Jean Monnet Chair

EU Constitutional Framework for International Dispute Settlement and Rule of Law

JEAN MONNET PAPERS

08/2023

Res Judicata and International Investment Arbitration

Catriona Laidlaw

EUROPA-INSTITUT SAARLAND UNIVERSITY SINCE 1951

Co-funded by the Erasmus+ Programme of the European Union

The Jean Monnet Paper Series is a project of the chair of Prof. Dr. Marc Bungenberg LL.M. at Saarland University in its capacity as Jean Monnet Chair under the title "EU Constitutional Framework for International Dispute Settlement and Rule of Law". The European Commission, which recognises exceptional excellence in teaching and research on the European Union by awarding Jean Monnet Chairs, co-funds this program.

More Jean Monnet Papers can be found at

https://www.uni-saarland.de/lehrstuhl/bungenberg/jean-monnet-papers.html

ISSN: 2752-2512 (online)

Chair of Public Law, Public International Law, European Law and International Economic Law and Jean Monnet Chair of EU Constitutional Framework for International Dispute Settlement and Rule of Law

Prof. Dr. Marc Bungenberg, LL.M.

Saarland University

66123 Saarbrücken

Germany

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET PAPER NO./YEAR [URL]

Abstract

Res Judicata is an ancient doctrine meaning "a thing adjudicated"; once a dispute has been finally decided, it cannot be subject to further litigation. Two features of res judicata are undisputed: it is a general principle of (international) law, and the tripartite test applies to determine its application. This requires the identity of parties, subject matter and legal grounds in order to establish whether a subsequent matter is sufficiently similar to a previous dispute (where a final and binding award has been issued) to warrant further proceedings being precluded. Beyond this, and with particular regard to international investment arbitration, there is division in how the doctrine should be applied, resulting in conflicting arbitral awards. Arguably, this doctrinal fragmentation is influenced by differing municipal notions of the doctrine that inevitably influences international adjudication. The application of res judicata is presented as follows: first through considering its application to international investment arbitration in general; second, the main focus turns on differing interpretations of the tripartite test, where arbitral fragmentation is established; finally, the scope of res judicata is considered with regards to arbitral awards, interim decisions and proceedings, where again, the case law conveys contradictory conclusions. Consequently, the substantive application of res judicata in international investment arbitration has not reached jurisprudence constant. It is submitted that a flexible, rational, and substantive interpretation and application of res judicata requires to be adopted by international investment tribunals, not only to protect arbitral authority and autonomy but also to uphold the rule of law. Ideally, the consensus on the international plane should be reached to ensure legal certainty and predictability, particularly considering the public nature of international investment arbitration.

Keywords

Res Judicata – Conflicting Awards – Arbitral Autonomy – Tripartite Test – Rule of Law – General Principles of Law

Biography of the authors

Catriona Laidlaw was an LL.M. Candidate at the Europa-Institut, Saarland University in the year 2021-2022 and is a qualified solicitor from the UK. She successfully participated in the FDI International Arbitration Moot in 2022 on behalf of the Saarland University/ Europa-Institut team. Res Judicata was included in the 2022 FDI Moot problem and initiated the author's further interest to examine issues surrounding the doctrine within investment arbitration.

Table of contents

A. Introduction 5
B. Public International Law 6
I. General Principles of Law & Res Judicata 7
II. Function of General Principles & Res Judicata 8
III. Relationship to National Laws 9
IV. A Substantive Approach 10
C. The Tripartite Test 11
I. Identity of Parties 11
II. Identity of Subject Matter 14
III. Identity of Legal Grounds 16
IV. A Way Forward 18
D. Application to Arbitral Awards 18
I. Scope of application 19
II. Extent of Application – Reasoning or Dispositif? 20
III. Interim Decisions 21
IV. Relationship with other legal orders 23
E. Conclusion 24

Res Judicata and International Investment Arbitration

Catriona Laidlaw [*]

A. Introduction

Translated, res judicata means "a thing adjudicated". The doctrine is designed to protect the finality of judgments (for the purposes of this discussion, international arbitral awards) and applies across international, common, and civil law jurisdictions alike. Once a final decision has been rendered, it is final and binding and the same matter cannot be relitigated. In this sense, res judicata can encompass the principle of *ne bis in idem*. Res judicata is fundamentally a broad notion; it has both conclusive and preclusive effects. This core of the principle is shared across domestic legal orders.[1] To be conclusive (a positive effect), a decision must be final. To be preclusive (a negative effect), it must be impossible to re-consider a matter that has been conclusively decided (in other words, that is final) and is therefore binding on the parties.[2] Consequently, res judicata is a principle that is both substantive and procedural; it not only governs the relationship between the parties to a dispute but is also a procedural bar against a matter being re-examined.[3] In order to apply, three conditions must be fulfilled to establish congruence between a prior award and the subsequent dispute.[4] These three conditions are known as the tripartite test, requiring the cumulative identity of parties, subject matter and legal grounds.[5]

Respecting the finality of judgments, awards, and legally binding decisions (depending on the fora) ensures legal certainty.[6] Indeed, one of the advantages of arbitration is the finality of proceedings; no appeal is possible;[7] for example, the ICSID Convention (no. 7) only allows revision (Art. 51), annulment (Art. 52), supplementation (Art. 49(2)), and interpretation (Art. 50). Importantly for international investment arbitration, the application of res judicata aims to prevent the emergence of conflicting decisions concerning the same matter; particularly important as international investment tribunals are appointed on an *ad hoc* basis to determine the particular investor-state dispute brought before it; "each tribunal is sovereign, and may retain…. a different solution for resolving the same problem".[9] Whilst there is no principle of binding precedent for international arbitral tribunals, res judicata necessarily precludes the same matter being relitigated after it has been conclusively decided; the finality of a previous arbitral tribunal's decision must be respected by subsequent tribunals.[11] As a result, res judicata further ensures economic efficiency, as any further attempt at adjudication would require to be dismissed.

---

* *Catriona Laidlaw was an LL.M. Candidate at the Europa-Institut, Saarland University in the year 2021-2022 and is a qualified solicitor from the UK. E-Mail: catriona..laidlaw@hotmail.co.uk.*

1 *Boyling,* Int.A.L.R 2021, 24(3), p. 181, 182.

2 *Di Brozolo*, available at: <https://ssrn.com/abstract=1842685> (19/01/2023) p. 2.

3 Ibid, p. 1.

4 ICSID Case No. ARB(AF)/12/1, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, Award (25 August 2014), para 7.13.

5 Ibid; Permanent Court of International Justice *Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow*, 1927 P.C.I.J. (ser. a) no. 13 (16 December 1927) (dissenting opinion of Judge Anzilotti) p. 23.

6 *Ridi,* LJIL 2018 31(2), p. 383, 385.

7 *Bohmer*, FILJ 2016, 31(1) p. 236-245.

9 ICSID case No. ARB/02/17 *AES Corp v. Argentine Republic*, Decision on Jurisdiction (26 April 2005) para. 30:.

11 *Mandelbaum,* UCLJL. 2020 (91), p. 1, 2.

What becomes apparent, and constitutes a common thread throughout this discussion, is that despite a broad consensus on the general boundaries of res judicata, this consensus does not extend to its universal and consistent application by international investment tribunals, particularly considering the tripartite test. It will be presented that a flexible and substantive approach should be undertaken and utilised by international investment tribunals when applying the doctrine. The overarching aim of such an approach is to discourage attempts to circumvent or evade res judicata through the use of legal fiction or taking advantage of factual circumstances to relitigate a dispute if dissatisfied with the award.

To set the scene, the natural beginnings require an examination of the nature of the doctrine (and international investment arbitration) within public international law, to determine if indeed, such tribunals are able and/or willing to apply the doctrine. Thereafter, the second chapter (and the primary focus of this discussion) will consider the tripartite test, to establish whether the prior and subsequent proceedings are indeed the same. It is within this chapter that a fragmentation of the doctrine within international investment arbitration is presented, and where a transnational and flexible standard is advocated. The third chapter continues this thread, considering the extent and scope of res judicata to an arbitral award (and interim decisions), to convey that such flexibility requires to be extended to include the essential reasoning of an award, not simply the operative part. What this discussion hopes to achieve is to convey a rationale for the adoption of a sensible, flexible, and pragmatic understanding and application of res judicata that extends beyond current understandings within municipal legal orders, advocating for a transnational approach within public international law. It is submitted that a strict, literal or formalistic approach conflicts with the purpose of the doctrine, in turn, contributing to a decline in arbitral authority and legitimacy through conflicting arbitral awards.

B. Public International Law

At the outset, it is necessary to discuss the relationship between public international law, international investment arbitration and res judicata. Firstly, despite debates as to whether international investment truly is a branch of public international law,[12] it is argued here that it cannot and does not stand in isolation. Instead, it is inscribed within public international law by its very nature: considering the public nature of the subject matter being adjudicated; the function of investor-state arbitration as a control on the legality of host state conduct (international investment arbitration can be regarded as similar to judicial review; it is used when individuals (investors) are faced with potential misuse of governmental powers)[13]; and with regard to the special features of the relationship between the parties and the international nature of the obligations allegedly breached (the investor will be relying on international agreements, whether bilateral or multilateral).[14] It is the public international law character of the international treaty containing state consent to arbitration, and provisions by the host state to offer foreign investors protection that affords the investor the opportunity to initiate arbitration proceedings.

International (investment) arbitration is becoming one of the most used means of dispute settlement in public international law, therefore increasingly applying and shaping the norms

12 *Foster,* ICLQ 2015, 64(2), p. 461, 463; *Schill,* Va.J.Int'L L. 2011 52(1), p. 57, 71; *Garcia Bolivar*, J.World Inv & Tr. p .751, 752.

13 *Schill,* (fn 12), p. 59.

14 *De Brabandere,* p. 25.

within.[15] As will be demonstrated via case law, conflicting arbitral awards are arguably exacerbating doctrinal fragmentation, thereby threatening its own normative legitimacy.[16] In light of this fragmentation, it is submitted transnational standards should be consistently adopted by international investment tribunals.

I. General Principles of Law & Res Judicata

Res judicata is one such norm inscribed within public international law. Turning firstly to public international law itself, the starting point for the formal sources of such is Art 38 of the Statute of the International Court of Justice (ICJ). Art 38(1)(c) refers to general principles as recognised by civilised nations, understood today as a broad range of (major) legal jurisdictions.[17] Res judicata was expressly listed as a general principle by the drafters of the original statute,[18] and subsequently recognised by the court as a "well-established and generally recognised principal of law".[19] Similar to other formal sources of public international law (such as international treaties and customary international law) reference to general principles is a means of law creation. Indeed, international law is, uniquely, a system consisting of "the network of relationships existing primarily, if not exclusively between states recognising certain common principles and ways of doing things."[20] In this sense, it often involves the transposition of rules contained in domestic legal orders to the international plane (however this does not allow "borrowing" of rules).[21] It is well established that international courts and tribunals can rely on general principles of law; "(t)here seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings."[22]

Consequently, res judicata is applied by international investment tribunals. Tribunals have unambiguously stated there is "no doubt that res judicata is a principle of international law and even a general principle of law within the meaning of Art 38(1)(c) of the Statute of the International Court of Justice".[23] Whilst international tribunals have a separate legal order from international courts, international investment tribunals have often followed trends set by the ICJ. As an example, the infamous case of Maffezini[24] was influenced by the ICJ in a case decided a year earlier.[25] Debates exist as to whether res judicata can be 'binding' on international arbitral tribunals due to the central role of party autonomy; "Since party autonomy, as a matter of general principle, reigns supreme in international arbitration, a party can, if it deems so appropriate, waive an otherwise legitimate

15 *Schill*, (fn. 12), p. 57.

16 *Martinez-Fraga & Samra*, Nw.J.Int'L Bus. 2012 32(3) p. 419, 421.

17 <https://digitallibrary.un.org/record/3805756?ln=en> (17/01/2023).

18 *Lord Phillimore*, Advisory Committee of Jurists, Council of the League of Nations, 'Proce`s-Verbaux of the Proceedings of the Committee' (1920), 13th Meeting on 1 July 1920 (speech of Root), 335.

19 Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 ICJ 47, 53 (July 13).

20 *Shaw*, p. 4.

21 *Schill,* (fn. 12), p. 92.

22 *Cheng*, p. 336.

23 ICSID Case No. ARB(AF)/00/3, *Waste Management v. Mexico*, Final Award (30 April 2004) para. 39. For further discussion, see *Lenci,* in Gattini, Tanzi and Fontanelli (eds.) p. 21, 37.

24 *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID case no. ARB/97/7, Decision on Provisional Measures dated 28 October 1999)

25 Namely *The Vienna Convention on Consular Relations* (Paraguay v. United States of America) Provisional Measures, Order of 9 April 1998, ICJ Report 1998, 248.

objection based on *res judicata*. By the same token, the parties can agree to submit the same dispute to a new tribunal".[26] In contrast, party autonomy can be used to argue res judicata should apply; when choosing arbitration, parties are deliberately accepting the final and binding nature of the final award, presumed to accept the res judicata effect.[27] Accordingly, it is argued that by virtue of its status as a general principle of law, res judicata does necessarily apply. Explicit inclusion in an international investment treaty or arbitral rules is not required in order to be applied by a tribunal; its application is necessary for the correct functioning of the investment treaty system in its entirety. Indeed, international investment law (including arbitration) promotes and develops public international law in its supervision of host states' conduct, ensuring the rule of law is upheld.[28] Consequently, res judicata, as a principle of general international law, has a binding effect on international investment tribunals (who operate within the sphere of public international law) reinforced by the finality and binding nature of arbitral awards.

Beyond this, it has been considered that the consistent application of res judicata internationally has elevated the principle to that of customary international law; repeated use of general principles of international law creates a transitory effect, crystallising into customary international law.[29] However, substantial differences in approach imply that only the general features of res judicata could attain the status of customary international law; its substantive application by international tribunals, as will be presented below, is often conflicting and contrasting.

II. The Function of General Principles & Res Judicata

The function of general principles is to enable courts and tribunals to deduce a relevant rule from those principles that exist in municipal systems, in order to close gaps in the international legal system.[30] Therefore, general principles act as an autonomous source of law that can be directly applied by an arbitrator when resolving questions of international law, to achieve unity of international law as a system and as an interpretative aid in novel situations.[31] In turn, this is reflected in Art. 44 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1968 (ICSID Convention), where arbitrators are explicitly afforded gap-filling powers "if any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question." Tribunals therefore have the ability to apply public international norms, even if not explicit in the international investment treaty, investor-state contract or agreed arbitral institutional rules. This position is reinforced by Schreuer, who states "[a]n ICSID tribunal's power to close gaps in the rules of procedures is declaratory of the inherent power of any tribunal to resolve procedural questions in the event of lacunae".[33] Following norms of public international law is essential for arbitral tribunals to maintain legitimacy; arbitral case law cannot be incompatible with general principles of law since these stem from the expression of the main legal systems of the world.[34]

26 *Hober*, in Collected Courses of the Hague Academy of International Law p. 103, 257..

27 *Lanser* IICJ. 2019 12(46).

28 *Foster,* (fn. 12), p. 483.

29 *Reinisch*, Law.Pract.Int. Courts Trib, 2004 (3), p. 37, 44.

30 *Lenci,* (fn. 23) p. 21, 25.

31 See *Dumberry* in Schultz (ed.) p. 194, 215.

33 *Schreuer*, The ICSID Convention, p. 880.

34 *Lenci,* (fn. 23), p. 27.

Indeed, res judicata is not the only principle applied by international arbitral tribunals.[35] The doctrine therefore constrains arbitral tribunals and can be viewed as a gate-keeping function, acting as a limit on arbitral rule-making power. Despite broad agreement as to the purpose and status of res judicata, there is correspondingly little consensus as to how it should be applied. This can stem from the various (and divergent) approaches to the doctrine within municipal legal orders. It is submitted that consensus on the application of res judicata by international investment tribunals requires to be established, otherwise "inconsistent findings by different tribunals on the same facts deprive the law of its predictability and hence of its ability to provide effective guidance; and hence, they threaten to undermine… the rule of law".[36]

III. Relationship to National Laws

Determining that the principle of res judicata applies to international investment tribunals in itself, is not enough. For a tribunal to apply the principle, this requires a determination as to which 'version' of the principle should be applied. This struggle has been noted by tribunals themselves, noting "the principle of res judicata has long formed part of many – if not most – systems of national law. That is not to say that the scope and application of the principle is the same in every national legal system."[37] This forms one of the splintering facets of the doctrine.[38] In this respect, a brief consideration of domestic laws requires brief examination. The core features of res judicata (the tripartite test) are generally in harmony with most national laws.[39] The divergence emerges in application, in particular between civil and common law jurisdictions. [40] Of course, the application of res judicata on the international plane does not rely on, nor is it dependent on, domestic legal orders. Contemporaneously, such considerations cannot be ignored, stemming from the very nature of res judicata as a general principle of law.[41] An in-depth analysis of municipal legal orders goes beyond the scope of this discussion, however, it is worth highlighting to explain and assist in understanding any contradictory awards or decisions reached by international tribunals. It is presented that the disparate interpretation of the doctrine throughout municipal legal orders hinders its application in international investment arbitration.

Civil law jurisdictions tend toward a narrower interpretation.[42] This necessitates a strict interpretation of the tripartite test for res judicata to apply to subsequent proceedings, the identity of parties, subject matter and legal grounds must be strictly the same. Taken literally, a small amendment to any of the criteria could consequently evade its application, and therefore the preclusive effect of the first tribunal's award.[43] Additionally, the reasoning of the earlier decision is generally denied binding effect, with res judicata limited only to the operative part of the award.[44]

---

35 *Dumberry,* (fn. 31) p. 203.

36 *Lowe*, Afr.J.Int. Comp. 38(8) 1996 p. 38, 48.

37 ICSID Case no ARB/15/6 *Mobil Investments Canada inc v. Canada*, Decision on Jurisdiction and Admissibility (13 July 2018), para. 187.

38 *Martinez-Fraga & Samra*, (fn. 16), 420.

39 Ibid.

40 *Park,* in Rovine (ed.) 2017/52, 2.

41 As discussed in paras I:A above.

42 As examples, Code Civil [C.Civ] Art. 1351 (Fr). And Code Civil (C.Civ) Art. 23 (Belg); *Martinez-Fraga & Samra*, (fn. 16) p. 427.

43 *Park*, (fn. 40) p. 16

44 *Martinez-Fraga & Samra*, (fn. 16) p. 424. This is discussed further in paragraph D:II.

In contrast, common law jurisdictions tend to employ a more transactional method. Such an approach stands in stark contrast to the above. Materially, it is less formal; the prism of "same claim" is interpreted broadly, allowing the preclusive effect of the earlier decision to be applied widely. The doctrine is therefore extended to a wider range of second proceedings,[45] precluding subsequent adjudication even if not raised by exactly the same party, requesting different relief based on different legal grounds. As an example, English common law uses the doctrine of privity to establish whether parties are sufficiently similar (considering identity of interest) as opposed to requiring exact identity of parties.[46] A congruence between disputes is more important than strict identity. Further, res judicata can be held to apply to not only the operative part of the judgment but also the reasoning.[47] On comparison, it is possible that civil law jurisdictions could potentially allow a second bite at the apple (through parties slightly modifying their dispute) whilst a common law interpretation applies expansively to prevent such. This potential conflict is of particular relevance for international investment tribunals; whilst operating under a different legal order, they do not work in isolation. Arbitrators themselves may have varying understandings, and parties can present differing arguments based on either civil or common law interpretations to argue for or against the application of res judicata.[48]

IV. A Substantive Approach

To establish distance from such conflicts, international tribunals should be in favour of a "flexible and pragmatic approach".[49] International awards are made for international circulation, requiring a uniform approach.[50] This reflects the nature of international arbitration; arbitrators have no *lex fori* and are not bound by national laws. Instead, their jurisdiction is confined to the relevant international agreement. Applying national notions of res judicata can be deemed inappropriate; most domestic interpretations refer to domestic court judgments, are of little relevance and are ill-suited for use in international investment. [51] Indeed, the International Law Association (ILA) recommended arbitrators refer to transnational rules when determining the effect of prior arbitral awards, stating that the "conclusive and preclusive effects of arbitral awards in further arbitral proceedings… need not necessarily be governed by national law and may be governed by transnational rules applicable."[52] However, no transnational rules on procedure (including res judicata) yet exist, and these recommendations were not intended to apply to investor-state disputes.[53] In the meantime, an expansive and substantive approach to the criteria of res judicata

45 Ibid, p. 429; As examples, *S Pac.R R. Co v. United States* 168 US 1, 48 (1897) and in England, *Henderson -v- Henderson* All. E.R. Rep. 378.

46 *Henderson v. Henderso*n (fn. 45). See paragraphs C:1-3 below.

47 *Vargiu*, p. 2, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967490>, (23/01/2023). This is discussed further in paras D:I-II below.

47 Ibid.

48 As an example, in *Apotex Holdings v. USA*, (fn. 4), para. 7.22.

49 PCA Case No.2017-41, *Iberdrola Energia S.A. v. Republic of Guatemala* (II) Final Award (24 August 2020) para. 97. For further discussion see *Wehland*, The Co-ordination of Multiple Proceedings, paras. 6.22-6.33.

50 *Di Brozolo*, (fn. 2) p. 127, 134.

51 *Gaillard*, ARIA 29(3), 2018 p. 225

52 International Law Association Resolution No. 1/2006, Annex 2: Recommendations on res judicata and |Arbitration, para. 2.

53 *De Ly & Sheppard*, Arb. Int. LCIA 2009, 25(1), p. 67, p. 75.

should prevail, removed from formalistic understandings.[54] This enables arbitrators to apply a flexible, pragmatic and issue-orientated solution to the case before them, whilst acting in accordance with the doctrine as an irrefutable norm of public international law. Advocacy in favour of such an approach is set out by considering the tripartite test, with reference to arbitral case law.

C. The Tripartite Test

Despite differences across jurisdictions as to the nuances of the tripartite test, the broad conditions for application at the international level are identical; it is accepted and required that the tripartite (or triple identity) test must be cumulatively fulfilled in order for any determination of res judicata to be made between two separate disputes.[55] In order for an arbitral award to have preclusive and conclusive effects, there must be identity of parties, subject matter and cause of action (identity of *persona, petitum* and *causa petendi*).[56] By being cumulative, if one of these conditions is not fulfilled, a tribunal can conclude res judicata will not apply to preclude the relevant determination at hand. The purpose is to establish claim similarity, reflecting the public policy purpose of res judicata to bar further adjudication of the same dispute; successive cases require to be sufficiently similar in order for the doctrine to apply. Therefore, the application of res judicata with regards to an arbitral award depends on the tripartite test being fulfilled by comparing the two disputes. If not fulfilled, this does not mean the original award does not have conclusive effect, but rather the subsequent proceedings are not sufficiently similar so as to warrant being precluded from adjudication.

<u>I. Identity of Parties</u>

The first component of the tripartite test is that of the parties themselves; requiring the identity of parties in both sets of arbitral proceedings be identical. This is reflected at Aricle 53 of the ICSID Convention, stating that "the award shall be binding on the parties." Indeed, different sets of parties necessarily imply that the dispute is not the same. Prima facie this appears straightforward; it is generally clear whether the parties to the first dispute are identical in the second. Unfortunately, the very nature of international investments creates added complexity; it is not always so simple to determine if the identities of the parties (of the claimant) are identical, and whether this should preclude subsequent adjudication. Primarily, this determination will focus significant attention onto any corporate chains or identities.[59]

It goes without saying that a benefit of incorporating a company is its independent legal personality. Indeed, it is often a requirement in many international investments that the investor(s) incorporate a local entity under the laws of the host state.[60] This necessarily creates a corporate chain, between the shareholders on one side, and (potentially a string of) corporate vehicles on the other. In this sense, a multiplicity of potential claimants can exist, representing essentially the same investment. This raises the question of whether arbitral tribunals can (or should) disregard a claimant's separate

54 For a general discussion on Investment Arbitration (in particular the jurisdiction of the tribunal), see *Waibel* <https://www.researchgate.net/profile/Michael-Waibel-2/publication/314436397_Investment_Arbitration_Jurisdiction_and_Admissibility/links/5be99e4ca6fdcc3a8dd1b25d/Investment-Arbitration-Jurisdiction-and-Admissibility.pdf> [Last accessed 26/01/2023).

55 *De Ly & Sheppard*, (fn. 53), p67, 73; *Alekhin & Bayandin*, NHIA 2019(5), pp. 380-383.

56 UNCITRAL, *CME Czech Republic B.V v. The Czech Republic*, Final Award (14 March 2003) 15 World Trade & Arb Materials 4 (83), para. 435.

59 *De Ly & Sheppard*, (fn. 53) p. 77..

60 *Schreuer*, Investments International Protection, p. 6.

legal personality for the purpose of res judicata to identify whether two parties are the same.[61] Consequently, this returns focus as to whether a flexible or formal determination of party identity should be adopted. The latter would require a strict application whereby any separate legal personality would be respected, whilst the former may consider whether the parties are essentially the same despite any formal separation.

In this respect, there is no consensus. Whilst some tribunals have adopted a flexible approach to determine that shareholders and their corporate interests are sufficiently similar for res judicata,[62] others have confirmed that a company and its shareholders must be deemed as distinct entities in investment treaty arbitration.[63] Inconsistent approaches are evident by comparing two recent arbitral decisions, that of Eskosol v. Italy from 2020[64] and Ampal-American v. Egypt from 2016.[65]

Turning firstly to Eskosol v. Italy, a narrow approach to identity of parties was adopted by the tribunal to determine that a company and its majority shareholder were not the same party for the purpose of res judicata. Briefly, Blusun (a Belgian company) held 80% of the shares in Eskosol (an Italian company). Blusun had already commenced and lost ICSID arbitral proceedings against Italy.[66] Thereafter, Eskosol initiated its own ICSID arbitral proceedings against Italy, in which Italy objected to jurisdiction on the basis of res judicata; arguing that although shareholders are formally distinct from the investment company, in practice, they are inextricably linked.[67] The Eskosol tribunal ultimately decided this issue in favour of the Claimant, stating "when an international treaty allows a claim to be brought by a company, the company speaks for itself and not as a vehicle only for the interests of whichever shareholders might have sued on their own behalf",[68] emphasising the right of "a current litigant… to pursue claims on its own behalf".[69] However, even in reaching such a conclusion, the tribunal admitted that in such circumstances, where both shareholders and companies raise claims in respect of the same investment, the outcome is indeed "awkward".[70]

In contrast, the tribunal in Ampal-American, whilst also citing features of international investment law, reached a conflicting decision on identity of parties by adopting an economic approach (following the rationale adopted previously by Reinisch and Schreuer).[71] The Claimants consisted of four legal entities and one natural person. The investment in question concerned the Claimants' interest in EMG, a locally incorporated company in Egypt. Unlike in Eskosol, where the tribunal

61 For further discussion see *Kryovi* Global Bus.L.Rev (2010) 1(2), p. 169-186

62 As examples: ICSID, *Ampal-American Israel Corp and others v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017) para 261; *Apotex Holdings v. USA* (fn. 4), para. 738; ICSID *Eskosol S.p.A in liquidazione v. Italy*, ICSID Case no. ARB//15/50, Final Award (04 September 2020) paras. 265, 267; *Brekoulakis,* ARIA 2005 16(1), p. 11-12.

63 ICSID Case No. ARB/05/3, *L.E.S.I S.p.A and Astaldi S.p.A v. Algeria*, Decision on Jurisdiction (12 July 2006), para. 37(iii)-(iv); ICSID *L.E.S.I-DIPENTA v. Algeria*, ICSID Case No. ARB/03/08, Final Award (10 January 2005) para. 56; *CME v. Czech Republic* (fn. 56) para. 436.

64 *Eskosol v. Italy* (fn. 62).

65 *Ampal-American v. Egypt* (fn. 62).

66 ICSID Case No. ARB/14/3, *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, Final Award (27 December 2016).

67 *Eskosol v. Italy*, (fn. 62) para. 255..

68 *Eskosol v. Italy*, (fn. 62) para. 266.

69 Ibid, para. 267.

70 Ibid.

71 In *CME v. Czech Republic* (fn. 50), a legal Opinion submitted to the Svea Court of Appeal, Prepared by Reinisch and Schreuer (20 May 2022) paras. 222-239.

considered only the connection between a majority shareholder and its interest, the corporate structure concerning Ampal-American and EMG was incredibly complex, described as "highly convoluted and opaque".[72] As EMG had already initiated ICC arbitral proceedings in its own right and an award had been rendered,[73] the question before the tribunal was whether this investor-state dispute, raised by Ampal-American, was precluded by the application of res judicata given Ampal-American was relying on its interest in EMG.[74] Operating within different legal orders, and absent any system of precedents, an ICSID tribunal is not bound by the award of an ICC tribunal. Egypt nonetheless urged the tribunal to take the ICC award into account to avoid double compensation.[75] Indeed, the Tribunal was concerned "with the potential for overlap and inconsistent findings between the various tribunals charged with determining claims arising out of the same factual matrix between the same or related persons."[76] Despite the parties between the two arbitrations not being strictly identical, the tribunal nonetheless took an economic approach and determined the Claimant's to be in privity of interest, so that they were essentially the same party. The tribunal held that since

[i]nvestment treaties permit a shareholder… to pursue his own direct claim against the host State for loss… even though such investment is held indirectly through the investment company. One of the consequences of that is that the investor/shareholder is treated as a privy to the investment company 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.[77]

Though taking inspiration from common law,[78] the rationale also relies on the nature of international investment law whilst reaching a polar opposite conclusion from the Eskosol tribunal. What appears pertinent, is not the exact extent of ownership or control, rather an identity of interest as the foundation for the claim. Crucially, the Ampal-American tribunal reasoned that the ICSID claim existed "only through EMG and in respect of a contract that EMG entered into."[79] Such an approach is not novel to investment law, with prior tribunals, such as RSM v. Grenada noting that "shareholders cannot use such opportunities as both sword and shield".[80]

Whilst the Eskosol tribunal placed an emphasis on respecting separate legal personalities, the Ampal-American tribunal considered the underlying economic relationship between a company and shareholders. Following the approach in Eskosol, whilst not wrong, nonetheless increases the risk of double recovery. Complex corporate structures can afford a number of entities a jurisdictional link required for investor-state arbitration. This promotes a multiplicity of proceedings that could produce conflicting decisions with respect to the host state's rights and obligations.[81] In contrast, a substantive understanding of identity of parties in international

72 *Ampal-American v. Egypt* (fn. 62) Decision on Jurisdiction (1 February 2016) para 99. The full corporate structure is contained in Annex I of the Decision on Jurisdiction.

73 ICC Case No. 18215/GZ/MHM

74 *Ampal-American v. Egypt* (fn. 62) (Decision on Liability and Heads of Loss) paras 248-255..

75 Ibid, para. 250.

76 Ibid, para. 252.

77 Ibid, para. 260.

78 Ibid, para. 261.

79 Ibid, para. 268.

80 ICSID, *RSM Production and others v. Grenada*, ICSID Case No. ARB/10/6, Award (10 December 2010), para. 7.1.7. Such an approach is also evident in *Apotex Holdings Inc v. USA* (fn. 4), para. 7.40.

81 *Reinisch*, (fn. 29) p. 65.

investment law should reflect an economic approach, where the underlying economic realities between the parties are considered,[82] to avoid the possibility of a dispute being endlessly re-litigated using the disguise of separate legal personalities.[83] It is submitted that a flexible interpretation to the requirement of identity of parties should be preferred over a strict identity test; a rigid application of identity of parties could render res judicata largely obsolete, allowing manipulation in complex disputes engaging intricate corporate structures, a particular concern for international investments. In this sense, it does allow a tribunal to see through a separate legal personality to the extent that international investment law already, arguably, permits.

II. Identity of Subject Matter

The second limb of the tripartite test (interchangeably referred to as either object or subject matter) requires a comparison of the relief sought between the relevant proceedings.[84] Accordingly, "[t]he doctrine of *res judicata* [applies when] not only the Parties but also the matter in dispute [are] the same."[85] The rationale is to ensure that "the subject matter of the judgment or award cannot be re-litigated a second time, also referred to as *ne bis in idem*".[86] This relates to the aim of res judicata to promote stability, legal certainty and economic efficiency, achieved by preventing different tribunals producing divergent and contradictory awards on the same dispute.

Again, a conflict can be witnessed in how identity of subject matter is interpreted and applied by tribunals. On a strict understanding, the object of the two proceedings would require to be exactly identical, on the basis that the doctrine does not prevent the examination of a different or new matter that has not been previously decided.[87] Conversely, a focus on uniformity and excessive formality can allow "ambiguity…[that] can justify non-application of the doctrine".[88]

A strict interpretation of subject matter is evident in the cases of Lauder and CME v. The Czech Republic.[89] Mr Lauder raised proceedings in London against the Czech Republic by virtue of his shareholdings in CME, and subsequently, CME raised proceedings in Sweden. It was admitted that both sets of proceedings derived from the same circumstances and concerned the same subject matter, namely the same damage suffered to the same investment (in a private broadcasting station) in the Czech Republic.[90] Both tribunals concluded that res judicata did not apply.[91] Whilst the CME tribunal admitted that both actions "in substance dealt with the same dispute",[92] it nonetheless

82 In *Reinisch & Schreuer's* legal opinion (fn. 65) paras. 222-239; ICSID Convention in Article 25(2)(a) and (b).

83 Ibid, para. 229; ICSID Case No. ARB/12/35, *Orascom TMT Investments S.a.r.l. v. Peoples Democratic Republic of Algeria*, Final Award (31 May 2017) para. 542..

84 ICSID Case No. ARB/10/23, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, Award of the Tribunal (Resubmission Proceeding) (13 May 2020), para. 71; *Wehland* (fn. 49), para. 6.64.

85 PCIJ, *Polish Postal Service in Danzig*, 1925 P.C.I.J (Ser.B) No.11, para. 30.

86 *De Ly & Sheppard* Arb. Int. LCIA 2004 (Interim Report), p. 2 The finality of arbitral awards is discussed in paragraph III:A below.

87 *Iberdrola v. Guatemala (II)* (fn. 49) paras. 287, 307-309; ICSID *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding (10 May 1988), para. 65; *Reinisch*, (fn. 29), p. 62.

88 *Martinez-Fraga & Samra*, (fn. 16), p. 427.

89 UNCITRAL *Ronald S Lauder v. The Czech Republic*, UNCITRAL, 14 World Trade & Arb Materials 3(35) Final Award (3 September 2001); *CME v. Czech Republic* (fn. 56)

90 *CME v. Czech Republic* (fn. 56) para 200; *Lauder v. Czech Republic* (fn. 89) para 167ff.

91 *Lauder v. Czech Republic*, (fn. 89) paras. 173-175; *CME v. Czech Republic* (fn. 56) paras 432ff.

92 *CME v. Czech Republic* (fn 56) paras. 25.

concluded that it could not "judge whether the facts submitted… are identical."[93] On comparing the two awards, the Lauder tribunal found a breach of the US/Czech BIT in respect of one claim, whilst denying damages and the further two claims.[94] In stark contrast, the CME tribunal decided (with regards to the Netherlands/ Czech Republic BIT) the complete opposite; the two claims determined not to be breached in Lauder, were the two claims the Swedish tribunal found to be breached, in addition to awarding damages.[95] Consequently, two arbitral tribunals reached diametrically opposing conclusions in what was viewed, even by the tribunals themselves, as essentially the same dispute. Therefore, a strict interpretation, based on an (arbitrary) distinction can produce inconsistent awards that imperil the reputation of investor-state arbitration, potentially harming the source of arbitral authority itself.[96]

The cases of Lauder and CME have been widely commented on and highly criticised. Simply, the test for res judicata cannot be whether two tribunals are presented with identical requests for relief, based on exactly identical set of facts – such a test, as quoted by the CME tribunal above, renders it simply impossible to determine identity. No tribunal would be able to determine that the same matter is presented and argued in *exactly* the same way and therefore res judicata would never apply. The purpose of the doctrine is to put an end to litigation; and it would thwart that purpose if a party could so easily escape that doctrine on this basis or by 'claim-splitting' in successive proceedings.[97] Accordingly, identity of subject matter should be interpreted broadly, to capture the substance of the dispute. It would be far too easy for a claimant to slightly modify the object of the litigation, whilst still relying on the same underlying investment, facts and evidence.

A flexible approach has been adopted by international arbitral tribunals, as in the case of Apotex v. USA (III).[98] Successive claims were brought by differing companies in the Apotex family, culminating in Apotex Awards I and II.[99] In Apotex III, the tribunal reasoned that the claims from the previous two actions "does not, read strictly… address the Claimants' specific claims in this arbitration."[100] The Apotex III tribunal further reasoned that

[t]he specific claims pleaded by Apotex-Canada in the Apotex I & II arbitration… are different from the specific claims made by the Claimants in this arbitration. The former claims related to "tentatively approved" ANDAs. This is not the specific case pleaded by the Claimants in this arbitration where the ANDAs were "finally approved" and where no claim as to "tentatively approved" ANDAs is advanced by the Claimants.[101]

Prima facie, adopting a strict understanding, the analysis of identity of subject matter could end here and deny identity of subject matter. On comparison, these actions are not strictly the same and are not advancing strictly the same claims. Nonetheless, the Apotex III tribunal determined

93 Ibid p. 161.

94 *Lauder v. Czech Republic*, (fn. 89) p. 74-75.

95 Ibid.

96 For further discussion see *Brower, Ottolenghi & Prows*, OUP 2009, p. 843-864.

97 *Apotex Holdings v. USA* (fn. 4) para. 7.58. For further discussion on claim splitting see *Dodge* HICLR (2000) 23, p. 366.

98 Ibid.

99 ICSID Case No. UNCT/10/2 *Apotex Inc. v. United States of America*, (Apotex I); ICSID Case No. UNCT/10/2. *Apotex Inc. v. United States of America* (II).

100 *Apotex Holdings v. USA* (III) (fn. 4) para. 7.41.

101 Ibid para. 7.49.

that the two prior awards did carry res judicata effect, stating "[i]t is clear…the parties [in Apotex I and II] put distinctively in issue ANDAs generally, not limited to tentatively approved ANDAs but also including finally approved ANDAs; that the tribunal actually decided that issue; and… was necessary to resolve the parties' dispute before it."[102]Accordingly, any further adjudication would be "an impermissible attempt to re-argue and overturn the final and binding decisions [in the prior awards].[103]

Evidently, it is possible for international investment tribunals to somewhat soften identity. Sensibly, Apotex III adopted an objective understanding to determine that the three actions were sufficiently similar as to warrant the application of res judicata, despite any surface-level difference in terms of the claims advanced, the supporting reasons or factual matrix. Consequently, the requirement of identity of subject matter should be interpreted flexibly to truly give effect to the purpose of res judicata; preventing the same matter being re-litigated. Indeed, the facts submitted to any two tribunals will never be exactly identical.[104] Such an approach protects the reputation of investor-state arbitration; a strict focus on establishing exact identity not only allows claimants to simply re-formulate their claim, but also runs the risk of creating conflicting outcomes in subsequent proceedings (concerning essentially the same dispute) that threatens arbitral legitimacy.[105]

III. Identity of Legal Grounds

The *causa petendi*, or legal grounds, require a comparison of the same legal foundations, arguments and rights.[106] The type of relief sought directly relates to the legal grounds invoked, with both relying on the material facts to justify the relief and legal grounds.[107] Indeed, it has been commented that a distinction between the relief and legal grounds can be artificial due to this interdependency.[108]

Regardless, identity of grounds can firstly be established where two arbitrations are based on the same legal instrument.[109] Res judicata does not preclude a subsequent action where the legal foundation differs, i.e. where an international treaty (such as a BIT) is invoked in a subsequent action when the prior action relies on a contract. This is because "[n]ot only are the parties to these instruments different, these instruments are also different as regards… their respective negotiation and drafting history, contexts, underlying purposes and the rules of interpretation applicable to those instruments."[110] Such a declaration appears uncontroversial; to ensure a claimant's right of access to international arbitration and ensuring their right to be heard on legal grounds that have not been finally decided in a prior arbitration.

102 Ibid para. 7.50.

103 Ibid para. 7.59.

104 *Mandelbaum* (fn. 11) p. 21.

105 Ibid, 22; in consideration with the cases of *Lauder* (fn. 89) and *CME v. Czech Republic* (fn. 56).

106 ICSID Case No. ARB/08/12, *Caratube International Oil Company v. Kazakhstan*, Award (5 June 2012) para. 495, 497; ICSID Case No. ARB/05/17, *Desert Line Projects LLC v. Yemen*, Award (6 February 2008) paras. 136-37; *Iberdrola v. Guatemala* (fn. 49), paras. 281-82.

107 *Wehland*, (fn. 49) paras. 6.63 ff.

108 *Cheng*, p. 343, *Wehland* (fn. 49) para. 6.52; *Apotex Inc v. USA* (fn. 4), para. 7.16; The Pious Fund of the Californias, Permanent Court of Arbitration, Award (14 October 1902) p. 3 (Unofficial English Translation).

109 *Iberdrola v. Guatemala* (fn. 49) paras. 281f.; *Teco v. Guatemala* (fn. 84) para. 82; Reinisch (fn. 29), 65.

110 *Caratube v. Kazakhstan* (fn. 106), para. 495.

However, issues concerning identity of grounds can be observed in situations where multiple proceedings may be raised with reliance on two or more different international treaties, in particular BITs.[111] This has become particularly important concerning the proliferation of such agreements and international tribunals.[112] Prima facie, these proceedings would appear to be non-identical and therefore preclude the application of res judicata.

Again, this approach is illustrated in the cases of Lauder and CME v. Czech Republic.[113] As discussed above, the Czech Republic was presented with two conflicting arbitral awards in relation to the same matter, based on the USA/Czech Republic BIT (Lauder), and the Netherlands/ Czech Republic BIT (CME). The CME tribunal supported its award by stating there was no identity of grounds "(b)ecause the two bilateral investment treaties create rights that are not in all respects exactly the same, different claims are necessarily formulated"[114]. Whilst this may sound acceptable or logical on one level, the concern is that the same legal arguments can be identical (as in Lauder/ CME both argued, amongst others, breaches of fair and equitable treatment and full protection and security)[115] the only difference being the BIT invoked. This could be viewed instead as an arbitrary distinction that allows the same matter to be repeatedly re-litigated under the auspices of a different BIT, whilst relying on the same legal foundation.

As discussed above, in our increasingly globalised world there can be multiple nationalities of both people and corporations, affording access to arbitration via multiple BITs.[116] A flexible understanding of identity of grounds should consider the substantial identity of the two disputes, considering the underlying nature and not simply the formal classification.[117] Accordingly, all claims arising out of the same event and relying on the same evidence should be treated as the same cause of action. Whilst this highlights the often blurred line in clearly distinguishing between identity of subject matter and legal grounds, it prevents any slight modifications being used to pursue substantially the same claim before two tribunals, with Reinisch and Schreuer stating

International tribunals have also been aware of the risk that if they use too restrictive criteria of "object" and "grounds", the doctrine of res judicata would rarely apply: if only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds) in a second case would be precluded as a result of res judicata, then litigants could easily evade this by slightly modifying either the relief requested or the grounds relied upon.[118]

In accordance with such a rationale, the tribunal in UNCLOS Southern Bluefin Tuna looked directly at the substance of the claim. What appeared to be two separate claims raised under two separate conventions was instead a distinction that "would be artificial" and in fact "a single dispute

111 Such as in *Lauder* (fn. 89) (relying on a BIT between the USA/ the Czech Republic) and *CME* (fn. 50) (relying on a BIT between the Netherlands and the Czech Republic).

112 S*chill*, (fn. 12), p63.

113 *Lauder v. Czech Republic (*fn. 89); *CME v. Czech Republic* (fn. 56).

114 *CME v. The Czech Republic* (fn. 56) para. 433.

115 Ibid para. 27.

116 See para. C:I.

117 *Reinisch* (fn. 29), 64-68; *Ampal-American v. Egypt* (fn. 62) paras. 330-32*; Apotex Holdings v. USA* (fn. 4) para. 7.30; *De Ly & Shepard* (fn. 53) p. 42.

118 *CME v. Czech Republic*, Svea Legal Opinion (fn. 56) para. 247.

arising under both conventions"[119] Correspondingly, commentators have argued that tribunals should follow "simple and manifest rationality", an approach akin to the common law understanding.[120] Indeed, the ICSID tribunal in Ampal-American considered parallel UNCITRAL proceedings[121] and concluded that allowing such "is tantamount to double pursuit of the same claim in respect of the same interest… 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."[122] Whilst such conduct will not always amount to an abuse of process, indeed the threshold for such is high and rarely found by tribunals,[123] it is clear that tribunals take seriously the risk of claimant's taking advantage of their circumstances to pursue the same legal grounds before multiple tribunals. A pragmatic understanding of identity of legal grounds is one tool to catch such attempts.

IV. A Way Forward

Evidently, arbitral case law considering the application of the tripartite test is unsettled. It can thus be presented that international arbitral tribunals have not reached jurisprudence *constant* regarding the substantive application of res judicata to investor-state disputes, namely the tripartite test. Some tribunals have adopted a narrow interpretation,[124] whilst others have engaged a more purposive attitude to engage res judicata to apply to essentially the same claim.[125] A flexible approach should be adopted in order to truly give effect to the aim of res judicata; precluding subsequent proceedings involving the same parties, subject matter and legal grounds. Importantly, Lauder and CME, as the most criticised examples, occurred twenty years ago. Emerging arbitral practice and commentators appear to advance a position that would see the development of a substantive approach that addresses the novel situations raised in international investment arbitrations.[126] As witnessed, an evasive approach utilised by claimants regarding any of the three limbs of the tripartite test could lead to the non-application of res judicata (and potentially an abuse of process) allowing the possibility of repeated and vexatious claims. Highlighting formal differences prefers adherence to form over substance whilst contemporaneously under-protecting the host state, in having to defend piecemeal or repeated adjudications, in conflict with the public policy role of the doctrine.

D. Application to Arbitral Awards

Once res judicata is found to apply, the question then turns the scope, or extent, of its application to a previous arbitral award. Firstly, the decision, award or judgment must be final and binding. It can be concluded that awards adopted by international investment tribunals are final and binding for res judicata to apply. Turning to the ICSID convention itself, Art 53(1) ICSID states that awards

---

119 ITLOS *Southern Bluefin Tuna Case* (Austl. & NZ v. Japan) Case no. 3 & 4 Award on Jurisdiction and Admissibility (August 4 2000) para. 39.

120 *Martinez-Fraga & Samra*, (fn. 16) p. 439.

121 *Ampal-American v. Egypt* (fn. 62) paras. 328- 330.

122 Ibid paras. 331, 383-389 and 346.

123 For further discussion on the abuse of rights doctrine, see *Gaffney* JWIT (2010) 11(4), 515-538 and *Branson* J.Int.Arbitr. 2021 39(2), p. 187-214.

124 *Mandelbaum* (fn. 11) p. 1 and *Magnaye & Reinisch*, Law.Pract.Int. Courts Trib 15 (2016) p. 264, 276.

125 As examples *Apotex Holdings v. USA* (fn. 4), *Ampal-American v. Egypt* (fn. 62) and *Southern Bluefin Tuna Case* (fn. 119).

126 *Martinez-Fraga & Samra,* (fn. 16) p419; *Magnaye & Reinisch*, (fn. 124) p264; *Lanser,* (fn. 27).

shall be binding on parties. Similarly, Art 32(2) UNCITRAL Arbitration Rules states that an award "shall be final and binding on the parties", which includes the tribunal's decision on its own jurisdiction.Once an award has been rendered, there are very few remedies available and annulment is only possible if decided so by a separate ICSID ad hoc committee.[128] If neither party attempts to utilise the remedies available, or the options have been exhausted, "the award is res judicata and binding as a matter of private and international law".[129] This is reinforced by Art 54(1) ICSID, where "(e)ach contracting state shall recognise an award rendered pursuant to this convention as binding… as if it were a final judgment of a court in that state". It has been argued that this obligation to recognise an award is what allows the application of res judicata.[130] It is therefore uncontroversial that "once the ICSID tribunal has rendered its award and the review procedures under the Convention have been exhausted, the case is res judicata",[131] resulting in the impossibility of same matter being re-examined by another tribunal. By being bestowed with the ability to render final and binding awards, it would be paradoxical for arbitrators not to recognise the binding effect of a prior award.[132]

I. Scope of application

Case law can be further utilised to convey the extent of the res judicata effect of previous arbitral awards or decisions. Tribunals have devoted large sections of their judgments to determine exactly which issues are res judicata,[133] yet uncertainty exists as to whether the doctrine only carries so far as the matters specifically decided within the adjudication, or further (to the reasoning behind the decision) Under the former, even if subsequent proceedings concern substantially the same matter and parties, if the issues were not finally decided within the arbitral award, they are not precluded from further adjudication. Under the latter, such issues would be res judicata, forming the essential reasoning behind the final decision as "where there is a question regarding the extent of a prior decision or award's res judicata effect, international tribunals regularly look to the prior tribunal's reasons and indeed also to the parties' arguments, in order to determine the scope of what was finally decided".[135]

Firstly, it is presented that prior decisions that determined only that specific tribunal's jurisdiction will not always preclude a second tribunal from deciding the merits of the case. This can be witnessed in Waste Management v. Mexico (II).[136] The first tribunal produced a decision declining jurisdiction, based on a technicality of the relevant treaty (North American Free Trade Agreement 'NAFTA').[137] Once the Claimant had effectively remedied this procedural defect, subsequent arbitral proceedings were brought. Consequently, the Respondent argued the prior tribunal

128 Art. 52 ICSID Convention; ICSID Arbitration Rules 50 and 52-55. Post-award options are included at fn. 8.

129 *Brower, Ottolenghi & Prows* (fn. 90), p. 843.

130 *Schreue*r, p. 1128. This is discussed briefly at D:III.

131 Ibid, p. 1086.

132 *Gaillard*, (fn. 51).

133 As examples see *Apotex v. USA (III)* (fn 4) paras. 7.17-7.32; *Caratube v. Kazakhstan (II*) (fn. 106), paras. 487-498; and ICSID Case No. ARB/14/29, *Ioan Micula, Viorel Micula and others v. Romania* (II), Award (5 March 2020) paras. 350-352.

135 *Apotex Holdings v. Egypt* (fn. 4),para. 7.30.

136 *Waste Management v. Mexico* (fn. 23) Decision of the Tribunal on Mexico's Preliminary Objections concerning the Previous Proceeding (26 June 2002).

137 ICSID Case No. ARB(AF)/98/2 *Waste Management Inc v. United Mexican States*, Arbitral Award (2 June 2000), p. 239.

effectively decided the claim, despite whether the merits were considered, and therefore res judicata applied to deny this second tribunal jurisdiction.[138] In contrast, the Claimant argued res judicata could only attach to the issues that were decided; as the prior tribunal had not considered the merits of the dispute there was nothing precluding the jurisdiction of the second tribunal (res judicata would therefore be limited to the previous decision on jurisdiction).[139] The tribunal ultimately decided with the Claimant; whilst the 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"[140], nevertheless, "a decision which does not deal with the merits of the claim, even if it deals with issues of substance, does not constitute res judicata as to those merits".[141] Therefore, a negative decision on jurisdiction is not necessarily a decision on the merits and hence does not prevent further proceedings.

This conclusion, and the effect of res judicata on a decision concerning jurisdiction, is entirely different when the merits are necessarily considered in reaching such a decision. This is evident in the case of Iberdrola v. Guatemala (II). As in Waste Management, the first tribunal produced a negative decision on jurisdiction.[142] Once subsequent proceedings were raised by Iberdrola (II), the Respondent argued that res judicata applied equally to arbitral awards on merits and to decisions on jurisdiction.[143] In contrast, the Claimant argued, "if a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it".[144] Crucially, and distinguishing from the outcome in Waste Management, the prior decision refusing jurisdiction was based on an assessment of the factual matrix of the case. To consider the same case in subsequent proceedings would therefore "open the floodgates".[145] An examination of the merits within a decision on jurisdiction is therefore crucial to determine the extent of the doctrine's application; the concern otherwise being the risk investors could file multiple claims in the hope that one tribunal would reach a positive conclusion on jurisdiction. Thus, in various instances, it can be appropriate for the determination of jurisdictional issues to be joined to the merits, and therefore res judicata would apply to deny a second tribunal jurisdiction.[146] To decide otherwise would create questions regarding both the finality of arbitral awards and legal certainty. Indeed, this dynamic actually upholds arbitral autonomy;[147] a subsequent tribunal cannot be bound by a prior, where the prior did not in fact consider the merits.

II. The Extent of Application – Reasoning or Dispositive?

Beyond the claims finally decided in the award, one must also determine which elements of an award can be res judicata. Again, this leads to a comparison between a narrow (civil law) or broad (common law) approach. Briefly, the civil law approach deems the reasoning of an earlier award to

---

138 *Waste Management v. Mexico* (fn. 23), para. 38.

139 Ibid, paras. 18, 38.

140 Ibid, para. 47.

141 Ibid, para. 43.

142 ICSID Case no. ARB/09/5, *Iberdrola Energia S.A. v. Republic of Guatemala* (I), Award (17 August 2012).

143 *Iberdrola v. Guatemala (II)* (fn. 49) para. 48.

144 Ibid, para. 159.

145 Ibid, para 310.

146 As an example, see ICSID *Tradex Hellas SA v. Republic of Albania*, ICSID Case No. ARB/04/2 Decision on Jurisdiction, (24 December 1996).

147 *Ampal-American v. Egypt* (fn. 62) Decision on Jurisdiction (1 February 2016) para. 329.

not be binding on a second tribunal, therefore only the operative part of the judgment, or the dispositive, carries res judicata effect.[148] In contrast, common law extends the preclusive effect of an award to the reasoning contained within; a party is therefore precluded from raising further proceedings that contradict or re-try an issue that has already been raised and considered in further proceedings.[149] This extends only to statements that were essential and conclusive to the award, not simply to every statement contained therein. In international law, the trend is toward the broader understanding.[150] The tribunal in Apotex (III) reinforces this conclusion, stating "[f]or the purpose of res judicata, that paragraph… of the operative part is to be applied together with the reasons applicable to that paragraph"[151] as it is "impossible to dismiss [such reasons] as mere obiter dicta… [since] those reasons… were essential to the operative part and thereby distinctly determined matters in issue".[152] Extending such logic, this should protect the integrity of the arbitral system and interests in finality; the essential reasoning conveys the scope of the arbitral award, and necessarily, the scope of res judicata. A complementary conclusion was reached by the ILA, stating they "endorse a more extensive notion of res judicata, which is also followed in public international law, under which res judicata not only is to be read from the dispositive part of an award but also from its underlying reasoning".[153] It is therefore submitted that the crucial reasoning within an arbitral award carries res judicata effect, to preclude a claimant raising the same facts before a subsequent tribunal, particularly since more restrictive notions of res judicata can be viewed as overly formalistic and literal.[154] This corresponds with the jurisprudence of other international courts and tribunals[155]

III. Interim Decisions

Of particular importance here are provisional or interim decisions. Are these final and binding, do they carry res judicata effect, and if so, to what extent?

With reference to ICSID arbitral proceedings, it is worth noting at the outset that tribunals frequently issue decisions throughout proceedings (i.e. before a final award) to set out their position on questions raised by the parties.[156] The underlying rationale is to enable the tribunal to settle preliminary issues on specific aspects of the dispute, such as jurisdictional and admissibility challenges.[157] Often, these decisions are essential for the final award and are incorporated within. Whether or not these decisions carry res judicata effect is disputed.[158]

Firstly, it can be submitted that res judicata does not apply to interim decisions. Turning to the very nature of the doctrine, it applies to a final determination that can only be invoked where the

148 *Park* (fn. 40) p. 15.

149 Ibid. This is in line with the identity of the subject matter, above at C:II.

150 For examples see A*potex Holdings v. USA* (fn. 4) and *Caratube v. Kazakhstan* (II) (fn. 106).

151 *Apotex Holdings v. USA* (fn. 4) para. 7.42.

152 Ibid, para. 7.58.

153 *De Ly & Sheppard* (fn. 53), p. 77.

154 Ibid, p.77-78.

155 For example, the ICJ in *Corfu Channel case*, Judgment of 9 April 1949, I.C.J. Reports 1950, p. 395; and the European Court of Justice (ECJ) in *Asteris & Greece v. Commission* [1988] ECR 2181, para. 27.

156 For example, Articles. 41 and 48 ICSID.

157 For further discussion, see *Walters*, J. Int. Arbitr. 2012, 29(6), p. 651-680.

158 For further discussion, see *Titi,* ICSID. Rev 2018, 33(2) p. 358-379.

tripartite test is fulfilled.[159] In instances where no final award has been issued, the tripartite test necessarily cannot be applied; the action has not been finally disposed of.[160] This relates to the purpose of res judicata to prevent multiple proceedings concerning the same matter, not to hinder on-going proceedings.[161] This stance is further reinforced by the text of the ICSID convention itself; there are no equivalent provisions for interim decisions akin to those provided for at Art 53 & 54 ICSID regarding final awards.[162] Considering interim decisions on procedure under Art 44 ICSID, it is submitted that these also do not have res judicata effect by their very nature.[163] Indeed, interim decisions are not final in the same sense as the award; it is possible for the decision to be amended before the final award is issued.[164] With regards to decisions on provisional measures, an important consideration here is the link to Art 47 ICSID, where it is stated that a tribunal may "<u>recommend</u> provisional measures". Importantly, however, orders on provisional measures do not benefit from the use of the ICSID enforcement provisions and so often rely on voluntary compliance. This is in contrast to the UNCITRAL Arbitration Rules 2010, Art. 34(1) & (2) which clearly provide that an arbitral tribunal "may make separate awards on different issues at different times…all awards shall be… final and binding on the parties. The parties shall carry out all awards without delay."[166]

In addition, arbitral case law can further be adopted in support of this position. In Pey Casado v. Chile, it was held that provisional measures are not res judicata; they are valid only for the duration of the proceedings and can be modified or revoked at any time.[167] This prima facie implies that such measures are not binding and arguably, interim decisions are not vested with res judicata effect.

In stark contrast, other tribunals have concluded the exact opposite. In ConocoPhillips v. Venezuela, it was argued by the Claimant that an interim decision on jurisdiction did have res judicata effect, even though proceedings were ongoing.[168] This was upheld by the tribunal, concluding that decisions which resolve points in dispute between parties do have res judicata effect.[169] A decision declining jurisdiction would be final and binding.[170] Consequently, where a decision on a particular issue is a necessary part of the eventual determination and is dealt with as such by the tribunal, it thereby constitutes res judicata as between the parties to the decision.[171] This rationale was expanded in Perenco v. Ecuador; the tribunal reasoned that once an issue has

159 As discussed in chapter C.

160 *Titi* (fn. 158).

161 As discussed above at B:II.

162 As discussed above in chapter D.

163 *Lefcovitch & Chatterjee,* IICJ, 2016, 10(37) p. 1, 6.

164 ICSID, *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013), Dissenting Opinion of George Abi-Saab. For further discussion, see *Lefcovitch & Chatterjee,* (fn. 155) p. 1-8.

166 For further discussion, see *Luttrell*, Arbitr.Intl. 31/2015, p. 393 and *Lenci* (fn. 21) p. 29.

167 ICSID Case No ARB/ 98/2 *Victor Pey Casado v. Republic of Chile*, Decision on Provisional Measures (25 September 2001) para. 14.

168 *ConcoPhillips v. Venezuela* (fn. 164)..

169 Ibid, para. 21.For further discussion, see *MacDougall & Markbaoui*, J.World Investment & Trade, 2014, 15 p. 1062-1069.

170 See paragraph D:I above

171 *Waste Management v. Mexico* (II) (fn. 23) para. 45.

been decided, this decision becomes res judicata and cannot be revisited save for in very specific circumstances.[172] Article 51(1) ICSID only allows revision "on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence." Effectively, this should equate an interim decision with the status of a final award.[173]However, this case law has been subject to extensive criticism.[174] In addition to the critique above (that res judicata can only apply to final awards), it has been argued that such interim decisions should be deemed to have a "half existence" until incorporated into the final award.[175]

In consideration of the above, it can be presented that the fundamental difference between a decision on provisional measures, and an interim decision (on jurisdiction) is simply that the decision on jurisdiction, whilst not a final award, conclusively decides an issue in dispute between the parties and thereafter incorporated into the final award. Taken from this angle, it is submitted that conclusive interim decisions (such as on jurisdiction) could be deemed as final for the application of res judicata, so long as they decide an issue in dispute between the parties, but only once the interim decision incorporated into the final award.[176] Provisional measures, in contrast, are not endowed with the requisite finality in order to carry res judicata effect, at least not until they are incorporated within the final award. This is evident from their very name, being temporary until something later is decided.

IV. Relationship with other legal orders

Whilst arbitral awards can have preclusive and conclusive effects with regard to further arbitral proceedings, it does not have a third-party effect and binds only the parties to the dispute.[177] One must also establish whether this can be extended to other international or domestic tribunals and courts, i.e. would domestic courts stay proceedings on the basis the matter had already been conclusively decided by an international arbitral tribunal? Not all national laws conclusively determine the effect of arbitral awards within the domestic legal order, or they do so in general terms, concentrating instead on the effects of domestic judgments. [178] Prima facie, domestic courts and international tribunals operate within different legal orders, and so neither are bound by the decision of the other.[179] Indeed, even on the international plane, international commercial arbitral tribunals are not bound by international treaty tribunals, and vice versa.[180] This does, however, depend on the particular circumstances and whether the tripartite test is fulfilled; findings of a contractual tribunal which are relevant to an investment treaty tribunal can have a res judicata effect, provided that it finds the resulting award to be binding on the parties .[181] Nonetheless, taking

172 ICSID Case No. ARB/08/06 *Perenco Ecuador Ltd v. The Republic of Ecuador and Empresa Estatal Petoleos del Ecuador*, Final Award (27 September 2019) para. 458.

173 *Titi* (fn. 158) p. 25.

174 For further discussion, see *Vargiu* (fn. 47), *Titi* (fn. 158) and *MacDougall & Markbaoui* (fn. 169).

175 Ibid.

176 *ConocoPhillip*s (fn. 164), (Dissenting Opinion of Georges Abi-Saab, Decision on Jurisdiction and Merits, 3 September 2013 paras 30, 52)..

177 *Gaillard* (fn. 51) p. 227. In line with the requirement of identity of parties, as discussed in C:I.

178 Ibid.

179 *Di Brozolo* (fn. 2), p. 131.

180 *De Ly & Sheppard* (fn. 53).

181 *Ampal-American v. Egypt* (fn. 62), paras 257, 259, 270..

a holistic approach to international arbitration as a whole, domestic courts are required to view arbitration awards as final and binding, therefore carrying res judicata effect. This can clearly be seen in Art 54 ICSID, as considered above, as well as in other international conventions[182] Therefore, it can be argued that the interactions between national courts and international tribunals are regulated via the application of the res judicata doctrine. This interpretation is consistent with the nature of arbitration itself; due regard must be taken by the national court with regards to the parties' agreement to arbitrate;[183] this cannot and should not be circumvented by a disgruntled party thereafter raising the same dispute before a domestic court as a means of re-litigating when a final and binding award has been rendered. By consenting to arbitration, both parties are consenting to be bound by the arbitral award.

E. Conclusion

To conclude, res judicata is a fundamentally broad notion, indisputably a general principle of international law and necessarily applies to international investment arbitration by operating within public international law. Despite consensus as to the general features of res judicata, there is little consensus on the substantive application of the doctrine by international investment tribunals, as evinced in case law considered throughout this discussion. Throughout, it is evident these inconsistencies can be influenced by conflicting municipal interpretations of res judicata, whether broad (as in common law jurisdictions) or narrow (as in civil). Reference to national understandings in this field is inappropriate, intensifying the need for an international and coherent understanding of res judicata. A substantive and rational approach to res judicata should be adopted; it requires to be flexible and based on international norms to prevent tactical and evasive manoeuvring by parties taking advantage of formalistic understandings. In light of the rapid expansion of international investment (and correspondingly, arbitration) in our increasingly globalised world, a substantive interpretation is required to encapsulate the complexities (in parties, subject matter and grounds) that otherwise afford the opportunity for parties to undermine the very purpose of res judicata; to preclude further adjudication where a matter has been conclusively decided. Regulating the application of res judicata by international investment tribunals is essential for preserving its own normative legitimacy. International investment law is fundamentally public in nature, thereby shaping public international norms. Such fragmentation produces inconsistencies that threaten the rule of law, contradicting legal certainty and predictability.

182 For example, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in Art. III "Each Contracting State shall recognise arbitral awards as binding and enforce them…".

183 *Di Brozolo* (fn. 2), p. 136.

Bibliography

ALEKHIN, SERGEY; BAYANDIN, DMITRY, *Cherry Picking or Cherry Biting? The Res Judicata Doctrine and the Limits of Permissible Parallel and Consecutive Proceedings in Investment Arbitration*, New Horizons of International Arbitration, 2019, Vol. 5, p. 376-423.

BOYLING, SAM, *Principles for res judicata in international commercial arbitration*, International Arbitration Law Review, 202, Vol. 24(3), p. 181-207.

BRANSON, JOHN DAVID, *The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration*, Journal of International Arbitration, 2021, Vol. 39(2), p. 187-214.

BREKOULAKIS, STAVROS, *The effect of an International Arbitral Award and Third Parties*, American Review of International Arbitration, 2005, Vol. 16(1), p. 1-31.

BROWER, CHARLES N.; OTTOLENGHI MICHAEL; PROWS, PETER, *The saga of CMS: Res Judicata, Precedent and the Legitimacy of ICSID Arbitration*, in: Binder, Christina; Kriebaum, Ursula; Reinisch, August; Wittich Stephan (eds.), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, Oxford 2009, p. 843-864.

CHATTERJEE, CHARLES; LEFCOVITCH, ANNA, *Decisions of ICSID Tribunals on Procedural Issues May Not Be Confused with Their Awards*, International In-House Counsel Journal, 2016, Vol. 10, p. 1-8.

CHENG BIN, *General Principles of Law as Applied by International Courts and Tribunals London*, 1953.

DE BRABANDERE, ERIC, *Investment Treaty Arbitration as Public International Law; Procedural Aspects and Limitations*, Cambridge University Press, 2014, Vol. 112.

DE LY, FILIP; SHEPPARD, AUDLEY*, ILA Interim Report on Res Judicata and Arbitration*, Arbitration International, 2009, Vol. 25(1), p. 35-66.

DE LY, FILIP; SHEPPARD, AUDLEY*, ILA Final Report on Res Judicata and Arbitration*, Arbitration International, 2009, Vol. 25(1), p. 67-82.

DHAWAN PULKIT, *Application of Precedents in International Arbitration*, The International Journal of Arbitration, Mediation and Dispute Management, 2021, Vol. 87(4), p. 550-574.

DUMBERRY, PATRICK, *The Emergence of the Concept of 'General Principle of International Law' in Investment Arbitration Case Law*, Journal of International Dispute Settlement, 2020, Vol. 11(2), p. 194-216.

FOSTER, CAROLINE, *A New Stratosphere? Investment Treaty Arbitration as "Internationalised Public Law"*, International & Comparative Law Quarterly, 2015, Vol. 64(2), p. 461-485.

GAILLARD, EMMANUEL, *Coordination or Chaos: Do the Principles of Comity, Lis Pendens and Res Judicata Apply to International Arbitration*, American Review of International Arbitration, 2018, Vol. 29(3), p. 205-242

GAFFNEY, JOHN P., *'Abuse of Process' in Investment Treaty Arbitration*, The Journal of World Investment & Trade, 2010, Vol. 11(4), p. 515-538.

GARCIA-BOLIVAR, OMAR E., *The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements*, The Journal of World Investment & Trade, 2005, Vol. 6, p. 751-772.

GHOSH, VARUN N., *An uncertain shield: res judicata in arbitration, Arbitration International*, 2015, Vol. 31, p. 661-669.

GUNES, BISET SENA, *Res Judicata in International Arbitration: To what extent does an arbitral award prevent the re-litigation of issues,* Transnational Dispute Management, 2015, Vol. 12, p. 1-35.

HOBER, KAJ, *Res Judicata and Lis Pendens in International Arbitration*, Collected Courses of the Hague Academy of International Law, 2014, Leiden, Vol. 366.

KRYVOI, YARASLAU, *Piercing the Corporate Veil in International Arbitration*, The Global Business Law Review, 2010, Vol. 1(2), p. 169-186.

LANSER, MICHAEL, *The Notion of Res Judicata in Investor-State Arbitration*, International In-house Counsel Journal, 2019, Vol. 46(12), p. 1-19.

LOWE, VAUGHN, *Res Judicata and the Rule of law in International Arbitration*, African Journal of International and Comparative Law, 1996, Vol. 8, p. 38-50.

LENCI, FREDERICO, *General Principles of Law on the Legal Force of Provisional Measures in International Investment Arbitration*, in: Gattini, Andrea; Tanzi, Attila; Fontanelli, Filippo, (eds.), General Principles of Law and International Investment Arbitration, Leiden, 2018, p. 21-44.

LUTTRELL, SAM ICSID, *Provisional measures 'in the round'*, Arbitration International 2015, Vol. 31(3), p. 393-412.

MACDOUGALL, ANDREW; MARKBAOUI, SAMY, *Case Comment ConocoPhillips Petrozuata, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BCv v. Bolivarian Republic of Venezuela: ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration 10 March 2014 and Dissenting Opinion, 10 March 2014*, The Journal of World Trade & Investment, 2014, Vol. 15, p. 1062-1069.

MAGNAYE, JOSE; REINISCH, AUGUST, *Revisiting Res Judicata and Lis Pendens in Investor State Arbitration*, The Law & Practice of International Courts and Tribunals, 2016, Vol. 15(2), p. 264-286.

MANDELBAUM, STEFAN, *The Measure of finality: a dialectical analysis of legitimacy concerns in investment arbitration*, UCL Journal of Law and Jurisprudence, 2020, Vol. 9(1), p. 1-25.

MARTINEZ-FRAGA, PEDRO; SAMRA, HAROUT JACK, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration,* Northwestern Journal of International Law and Business, 2012, Vol. 32(3), p. 419-450.

MCLACHLAN, CAMPBELL; SHORE, LAURENCE; WEINIGER, MATTHEW, *International Investment Arbitration: Substantive Principles*, (2nd ed.) Oxford 2017.

PARK, WILLIAM W., *Soft Law and Transnational Standards in Arbitration: The Challenge of Res Judicata*, in Rovine, Arthur. W, (eds.), Contemporary Issues in International Arbitration and Mediation: The Fordham Papers, Leiden, 2015, p. 52-71.

RADICATI DI BROZOLO, LUCA G.*, Res Judicata in International Arbitral Awards*, 15/04/2011, available at: https://ssrn.com/abstract=1842685 (19/01/2023)

RIDI, NICCOLO, *Precarious Finality? Reflections on Res Judicata and the Question of the Delimitation of the Continental Shelf Case*, Leiden Journal of International Law, 2018, Vol. 31(2) p. 383-401.

REINISCH, AUGUST, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, The Law and Practice of International Courts and Tribunals, 2004, Vol. 63(3), p. 37-77.

SCHILL, STEPHAN, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, Virginia Journal of International Law, 2011, Vol. 52(1), p. 57-102.

SCHREUER, CHRISTOPH H., *The ICSID Convention; A Commentary*, (2nd ed.), Cambridge 2009.

SHAW, MALCOM N., *International Law* (9th ed.), Cambridge 2021.

TITI, CATHARINE, *Res Judicata and Interlocutory Decisions under the ICSID Convention: Antinomies over the Power of Tribunals to Review*, ICSID Review-Foreign Investment Law Journal, 2018, Vol. 33(2), p. 358-379.

WAIBEL, MICHAEL, *Investment Arbitration: Jurisdiction and Admissibility* (02/2014) available at: https://www.researchgate.net/profile/Michael-Waibel-2/publication/314436397_Investment_Arbitration_Jurisdiction_and_Admissibility/links/5be99e4ca6fdcc3a8dd1b25d/Investment-Arbitration-Jurisdiction-and-Admissibility.pdf (26/01/2023).

WALTERS, GRETTA L., *Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems*, Journal of International Arbitration, 2012, Vol. 29(6), p. 651-680.

WEHLAND, HANNO, *Ibedrola v. Guatemala – When do Negative Jurisdictional Awards Have Res Judicata Effect in Investment Treaty Arbitrations*, ASA Bulletin 2021, Vol. 39(1) p. 91-108.

WEHLAND, HANNO, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (1st ed.), Oxford 2013.

VARGIU, PAOLO, *The Elusive Nature of Res Judicata in ICSID Arbitration*, (12/04/2017) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967490 (26 /01/2023).

VAZQUEZ-BERMUDEZ, MARCELO*, International Law Commission, First report on General Principles of Law, 71st Session 2019*, available at: https://digitallibrary.un.org/record/3805756?ln=en (26/01/2023).