yes.	The identity test was not at issue in this decision.			

[2002] The cases are arranged in reverse-chronological order. This table contains all ISDS cases that have discussed the *res judicata* effect to date. There are in total 44 cases. However, not all of them concern *res judicata* as between different proceedings, i.e. some of the cases (marked in blue) discuss the *res judicata* effect of a prior decision the tribunal made in the same case.

[2003] The aim of this column is to provide a "yes" or "no" answer. However, for decisions where a simple "yes" or "no" could not clearly convey the tribunal's approach, further information has been provided.

[2004] In *Mobil (I)*, the majority found the respondent in violation of NAFTA and awarded compensation for "actual" damages (as opposed to "future" losses) to the claimants. Here, in the *Mobil (II)* case, the claimant sought damages for what in *Mobil (I)* were considered to be "future" losses but later became "actual" losses, as well as for future losses onward.

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
	and on the Principles of Quantum (30 November 2018) Applicable legal instrument: ECT						
3.	*Lao Holdings NV v Laos*, ICSID Case No ARB(AF)/12/6, Decision on the Merits of Claimants' Second Material Breach Application (15 December 2017) Applicable legal instrument: Netherlands-Laos BIT	A SIAC arbitration award rendered pursuant to the dispute resolution clause in the Settlement Agreement that the parties to this ICSID arbitration had concluded to settle the ICSID arbitration.[2005]	No. Found that "[i]n arbitral matters, the contract governs. The Settlement confers two distinct and separate arbitral mandates without creating any preclusive hierarchy in their authority to decide issues within their respective spheres. The Settlement creates no rule of paramountcy between the SIAC Tribunal and this Treaty Tribunal. The application in these circumstances of *res judicata* or issue preclusion would be contrary to the freedom of contract exercised by the parties." (para 109).	Not discussed.	Not met.	Not met.	Not discussed.

[2005] The Settlement Agreement had two different dispute resolution mechanisms: (i) a general arbitration clause in favor of SIAC arbitration; and (ii) that disputes as to material breach of the Settlement Agreement (and hence the revival of the ICSID arbitration) had to be referred to the same ICSID tribunal.

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
4.	*Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6 • Decision on Claimant's Application for Dismissal of Respondent's Counterclaims (18 August 2017) • Award (27 September 2019) Applicable legal instrument: France-Ecuador BIT	• The interim decision (in the same case). • Another investment arbitration.[2006]	• Yes (for its interim decision). • No (for the other investment arbitration). Reasoned that, *inter alia*, the counterclaims it had already held to be admissible in its Interim Decision (to which *res judicata* attached) were not rendered inadmissible by the *res judicata* effect of the award in the parallel investment proceeding, which itself was a subject of the annulment proceeding.	Not discussed.	Not discussed.	Not discussed.	Not discussed.
				Note: The tribunal did not address the identity test in its reasoning, but the parties discussed the same parties requirement and the issue of whether the counterclaims in both investment arbitrations concerned the same subject matter.			
5.	*Eskosol SpA in liquidazione v Italy*, ICSID Case No ARB/15/50, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) Applicable legal instrument: ECT	Another investment arbitration based on the ECT.	No.	Not met.	Discussed by the parties, but the tribunal made no finding in this regard.	Discussed by the parties, but the tribunal made no finding in this regard. The parties used the term "object" interchangeably.	Not discussed.

[2006] Two different branches of a consortium initiated two investment arbitrations against the respondent state (this investment arbitration and another investment arbitration). The respondent then filed counterclaims against the claimants in both proceedings. Once the decision on counterclaims was issued in the other arbitration, the claimant in this arbitration argued that *res judicata* should attach to that decision, which would render the counterclaim inadmissible.

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
6.	*Ampal-American Israel Corp, EGI-FUND (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC, and Fischer v Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017) Applicable legal instruments: • US-Egypt BIT and • Germany-Egypt BIT	An international commercial arbitration.	Yes. Noted that *res judicata* and issue preclusion are general principles of law. Held that, where an investment tribunal must first answer a contract question in order to decide a treaty claim, the determinations of a commercial arbitral award on the same contract questions are *res judicata* between the parties to that award and their privies (including their shareholders).	Met. Considered the shareholders to be privies to the investment vehicle.	Not discussed. Note: The tribunal did not use the terms "cause of action" or "relief" when discussing the identity test. Instead, used the terms "same factual and legal bases" and "same claims".	Not discussed.	Not discussed.
7.	*Murphy Exploration and Production Company International v Ecuador* (II), PCA Case No 2012-16, Final Award (10 February 2017) Applicable legal instrument: US-Ecuador BIT	Partial Final Award (in the same case).	Yes. Note: The tribunal applied the principle impliedly because it did not expressly use the term "*res judicata*".	The identity test was not at issue in this decision.			
8.	*Pac Rim Cayman LLC v El Salvador*, ICSID Case No ARB/09/12, Award (14 October 2016) Applicable legal instrument: CAFTA-DR	Decision on Jurisdiction (in the same case).	No. Held that it "preferre[d]" not to rely on *res judicata* here. Nevertheless, rejected the respondent's additional objection to jurisdiction on the ground that those could and should have been raised earlier.	The identity test was not at issue in this decision.			

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
9.	*Pey Casado and President Allende Foundation v Chile* (I), ICSID Case No ARB/98/2, Award [resubmitted case] (13 September 2016) Applicable legal instrument: Spain-Chile BIT	The un-annulled part of the Award from the original proceeding.	Yes.	The identity test was not at issue in this decision.			
10.	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, ICSID Case No ARB/06/11, Decision on Annulment of the Award (2 November 2015) Applicable legal instrument: US-Ecuador BIT	Decision on jurisdiction (in the same case).	Yes. Upheld the tribunal's decision rejecting the respondent's argument, as it was already raised and rejected in the jurisdiction phase and hence become *res judicata*.	The identity test was not at issue in this decision.			
11.	*Venezuela Holdings BV, et al* (formerly *Mobil Corporation, Venezuela Holdings BV, et al*) *v Venezuela*, ICSID Case No ARB/07/27, Decision on Revision (12 June 2015) Applicable legal instrument: Netherlands-Venezuela BIT	Award (in the same case).	Noting that "[t]he concept of revision adversely affects the principle of *res judicata* and is therefore capable of impairing the stability of legal relations. It is not accepted in all arbitral rules and, when accepted, it must remain exceptional". (para 3.1.12).	The identity test was not at issue in this decision.			
12.	*Gavazzi v Romania*, ICSID Case No ARB/12/25,		The majority: No.	Not met.	Not met.	Set out the parties' positions	Not discussed.

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
	• Decision on Jurisdiction, Admissibility and Liability (21 April 2015) • Dissenting Opinion (14 April 2015) Applicable legal instrument: Italy-Romania BIT	Decision of the state's Court of Appeals.				only. Used the term "object" instead of "relief".	
			<u>The dissenting arbitrator:</u> Yes. Opined that issue estoppel is different from *res judicata* and "the conditions required in order to apply issue estoppel are not as strict as those for *res judicata*."	Met.	Met.	Not discussed.	Met.[2007]
13.	*Apotex Holdings Inc and Apotex Inc v United States (III)*, ICSID Case No ARB(AF)/12/1, Award (25 August 2014) Applicable legal instrument: NAFTA	The decision on jurisdiction and admissibility rendered in two other ICSID cases: *Appotex Inc v United States (I)* and *Appotex Inc v United States (II)*.	Yes. Noted that *res judicata* is a general principle of law. Held that the reasoning part of an award "can be read together with the operative part for the purpose of applying the doctrine of *res judicata*".	Met. Found that one of the claimants was the same in all the proceedings and that the other claimant should be considered	Did not discuss "same relief" and "same cause of action" in relation to the case at bar. However, expressed general doubts as to the approach that divides the "same issue" requirement into two elements of "same relief" and "same cause of action", i.e. that the tribunal would prefer the twofold test (same parties,		Not discussed.

[2007] The dissenting arbitrator did not use the term "legal order"; instead, he discussed the application of different laws and opined that the difference between international law and domestic law "does not affect the appreciation of the facts and of the findings on them, except when the application of the domestic law gives a result which is materially different from the one under international law." (para 24).

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
				the same by reason of privy.	same issues) to the triple identity test. (paras 7.12–7.16).		
14.	*ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Venezuela*, ICSID Case No ARB/07/30, Decision on Respondent's Request for Reconsideration (10 March 2014) Applicable legal instrument: Netherlands-Venezuela BIT	Decision on Jurisdiction and Merits (in the same case).	Yes. Held that "[t]hose decisions in accordance with practice are to be incorporated in the Award. It is established as a matter of principle and practice that such decisions that resolve points in dispute between the Parties have *res judicata* effect. They are intended to be final and not to be revisited by the Parties or the Tribunal in any later phase of their arbitration proceedings." (para 21).	The identity test was not at issue in this decision.			
15.	*TECO Guatemala Holdings, LLC v Guatemala*, ICSID Case No ARB/10/23, Award (19 December 2013) Applicable legal instrument: CAFTA-DR Note: The Award was partially annulled on other grounds.	Decisions of the state's Constitutional Court.	No.	Not met.	Not met. Note: The tribunal used the phrase "different dispute on the basis of different legal rules".		Not met.
16.	*Urbaser SA v Ar Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*,	A hypothetical local court proceeding.	No.	Not discussed.	Not discussed.	Not discussed.	Not met. However, this was due to

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
	ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) Applicable legal instrument: Spain-Argentina BIT						the specific wording of the relevant provision in the BIT. (paras 58, 61, 191).
17.	*Elsamex, SA v Honduras*, ICSID Case No ARB/09/4, Award (16 November 2012) Applicable legal instrument: contract Note: An annulment committee was constituted, but the proceeding was discontinued pursuant to ICSID Arbitration Rules 53 and 43(1).	Decision on Jurisdiction (in the same case).	No. Noted that *res judicata* is a general principle of law within the meaning of article 38 of the ICJ Statute. However, found that: (i) the respondent's new objections to jurisdiction were submitted within the period established by ICSID Arbitration Rule 41(1); and that (ii) there were new elements in those objections that merited hearing.	The identity test was not at issue in this decision.			
18.	*EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentina*, ICSID Case No ARB/03/23, Award (11 June 2012) Applicable legal instrument: France-Argentina BIT and BLEU-Argentina BIT	Local court proceedings.	No.	Not met.	Not met.	Not discussed.	Not discussed. Instead, discussed the identity of applicable "legal standards", and held that

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
							it was not met.
19.	*Oostergetel and Laurentius v Slovakia*, UNCITRAL, Final Award (23 April 2012) Applicable legal instrument: Netherlands-Slovakia BIT	Decision on Jurisdiction (in the same case).	Yes.	The identity test was not at issue in this decision.			
20.	*Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic (16 September 2011)	Award (in the same case).	Noted that the role of an annulment committee was limited. Quoted the annulment committee in the *MTD* case (see row 36) stating that "[a]ll it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one." (para 82).	The identity test was not at issue in this decision.			
21.	*Hochtief AG v Argentina*, ICSID Case No ARB/07/31, • Decision on Jurisdiction (24 October 2011) • Separate and Dissenting Opinion of J Christopher Thomas QC (7 October 2011) Applicable legal instrument: Germany-Argentina BIT	Hypothetical domestic court proceedings (in the context of the "prior recourse" condition in the BIT).	<u>The majority:</u> Refrained from deciding the issue. Noted that if, as required by the BIT provision, the parties had to first refer their dispute to domestic courts in the first 18 months, "neither the Claimant nor the Respondent would be obliged by the BIT to accept any decision rendered by the court."	The identity test was not at issue in this decision.			

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
			Decided not to rule on "whether such a decision could have effect as *res judicata* in any respect." (para 49). The dissenting arbitrator: Noted that prior domestic court rulings could be entitled to *res judicata* effect and that local courts "can alter the scope of a subsequent international proceeding through the expansion or reduction of the international claim, depending upon how the local courts treat the investor's local law claim." (paras 9–10).				
22.	*Chevron Corp v Ecuador (I),* PCA Case No 2007-02/AA277, Final Award (31 August 2011) Applicable legal instrument: US-Ecuador BIT	A partial award rendered by the same tribunal.	No. Noted that that *res judicata* is a "general principle of international law". Held that "it is disputed whether and to what extent the reasoning of an arbitral award may be vested with *res judicata* effect independently of the *dispositif*. In any event, in the present case, neither the dispositive section nor the reasoning of the Partial	The identity test was not at issue in this decision.			

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
			Award covers the issue raised". (para 273).				
23.	*Lemire v Ukraine (II)*, ICSID Case No ARB/06/18, Dissenting Opinion of Arbitrator Dr. Jürgen Voss (1 March 2011) Applicable legal instruments: • US-Ukraine BIT and • the parties' Settlement Agreement that was recorded as an award in their first investment arbitration.[2008] Note: The request for annulment was rejected (8 July 2013).[2009]	Settlement Agreement / Award in the parties' first investment arbitration.	The dissenting arbitrator opined that the majority "manifestly" exceeded its power by disregarding the *res judicata* effect of the Settlement Agreement, as they awarded claims based on the business plans and expectations that were precluded by the Settlement Agreement.	The identity test was not at issue in the Dissenting Opinion.			
24.	*Malicorp Limited v Egypt*, ICSID Case No ARB/08/18, Award (7 February 2011) Applicable legal instrument: UK-Egypt BIT	A commercial arbitration award.	• <u>In the preliminary phase:</u> Refrained from deciding the matter because: (i) the respondent never objected to the *res judicata* effect of the commercial arbitral award; and (ii) it even applied to set aside the commercial award. Found	Met.	The tribunal did not use the terms "cause of action" or "relief" when discussing the identity test. Instead, it used the terms "same factual and legal bases" and "same claims" and found that they were met.		Not discussed.

[2008] The Settlement Agreement had a dispute resolution clause in favor of ICSID arbitration for all disputes arising out of that Settlement Agreement/Award.
[2009] The Annulment Committee held that the respondent's argument (that the majority in the Decision on Jurisdiction and Liability failed to consider the *res judicata* effect of the Settlement Agreement) should have been raised earlier and, as such, the respondent's right to object to the content of that decision was waived.

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
	Note: The request for annulment was rejected. (3 July 2013)		that the respondent's approach made it "acceptable for the party claiming to have been injured to use the remedies afforded by the [BIT]." (para 103.d). • <u>In the merits phase:</u> Yes, the tribunal was keen to apply the doctrine of issue preclusion to the relevant issues decided by the commercial arbitral tribunal.				
25.	*Enron Corporation and Ponderosa Assets, LP v Argentina*, ICSID Case No ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010) Applicable legal instrument: US-Argentina BIT	Award (in the same case).	Noted that the role of an annulment committee is limited, quoting the annulment committee in the *MTD* case (see row 36) stating that "[a]ll it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one." (para 42).	The identity test was not at issue in this decision.			
26.	*Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's	Award (in the same case).	Noting that "annulment of an award in its entirety necessarily leads to the loss of the *res judicata* effect of	The identity test was not at issue in this decision.			

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
	Application for Annulment of the Award (29 June 2010) Applicable legal instrument: US-Argentina BIT		all matters adjudicated by the Tribunal". (paras 73, 78).				
27.	*Helnan International Hotels A/S v Egypt*, ICSID Case No ARB/05/19, Decision of the ad hoc Committee (14 June 2010) Applicable legal instrument: Denmark-Egypt BIT	Award (in the same case).	Yes. Upheld the tribunal's approach to the contractual dispute and noted that the commercial arbitral award is *res judicata* between the parties to the award and with respect to their contractual dispute.	The identity test was not at issue in this decision.			
28.	*Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (1 September 2009) Applicable legal instrument: US-Argentina BIT	Award (in the same case).	Noted that the role of an annulment committee was limited, quoting the annulment committee in the *MTD* case (see row 36) stating that "[a]ll it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one." (para 42).	The identity test was not at issue in this decision.			
29.	*Jan de Nul NV and Dredging International NV v Egypt,* ICSID Case No ARB/04/13, Award (6 November 2008) Applicable legal instrument:	Decision on Jurisdiction (in the same case).	Yes.	The identity test was not at issue in this decision.			

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
	Belgo-Luxembourg Economic Union-Egypt BIT						
30.	*Helnan International Hotels A/S v Egypt*, ICSID Case No ARB/05/19, Award (3 July 2008) Applicable legal instrument: Denmark-Egypt BIT Note: The Award was partially annulled, but the part on *res judicata* remained intact.	A commercial arbitration award.	No.	Not met.	Not met.	Not met.	Not met.
31.	*Desert Line Projects LLC v Yemen*, ICSID Case No ARB/05/17, Award (6 February 2008) Applicable legal instrument: Yemen-Oman BIT	A commercial arbitration award.	No.	Not discussed.	Not met.	Not discussed.	Not discussed.
32.	*CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007) Applicable legal instrument: US-Argentina BIT	Award (in the same case).	Noted that the role of an annulment committee is limited, quoting the annulment committee in the *MTD* case (see row 36) stating that "[a]ll it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one." (para 44).	The identity test was not at issue in this decision.			

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
33.	*Empresas Lucchetti, SA and Lucchetti Peru, SA v Peru* (also known as *Industria Nacional de Alimentos, AS and Indalsa Perú SA v Peru*), ICSID Case No ARB/03/4, Decision on Annulment (5 September 2007) Applicable legal instrument: Chile-Peru BIT	Local court decisions.	No. Noted that *res judicata* is a "principle of international law". (para 86). Held that "a clear distinction must be made between *res judicata* at international and at national level. … [*R*]*es judicata* at national level produces its legal effects at national level and will in international judicial proceedings not be more than a factual element." (para 87).	Not discussed.	Not discussed.	Not discussed.	Not met.
34.	*Fraport AG Frankfurt Airport Services Worldwide v Philippines* (I), ICSID Case No ARB/03/25, Award (16 August 2007) Applicable legal instrument: German-Philippines BIT Note: The Award was later annulled in its entirety.	Findings of the Prosecutor's Office.	No.	Not met.	Note: The tribunal did not use the terms "cause of action" or "relief" when discussing the identity test. Instead, it used the terms "claims" and "issues" and held that they were not met.		Not met.
35.	*Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Award (26 July 2007)	Decision on Jurisdiction (in the same case).	Yes. Held that the principles of *res judicata* and issue estoppel bar the parties from re-litigating an issue that was raised and decided in the Decision on Jurisdiction.	The identity test was not at issue in this decision.			

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
36.	*MTD Equity Sdn. Bhd. and MTD Chile SA v Chile*, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007) Applicable legal instrument: Malaysia-Chile BIT	Award (in the same case)	Regarding the scope of annulment authority, found that: • all an ICSID annulment committee can do is "[to] annul the decision of the tribunal: it can extinguish a *res judicata*, but on a question of merits it cannot create a new one" (para 54); • "A reconvened tribunal following an annulment will no doubt have regard to the reasoning of an annulment Committee, but it is not formally bound by its views as to any issue on which the first tribunal's award has been annulled" (fn 63).	The identity test was not at issue in this decision.			
37.	*Inceysa Vallisoletana SL v El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) Applicable legal instrument: Spain-El Salvador BIT	A domestic court decision.	No.	Not met. Note: The claimants in the local proceeding were the	Not discussed.	Not discussed.	Not met. This element served as a policy reason for not applying the

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
				other participants in the bidding process.	Note: The tribunal did not use the terms "cause of action" or "relief" when discussing the identity test. Instead, used the terms "claims" and "issues", and held that they were not met.		*res judicata* principle as well. (paras 208–212).
38.	*Compañía de Aguas del Aconquija SA and Vivendi Universal* (formerly *Compagnie Générale des Eaux*) *v Argentina* [*Vivendi II*], ICSID case No ARB/97/3 [2010] • Decision on Jurisdiction (14 November 2005) ("DoJ") • Decision on the Argentine Republic's Request for Annulment of the Award (10 August 2010) ("DoA") Applicable legal instrument: France-Argentina BIT	In the DoJ, the *res judicata* effect of the decision on jurisdiction by the first tribunal (i.e. the tribunal in *Vivendi I*) was discussed.	Yes. Noted that *res judicata* is a general principle of law.	Met.	Met.	Met.	Not discussed.
		In the DoA, the *res judicata* effect of the decisions in two other cases was discussed:	No. Noted that the *Suez* and *EDF* decisions were not final yet, as those decisions were subject to ICSID annulment proceedings.	Not met. Held that, although the respondent and UBS[2013] were present in all the proceedings,	Not discussed.	Not discussed.	Not discussed.

[2010] This is the resubmitted case (*Vivendi II*), as the matter was once decided and annulled (*Vivendi I*). The annulment concerned the merits part and left the jurisdiction part intact (see below, row 42).

[2013] The bank of which the challenged arbitrator was a board member.

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
		Suez and Vivendi v Argentina[2011] and *EDF v Argentina*[2012] on the disqualification of a member of the tribunal. In both cases, as in the case at bar, the respondent was Argentina and the challenged arbitrator was the same person.		UBS' relationship with the claimants in each case was different.			
39.	*Petrobart Limited v Kyrgyzstan*, SCC Case No 126/2003, Arbitral Award (29 March 2005) Applicable legal instrument: ECT	• Another investment arbitration (based on the state's investment law).	No. Noted that "*res judicata* is undoubtedly recognised in international law"; that although the doctrine of issue preclusion has primarily developed in US law, "other legal systems have similar rules … A doctrine of estoppel is also recognised in public international law.	Not discussed.	Not met.	Not discussed. Instead, discussed the identity of "subject matter/issue" and held that it was not met here.	Not discussed.

[2011] *Suez, Sociedad General de Aguas de Barcelona SA, Vivendi Universal SA v Argentina*, ICSID Case No ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 October 2007).
[2012] *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentina*, ICSID Case No ARB/03/23, Challenge Decision regarding Professor Gabrielle Kaufmann-Kohler (25 June 2008).

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
		• A local court proceeding (initiated by the respondent State as to whether there was an investment dispute between the parties).		Not discussed.	Not met.	Not met (impliedly).	Not discussed.
40.	*CME Czech Republic BV v Czech Republic*, UNCITRAL, Final Award (14 March 2003) Applicable legal instrument: Netherlands-Czech Republic BIT	Another investment arbitration (*Lauder v Czech Republic*).	No.	Not met.	Not met.	Not discussed.	Not discussed.
41.	*Repsol YPF Ecuador SA v Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/01/10, Decision on Jurisdiction (23 January 2003) Applicable legal instrument: a participation contract	The decision of a local administrative body.	No. Held that the decision of the National Hydrocarbons Directorate (an administrative body) had no *res judicata* effect on the tribunal's jurisdiction.	Not discussed.	Not discussed.	Not discussed.	Not met (impliedly).
42.	*Compañía de Aguas del Aconquija SA and Vivendi Universal* (formerly *Compagnie Générale des Eaux*) *v Argentina (I)*, ICSID	Award (in the same case).	Yes. Partially upheld the merits part of the Award and noted that that part became *res judicata*.	The identity test was not at issue in this decision.			

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
	case No ARB/97/3, Decision on Annulment (3 July 2002 Applicable legal instrument: France-Argentina BIT						
43.	*Waste Management, Inc v Mexico* (II), ICSID Case No ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings (26 June 2002)[2014]	The first tribunal's decision on jurisdiction.	No. Reasoned that the dismissal of a claim for "lack of jurisdiction does not constitute a decision on the merits and does not preclude a later claim before a tribunal which has jurisdiction." (para 43). Noted that *res judicata* is a general principle of law. Discussed the identity test (but with different wording from that used in this table: see the next columns). Noted that issue preclusion should apply to a decided issue if the requirements of that doctrine were met.	Used the same term in its identity test.	Did not use the terms "cause of action" or "relief". Instead, used the term "question".		Not discussed.

[2014] This is a resubmitted case lodged after the tribunal in the first case [*Waste Management, Inc v Mexico* (I), ICSID Case No ARB(AF)/98/2, Arbitral Award (2 June 2000)] held that it did not have jurisdiction.

No.	CASE [2002]	PREVIOUS PROCEEDING / DECISION	DID THE TRIBUNAL HOLD THAT THE PREVIOUS ADJUDICATION HAD A *RES JUDICATA* EFFECT? [2003]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
44.	*Amco Asia Corporation v Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction in Resubmitted Case (10 May 1988) Applicable legal instrument: an investment agreement	The annulment decision on the initial award.	No. Noted that *res judicata* is a general principle of law and that those parts of the initial award that were not annulled were *res judicata* to the second tribunal. Held that *res judicata* did not attach to the reasoning part of the Annulment Committee's decision.	The identity test was not at issue in this decision.			

Appendix 4: Table of ISDS Cases on *Lis Pendens*

No.	CASE [2015]	THE PARALLEL PROCEEDING(S)	DID THE TRIBUNAL APPLY THE *LIS PENDENS* PRINCIPLE? [2016]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST [2017]			
				(i) same parties	(ii) same cause of action	(iii) same relief	(iv) same legal order
1.	*Gosling and others v Mauritius*, ICSID Case No ARB/16/32, Award (18 February 2020) Applicable legal instrument: UK-Mauritius BIT	Local court proceedings.	No.	Not met.	Not met.	Not discussed.	Not discussed.
2.	*Unión Fenosa Gas, SA v Egypt*, ICSID Case No ARB/14/4, Award (31 August 2018) Applicable legal instrument: Spain-Egypt BIT	A commercial arbitration.	No.	Not met.	Not discussed.	Not discussed.	Not discussed.
3.	*Busta v Czech Republic*, SCC Case No V 2015/014, Final Award (10 March 2017) Applicable legal instrument:	A local court proceeding.	No.	Not met.	Not met.	Partially met.[2018]	Not met.

[2015] The cases are arranged in reverse-chronological order.
[2016] The aim of this column is to provide a "yes" or "no" answer. However, for decisions where a simple "yes" or "no" could not clearly convey the tribunal's approach, further information has been provided.
[2017] The test adopted by the majority of tribunals is the triple identity test (i.e. same parties, same cause of action, and same relief). However, some tribunals, like those deciding *Busta v Czech Republic* and *Flughafen Zürich AG v Venezuela* discussed an additional element: the same legal order.
[2018] The damages claimed in the two proceedings were mostly the same; however, in the investment arbitration, the claimant also sought moral damages.

No.	CASE [2015]	THE PARALLEL PROCEEDING(S)	DID THE TRIBUNAL APPLY THE *LIS PENDENS* PRINCIPLE? [2016]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST [2017]			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
	UK-Czech Republic BIT						
4.	*British Caribbean Bank Ltd v Belize*, PCA Case No 2010-18, Award (19 December 2014) Applicable legal instrument: UK-Belize BIT	Local court proceedings.	No.	Not Discussed.	Not met.	Not discussed.	Not discussed.
5.	*Flughafen Zürich AG and Gestión e Ingeniería IDC SA v Venezuela*, ICSID Case No ARB/10/19, Award (18 November 2014) Applicable legal instrument: Switzerland-Venezuela BIT and Chile-Venezuela BIT	Local court proceedings.	No.	Not discussed.	Not discussed.	Not discussed.	Not met.
6.	*Sanum Investments Limited v Laos*, PCA Case No 2013-13, Award on Jurisdiction (13 December 2013) Applicable legal instrument: China-Laos BIT	Another investment arbitration.	No.	Not met.	Not met.	Not discussed.	Not discussed.
7.	*EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentina*, ICSID Case	Not applicable.	There was no parallel proceeding in this case. The discussion concerned the principle of *res judicata*, but the tribunal also noted the test for the *lis pendens* principle. The test it that adopted had three elements, for only two	Used the same term.	Used the same term.	Not discussed.	Discussed the identity of applicable "legal standards".

No.	CASE [2015]	THE PARALLEL PROCEEDING(S)	DID THE TRIBUNAL APPLY THE *LIS PENDENS* PRINCIPLE? [2016]	TRIBUNAL'S DECISION CONCERNING THE IDENTITY TEST [2017]			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
	No ARB/03/23, Award (11 June 2012) Applicable legal instrument: France-Argentina BIT and Belgium Luxembourg Economic Union-Argentina BIT		of which used the same terms as those discussed in this table (see the next columns).				
8.	*Limited Liability Company AMTO v Ukraine*, SCC Case No 080/2005, Final Award (26 March 2008) Applicable legal instrument: ECT	An ECtHR proceeding.	No.	Not met.	Not met.	Not discussed.	Not discussed.
9.	*SGS Société Générale de Surveillance SA v Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) Applicable legal instrument: Switzerland-Pakistan BIT	A commercial arbitration.	No. Reasoned that: (i) for the principle to be applicable, there should be concurrent jurisdiction between the two forums, whereas this tribunal did not have jurisdiction over contract claims; and (ii) with respect to the BIT claims, the causes of action in the two proceedings were not identical.	Met.[2019]	Not met (as to the BIT claims).	Not discussed.	Not discussed.
10.	*Azurix Corp v Argentina*, ICSID Case No ARB/01/12,	Local court proceedings.	While discussing whether the pending local proceedings had	Not met.	Not met.	Not discussed.	Not discussed.

[2019] The same investor who brought the investment claim was party to an agreement that had an exclusive jurisdiction clause.

No.	Case [2015]	The parallel proceeding(s)	Did the tribunal apply the *lis pendens* principle? [2016]	Tribunal's decision concerning the identity test [2017]			
				(i) same parties	**(ii) same cause of action**	**(iii) same relief**	**(iv) same legal order**
	Decision on Jurisdiction (8 December 2003) Applicable legal instrument: US-Argentina BIT		triggered the BIT's FITR provision, noted that the tribunal in one of the first ICSID cases on *lis pendens* (*SARL Benvenuti and Bonfant v Congo* - see row 10) held that the triple identity test had to be met for the principle to apply.				
11.	*Lauder v Czech Republic*, UNCITRAL, Final Award (3 September 2001) Applicable legal instrument: US-Czech BIT	• Another investment arbitration; • An ICC commercial arbitration; and • A number of local court proceedings.	No.	Not met.	Not met.	Not discussed.	Not discussed.
12.	*SARL Benvenuti and Bonfant v Congo*, ICSID Case No ARB/77/2, Award (8 August 1980), (1993) 1 ICSID Report 330 Applicable legal instrument: An investment contract	A local court proceeding.	No.	Not met.	Not met.	Not discussed.	Not discussed.

Appendix 5: Table of ISDS Cases on Issue Preclusion

No.	CASE [2020]	THE OTHER PROCEEDING/ DECISION	DID THE TRIBUNAL USE THE TERM "ISSUE PRECLUSION" OR SIMILAR TERMS?	DID THE TRIBUNAL RECOGNISE THE RULE OF ISSUE PRECLUSION?	DID THE TRIBUNAL FIND THAT THE RULE WOULD BAR REHEARING OF THE ISSUE?
1.	*Eskosol SpA in liquidazione v Italy*, ICSID Case No ARB/15/50, Decision on Respondent's Application Under Rule 41(5) (20 March 2017)	Another investment arbitration.	Yes.	Yes.	No.
2.	*Ampal-American Israel Corp, EGI-FUND (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017)	An ICC commercial arbitral award.	No.	Yes.	Yes.
3.	*Gavazzi v Romania*, ICSID Case No ARB/12/25, Decision on Jurisdiction, Admissibility and Liability (21 April 2015)	A local court proceeding in which a relevant commercial arbitral award was set aside and the matter was decided on the merits.	Yes.	Yes.	No.
4.	*Apotex Holdings Inc and Apotex Inc v United States (III)*, ICSID Case No ARB(AF)/12/1, Award (25 August 2014) [Apotex III]	Decisions in *Apotex (I)* and *Apotex (II)*.	Yes.	Yes.	Yes.
5.	*Chevron Corporation and Texaco Petroleum Company v Ecuador (I)*, PCA Case No	Partial Award (in the same case).	No.	Refrained from deciding.	No.

[2020] The cases are arranged in reverse-chronological order.

No.	CASE [2020]	THE OTHER PROCEEDING/ DECISION	DID THE TRIBUNAL USE THE TERM "ISSUE PRECLUSION" OR SIMILAR TERMS?	DID THE TRIBUNAL RECOGNISE THE RULE OF ISSUE PRECLUSION?	DID THE TRIBUNAL FIND THAT THE RULE WOULD BAR REHEARING OF THE ISSUE?
	2007-02/AA277, Final Award (31 August 2011)				
6.	*Malicorp Limited v Egypt*, ICSID Case No ARB/08/18, Award (7 February 2011)	A commercial arbitral award.	No.	Yes.	Yes, but conducted a summary analysis of the issue to ensure that the commercial arbitral tribunal's conclusions would still stand.
7.	*RSM Production Corporation and others v Grenada (II)*, ICSID Case No ARB/10/6, Award (10 December 2010)	A previous investment arbitration between the same parties. Unlike the case at bar, which was based on a BIT, the first arbitration was based on an investment agreement.	Yes.	Yes.	Yes.
8.	*Petrobart Limited v Kyrgyzstan*, SCC Case No 126/2003, Arbitral Award (29 March 2005)	Another investment arbitration and a court proceeding.	Yes.	Yes.	No.
9.	*Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Award (26 July 2007)	Decision on Jurisdiction (in the same case).	Yes.	Yes.	Yes.
10.	*Amco Asia Corporation v Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction in Resubmitted Case (10 May 1988)	The annulment decision in the first round that the matter was submitted to ICSID.	No. Used the term "*res judicata*".	No.	No.