Univerzita Karlova
Právnická fakulta

Determining *Res Judicata* in Investment Treaty Arbitration: Looking back at CME/Lauder v. Czech Republic

Studentská vědecká odborná činnost

Kategorie: magisterské studium

2023 Autor: Jitka Rounová
XVI. ročník

Navrhovaný specializační modul: Mezinárodní právo

Čestné prohlášení a souhlas s publikací práce

Prohlašuji, že jsem práci předkládanou do XVI. ročníku Studentské vědecké a odborné činnosti (SVOČ) vypracovala samostatně za použití literatury a zdrojů v ní uvedených. Dále prohlašuji, že práce nebyla ani jako celek, ani z podstatné části dříve publikována, obhájena jako součást bakalářské, diplomové, rigorózní nebo jiné studentské kvalifikační práce a nebyla přihlášena do předchozích ročníků SVOČ či jiné soutěže.

Souhlasím s užitím této práce rozšiřováním, rozmnožováním a sdělováním veřejnosti v neomezeném rozsahu pro účely publikace a prezentace PF UK, včetně užití třetími osobami.

V Praze dne 11. dubna 2023

Jitka Rounová

Celkový rozsah vlastního textu práce (od úvodu po závěr), včetně mezer a poznámek pod čarou: *52 420 znaků.*

Table of contents

1. Introduction

International investment arbitration has become an important mechanism for resolving disputes between foreign investors and host states arising from investment treaties or contracts. While investment arbitration awards are generally considered final and binding, questions may arise as to whether a particular dispute has already been decided in a previous case or forum, and whether the principle of *res judicata* applies. *Res judicata*, or the matter already judged, is a legal doctrine that prevents the re-litigation of a claim or issue that has already been finally adjudicated by a court or a tribunal.

In the context of investment arbitration, *res judicata* can stop the parties from re-litigating the same dispute or issues that have already been resolved in a previous arbitration proceeding and prevent parallel proceedings. However, determining whether *res judicata* applies in a particular investment arbitration case can be a complex and fact-specific inquiry, involving issues such as the identity of parties, objects, and causes of action, as well as the nature of the legal order. This thesis examines the doctrine of *res judicata* in international investment arbitration, with the focus on how tribunals have applied it in practice, and the sources of the *res judicata* principle.

The thesis follows to describe existing methods of determining *res judicata* in investment treaty arbitration and their actual use in the practice of international tribunals. The key focus is on the so-called triple identity test examining the identity of parties, identity of object, and identity of cause in the deliberations on the applicability of the *res judicata* principle in investment treaty arbitration.

In the final part, the theory is put into practice as a critical analysis of the Lauder v. Czech Republic and the CME v. Czech Republic cases from the perspective of the *res judicata* principle.

2. The principle of *res judicata*

A decision becomes vested with *res judicata* effect once a competent international tribunal or court renders a final decision concerning the same parties, the same legal grounds, and the same claims.[1] These characteristics are reflected in the so-called triple identity test which arbitral tribunals have used to determine the identity of proceedings. The individual conditions of the test include identity of parties, identity of object, and identity of cause and will be described in detail in chapter 6 below.

The importance of the *res judicata* effect lies in its ability to prevent re-litigation of claims once decided (negative effect) and to provide final arbitral award binding on the parties (positive effect).[2]

The negative effect encompasses the *ne bis in idem* principle, which translates as "*not twice in the same matter*". Therefore, if the criteria of identity of the parties, the claim, and the cause[3] are fulfilled, the case cannot be brought before an arbitral tribunal again. This principle applies to the initiation of a new proceeding as well as re-litigation of the same issue within the same proceedings.[4]

The positive effect of *res judicata* aims to provide stability and security to the parties after a final award is rendered. Cheng adds that "*the positive effect of res judicata imposing an obligation on the parties to carry out the judgment is not, however, impaired, if the obligation is prevented from being performed through force majeure, nor does it preclude the possibility of arrangements between the parties concerned modifying by common consent the obligation imposed by the judgment, as, for instance, by taking into account the debtor's capacity to pay*".[5]

---

[1] GAILLARD, Emmanuel. *Coordination or Chaos: Do the Principles of Comity, Lis pendens, and Res Judicata Apply to International Arbitration?* New York: The American Review of International Arbitration Vol. 29 No. 3, 2018, p. 219.
[2] BROWER, Charles N., and Paula F. HENIN. *Chapter 5: Res Judicata*, in Kinnear, Meg and Geraldine R. Fischer, et al. (eds). Building International Investment Law: The First 50 Years of ICSID. Kluwer Law International, 2015, p. 56.
[3] See chapter 6 below.
[4] Gaillard, p. 225.
[5] CHENG, Bin. *General Principles of Law as Applied by International Courts and Tribunals*. Cambridge: Grotius Publications/Cambridge University Press, reprinted 1987, p. 338.

This means that even when the decision or award becomes final and acquires the *res judicata* effect, the principle of party autonomy remains valid. The parties are free to abandon the final decision wholly or in part and choose to regulate their contractual relationship in a different, more profitable way.

Finally, an arbitrator may individually examine an existence of a *res judicata* decision without any initiative from the parties. Or as Gaillard put it, "*nothing prevents arbitrators from assessing the impact of previously adjudicated matters on the dispute before them in the same way as national courts*"[6]. On the contrary, in some jurisdictions a disregard to the *res judicata* effect in international arbitration is considered a violation of public policy[7].

2.1. *Lis pendens*

When analysing the *res judicata* principle, it is only appropriate to address the related *lis pendens* principle (or *lis alibi pendens* principle) as well.

The *lis pendens* principle applies before a final decision is rendered. According to this principle, a case cannot be litigated in another court or tribunal, when the same dispute is pending before a different court or a tribunal.[8] Therefore the aim of *lis pendens* is to prevent parallel proceedings and possible different outcomes of the same cases. Like *res judicata* principle, it is widely recognised as a procedural principle of international law.[9]

The approach towards the relation between the *res judicata* and *lis pendens* principle is not settled among scholars. Some academics claim that these principles are separate because they refer to different stages of the proceedings[10], other consider *lis pendens* as an extension of the *res judicata* principle[11]. The author identifies with the latter opinion for which the following analysis may also apply to the *lis pendens* principle.

---

[6] Gaillard, p. 225.
[7] E. g. Switzerland, Federal Supreme Court, 4A_633/2014, 29 May 2014.
[8] MAGNAYE, Jose, and August REINISCH. *Revisiting Res Judicata and Lis pendens in Investor-State Arbitration.* The Law & Practice of International Courts and Tribunals, 2016, pp. 269-270.
[9] *Ibid.*
[10] Brower & Henin, p. 56.
[11] Magnaye & Reinisch, pp. 269-270.

Finally, very few investment arbitration tribunals have expressed an opinion on parallel proceedings and the applicability of the *lis pendens* principle. And even less arbitral tribunals have agreed to decline jurisdiction under this principle. They have either considered that the requirements of *lis pendens* were not met or they did not accept the applicability of the principle in investment arbitration.[12]

[12] YANNACA-SMALL, Katia. *Chapter 25: Parallel Proceedings*, in Muchlinski, Peter, et al. (ed.). The Oxford Handbook of International Investment Law. Oxford Academic, 2012, p. 1023.

3. Investment treaty arbitration

Investment treaty arbitration forms a crucial part of international economic law. Unlike international commercial arbitration, arbitral tribunal's jurisdiction is derived from investment treaty concluded between the state on the side of respondent and the state of investor's origin[13]. Investment treaty can take the form of a bilateral treaty (e. g. the Czech Republic-Israel Bilateral Investment Treaty) or multilateral treaties and conventions (e. g. the ICSID Convention). However, an arbitration clause can be found in trade agreements as well (e. g. the North American Free Trade Agreement). Consequently, we may expect broad developments in the field of investment treaty arbitration, as the CJEU ruled that investment arbitration within EU contradicts the foundations of European law and shall be limited.[14] Since 2015, the European Commission has been working on a proposal to establish a Multilateral Investment Court for the EU. [15][16]

The uniqueness of the investment treaty arbitration as a method of dispute resolution lies in the ability of the investor as a private entity to initiate proceedings against the state to assert his rights and seek protection. The doctrine is not clear on whether the state can also initiate arbitration proceedings against an investor[17]. The arbitration proceedings can be conducted through an *ad hoc* proceeding (typically relying on the UNCITRAL rules) or via an arbitral institution and using its rules accordingly, typically through the International Centre for Settlement of Investment Disputes ("ICSID").

The difference between international commercial arbitration and investment treaty arbitration regarding *res judicata* principle is the governing law of the dispute. In commercial disputes *res judicata* is applied under *lex fori* or conflict of law rules, which may become

---

[13] Except for investment contracts concluded directly between the state and the investor about the terms and conditions of the investment; ŠTURMA, Pavel, and Vladimír BALAŠ. Mezinárodní ekonomické právo. 2nd edition. Prague: C.H. Beck, 2013, pp. 336-338.
[14] Achmea BV v. Slovakia, C-284/16, 6 March 2018.
[15] European Commission's Multilateral Investment Court project, details available here https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en.
[16] BALAŠ, Vladimír, and Pavel ŠTURMA. Nové mezinárodní dohody na ochranu investic. Prague: Wolters Kluwer, 2018, p. 22.
[17] ŠTURMA, Pavel, and Vladimír BALAŠ. Mezinárodní ekonomické právo. 2nd edition. Prague: C.H. Beck, 2013, p. 429.

complicated due to a different interpretation in civil law and common countries.[18] In investment treaty disputes, on the other hand, international law is applied, and the importance of domestic law becomes limited. And even though it is possible to choose a domestic governing law for an investment dispute, it is rather rare and only applied in investment contracts[19].

In conclusion, even though the investment treaty arbitration may look like a sister to the international commercial arbitration, it has rather close ties with disputes under public international law. That is why many of the early *res judicata* interpretations come from international courts and arbitral tribunals ruling on disputes among states.

[18] ALFORD, Roger. The "Transnational Approach" of the ILA Recommendations on Res Judicata and Arbitration. Kluwer Arbitration Blog, 2009.
[19] See supra note 13.

4. Sources of *res judicata*

As introduced in the previous chapter, investment treaty arbitration is primarily governed by international law, specifically the branch of international investment law. Authors traditionally consider following sources relevant for international investment law: investment treaty (bilateral, multilateral, and free trade agreements), investment contracts, customary international law, universal legal principles, acts of international organizations, and arbitral decisions.[20]

In contrast to international commercial arbitration where tribunals typically resort to the application of national rules to *res judicata*, in the context of investment treaty arbitration national law provisions play a much less significant role, and arbitral tribunals tend to look, instead, to rules of public international law.[21]

Res judicata can be found within the meaning of "*general principles of law recognized by civilized nations*" in the Article 38 (1) (c) of the Statute of the International Court of Justice[22]. To add to the contention that *res judicata* is a universal global principle, the *res judicata* principle is explicitly mentioned as one of the intended *general principles of law recognized by civilized nations* in the Minutes of the Committee of Jurists recorded during the drafting of the original Permanent Court of International Justice Statute[23].

Considering the specific nature of *res judicata* as an international principle, we can find its interpretation in some occurrences of international treaties and conventions. arbitral rules, case law of international courts and arbitral tribunals and legal doctrine.

---

[20] ŠTURMA, Pavel, and Vladimír BALAŠ. Mezinárodní ekonomické právo. 2nd edition. Prague: C.H. Beck, 2013, p. 313.
[21] Brower & Henin, pp. 57-58.
[22] Previously Article 38 (3) of the PCIJ.
[23] The document is available at p. 335 at https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf.

4.1. Treaties and arbitration rules

The ICJ Statute recognizes *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states*[24] as another source of international law.

The first important treaty where arbitral tribunals can look for *res judicata* clauses are the treaties under which the arbitration was initiated. Namely the bilateral investment treaties may contain provisions regarding the positive res judicata effect. An example of such provision is the Czech Republic - Russian Federation BIT (1994) and its Article 8 (3) stating that "*An Arbitration decision shall be final and binding upon both parties to the dispute.*"

The only currently available BITs that refer specifically to the *res judicata* principle are the Brazil - United Arab Emirates BIT (2019), and the Brazil - Suriname BIT (2018).[25] In an identical wording in both treaties the Article 25 (13) (b) forbids the application of the dispute resolution procedure described therein if the dispute with the particular investor had been resolved and where the *res judicata* principle applies.[26]

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) hints on the presumed *res judicata* effect of existing arbitral awards in its Article 3: "*Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.*" Similarly, like the ICJ Statute, the New York Convention upholds the positive *res judicata* effect of a binding decision. However, it may be argued that a binding decision in the context of Article 3 holds the meaning of a condition for future enforcement in the sense of the New York Convention rather than an expression of the *res judicata* principle.

The ICSID Convention goes further and adds that "*The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this*

---

[24] Article 38 (1) (a) of the Statute of the ICJ.
[25] Both BITs have been signed by the states but not yet entered into force.
[26] "*This paragraph shall not be applied to a dispute concerning a particular investor which has been previously resolved and where protection of res judicata applies.*"

Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."[27] This principle effectively bars re-litigation of the same dispute between the same parties before another forum, and can be seen as a form of *res judicata*. Unlike in the previously mentioned cases, the ICSID Convention explicitly refers to both the positive and the negative effect of *res judicata*. Still however, the term *res judicata* is not used anywhere in the Convention or the updated ICSID arbitration rules.

Even though *res judicata* is not mentioned in the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules contain the *res judicata* principle in its Article 34 (2). It states that: "*All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.*" This wording, however, grants the rendered awards only the positive *res judicata* and does not prevent the parties from re-litigating the case.

The reason for the drafters of the above-mentioned instruments to avoid the term *res judicata* can be of dual nature. First, they considered it as such a trivial and widespread legal principle that its repetition would be redundant – such as in the ICJ Statute. Secondly, the drafters may have been aware that even though the general idea of *res judicata* is shared world-wide, no universal definition exists. And for this reason, we find the *res judicata* principle through its expressed positive and or negative effect rather than the express mention of the term "*res judicata*".

4.2. Case law

Even though the approach towards case law as a source of law in international investment law is not uniform, it remains an important source for the interpretation of the *res judicata* principle. The drawbacks of relying on case law is the fact that arbitral tribunals do not form a coherent system with appellate instances interpreting and unifying the approach to cases (such as domestic judicial systems where decision of the higher courts have binding nature). Different arbitrators are selected for every dispute, each tribunal is independent and must abide by different rules. Finally, investment treaty arbitration despite the latest efforts, is

[27] Article 53 (1) of the ICSID Convention.

typically less transparent than other forms of dispute settlement and the information available can often be incomplete. Consequently, if the decisions are not made available to the public, they cannot be relied on in the future disputes no matter the quality and possible importance for the future development of investment treaty case law.[28]

On the other hand, we may observe an increasing amount of precedential decisions in the investment treaty arbitration. What is more, these decisions are often cited by scholars and other tribunals.[29] And specifically for the interpretation of *res judicata*, case law allows us to critically analyse how different tribunals determine *res judicata* and how it affects the cases.

Before the first arbitration case based on a bilateral investment treaty was decided in 1990[30], the PCIJ, the ICJ, and PCA and others had been delivering volumes of cases interpreting international law, including the *res judicata* principle.

For example, the very first decision of the Permanent Court of Arbitration in The Hague in 1902 resulted in *res judicata* ruling on a matter previously decided by the U.S. - Mexican Claim Commission years earlier.[31] In the Trail Smelter case of 1905, decided under the Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail between Canada and the U.S., the arbitral tribunal held that "*The sanctity of res judicata attaches to a final decision of an international tribunal is essential and settled rule of international law*."[32]

In 1927, judge Anzilotti in his dissenting opinion regarding the Chorzów factory case came to the conclusion, that Article 59 of the PCIJ Statute[33] encompasses the *res judicata* principle as it "*clearly refers to a traditional and generally accepted theory in regard to the material limits of res judicata*".[34] He also emphasized the nature of *res judicata* as a general principle of law

---

[28] ŠTURMA, Pavel, and Vladimír BALAŠ. Mezinárodní ekonomické právo. 2nd edition. Prague: C.H. Beck, 2013, pp. 344-345.
[29] *Ibid.*
[30] Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990.
[31] The Pious Fund of the Californias, The United States of America vs. The United Mexican States, Permanent Court of Arbitration, 14. October 1902.
[32] Trail Smelter Case (U.S. v. Canada), 3 R.I.A.A., 1905.
[33] "*The decision of the Court has no binding force except between the parties and in respect of that particular case*."
[34] Factory at Chorzów, Interpretation of Judgments Nos. 7 and 8, P.C.I.J. (Ser. A) No. 13, 1927, Dissenting Opinion of Judge Anzilotti, p. 27.

recognized by civilized nations as mentioned in Article 38 (3) of the Statute.[35] Judge Anzilottis's analysis in this opinion later became the basis for the so-called "*triple identity test*" cited by tribunals and scholars alike.

Consequently, decisions rendered by arbitral tribunals in investment treaty disputes help us interpret terms like "*res judicata*" more precisely taking into the account the specific nature of the arbitral procedure. For example, in the Waste Management v. Mexico II, the ICSID tribunal confirmed the existence of *res judicata* as part of international law applicable to international investment arbitration, stating that: "*the present Tribunal in no way denies the value of the principle of res judicata, nor its potential application in the present proceedings to the extent that any issue already decided between the parties may prove to be relevant at a later stage.*"[36]

4.3. Doctrine and soft law

Doctrine in the sense of *"teachings of the most highly qualified publicists of the various nations*"[37] may be used as subsidiary means for the determinations of rules of law. Much has been written about investment treaty arbitration as it is an area of law that has been dynamically growing.

It is of particular importance to turn attention to the International Law Association's Final Report on *Res Judicata* and Arbitration presented and adopted at the ILA Conference on International Commercial Arbitration in Toronto, Canada, in 2006. Even though the report focuses on commercial arbitration, the findings of the committee are crucial for investment treaty arbitration as well. The ILA presented a set of transnational recommendations to help unify the arbitral tribunal's approach when determining the effect of prior arbitral awards.[38]

---

[35] *Ibid.*
[36] MAGNAYE, Jose, and August REINISCH. Revisiting Res Judicata and *Lis pendens* in Investor-State Arbitration. The Law & Practice of International Courts and Tribunals, 2016, p. 269; Waste Management, Inc. v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, para. 47.
[37] Article 38 (1) (d) of the ICJ Statute.
[38] International Law Association Resolution No. 1/2006, Annex 2: Recommendations on *Res Judicata* and Arbitration, available at https://www.trans-lex.org/803600.

The Recommendations focus on the conclusive and preclusive effect of awards in arbitral proceedings. This mirror the positive and negative *res judicata* effect referenced above accordingly. According to the Recommendations, an arbitral award becomes vested with the conclusive and preclusive when, *inter alia,* it has decided or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings; it is based upon a cause of action which is invoked in the further arbitration proceedings, or which forms the basis for the subsequent arbitral proceedings; and it has been rendered between the same parties[39].

Even though some authors remain sceptical towards the real value of these recommendations for international arbitration,[40] the ILA transnational principles are a unique and crucial source of transnational approach to the *res judicata* principle.

[39] Article 3 of the Recommendations on *Res Judicata* and Arbitration.
[40] ALFORD, Roger. The "Transnational Approach" of the ILA Recommendations on Res Judicata and Arbitration. Kluwer Arbitration Blog, 2009.

5. Same legal order

Before resorting to a full analysis of whether the *res judicata* principle applies, the prerequisite of the same legal order must apply.

It has been consistently held, that *res judicata* effect of a domestic court decisions does not impact the proceedings of investment treaty arbitration.[41] In *Lucchetti v. Perú*, the ICSID annulment committee held that in the proceedings before international tribunals, the *res judicata* effect of a domestic judgment will only be considered as a factual element and not a legal obstacle.[42] While the *res judicata* effect of domestic decisions applies within the domestic legal system, the interpretation of an investment treaty or other international investment agreement is, on the contrary, a matter of international law.[43]

This notion has been confirmed and reinforced in Helnan v. Egypt, where the arbitral tribunal held, that not even a domestic commercial arbitration would have any *res judicata* effect on the international proceedings under the relevant BIT.[44]

The requirement of the same legal order for *res judicata* to take effect reflects the unique nature of investment treaty disputes. Unlike international commercial arbitration disputes or domestic disputes, investment treaty arbitration takes place within the international legal order applying public international law and its principles, rather than domestic law. The difference in legal orders precludes *res judicata* from taking effect.

---

[41] CREMADES, Bernardo M., and Ignacio MAGDALENA. *Parallel Proceedings in International Arbitration.* Arbitration International, Vol. 24, Issue 4, 2008, pp. 507, 521; TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Award, 19 December 2013, paras. 512-519; Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru (cited as Lucchetti v. Peru), ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, para 86; EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 1130.

[42] Lucchetti v. Peru, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, para. 87.

[43] *Ibid.*, para. 88.

[44] Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Award, 7 June 2008, para. 123.

6. Methods of determining *res judicata*

Firstly, it shall be noted that the application of *res judicata* in investment treaty arbitration is a complex and an evolving area of law, and different tribunals may use different tests or approaches to determine its applicability. The two methods which are often alternatively used by tribunals in investment treaty arbitration are the triple identity test and the fundamental basis test.

6.1. Triple identity test

The triple identity test for determining *res judicata* in investment treaty arbitration comes from Judge Anzilotti's frequently cited dissenting opinion in the Chorzów Factory case.[45] He interpreted Article 59 in connection with Article 60 of the PCIJ Statute and extracted the three key elements of identification: *causa persona* (identity between parties), *causa petitum* (identity of the object or relief), and *causa petendi* (identical legal grounds). Only when all three requirements are fulfilled, the dispute can be considered identical, and *res judicata* comes into effect.

In each of the individual prongs of the test, different approaches are used throughout the world. The formalistic approach is traditionally connected to the civil law jurisdiction tribunals. A more flexible approach that has roots in estoppel doctrines is, on the other hand, typical for common law approach to the triple identity test.

6.1.1. Identity of parties

The first requirement that must be met before *res judicata* can apply is the identity of parties (*causa persona*) to the dispute. This requirement seems to follow all jurisdictions and modalities of the *res judicata* principle.[46] However, this does not guarantee a uniform application of this condition. While the party identity is often clear on the responding state's side for obvious reasons, the view on the identity of claimant on the investors side is divided. The jurisprudence is inconsistent with the answer to the question whether the controlling

[45] Factory at Chorzów, Interpretation of Judgments Nos. 7 and 8, P.C.I.J. (Ser. A) No. 13, 1927, Dissenting Opinion of Judge Anzilotti, p. 27.
[46] Cheng, p. 340; International Law Association Resolution No. 1/2006, Annex 2: Recommendations on *Res Judicata* and Arbitration, Article 3.4; KIM, Junu, and Sejin KIM. *The Investment Treaty Arbitration Review: Res Judicata.* The Law Reviews, 14 June 2022.

shareholders of a company and the company itself should be considered the "*same parties*" for purposes of *res judicata*.[47]

The tribunals have taken two opposite approaches to answer this question. First, a more flexible economic approach and second, a strict formalistic approach.

The economic approach aims to prevent the possibility of endless re-litigation of the same dispute by individual companies of a corporate group (constituting a single economic entity) under the disguise of separate legal entities.[48] An example where the tribunal took the economic approach to determine the identity of the parties is the case of Orascom v. Algeria. The tribunal dismissed an investor's claim as it was brought by the same investor who had commenced a separate investor-state arbitration against the same state through its parent company.[49] Other examples where the tribunals took the economic approach may be the cases of Amco v Indonesia[50] and Klockner v Cameroon[51].

The formalistic approach, on the contrary, makes a strict distinction between each individual legal entity regardless of their economic relations. This approach was famously adopted in the CME v. Czech Republic and Lauder v. Czech Republic cases.[52] The formalistic approach was also taken in the Eskosol v. Italy case where the tribunal dismissed Italy's argument on the basis that it considered Eskosol and its parent company Blusun different parties "*formally or in essence*" as they did not have the same interests[53]. However, the tribunal also

---

[47] Brower & Henin, p. 58.
[48] REINISCH, August. *The Use and Limits of Res Judicata and Lis pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*. The Law & Practice of International Courts and Tribunals, 2004, p. 59.
[49] KIM, Junu, and Sejin KIM. The Investment Treaty Arbitration Review: Res Judicata. The Law Reviews, 14 June 2022; Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Award, 31 May 2017.
[50] Amco v Indonesia, Decision on Jurisdiction, 25 September 1983.
[51] Klockner v Cameroon, Award, 21 October 1983.
[52] See chapter 7 below.
[53] TORAO, Maria Bisila. *In another energy case against Italy, an ICSID tribunal rejects all claims on the merits on the basis that Italy acted reasonably and in the public interest*. Investment Treaty News, 19 December 2020; Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, 4 September 2020, para. 264.

acknowledged the fact, that in the case of the claimant's victory, the parent company is likely to benefit as well despite its loss in the previous proceedings.[54]

The determination of identity of parties is also influenced by the definition of an investor in the applicably treaty. A wide definition will encompass direct investors as well as indirect shareholders. The wide definition of an investor is one of the main reasons why parallel proceedings occur along with the coexistence of contract and treaty claims, and jurisdictional overlap.[55]

6.1.2. Identity of object

The second step of the triple identity test is the requirement of identity of the object of the dispute (*causa petitum*). Object in the sense of *res judicata* doctrine refers to remedies sought by the claimant in the arbitration.[56] Applying this requirement aims to eliminate the so-called "*claim splitting*" where the relief sought is slightly altered in otherwise identical proceedings. The identity of the object and the cause together are sometimes referred to as the identity of issue.

The arbitral tribunals tend to conduct a complex analysis when examining the identity of object requirement. If only an exactly identical relief sought (object) in a second case would be precluded as a result of *res judicata*, then litigants could easily evade this by slightly modifying the relief requested. This would be the case, for instance, if in a typical investment dispute, involving allegations of acts amounting to expropriation, the investor first sought *restitutio in integrum* as relief from the host state and in a later litigation changed the object of his case by requesting compensation.[57]

6.1.3. Identity of cause

The requirement of the identity of cause or grounds (*causa petendi*) is the third and last condition under the triple identity test. This requirement aims to eliminate occurrences

---

[54] Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, 4 September 2020, para. 267.
[55] YANNACA-SMALL, Katia. *Chapter 25: Parallel Proceedings*, in Muchlinski, Peter, et al. (ed.). The Oxford Handbook of International Investment Law. Oxford Academic, 2012, pp. 1012-1013.
[56] Reinisch, p. 62.
[57] *Ibid*.

where claimant could seek compensation for factually identical breach that is only differently legally qualified. It also aims to prevent the repetition of raising the same claim under different BITs or multilateral agreements.

A great example of a holistic approach to the identity of cause requirement was taken in the Southern Bluefin Tuna case[58], a dispute between Australia and New Zealand on one side and Japan on the other. In this case, the tribunal determined that the two claims that differ virtually only in the convention, under which they were brought before the tribunal, are in fact identical, and the re-litigation is barred by the *res judicata* preclusion.[59]

On the contrary, in the CME v. Czech Republic case it was determined that there was no identity of cause, despite its obvious similarity with the ongoing Lauder v. Czech Republic case, because it was brought under a different BIT.[60]

6.2. Fundamental basis test

Where it is not possible or suitable to use the triple identity test, arbitral tribunals have been resorting to using the so-called fundamental basis test to determine the identity of a dispute.

Unlike the triple identity test, the fundamental basis test does not indicate specific conditions or requirements that must be met in order to claim the *res judicata* effect. Under the fundamental basis test, the tribunal looks at the claim as whole and determines whether "*in nature*" the case does or does not qualify as identical.[61]

---

[58] KIM, Junu, and Sejin KIM. *The Investment Treaty Arbitration Review: Res Judicata.* The Law Reviews, 14 June 2022; Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), 39 ILM 1359, Award on Jurisdiction and Admissibility, 4 August 2000, paras. 47–54.
[59] KIM, Junu, and Sejin KIM. *The Investment Treaty Arbitration Review: Res Judicata*. The Law Reviews, 14 June 2022.
[60] See chapter 7 below.
[61] SOVANMONY, Ung. *Loopholes in the Application of the "Fork-in-the-Road" Provisions in Investor-State Dispute Settlement Mechanisms*. Cambridge Core Blog, 12 October 2022.

The fundamental basis test has been in practice primarily used in the adjudications of the fork-in-the-road provisions[62], such as in the Pantechniki v. Albania case or H&H v. Egypt case.[63]

The use of the fundamental basis test has been criticized for its lack of clarity and an overly broad discretion it gives to the arbitral tribunal over the case.[64]

[62] A provision in the investment treaty that dictates a mandatory choice between domestic judiciary proceedings or investment treaty arbitration. The provision is relevant when talking about the res judicata doctrine because the tribunal examines whether an identical had not been decided previously by the domestic courts.
[63] SAFAR, Safarli. *Applying the "fundamental basis" test in analysis of the disputes' identity for the purpose of the Fork-in- the-road provision: Main advantages and disadvantages.* SSRN, 24 March 2021, pp. 6-7; H&H Enterprises Investments, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB 09/15, Award, 6 May 2014; Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009.
[64] Safar, pp. 6-7.

7. Looking back at CME/Lauder v. Czech Republic

The saga of the parallel proceedings of CME v. Czech Republic[65] and Lauder v. Czech Republic[66] constitutes a significant moment in the history of investment treaty arbitration. Besides its importance for its contradicting decisions on substance, the procedural aspects are just as important.

The tribunal had to consider the issue of whether certain claims had already been decided in a prior arbitration between the parties. And as such, the CME/Lauder v. Czech Republic cases are relevant for understanding how the *res judicata* principle may be applied in the context of investment treaty arbitration. Even though the proceedings over identical facts under two different BITs, by a shareholder and by a company that he controlled, did not amount to a violation of *lis pendens*, or by extension the *res judicata* principle.

In the following sections, the author will provide a brief background of the proceedings, apply the triple identity test as described above to determine whether *res judicata* could have applied and compare the findings with the methods used by the tribunals.

7.1. Background

The proceedings of CME, a Dutch company and Mr. Lauder, a U.S. investor and a controlling shareholder in CME, arose in reaction to a failed media venture in the Czech Republic.

The first case was brought by the controlling shareholder of CME and an American investor Mr. Ronald S. Lauder before an arbitral tribunal in London in an UNCITRAL arbitration under the United States - Czech Republic BIT. The request for arbitration was lodged on 19 August 1999 and the final award was rendered on 3 September 2001. The tribunal in this case decided in favour of neither party - despite finding liability of the state, it awarded no damages.

The second case was brought by the Dutch media and entertainment company CME Czech Republic B.V. before an arbitral tribunal in Stockholm in an UNCITRAL arbitration under the Netherlands - Czech Republic BIT. The request for arbitration was lodged on 22 February

[65] CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Award, 14 March 2003.
[66] Ronald S. Lauder v. The Czech Republic, UNCITRAL, Award, 3 September 2001.

2000, a partial award was rendered on 13 September 2001 and the final award was rendered on 14 March 2003. The investor won this case and was awarded USD 270 million.

It has been widely agreed that the arbitration proceedings were initiated over identical facts in both above mentioned cases.[67]

7.2. Prerequisites and conditions of *res judicata*

The following analysis aims to ascertain whether the final award rendered in the Lauder case constituted a *res judicata* and should have precluded the CME tribunal from rendering its final award. The conditions that will be considered are the identity of legal order and the individual prongs of the triple identity test.

It is important to note that the tribunal in the CME did not conduct a proper *res judicata* analysis, because it considered that the respondent waived their defence by refusing to accept any of the claimant's proposals to coordinate the two proceedings.[68] The issue of *res judicata* and *lis pendens* between the two cases was, however, briefly addressed by the Svea Court of Appeal in its judgement on 15 May 2003, by which it also denied the respondent's motion to declare invalid or alternatively set aside the final award in the CME case.[69]

7.2.1. Same legal order

The prerequisite of the same legal order of the disputed cases before applying the *res judicata* aims to separate the investment treaty arbitration for its unique nature from international commercial arbitration cases and all domestic cases. Non-compliance with this condition precludes *res judicata* from taking effect as described above.

It shall be noted that prior to the initiation of the investment treaty arbitrations, disputes involving the same parties and stemming from the same conduct of the Czech Media Council were being decided before domestic courts and before in an ICC arbitration.

---

[67] BOHMER, Lisa. *Looking back (1 of 3): In CME and Lauder Cases, Two Different UNCITRAL Tribunals Upheld Jurisdiction over Czech Media Dispute Despite Parallel Proceedings.* Investment Arbitration Reporter. 10 April 2019; KLEIN, Bohuslav. *How to Avoid Conflicting Awards: The Lauder and CME Cases*. The Journal of World Investment & Trade, 1 January 2004, p. 20.
[68] CME v. The Czech Republic, para. 430.
[69] Svea Court of Appeal, Judgement, published at 42ILM919 (2003), paras. 117-126.

The case of CME was initiated under the Netherlands - Czech Republic BIT. Similarly, the case of Lauder was initiated under the United States - Czech Republic BIT. Therefore, both cases are well within the boundaries of public international law and the disputes are governed by the internationally recognized principles including the *res judicata* and *lis pendens* principle.

The tribunals did not address the matter of the identity of legal order, possibly because it is hard to imagine this prerequisite would be disputed in the issue at hand. The intricate matter of different underlying BIT's, however, falls within the argumentation of the last prong of the triple identity test as the *causa petendi* and will be addressed in due course.

7.2.2. Identity of parties

The question of the identity of the parties in the CME and Lauder case were the *alpha and omega* of the disputes. Is Mr Lauder an identical party to the company CME of which he is the controlling shareholder?

The Lauder tribunal did not address this issue *per se*, but it did not consider Mr Lauder identical to CME in its deliberations. On the other hand, the tribunal in the CME arbitration argued that the traditional formalistic approach shall be taken and therefore no identity of parties in the parallel proceedings was found.

The tribunal acknowledged that other authorities argue in favour of the economic approach but argued against it, as it did not find this approach sufficiently generally accepted to apply it to the present case. Professor Sacerdoti in his expert opinion provided to the CME tribunal argued against the economic approach. He held that theories of "*piercing of the corporate veil*" and the "*group of companies*" have been the basis for the extension of the subjective application of an arbitral agreement only when some additional factual elements concerning the relationship has also been shown, such as intervening in the deal negotiations.[70]

The tribunal also considered the agreed minutes of the Common Position of the Netherlands and the Czech Republic adopted in pursuance of consultation procedure of the applicable BIT.

---

[70] YANNACA-SMALL, Katia. *Chapter 25: Parallel Proceedings*, in Muchlinski, Peter, et al. (ed.). The Oxford Handbook of International Investment Law. Oxford Academic, 2012, p. 1019; Expert Opinion of Prof. Giorgio Sacerdoti, 1 January 2005, available at https://www.transnational-dispute-management.com/article.asp?key=562.

The Netherlands' position was of that the strict formalistic approach should be used, suggesting that legal entities and their protection under the BIT should be kept separate regardless their membership in one economic entity.[71]

The deciding point for the tribunal against using the economic approach and potentially finding Mr Lauder and CME as identical, was the fact that even though Mr Lauder was the ultimate controlling shareholder, he was not the majority shareholder of CME.[72]

As the approach towards determining the identity of parties specifically in relation to a subsidiary and its parent company or shareholders has been divided into two, it was left up to the tribunal's discretion to choose a more fitting approach. At the CME case, the traditional formalistic approach was supported by the expert opinion, the agreed minutes, and the fact that Mr Lauder was not a majority shareholder of the parent company despite having control over it.

7.2.3. Identity of object

The second requirement of the triple identity test aims to prevent claimants from abusing their protection under BIT's by altering the relief sought in multiple proceedings.

In the cases of Lauder and CME, much attention has not been paid to the identity of object analysis. The Lauder tribunal argued by relying on the difference between the parties which naturally leads to different claims. The tribunal acknowledged the possibility of the identity of object as "*the Arbitral Tribunal holds that the seeking of the **same remedies** in different fora does not preclude it from having jurisdiction in the present proceedings."*[73] However, the tribunal admitted the possible risk the multiplicity of proceedings may lead to as the damages could be concurrently granted by the other tribunal. This problem is quickly solved by the tribunal by suggesting that the other deciding body could take the amount of damages

[71] CME v. The Czech Republic, para. 437; Agreed Minutes of the Common Position of the Netherlands and the Czech Republic, p. 3.
[72] CME v. The Czech Republic, para. 436.
[73] Lauder v. The Czech Republic, para. 175.

previously awarded into consideration.[74] This argument became irrelevant as the Lauder tribunal did not award any damages in the case.

The CME tribunal identified with the Lauder tribunal theory that conflicting decisions do not constitute any problem since the awarded damages can be adjusted after considering the previous award.[75] Neither of the tribunals analysed whether there is an identity of object between the two parallel cases despite its obvious similarities.

The claimants in the Lauder and CME cases sought the following relief[76]:

I. Declaring, that the Czech Republic has violated the following provision of the respective investment treaty:
    a. The obligation of fair and equitable treatment of investments.[77]
    b. The obligation of full security and protection.[78]
    c. The obligation to treat investments at least in conformity with the rules/principles of international law.[79]
    d. The obligation not to impair:
        i. investments by arbitrary and discriminatory measures.[80]
        ii. the operation, management, maintenance, use, enjoyment, or disposal of investments by unreasonable or discriminatory measures.[81]
    e. The obligation not to:
        i. expropriate investments directly or indirectly though measures tantamount to expropriation.[82]
        ii. deprive Claimant of its investments by direct or indirect measures.[83]

II. Declaring that the Czech Republic is obliged to pay damages as a consequence of the treaty violations in an amount to be determined in a second phase of the arbitration.

---

[74] Lauder v. The Czech Republic, para. 172.
[75] CME v. The Czech Republic, para. 434.
[76] *Ibid.*, para. 26; Lauder v. The Czech Republic, para. 42.
[77] Article II(2)(a) of USA/CZ BIT; Article 3 (1) NL/CZ BIT.
[78] Article II(2)(a) of USA/CZ BIT; Article 3 (2) NL/CZ BIT.
[79] Article II(2)(a) of USA/CZ BIT; Article 3 (5) NL/CZ BIT.
[80] Article II(2)(b) of USA/CZ BIT.
[81] Article 3 (1) NL/CZ BIT.
[82] Article III of USA/CZ BIT.
[83] Article 5 NL/CZ BIT.

III. Declaring that the Czech Republic will pay the Claimant's cost.

As illustrated above, the relief sought in both cases is nearly identical. The only differences can be found in the points 1(d) and 1(e) above, caused by the slightly different wording in each of the BITs. This contention is supported by one of the arbitrators of the Lauder tribunal Mr Klein: "*First of all, the facts were identical. The legal representatives, the lawyers, presented them in practically the same way*."[84]

As the tribunals already found that the first requirement of the triple identity test was not fulfilled since the parties were not identical, neither of the tribunals investigated the second step of the test. Therefore, no identity of the claims was found despite its obvious presence.

7.2.4. Identity of cause

As discussed above, the identity of cause requirement, *inter alia,* aims to prevent the repetition of raising the same claim based on the same grounds or under different BITs or multilateral agreements.

The tribunal in the Lauder arbitration briefly addressed the question of the identity of cause and the parallel proceedings and concluded that "*the seeking of the same remedies in **different fora** does not preclude it from having jurisdiction in the present proceedings*".[85]

The tribunal in the CME arbitration concluded that the principle of *res judicata* does not apply, *inter alia,* because the two arbitrations are each based on a differing bilateral investment treaty, which "*grants comparable protection, which, however, is not identical."*[86] Because two bilateral investment treaties create rights that are not in all respects exactly the same, different claims are necessarily formulated.[87] The tribunal further argues with PCIJ and other case law that supports the contention that multiple identical proceedings can be initiated under different treaties such as in the case of Certain German Interests in Polish Upper Silesia (1925), American Bottle Company (1929) and SSP Ltd. v. Egypt (1985).

---

[84] Klein, p. 20.
[85] Lauder v. The Czech Republic, para. 175.
[86] CME v. The Czech Republic, para. 432.
[87] *Ibid.*, para. 433.

While the argument that investors should not be deprived of protection under all other BIT's once the first proceedings are initiated is persuasive, it may set a dangerous precedent where all minority shareholders from different countries could initiate identical proceedings against one state over an identical breach of the investment protection.

The tribunal naturally chose to refer to case law that supported its decision; however, the choice is not convincing. All the referenced cases come from even decades before the above-mentioned Southern Bluefin Tuna case, where the decision was the polar opposite stating that identical claims shall not be brought before tribunals under different treaties.

7.3. Further developments

The charade we were able to witness in the parallel cases of Lauder v. Czech Republic and CME v. Czech Republic served as a unique experiment that many academics have addressed since. It was also reflected in cases that followed since the early 2000's.

A landmark decision in Orascom TMT Investments v. Algeria went against the precedent set by the Lauder and CME tribunals that allowed contradicting outcomes in parallel proceedings. The Orascom TMT Investments v. Algeria concluded in reaction the CME and Lauder cases that *"… it cannot be denied that in the fifteen years that have followed those cases, the investment treaty jurisprudence has evolved, including on the application of the principle of abuse of rights (or abuse of process) … The resort to such principle has allowed tribunals to apply investment treaties in such a manner as to avoid consequences unforeseen by the drafters and at odds with the very purpose underlying the conclusion of those treaties."*[88] Implying that what happened in the Lauder and CME cases should serve the future tribunals as an example of what to avoid.

Since the cases' conclusion, the ILA presented the set of Recommendations mentioned above that has helped to unify the arbitral tribunals' approach towards *res judicata* and parallel proceedings with the aim to prevent conflicting decisions.

[88] Orascom TMT Investments v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Award 31 May 2017, para. 547

8. Conclusion

Even though the principle of *res judicata* is accepted universally across jurisdictions, its application in practice differs drastically. Arbitral tribunals, and especially in investment treaty arbitration, must bridge these differences and apply the *res judicata* principle in a way that is universal and prevents abuse of process by the parties.

There are tools the arbitrators can use to determine *res judicata* such as the ILA Recommendations on *res judicata* that provide tribunals with transnational principles of applying *res judicata*. Tribunals can also follow case law of previous arbitral tribunals and international courts, but the tribunals shall act with the utmost awareness of the different circumstances in each case. Through case law, two main tests had crystalized that tribunals use to determine *res judicata* - the triple identity test and the fundamental basis test.

The most prominent of the available tools is the triple identity test. It enables the tribunals to conduct an efficient analysis that is transparent for the parties especially on what is being taken into the tribunal's considerations on the *res judicata* issue. However, not even the triple identity test guarantees a uniform approach since different tribunals interpret the individual steps differently.

Finally, even though far from perfect, the triple identity test together with the ILA Recommendations on *res judicata* represent the best tools currently available to ensure the most uniform outcomes possible.

List of sources

Literature

01. ALFORD, Roger. *The "Transnational Approach" of the ILA Recommendations on Res judicata and Arbitration.* Kluwer Arbitration Blog, 2009, available at https://arbitrationblog.kluwerarbitration.com/2009/07/25/the-transnational-approach-of-the-ila-recommendations-on-res-judicata-and-arbitration/.

02. BALAŠ, Vladimír, and Pavel ŠTURMA. *Nové mezinárodní dohody na ochranu investic.* Prague: Wolters Kluwer, 2018.

03. BOHMER, Lisa. *Looking back (1 of 3): In CME and Lauder Cases, Two Different UNCITRAL Tribunals Upheld Jurisdiction over Czech Media Dispute Despite Parallel Proceedings.* Investment Arbitration Reporter. 10 April 2019, available at https://www.iareporter.com/articles/looking-back-1-of-3-in-cme-and-lauder-two-different-uncitral-tribunals-upheld-jurisdiction-over-czech-media-dispute-despite-parallel-proceedings/.

04. BROWER, Charles N., and Paula F. HENIN. *Chapter 5: Res judicata*, in Kinnear, Meg and Geraldine R. Fischer, et al. (eds). Building International Investment Law: The First 50 Years of ICSID. Kluwer Law International, 2015, pp. 55-70.

05. CHENG, Bin. *General Principles of Law as Applied by International Courts and Tribunals.* Cambridge: Grotius Publications/Cambridge University Press, reprinted 1987, available at https://www.trans-lex.org/101100.

06. CREMADES, Bernardo M., and Ignacio MAGDALENA. *Parallel Proceedings in International Arbitration*. Arbitration International, Vol. 24, Issue 4, 2008, pp. 507-521.

07. GAILLARD, Emmanuel. *Coordination or Chaos: Do the Principles of Comity, Lis pendens, and Res judicata Apply to International Arbitration?* New York: The American Review of International Arbitration Vol. 29 No. 3, 2018, pp. 205-242.

08. KIM, Junu, and Sejin KIM. *The Investment Treaty Arbitration Review: Res judicata.* The Law Reviews, 14 June 2022, available at https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/res-judicata#footnote-054.

09. KLEIN, Bohuslav. *How to Avoid Conflicting Awards: The Lauder and CME Cases.* The Journal of World Investment & Trade, 1 January 2004, pp. 19-22, available at https://doi.org/10.1163/221190004X00164.

10. MAGNAYE, Jose, and August REINISCH. *Revisiting Res judicata and Lis pendens in Investor-State Arbitration*. The Law & Practice of International Courts and Tribunals, 2016, pp. 264-286, available at https://doi.org/10.1163/15718034-12341322.

11. REINISCH, August. *The Use and Limits of Res judicata and Lis pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes.* The Law & Practice of International Courts and Tribunals, 2004, pp. 37-77, available at https://doi.org/10.1163/157180301773732627.

12. SAFAR, Safarli. *Applying the "fundamental basis" test in analysis of the disputes' identity for the purpose of the Fork-in- the-road provision: Main advantages and disadvantages.* SSRN, 24 March 2021, available at http://dx.doi.org/10.2139/ssrn.4044956.

13. SOVANMONY, Ung. *Loopholes in the Application of the "Fork-in-the-Road" Provisions in Investor-State Dispute Settlement Mechanisms*. Cambridge Core Blog, 12 October 2022, available at https://www.cambridge.org/core/blog/2022/10/12/loopholes-in-the-application-of-the-fork-in-the-road-provisions-in-investor-state-dispute-settlement-mechanisms/.

14. ŠTURMA, Pavel, and Vladimír BALAŠ. *Mezinárodní ekonomické právo*. 2nd edition. Prague: C.H. Beck, 2013.

15. TORAO, Maria Bisila. *In another energy case against Italy, an ICSID tribunal rejects all claims on the merits on the basis that Italy acted reasonably and in the public interest.* Investment Treaty News, 19 December 2020, available at https://www.iisd.org/itn/en/2020/12/19/in-another-energy-case-against-italy-an-icsid-tribunal-rejects-all-claims-on-the-merits-on-the-basis-that-italy-acted-reasonably-and-in-the-public-interest/.

16. YANNACA-SMALL, Katia. *Chapter 25: Parallel Proceedings*, in Muchlinski, Peter, et al. (ed.). The Oxford Handbook of International Investment Law. Oxford Academic, 2012, pp. 1008-1048, available at https://doi.org/10.1093/oxfordhb/9780199231386.013.0025.

Case law

17. Achmea BV v. Slovakia, C-284/16, 6 March 2018.

18. Amco Asia Corporation and others v. Republic of Indonesia, Decision on Jurisdiction, 25 September 1983.

19. Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990.

20. CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Award, 14 March 2003.

21. EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, 11 June 2012.

22. Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, 4 September 2020.

23. Factory at Chorzów, Interpretation of Judgments Nos. 7 and 8, P.C.I.J. (Ser. A) No. 13, 1927, Dissenting Opinion of Judge Anzilotti.

24. H&H Enterprises Investments, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB 09/15, Award, 6 May 2014.

25. Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Award, 7 June 2008.

26. Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru (cited as Lucchetti v. Peru), ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007.

27. Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Award, 21 October 1983.

28. Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Award, 31 May 2017.

29. Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009.

30. Ronald S. Lauder v. Czech Republic, UNCITRAL, Award, 3 September 2001.

31. Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), 39 ILM 1359, Award on Jurisdiction and Admissibility, 4 August 2000.

32. TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Award, 19 December 2013.

33. The Pious Fund of the Californias, The United States of America vs. The United Mexican States, Permanent Court of Arbitration, 14 October 1902.

34. Trail Smelter Case (U.S. v. Canada), 3 R.I.A.A., 1905.

35. Waste Management, Inc. v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002.