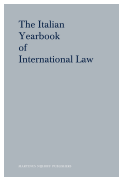
THE RELEVANCE OF STATE INTERESTS IN RECENT ICSID PRACTICE



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« Previous Article | Table of Contents | Next Article »

Abstract

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Go to section

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- TOP

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Giovanni Zarra

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CONTENTS

ARTICLES

NOTES AND COMMENTS

PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS

THE RELEVANCE OF STATE INTERESTS IN RECENT ICSID PRACTICE

GIOVANNI ZARRA*

1. INTRODUCTION

In 2016, the International Centre for the Settlement of Investment Disputes (ICSID) registered 45 new cases and concluded 51 pending controversies.[1] These high numbers confirm that ICSID arbitration is still the preferred mechanism for the settlement of disputes related to international investments.

However, it is worth noting that 2016 has been also a year rich in debate concerning the legitimacy of ICSID arbitration and its suitability to solve disputes involving essential public concerns.[2] Critics usually repeat that State interests are not sufficiently taken into account by arbitration tribunals, which are sometimes accused of being inherently biased in favour of investors.[3] Such polemics have even led the EU Commission to start considering the possibility of establishing a permanent multilateral investment court, which might ideally replace the current system based on *ad hoc* arbitral tribunals.[4]

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* Adjunct Professor of Private International Law, University of Napoli "Federico II". The author is grateful to Eduardo Savarese for his precious suggestions on some of the topics dealt with in this note.

[1] See *ICSID 2016 Annual Report*, available at: <https://openknowledge.worldbank.org/handle/10986/25124>. These numbers are in line with the ones of last year. See SAVARESE, "The Arbitral Practice of the International Centre for the Settlement of Investment Disputes (ICSID) in 2015", IYIL, 2015, p. 469 ff.

[2] A very strong, and at least partially unjustified, criticism against investment arbitration has been made by VAN HARTEN, "The Public-Private Distinction in the International Arbitration of Individual Claims against the State", 2009, p. 30, available at: <https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1461125>. Other, and more pertinent, criticisms are mainly related to the issue of incoherence and inconsistency between international investment awards. See, in this regard, *ex multis*, FRANCK, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions", Fordham Law Review, 2015, p. 1521 ff. See also the opinion expressed by the EU Commissioner MALMSTRÖM, "The way ahead for an international investment court", 2016, available at <https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/way-ahead-international-investment-court_en>. For a reply to such criticisms see ALVAREZ et al., "A Response to the Criticisms Against ISDS by EFILA", Journal of International Arbitration, 2016, p. 1 ff.

[3] SORNARAJAH, *Resistance and Change in the International Law on Foreign Investment*, Cambridge, 2015; KÖPPEN and D'ASPREMONT, "Global Reform v. Regional Emancipation: The Principles on International Investment for Sustainable Development in Africa", ESIL Reflection, Vol. 6, issue 2, 2017; and EL BOUDOUHI, "L'intérêt général et les règles substantielles de protection des investissements", AFDI, 2005, p. 542 ff.

[4] In this regard, the Commission also launched a "Public Consultation on a Multilateral Reform of Investment Dispute Resolution", which, however, is no longer available on the web.

The analysis of the 2016 ICSID practice, however, shows that such criticism is often put forward as a matter of principle and is not based on an actual substance and merit of investment decisions. Indeed, a closer look at what arbitrators have decided and how they motivated their decisions shows that certain "self-adjustments" of the investor-State dispute settlement mechanism are taking place with the aim of ensuring that equal weight is given to the interests of both States and investors. It is not by chance that last year in only 43% of the disputes decided by ICSID tribunals investors' claims have been (totally or partially) upheld.[5] This should lead commentators to consider with utmost caution the need for, and possibility of, reforms of the existing investor-State dispute settlement mechanism. Such a reform would entail the risk of generating uncertainties in international investment law instead of resolving existing issues.

The above-mentioned self-adjustments are taking place with regard to several aspects of investment arbitration, which will be examined in the present note. We will start with a discussion of a new possible reading of the supposed asymmetrical relationship existing between investors and States that has been proposed in *Urbaser v. Argentina* (section two) and will then move to various decisions concerning ICSID jurisdiction that seem to have given more weight to State reasons than happened in the past (section three). The discussion will then turn to the responsiveness shown by tribunals with regard to the "States' power to regulate" in order to safeguard public interests, even in the cases where the State concerned has generated a prejudice to investors (section four). Finally, we will briefly discuss some decisions in which State reasons have not prevailed and will try to demonstrate that such cases do not alter the general perception of a change of attitude by investment tribunals (section five). The whole analysis will finally lead the present author to share José Alvarez's conclusion that "[t]he regime most criticized for ignoring the will of the States has become the foremost example of their persistent power".[6]

Another proposed way of reforming international investment law is the institution of an investment court system relating to specific treaties only. In this regard see, Art. 8.27 and Art. 8.28 of the consolidated text of the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada published on 29 February 2016 (the text of treaty is available at <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf>). Similarly, see Chapter 8, Section 3 of the consolidated text of the Free Trade Agreement between the European Union and Vietnam, published on 1 February 2016 and available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

[5] See *The ICSID Caseload – Statistics*, Issue 1, 2017, p. 30, available at: <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf>. This low number reflects the whole history of ICSID in which only 46% of the Claimants have prevailed in part or in full. See MARCHILI and MCBREARTY, "Annulment of ICSID Awards: Recent Trends", in BALTAG (ed.), *ICSID Convention after 50 Years: Unsettled Issues*, The Hague, 2016, p. 427 ff., p. 430.

[6] ALVAREZ, "The Return of the State", Minnesota Journal of International Law, 2011, p. 223 ff., p. 231.

2. Arbitration without Privity, States' Counterclaims and the Asymmetrical Relationship between States and Foreign Investors: The Revolutionary Approach of the *Urbaser* Award

It is today undisputed that the main pillar of investment arbitration, as well as the fundamental reason for the development of such a form of dispute settlement, is the possibility for investors to commence arbitration proceedings against a State even in the absence of an agreement between such parties, i.e. on the mere basis of general offers to arbitrate future investment disputes made by States to foreign investors through bilateral investment treaties or domestic investment laws (the so-called "arbitration without privity").[7]

Investors may – either through a deed of acceptance or by means of their request for arbitration – match the offer contained in the bilateral investment treaty (BIT) or domestic law and are then entitled to bring their claims against States. This approach has been subject to severe criticisms, due to the fact that it generates strong asymmetry between the position of investors and States.[8] While the former are – save for rare exceptions[9] – free to bring all their complaints before an arbitral tribunal, the latter may only act as respondents and cannot start proceedings for investors' defaults.[10] In the words of Martti Koskenniemi, "[w]hen one of the parties, and only *one of them*, may say to the other 'if you do not agree with my conditions, then see you in the court', then the balance of power has shifted decisively in favour of that party".[11]

This unbalanced situation has had repercussions also on the law of counterclaims in investment arbitration. Article 46 of the ICSID Convention admits, as a matter of principle, the possibility of counterclaims, provided that there is consent and that such counterclaims arise directly out of the subject matter of dispute. Such requirements have usually been strictly interpreted, as a consequence of the asymmetrical nature of investment arbitration. Indeed, in order to assume jurisdiction, tribunals have usually required, first, a clear wording which establishes consent of

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[7] Paulsson, "Arbitration Without Privity", ICSID Review, 1995, p. 232 ff., p. 233. The first arbitration started on the basis of a provision of domestic investment law was *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), while the first arbitration based on a BIT provision was *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3).

[8] Giardina, "L'arbitrato internazionale in materia di investimenti: impetuosi sviluppi e qualche problema", in Boschiero and Luzzatto (eds.), *I rapporti economici internazionali e l'evoluzione del loro regime giuridico*, Napoli, 2007, p. 319 ff., pp. 323 and 330-331.

[9] See Art. 1119 NAFTA, according to which "[t]he disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted".

[10] Giardina, *cit. supra* note 8, p. 331.

[11] Koskenniemi, "It's not the Cases, It's the System", Journal of World Investment and Trade, 2017, p. 343 ff., p. 351.

the parties on claims *and* counterclaims and, second, the presence of the same legal basis for the claim and the counterclaim.[12] This last requirement has determined that usually tribunals refused to assume jurisdiction on counterclaims which were inextricably linked to the main claim from the factual point of view, but had a different legal grounding (e.g. they were based on an alleged violation of human rights law). Such a restrictive approach has generated major concerns because it has not duly taken into account State interest and encouraged the emergence of parallel proceedings.[13]

All the above criticism might be overcome by the quite revolutionary *Urbaser* award of 8 December 2016.[14] The dispute arose from the 1991 BIT between Spain and Argentina and concerned a concession for water and sewage services to be provided in the Province of Greater Buenos Aires granted in 2000 to the company Aguas Del Gran Buenos Aires S.A. (AGBA), of which the Claimants were shareholders.[15]

Claimants asserted that they faced numerous obstructions by the Province's authorities, which rendered extremely difficult the efficient and profitable operation of the concession. More problems arose with the emergence of the Argentine crisis in 2001 and the related depreciation of the Argentine Peso. According to the Claimants, Argentina denied the request of renegotiating the concession (in particular with regard to rates) and this severely penalised Urbaser, which finally led to the termination of the concession in 2006.

The Respondent denied all claims and also filed a counterclaim based on the Claimants' alleged failure to provide the necessary investment (as set forth by the contract between AGBA and the Province) into the concession, thus violating its contractual commitments and also its obligations under international law based on the human right to water. Indeed, it was Argentina's case that – by assuming investment obligations – the Claimants gave rise to the *bona fide* expectation that

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[12] See *Saluka Investment BV v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004, paras. 78-80. See also *Sergei Paushok, CJSC Golden East Company and CJSC Vostok neftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability of 28 April 2011, para. 693. See also the well-known case *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1, Award of 7 December 2011), which has been analysed in-depth by SAVARESE, "The Arbitral Practice of the International Centre for Settlement of Investment Disputes (ICSID) in 2011", IYIL, 2011, p. 319 ff., p. 335 ff.

[13] See DUDAS, "Treaty Counterclaims under the ICSID Convention", in BALTAG (ed.), *cit. supra* note 5, p. 385 ff.; HOFFMANN, "Counterclaims", in KINNEAR et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID*, The Hague, 2015, pp. 513 and 518-519; and LALIVE and HALONEN, "On the Availability of Counterclaims in Investment Treaty Arbitration", Czech Yearbook of International Law, 2011, p. 141 ff., pp. 144 and 153-155.

[14] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, para. 304 ff. The Tribunal was composed of Andreas Bucher (President), Pedro J. Martínez-Fraga and Campbell McLachlan QC.

[15] Paras. 34 ff.

those investments would be made and the failure to do so also affected basic human rights as well as the health and the environment of thousands of people living in extreme poverty.

The Claimants objected to the Respondent's counterclaim stating that the asymmetric nature of BITs allegedly prevents a State from invoking any right based on such a treaty, including *a fortiori* the right to submit a counterclaim against an investor. The main aim of such treaties would be, according to the Claimants, to protect the investors' rights. It was the Claimants' case that BITs do not impose obligations upon investors and, accordingly, host States cannot rely on the violation of the provision of any such treaty as a basis to sue an investor.[16] Moreover, the Claimants stated that a ruling on human rights violations is outside of the scope of the Tribunal's jurisdiction.

The Respondents finally replied that, by recalling the asymmetry in BITs, the Claimants are seeking absolute un-accountability for investors, who can file a claim against a State but could not hypothetically be demanded by such State to act in conformity with its laws.[17]

The Tribunal started its analysis by recalling Article X of the Spain-Argentina BIT, providing that "[d]isputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably" and eventually through ICSID arbitration "at the request of either party to the dispute". The Tribunal firstly noted that "[t]his provision is completely neutral as to the identity of the claimant or respondent in an investment dispute arising 'between the parties'. It does not indicate that a State party could not sue an investor in relation to a dispute concerning an investment".[18] Secondly, it stated that the dual possibility of starting an arbitration has, as its logical consequence, the possibility of both parties to file a counterclaim if it arises from an investment.[19] Finally, the Tribunal explained that, once the offer to arbitrate contained in a BIT is accepted, and if such an acceptance does not encompass any specific exclusion, this means that the State is empowered to start an arbitration for a dispute arising out of an investment and also to file counterclaims if the arbitration is started by the investor,[20] provided that there is a link between the main claim and the counterclaim.[21] In the present case the link was evident, in particular from the *factual* point of view: the Respondent argued that the Claimants' failure to provide the agreed investments caused a violation of the fundamental right to access to

[16] Para. 1120.
[17] Para. 1140.
[18] Para. 1143. States are free to shape arbitration clauses in BITs as they prefer. See *The Renco Group Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Award of 9 November 2016, para. 171.
[19] Paras. 1144 and 1153.
[20] Paras. 1145-1146.
[21] Para. 1151.

water and the protection of such a right was the main reason why Argentina entered into the concession. It would have been, therefore, inconsistent for the Tribunal to rule on the Claimants' requests and then have a separate proceeding regarding the Respondents' grievances.[22]

In this regard, it is to be highlighted that the Tribunal's focus on a factual rather than legal link is quite revolutionary if compared to the approach of previous tribunals, which required the same legal basis for claims and counterclaims in order to assume jurisdiction on the latter.[23]

Moreover, due to commonality of the "neutral" wording used in the Spain-Argentina BIT,[24] the *Urbaser* decision – should it find approval in the future – could be seen as the beginning of a new era concerning the interpretation of arbitration clauses contained in BITs. First, it will allow States – once investors have accepted the offer to arbitrate – to be in a position of potential equality consisting in the possibility to submit to arbitral tribunals all their (counter)claims which have a factual link with the relevant investment. Second, and as a consequence, this will avoid a possible duplication of proceedings (with all the undesired effects that this determines) which might take place if States are not empowered to bring their counterclaims before arbitral tribunals.[25] Last, but not least, the award is of extreme importance in admitting the possibility of a counterclaim based on human rights law, something that – as we have seen – has not been allowed in the past and has generated several concerns among scholars. The decision, therefore, deserves praise for its consideration of State interests, for its positive effects in terms of judicial economy and for the centrality of non-commercial values in the reasoning of the Tribunal.[26]

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[22] A previous decision, which was based on similar policy considerations, is *Antoine Goetz & Consorts and SA Affinage des Metaux v. Burundi*, ICSID Case No. ARB/01/2, Award of 21 June 2012, para. 280 ff.

[23] See GUNTRIP, "*Urbaser v. Argentina*: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?", EJIL: Talk!, 10 February 2017, available at: <http://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/>; and BUROVA, "Jurisdiction of Investment Tribunals Over Host States' Counterclaims: Wind of Change?", 2017, available at: <http://kluwerarbitrationblog.com/2017/03/06/jurisdiction-of-investment-tribunals-over-host-states-counterclaims-wind-of-change/>. Previously, the focus was not on a factual link but it was explicitly required that claim and counterclaim have the same legal grounding.

[24] This kind of wording occurs in several BITs: see, e.g., Art. 8 of the 1990 BIT between Italy and Argentina; and Art. 8(3) of the UK Model BIT. Contrariwise, see Art. 9(1) of the 1997 Greece-Romania BIT.

[25] In this regard, see *Spyridon Roussalis v. Romania*, *cit. supra* note 12, Declaration of Michael Reisman of 28 November 2011. More generally, concerning the problems related to duplication of proceedings, see ZARRA, *Parallel Proceedings in Investment Arbitration*, Turin/The Hague, 2017, p. 37 ff.

[26] Concerning judicial economy in international law see PALOMBINO, "Judicial Economy and Limitation of the Scope of the Decision in International Adjudication", Leiden JIL, 2010, p. 909 ff.

3. Jurisdiction

In 2016, various ICSID tribunals have declined jurisdiction in order to heed the specific State interests at stake. However, it must be noted that, in the past, ICSID tribunals have often affirmed jurisdiction (and gave rise to a perception of bias in favour of investors) in similar cases. The change of attitude of investment tribunals concerns various aspects of the jurisdictional analysis: (i) the concept of effective corporate seat; (ii) the ability of shell companies to commence arbitration proceedings; (iii) the applicability of the doctrine of abuse of rights (and process) in investment arbitration; and (iv) the possibility for tribunals to contrast the purposeful abusive duplication of investment arbitration proceedings. We will deal with all these matters separately.

3.1. Tenaris and Talta v. Venezuela and the Concept of Effective Corporate Seat

One of the most debated issues in investment treaty arbitration is whether – in order to determine the nationality of an investor – the concept of statutory seat may be interpreted only in a formal way, i.e. by considering sufficient that the company is established in a certain country, or in a substantive way, viz. by ascertaining that effective management is present in the country where the company is incorporated.[27]

This issue has been analyzed in-depth in the *Tenaris and Talta v. Venezuela*[28] award. The dispute, commenced by the Luxembourg company Tenaris and the Portuguese company Talta, concerned the violation of several standards of treatment set forth in the 1988 Luxembourg-Venezuela BIT and the 1994 Portugal-Venezuela BIT. Both of these BITs provided that, in order to qualify as an investor, the Claimant shall have its seat in one of the Contracting Parties.

The Respondent averred that the Tribunal lacked jurisdiction, inter alia, because neither Tenaris nor Talta were effectively managed in the countries in which they were incorporated; in reality, the two companies were to be considered as Argentine corporations.[29] The Claimants asserted that the concept of *siège social* has been taken to mean no more than registered office or statutory seat. Both Respondent and Claimants quoted several authorities in support of their findings.[30]

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[27] It is sufficient here to recall, for its thorough analysis of the problem, Savarese, *La nozione di giurisdizione nel sistema ICSID*, Napoli, 2012, p. 80 ff.

[28] *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award of 29 January 2016, para. 134 and ff. The members of the Tribunal were John Beechey (President), Judd L. Kessler and Toby T. Landau QC.

[29] Paras. 114-123.

[30] For the Respondent's position it is possible to refer to Sornarajah, *The International Law of Foreign Investment*, Cambridge, 2010, p. 324. As to the Claimants' approach, which as of today has found large application in tribunals' practice, see the well-known and highly discussed

The Tribunal[31] made express reference to the doctrine of *effet utile*[32] and stated that the concept of *siège social* cannot simply mean "registered office" or "statutory seat" in a purely narrow and formal sense, since neither term would then have any effective meaning:

> "[I]f 'siège social' and 'sede' are to have any meaning, and not be entirely superfluous, each must connote something different to, or over and above, the purely formal matter of the address of a registered office or statutory seat. And this leads one to apply the other well-accepted meaning of both terms, namely 'effective management', or some sort of actual or genuine corporate activity".[33]

Furthermore, the Tribunal added that nothing in the object and purpose of the BITs at stake could lead to a different interpretation and "nothing suggests that a genuine link would somehow undermine any object and purpose".[34] As a consequence, the Tribunal determined that both of the BITs require that actual or effective management takes place in the place where the *siège social* of a company is established.

The existence of such an effective management, however, is to be ascertained with reference to the object of a company as provided in its bylaws. In the present case,[35] the Tribunal noted that Tenaris and Talta have been incorporated as mere holding companies and this means that the effective management of those corporations shall be compliant with the purposes and activities of that kind of company. The Tribunal, then, analysed whether Tenaris and Talta effectively carried out their activities as holding companies (including, e.g., meetings of shareholders and Board of Directors meetings) respectively in Luxembourg and Portugal, and concluded that the requisite of effective management was satisfied in both cases.

Even if in the present case the Tribunal (apparently correctly) assumed jurisdiction, the stance assumed, *obiter dictum*, by the Tribunal in the *Tenaris and Talta*

Tokios Tokelès v. Ukraine, ICSID Case No. Arb/02/18, Decision on Jurisdiction of 29 April 2004, para. 43. With regard to this case see BURGSTALLER, "Nationality of Corporate Investors and International Claims against the Investor's Own State", Journal of World Investment and Trade, 2006, p. 857 ff., p. 859 ff.; and MARTIN, "International Investment Disputes, Nationality and Corporate Veil: Insights From *Tokios Tokelés* and *TSA Spectrum de Argentina*", Transnational Dispute Management, 2011, p. 1 ff.

[31] Paras. 148-154.

[32] This principle establishes the presumption that a provision of a treaty shall not be interpreted in a way that makes other provisions superfluous or meaningless. ICSID Tribunals often make recourse to it, as demonstrated by FAUCHALD, "The Legal Reasoning of ICSID Tribunals: An Empirical Analysis", EJIL, 2008, p. 301 ff., p. 317 ff.

[33] Para. 150.

[34] Para. 153.

[35] Paras. 201-225.

award is very interesting from the perspective of the analysis of the *ratione personae* requirements for ICSID jurisdiction and may potentially constitute a very important limit to abusive (and often strongly criticized) practices consisting in the establishment of mere shell (or mailbox) companies in certain countries with the sole purpose of taking advantage of favourable international treaties.[36] If the effective management test applied in the present award is implemented also by future tribunals (by way of denials of jurisdiction in these cases), this could surely lead to a diminution of claims started by investors which only formally have the nationality of a certain State but which are substantially governed elsewhere. A decision pointing in this direction has been issued in the award analysed in the next sub-section.

3.2. CEAC v. Montenegro and Claims Started by Shell Companies

An analysis similar to the one carried out in *Tenaris and Talta*, but with opposite outcome, was carried out in *CEAC v. Montenegro*.[37] The dispute was started in accordance with the 2005 BIT between Cyprus and Serbia and Montenegro and concerned CEAC's ownership of an aluminium plant located in Podgorica. CEAC was incorporated in Cyprus, but the management of the company, as well as the funding activity, were carried out abroad by Rusal Holdings Limited (a UK company). In this regard, Article 1(3) of the BIT merely sets forth that investors shall be legal entities having their seat in the territory of one of the Contracting Parties.

Montenegro asserted that the Tribunal lacked jurisdiction over CEAC's claim in light of the fact that there was no effective management of the business in Cyprus.[38] According to the Respondent, an autonomous interpretation of the word "seat" under the BIT was to be carried out by the Tribunal, leading to the affirmation – in light of the principle of *effet utile* – of the concept of seat as the place where the effective management and financial control of a company take place. It was not sufficient, according to the Respondent, to have a mere "address" in Cyprus in order to say that a seat existed in that State, but a genuine link had to be shown between the company and the State. In the present case such a link was lacking: while it was true that the existence of a legal seat in Cyprus was proved by a certificate of the Registrar of Companies, it was equally undeniable that the Registrar did not carry

[36] See SAVARESE, *cit. supra* note 27, p. 84 ff.; SINCLAIR, "The Substance of Nationality Requirements in Investment Treaty Arbitration", ICSID Review, 2005, p. 357 ff.; and VALASEK and DUMBERRY, "Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes", ICSID Review, 2011, p. 34 ff., p. 55 ff.

[37] *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award of 26 July 2016. The members of the Tribunal were Bernard Hanotiau (President), William W. Park and Brigitte Stern.

[38] Para. 97 ff.

out any investigation concerning the actual presence of a seat in Cyprus. Indeed, there was not even a brass plate for CEAC at the address specified in that certificate and it has never been possible to deliver packages to CEAC there.

The Claimant rejected this approach and stated[39] that the Tribunal had jurisdiction on the dispute because there is no "real seat theory" in international law and, moreover, the concept of seat in the present case should be established according to Cypriot law, which allegedly supports a formal reading of such a word. Furthermore, according to the Claimant, had the contracting parties wished to exclude holding companies from the definition of the BIT, they would have done so by including a denial of benefits clause in the treaty.[40]

The Tribunal, first of all, refused to anchor the concept of seat to the meaning given to it in Cypriot law and stated that its duty was to ascertain whether, *in the international legal order*, the certificate of the Cypriot Registrar of Companies was sufficient to establish the existence of a seat.[41] The Tribunal, then, came by majority to the conclusion that CEAC did not have a seat in Cyprus and was a mere mailbox company on which it does not have jurisdiction.[42] Interestingly enough, as already stated, the majority of the Tribunal conducted an analysis analogous to the one conducted in *Tenaris and Talta* and in this case established that there was no activity performed by CEAC in Cyprus and it was not even possible to talk of a holding company.[43]

Arbitrator Park, however, issued a separate opinion (appended to the Award) in which he stated that CEAC appeared to have a seat in Cyprus according to the BIT, because the treaty did not employ any definition of real seat and did not contain a denial of benefits clause.

The *CEAC* Award constitutes another step towards a more balanced approach to jurisdiction, in which the protection of BITs is granted only to a company effectively managed in one of the Contracting Parties.[44] The dissenting opinion written by Park, however, leads us to think that the issue of claims started by shell companies is still not completely settled.

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[39] Paras. 50-96.

[40] Denial of benefits clauses, if inserted in BITs, offer treaty protection only to companies which have a real economic activity in one of the Contracting Parties. For an analysis of such clauses see MISTELIS and BALTAG, "Denial of Benefits and Article 17 of the Energy Charter Treaty", Penn State Law Review, 2009, p. 1301 ff.

[41] Paras. 154-159.

[42] Para. 143 ff.

[43] Paras. 204-208.

[44] This position was supported by dissenting arbitrator Alberro-Semerena in *Aguas del Tunari S.A. v. Republic of Bolivia*: ICSID Case No. ARB/02/3, Declaration of Jose Luis Alberro-Semerena of 11 October 2005 appended to the Decision on Respondent's Objection to Jurisdiction of 21 October 2005. Although it presented similar circumstances to the *CEAC* case, in *Aguas del Tinari* the Tribunal assumed jurisdiction.

3.3. Transglobal v. Panama and the Abuse of the Investment Arbitration System

One of the most debated issues concerning ICSID jurisdiction is the investors' recurring practice of purposefully changing nationality just prior to the commencement of a dispute, in order to get the protection of a certain BIT. Such a practice has generated serious concerns for States, which had to face "*ad hoc* fabricated" proceedings commenced on the basis of BITs that would not have naturally been applicable to a certain legal relationship. In this regard Tribunals have, in principle, accepted that nationality planning is a physiological figure of a company's business. There is, however, a growing tendency to find that a change of nationality just prior to the commencement of an arbitration constitutes an abuse of rights at the prejudice of the Respondent State. In presence of such abusive changes of nationality Tribunals following this approach either declared that they lack jurisdiction on the dispute or stated that the claims were inadmissible.[45] It is worth mentioning the 2015 PCA decision in *Philip Morris v. Australia*, in which the Tribunal dismissed for abuse of rights a claim filed by the well-known Swiss tobacco group through its affiliate Philip Morris Asia, which had been incorporated in Hong Kong with the sole purpose of taking advantage of the BIT between Australia and Hong Kong and start arbitration proceedings against Australia for the legislation it enacted to protect public health.[46]

Transglobal v. Panama[47] is an award which perfectly integrates itself in such a tendency and confirms the recent tendency of investment tribunals to avoid attempts of abuse of the protection offered by BITs. The dispute was commenced in accordance with the 1982 BIT between the United States and Panama. Transglobal was a company incorporated under the law of Texas, while Transglobal Panama

[45] For an in-depth analysis of the problem see ASCENSIO, "Abuse of Process in Investment Arbitration", Chinese Journal of International law, 2014, p. 763 ff.; DE BRABANDERE, "'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims", Journal of International Dispute Settlement, 2012, p. 609 ff.; and ZARRA, *cit. supra* note 25, p. 128 ff. As to the case law, see *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award of 17 September 2009; and *Renée Rose Levy de Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award of 9 January 2015. As to the difference between jurisdiction and admissibility see, inter alia, PAULSSON, "Jurisdiction and Admissibility", in AKSEN ET AL. (ed.), *Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in Honour of Robert Briner*, Paris, 2005, p. 601 ff.

[46] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015. The Tribunal was composed of Karl-Heinz Bockstiegel (President), Gabrielle Kaufmann-Kohler and Donald M. McRae. For a comment see HEPBURN and NOTTAGE, "A Procedural Win for Public Health Measures", Journal of World Investment and Trade, 2017, p. 307 ff.

[47] *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award of 2 June 2016. The members of the Tribunal were Andrés Rigo Sureda (President), Christoph Schreuer and Jan Paulsson.

was incorporated in Panama. The controversy concerned a concession contract for the construction of a hydroelectric power plant, which was originally granted by the Panamanian State entity *Ente Regulador de los Servicios Publicos* (ASEP) to the Panamanian company La Mina Hydro-Power Corp (La Mina), which was owned by the Panamanian national Mr. Lisac. After La Mina's failure to start the construction according to the concession contract, a dispute arose between ASEP and La Mina, pursuant to which the latter entered into a partnership with the US company Transglobal in order to transfer the concession rights. For this purpose, Transglobal incorporated in Panama the special purpose vehicle Transglobal Panama, to which Mr. Lisac finally assigned his rights. However, Panamanian authorities terminated the concession contract on grounds of urgent social interest, because they considered that Transglobal Panama was not capable of developing and operating the project. Dissatisfied with this outcome, Transglobal and Transglobal Panama finally brought the dispute before an ICSID Tribunal.

Panama objected that the Tribunal did not have jurisdiction on both Transglobal and Transglobal Panama.[48] With regard to the former of them, the Tribunal allegedly lacked jurisdiction because the introduction in the dispute of a foreign company consisted in a manipulation of the investment treaty system by the Claimants aimed at artificially creating an international dispute over a pre-existing domestic dispute between Mr. Lisac and ASEP. As to Transglobal Panama, the Respondent stated that this company was *de facto* 90% controlled by Mr. Lisac. Therefore it actually was a Panamanian company effectively controlled by a Panamanian citizen on which the Tribunal did not have jurisdiction due to the lack of the foreign control required by Article 25(2)(b) of the ICSID Convention for establishing ICSID jurisdiction.

The Claimants[49] did not file a counter-memorial on jurisdiction. They only previously asserted that Transglobal's acquisition of Concessions rights from Lisac was to be considered as an investment deserving the protection of the BIT. According to the Claimants, the US company Transglobal owned 70% of the shares in Transglobal Panama and this was sufficient to establish the foreign control over the locally incorporated company.[50]

[48] Paras. 76-93.

[49] Paras. 94-99

[50] In this regard it is worth noting that Art. 25 of the ICSID Convention extends the Centre's jurisdiction to companies incorporated in the host State but that, because of foreign control, can be considered as international investors. See, in this regard, SAVARESE, *cit. supra* note 1, pp. 470-473; SAVARESE, *cit. supra* note 27, pp. 90-94; LETELIER ASTORGA, "The Nationality of Juridical Persons in the ICSID Convention in light of Its Jurisprudence", Max Planck UNYB, 2007, p. 419 ff.; and MORELAND, "'Foreign Control' and 'Agreement' under ICSID 25(2)(b): Standards for Claims Brought by Locally Organizers Subsidiaries Against Host States", Currents International Trade Law Journal, 2000, p. 18 ff.

The Tribunal started its analysis[51] by noting that, as outlined above, a consistent line of decisions recognizes the possibility of abuses of the investment treaty system through deliberate changes of nationality. Arbitrators highlighted that, in order to establish the existence of an abuse, several elements are to be considered, including the timing of the purported investment, the timing of the claim, the terms of the transaction and the degree of foreseeability of the governmental action against the company at the time of the corporate restructuring. The Tribunal then carefully demonstrated[52] that Mr. Lisac's intent was to *de facto* control Transglobal Panama, irrespective of the percentage of shares he actually held in the company. This circumstance is to be considered jointly with the fact that the dispute between Lisac and Panamanian authorities began well before the assignment of rights to Transglobal (and, then, to Transglobal Panama). Such a timing led the Tribunal to consider that the involvement of the new entities in the investment (and, as a consequence, in the dispute) "is even more telling" with regard to the Claimants bad faith.[53] The Tribunal, therefore, dismissed the claim for abuse of process.

3.4. Ampal v. Egypt and the Abusive Duplication of Investment Proceedings

It is not uncommon in investment arbitration that several companies of different nationalities, which are part of the same group, start different arbitrations against the same State and on the basis of the same facts, taking advantage of different BITs.[54] This happened, e.g., in the well-known *Lauder*[55] and *CME*[56] cases, where the same investor sought recovery against the Czech Republic both personally, under the US-Czech BIT, and through the company CME which he controlled, under the Dutch-Czech BIT. This situation is highly undesirable, because it duplicates costs, runs against finality and judicial economy, undermines legal certainty and generates the risk of conflicting outcomes (as actually happened in the *Lauder* and *CME* cases). Notwithstanding the fact that, from the perspective of States, this situation is deplorable, as of today a rigid approach has prevailed and, in order to consider an arbitration as a duplication of an already existing dispute, arbitrators, supported by some scholars,[57] have usually requested a perfect coincidence of the parties, the *petitum* and the *causa petendi* (so-called "triple identity test").

[51] Para. 100 ff.

[52] Para. 111.

[53] Para. 117.

[54] See ZARRA, *cit. supra* note 25, pp. 13-17.

[55] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award of 3 September 2001.

[56] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award of 14 March 2003.

[57] See WEHLAND, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Oxford, 2013, pp. 127 and 185 ff.

Only in rare cases have Tribunals flexibly applied certain doctrines recognized in international law (namely *res judicata* and collateral estoppel) in order to declare inadmissible duplicative proceedings in cases where the triple identity test was not formally met but there was a substantial coincidence between the two claims (e.g. when two companies of the same group start two substantially identical claims against the same State in accordance with the same standard of treatment as contained in two different BITs).[58]

This situation was dealt with in a quite innovative way in the *Ampal v. Egypt* Decision on Jurisdiction of 1 February 2016.[59] The dispute, arising from the BITs between Germany and Egypt (with regard to the Claimant Mr. David Fischer) and between US and Egypt (with regard to all other Claimants), regarded an investment in East Mediterranean Gas (EMG), a company incorporated under the law of Egypt, the purposes of which were to buy gas in Egypt and export it to Israel, and to construct a pipeline from Egypt to Israel. This dispute constituted one of five related arbitration proceedings, of which three were contract claims between some of the Claimants in the present arbitration and EMG's main downstream customer and two (the present arbitration and a parallel UNCITRAL case started under the BIT between Egypt and Poland)[60] were treaty claims. The two parallel treaty claims have been started by two companies of the same group (Ampal and Merhav-Ampal, both of them owned by Mr. Maiman) in respect of the same 12.5% indirect interest owned by Mr. Maiman in EMG.

Egypt requested that the Tribunal deny jurisdiction on Ampal on several basis, among which the alleged abuse of process by that company, which started a new arbitration in parallel to another already existing identical treaty dispute.[61] The Respondent stated that there was no legal or factual basis to say that Egypt consented to multiple arbitrations in relation to the same facts; indeed, this duplication would have unjustifiably given the Claimants double chances of recovery, created the risk of inconsistent outcomes and increased the phenomenon of treaty shopping.

The Claimants denied the Respondent's case, stating that Egypt behaviours during the arbitrations did not lead to consider that the duplication of chances was a serious concern for the Respondent.[62] Indeed, Egypt refused a proposal to consoli-

[58] See ZARRA, *cit. supra* note 25, pp. 128-167.

[59] *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC, and Mr. David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction of 1 February 2016. The Tribunal was composed of The Honorable L. Yves Fortier (President), Campbell McLachlan and Francisco Orrego Vicuna.

[60] *Yosef Maiman, Merhav (MNF), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v. Arab Republic of Egypt*, UNCITRAL, PCA Case 12-26. The arbitrators in this case are Donald M. McRae (President), Michael W. Reisman and Christopher J. Thomas QC.

[61] Paras. 312-313.

[62] Paras. 318-321.

date the related arbitrations and did not accept to even engage with the Tribunal on how it might coordinate its deliberation with the UNCITRAL Tribunal.

The Tribunal[63] started its brief analysis by clarifying that, *in principle*, the parallel existence of contract and treaty claims among substantially different investors, each of which is claiming for a different part of the same investment, is not abusive. As a matter of law, arbitrators said, contract claims are different from treaty claims.[64]

However, the mere fact that two parallel investment claims arising from the same facts existed against Egypt is a circumstance that *per se* was to be seen as abusive, regardless of the existence of bad faith on the side of the Claimants.[65] In its analysis the Tribunal also referred to Article 26 of the ICSID Convention, which states that, once consent to ICSID arbitration has been given, the parties automatically exclude any other possible remedy. According to the Tribunal, this rule prohibits a situation of parallel investment arbitrations such as the one occurring in the present case. As a consequence, the Tribunal invited the Claimant Ampal to elect, by the term of 11 March 2016, to pursue the duplicative claim either in this arbitration or in the parallel UNCITRAL case.[66] As far as we know, Ampal finally decided to withdraw its UNCITRAL claim and carry on the ICSID one.

The decision is surely to be welcomed for its practical effects against parallel proceedings, for its being the first arbitral award expressly applying the doctrine of abuse of process in a case of parallel proceedings in investment arbitration and for its protection of State interests against an abusive behaviour by investors.

However, from the point of view of the development of international investment law, it would have been preferable to have a better motivated decision, both with regard to the explanation of how abuse of process works in cases of parallel proceedings in investment arbitration and concerning the applicability of Article 26 of the ICSID Convention to cases in which the triple identity test is not met. As to the first aspect, it is still unsettled whether the existence of an abuse of process affects jurisdiction of tribunals or admissibility of claims. Moreover, the Tribunal did not explain why it did not consider necessary to evaluate the investors' bad faith, something that is usually required when discussing the doctrine of abuse of rights/process. Moving to Article 26 of the ICSID Convention, it might seem that, in order to be applicable, the wording of this rule requires that the parties, the *petitum* and the *causa petendi* are formally (and not only substantially) identical. Therefore, it

[63] Paras. 327-339.

[64] There could be, however, situations in which contract and treaty claims substantially coincide. In these cases it could be worth considering the possibility of coordinating such different proceedings through principles such as *res judicata* and collateral estoppel. See ZARRA, *cit. supra* note 25, pp. 154-158.

[65] See para. 331.

[66] The outcome of Ampal's choice results from the Decision on Liability and Heads of Loss issued by the Tribunal on 21 February 2017, paras. 11, 17 and 19.

would have been more advisable that the Tribunal explained why it did not consider it necessary to apply the test, instead of simply ignoring the issue.

4. *Philip Morris v. Uruguay*, the States' Power to Regulate and Their Margin of Appreciation in Protecting Public Interests

The present analysis on the centrality of State interests in the reasoning of recent ICSID tribunals shall necessarily focus on the application of the so-called States' power to regulate doctrine (also known as the "police power" of States doctrine). As defined in a recent book on the subject, "the right to regulate denotes the legal right exceptionally permitting to the host [S]tate to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate".[67] States can refer to their power to regulate that no compensation is due in cases of indirect expropriation.[68] Furthermore, in the framework of alleged violations of the fair and equitable treatment standard,[69] States can invoke their power to regulate in matters of public interest to assert that investors cannot rely on the legitimate expectation that the legal framework existing at the time when the investment was made remain the same for the whole duration of the investment. Therefore, according to this doctrine, a general change of regulation enacted in the name of public interest is allowed without any compensation to affected foreign investors.[70]

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[67] Titi, *The Right to Regulate in International Investment Law*, Baden-Baden, 2014, p. 33. On the subject, see also Elcombe, "Regulatory Powers vs. Investment Protection Under NAFTA's Chapter 1110: *Metalclad*, *Methanex* and *Glamis Gold*", University of Toronto Faculty of Law Review, 2010, p. 71 ff.; and Acconci, "The Integration of Non-Investment Concerns as an Opportunity for the Modernization of International Investment Law: Is a Multilateral Approach Desirable?", in Sacerdoti et al. (eds.), *General Interests of Host States in International Investment Law*, Cambridge, 2014, p. 165 ff., p. 178 ff.

[68] Indirect expropriations substantiate in measures which do not have the features of a formal expropriation but nonetheless consist in the actual deprivation of the value of the investment. See De Luca, "Indirect Expropriations and Regulatory Takings: What Role for the 'Legitimate Expectations' of Foreign Investors?", in Sacerdoti et al. (eds.), *cit. supra* note 67, p. 58 ff.

[69] In this regard see Pellet ("Police Powers or the State's Right to Regulate", in Kinnear et al. (eds.), *cit. supra* note 13, p. 446 ff., p. 456), stating that the States' power to regulate should be referred to only in cases of indirect expropriation.

[70] On investors' legitimate expectations see Palombino, *Il trattamento giusto ed equo degli investimenti stranieri*, Bologna, 2012, p. 133 ff. A revised English version of the book is forthcoming: *Fair and Equitable Treatment and the Fabric of General Principles*, The Hague/Heidelberg, 2017.

While the discussion on the States' power to regulate is drawing increasing attention in scholarship, reference to this doctrine appeared sparingly in the case law and, moreover, it has not been applied in a systematic way by arbitral tribunals.[71]

The Award of 8 July 2016 issued in the *Philip Morris v. Uruguay*[72] case is noteworthy for its in-depth discussion of the topic and for the particular attention given to the Respondent's police powers, which finally led to the dismissal of all claims. However, the presence of a partially dissenting opinion by Gary Born[73] shows that the scope of application of the doctrine is still far from being clear.

The dispute arose in the framework of the 1988 Switzerland-Uruguay BIT and concerned two measures regulating the tobacco industry taken by Uruguay with the general scope, as better described below, of protecting the health of its citizens. The first of these measures precluded tobacco manufacturers from marketing more than one variant of cigarettes per brand family (so-called "single presentation requirement"). The second increased the size of graphic health warnings appearing on cigarette packages (so-called "80/80 regulation").[74]

The Claimants, whose investment consisted in the ownership of cigarettes trademarks and brands in Uruguay, inter alia stated that these measures constituted an indirect expropriation and violated the fair and equitable treatment standard. As to the expropriation claim, the Claimants stated that the measures substantially deprived them of their investment and that the "public benefit" which inspired the measures did not consist in an exception from expropriation but was only one of the several prerequisites for lawful expropriation according to the BIT (which, nonetheless, requires compensation).[75] With regard to the alleged violation of the fair and equitable treatment, the Claimants generally challenged the measures because they allegedly inflicted damages on investors without serving any legitimate purpose and were, therefore, arbitrary. Indeed, with specific reference to the single presentation requirement, Philip Morris asserted that there was no causal relationship between (and no evidence of) the necessity to market only one variant of a product per brand and the purported rationale for adopting such measure, i.e. avoiding mis-

[71] See Acconci, *cit. supra* note 67, p. 179. As to case law, the reference mainly applies to *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award of 2 August 2010; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits of 3 August 2005; and *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006.

[72] *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. Arb/10/7, Award of 8 July 2016. The Tribunal was composed of Piero Bernardini (President), Gary Born (Dissenting) and Judge James Crawford. For an early comment to this decision see Voon, "*Philip Morris v. Uruguay*: Implications for Public Health", Journal of World Investment and Trade, 2017, p. 320 ff.

[73] See Gary Born's Concurring and Dissenting Opinion of 28 June 2016, Annex B of the Award.

[74] Para. 9 ff.

[75] Paras. 183-186.

leading consumers through advertisement (such as, e.g., "light" or "extra-light") that could lead them to think that some cigarettes are less harmful than others. As a consequence the Claimants considered the single presentation requirement not proportional to its objective. Concerning the 80/80 regulation, the Claimants stated that there is no evidence that the measure was necessary to increase awareness of the health effects of smoking and, therefore, of reducing tobacco consumption. For this reason, the measure was considered arbitrary. In addition, Philip Morris stated that the measures were in violation of its legitimate expectations that: (i) it could have continued to capitalize from the sale of all its products in Uruguay; (ii) no arbitrary measures would have been taken by the Respondent State; and (iii) its intellectual property rights would have been respected. The Claimants stated that their legitimate expectations arose from general statements, legislation, treaties, licenses, contracts and from the general expectations that the State would only implement regulations that are reasonably justified by public policies. Philip Morris averred that it relied on the stability and reliability of the Uruguayan legal system, which could not vary "outside of the acceptable margin of change".[76] The Claimants also expressly pointed out that "[s]pecific, explicit promises to an investor in a particular form are not necessary" in order to give rise to legitimate expectations.[77]

Uruguay rejected the above claims. As to the indirect expropriation claim, it firstly stated that "[i]nterference with foreign property in the valid exercise of police power is not considered expropriation and does not give rise to compensation".[78] Secondly, the Respondent affirmed that the expropriation claim should have failed in the merits, because the measures did not deprive Philip Morris of its investment, as demonstrated by the fact that the Claimants continued to do business in Uruguay.[79] With regard to the violations of the fair and equitable treatment, after having recalled that *bona fide* and non-discriminatory measures aimed at the general welfare are not entitled to compensation,[80] Uruguay stated that the single presentation requirement was aimed at avoiding a situation of deception which *per se* derives from the existence of multiple variants of product per brand, as demonstrated by the World Health Organization (WHO) and the Secretariat of the WHO Framework Convention on Tobacco Control (FCTC).[81] As to the 80/80 regulation, Uruguay stated that there was a logical and incontestable connection between more effectively warning people of the harms caused by smoking and the protection of

[76] Paras. 34-347.
[77] Para. 342.
[78] Para. 188.
[79] Para. 210.
[80] Para. 355.
[81] See World Health Ordanization Framework Convention for Tobacco Control, Convention, concluded on 21 May 2003, opened for signature on 16 June to 22 June 2003 in Geneva and entered into force on 27 February 2005. Uruguay signed the FCTC on 19 June 2003 and ratified it on 9 September 2004. See Para. 362 of the Award.

public health.[82] Finally, the Respondent contended that it made no specific commitments to the Claimants capable of giving rise to legitimate expectations[83] and that tobacco is one of the most highly regulated business in the world. Therefore Philip Morris could not reasonably have expected that Uruguay's regulatory scheme would ever change.[84]

The Tribunal started its analysis by explaining that this case required the assessment of the dichotomy of the investor's right to use its property and the State's right to protect public interests.[85] Having said that, arbitrators explained that nothing in any of the sources mentioned by Claimants supported the idea that a trademark is an absolute, inalienable right protected against any regulation that might limit or restrict its use. Limitations on the use of trademarks can (and shall) be even more expected in an industry like tobacco, due to the strong implications of smoking for public health.

The Tribunal then moved to analyze the expropriation claim and noted that Philip Morris did not suffer a deprivation of the value of its investment due to the measures adopted by Uruguay. This consideration, taken alone, would have been sufficient for dismissing the claim.[86] The Tribunal, however, decided to deal with

> "an additional reason in support of the same conclusion that should also be addressed in view of the Parties' extensive debate in that regard. In the Tribunal's view, the adoption of the Challenged Measures by Uruguay was a valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation".[87]

The Tribunal then engaged in an in-depth discussion of the doctrine of a State's police powers, which it considered as a rule of customary international law to be applied to this case according to Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties.[88] The Tribunal cited various arguments in support of the

[82] Para. 368.
[83] Para. 377.
[84] Para. 380 ff.
[85] Para. 267 ff.
[86] Paras. 284 and 287 ff.
[87] Para. 287.
[88] Para. 290 ff. On the alleged customary nature of the police powers doctrine see also para. 301. On Art. 31(3)(c) of the Vienna Convention see FOCARELLI, *Trattato di diritto internazionale*, Torino, 2015, p. 407. This paper is not the place to discuss the customary nature of the right to regulate and the possibility to apply it in investment disputes by way of systemic interpretation. It suffices here to say that – according to the very limited State practice and case law concerning the power to regulate – it is very difficult to say that the two requirements of *diuturnitas* and *opinio juris sive necessitatis* (necessary to say that a customary rule exists) have been met by this doctrine. Due to the complexity of the subject, the discussion on the power to regulate is to be postponed to another paper. An in-depth discussion of the subject may be found in TITI, *cit. supra* note 67, p. 1 ff.

purported customary nature of the doctrine of the right to regulate. Firstly, arbitrators said, such a doctrine is recognized by Article 10(5) of the 1961 Harvard Draft Convention on the International Responsibility of States for Injury to Aliens, and is endorsed both in the *Third Restatement of the Foreign Relations Law* of the United States of 1987 and by the Organisation for Economic Co-operation and Development (OECD).[89] Secondly, and equally importantly, the doctrine found approval in various investment awards,[90] and in recent trade and investment treaties.[91] According to the Tribunal, in order for an exercise of police powers to be legitimate, the action must be taken *bona fide* for the purpose of protecting public welfare and must be non-discriminatory and proportionate.[92] All these features are present in the case of the challenged measures, which apply indiscriminately to all tobacco producers and are aimed at protecting public health, as also dictated by the WHO and the FCTC. The measures are therefore to be considered as a legitimate exercise of police powers which excludes compensation.

As to the alleged fair and equitable treatment violations, after having recalled the purpose of the measures,[93] arbitrators referred to the European Court of Human Rights (ECtHR) and, by majority, stated that a certain "margin of appreciation"[94] shall be recognized to regulatory authorities when making policy determination.[95] According to the Tribunal, the doctrine of margin of appreciation is not to be limited to the context of the European Convention on Human Rights (ECHR) and may be applied also when evaluating alleged violations of standards enshrined in BITs. Therefore, in the present case, respect is due by the Tribunal to the discretionary exercise of sovereign powers not irrationally made and exercised in good faith for a public purpose. Arbitrators said that the only analysis they had to carry out consists

[89] OECD, "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law", OECD Working Papers on International Investment 2004/4, 2004, p. 5.

[90] See *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 122; *Saluka*, c*it. supra* note 71, paras. 255, 260 and 262; *Methanex*, c*it. supra* note 71, Part IV, Charter D, para. 7; *Chemtura*, c*it. supra* note 71, para. 266.

[91] See Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA), Annex 8-A, Expropriation, Art. 3. See the 2012 US Model BIT, Annex B, Art. 4(b). A similar provision is contained in Art. 33 of the 2012 BIT between Canada and China. On this matter see Acconci, *cit. supra* note 67, pp. 169-174.

[92] Para. 305 ff.

[93] Para. 391 ff.

[94] On the concept of margin of appreciation see Pitea, "Art. 8", in Bartole, De Sena and Zagrebelsky (eds.), *Commentario breve alla Convenzione europea dei diritti dell'uomo*, Padova, 2012, p. 297 ff., pp. 307-310; Randazzo, "Art. 32", in Bartole, De Sena and Zagrebelsky (eds.), *ibid*., p. 606 ff., pp. 618-620; Nigro, "Il margine di apprezzamento e la giurisprudenza della Corte europea dei diritti umani sul velo islamico", DUDI, 2008, p. 71 ff.; and Palombino, "Laicità dello Stato ed esposizione del crocifisso nella sentenza della Corte europea dei diritti dell'uomo nel caso *Lautsi*", RDI, 2010, p. 134 ff., pp. 137-138.

[95] Para. 398 ff.

in ascertaining whether or not there was a manifest lack of reasons for the legislation. In their opinion, this was not the case both for the single presentation requirement[96] and for the 80/80 regulation.[97] Moreover, with regard to the alleged violation of the Claimants' legitimate expectations, arbitrators explained that changes to general legislation are not prevented if they do not exceed the exercise of the State's normal regulatory power in the pursuance of public interest,[98] in particular if – as in the present case – there have not been inducements or specific undertakings.[99]

However, concerning the absence of a violation of the fair and equitable treatment standard, arbitrator Gary Born strongly dissented with Bernardini and Judge Crawford. First, Born stated that in his opinion the "margin of appreciation" doctrine cannot be transposed to the BIT context, considering that it is a rule developed within the ECHR system and in accordance with its particular features. According to Born, the application of such a doctrine in contexts outside the ECHR has been, indeed, largely refused both by other international courts and by scholars.[100] Second, the dissenting arbitrator averred that deference for State's power to regulate, which is undoubtedly to be given, cannot act "as a substitute for reasoned analysis. […] [D]eference to sovereign measures is the starting point, but not the ending point of evaluation of fair and equitable treatment claims".[101] In Born's opinion, with specific regard to the single presentation requirement, there was no proof of the existence of any deception caused by the existence of several products under the same brand; the measure, furthermore, did not prohibit the so-called "alibi brands" (i.e. different brands of the same producers which may be freely sold instead of trading different variants of the same brand), which consists in a circumvention of the limit posed by the Uruguayan legislator. The measure was therefore to be considered irrational, arbitrary and unbalanced in terms of proportionality,[102] as also confirmed by the fact that it was not based on any meaningful prior study or consultation.[103] On the basis of the above, Gary Born affirmed that the single presentation requirement involves a violation of the fair and equitable treatment.

In the present author's opinion, this decision deserves praise for its acknowledgment of the essential sovereign role of States in sensible matters such as public health. As a matter of law, it is also noteworthy that the Tribunal did not limit its analysis to previous case law in the framework of investment treaty arbitration but also took into account rules developed in other areas of international law. Such an

[96] Paras. 409-410.

[97] Paras. 418-420.

[98] Para. 423.

[99] Para. 426. For an analysis of the concept of inducement, see PALOMBINO, *cit. supra* note 70, p. 139 ff.

[100] Paras. 181-191 of the dissenting opinion.

[101] Para. 142 of the dissenting opinion.

[102] For an analysis of proportionality and fair and equitable treatment see PALOMBINO, *cit. supra* note 70, p. 149 ff.

[103] Paras 158-168 of the dissenting opinion.

approach has been strongly encouraged and desired by authors[104] and is a good development in the way towards a rebalancing of the interests at stake in investor-State arbitration.

There are, however, at least two aspects of the Tribunal's reasoning which, perhaps, would have deserved a more detailed discussion, as is evidenced by Born's dissenting opinion. The reference applies, first, to the application *tout court* of the doctrine of the margin of appreciation developed by the ECtHR and, second, to the lack of a meaningful discussion with regard to the proportionality of the single presentation requirement. In brief, with regard to the former aspect, it is to be noted that the margin of appreciation doctrine has been developed in a wide multilateral framework concerning the protection of human rights (the ECHR). It consists in the recognition of a certain degree of discretion to Contracting Parties that the ECtHR applies when evaluating the legitimacy of limitations to those rights imposed by States for reasons of public interest. In the jurisprudence of the ECtHR, such limitations shall be provided by a law and shall be characterized by necessity and proportionality. Moreover, in order to apply the doctrine, the Court requires that the Contracting States are not in agreement on the content of the specific right which is subject to the limitation.[105] Differently, BITs do not set forth any human right and there are only two State Parties. Hence it is difficult to imagine how the margin of appreciation could fit into this context. Not even the Tribunal tried to explain how such a mechanism of legal transplant could work in the present case, something that would have been worth even in light of the fact that Uruguay is not a party to the ECHR. Contrariwise, the dissenting opinion largely and clearly explains why, in Born's opinion, the doctrine *cannot* be applied to the BIT framework. Concerning, then, the proportionality analysis of the single presentation requirement, while the dissenting arbitrator explained why he considered that the measure was excessive with respect to its goals, the Award refuses to do so and – in concluding that the measure is "reasonable"[106] – only refers to the general purpose of the measure and to the margin of appreciation of the State. The decision might have been more acceptable from the investor side had the Tribunal spent part of its reasoning in explaining how it thought that the three requirements of the proportionality test (i.e. appropriateness, necessity and proportionality *stricto sensu*)[107] had been met by the measure.

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[104] See, inter alia, DI BENEDETTO, *International Investment Law and the Environment*, Cheltenham/Northampton, 2013, p. 83 ff.; SIMMA and KILL, "Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology", in BINDER et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford, 2009, p. 678 ff.; and GRECO, "The Impact of the Human Right to Water on Investment Disputes", RDI, 2015, p. 444 ff.

[105] See RANDAZZO, *cit. supra* note 94, p. 619. See also PALOMBINO, *cit. supra* note 94, p. 138.

[106] Para 409.

[107] See PALOMBINO, *cit. supra* note 70, p. 151.

The present author therefore firmly agrees on recognizing and giving deference to State sovereignty, but equally supports the view that – in doing so – the Tribunal should have been more detailed in terms of legal reasoning. Had the *Philip Morris* Tribunal done so, it would also have facilitated the work of future tribunals willing to follow a similar approach.

5. Decisions Apparently Contrasting the Proposed Reading of Recent ICSID Case Law

This section will briefly discuss, for the sake of completeness, some decisions where State interests seem to have received minor importance if compared to the awards examined in the previous sections of this work. The reference applies, in particular, to Awards in which Venezuela was the Respondent Party and annulment decisions by *ad hoc* Committees. It will be shown that, in fact, the approach assumed by Tribunals and Committees is fully justifiable from the legal point of view and, therefore, such decisions cannot be understood as undermining the considerations made above.

5.1. Cases in which Venezuela Has Been Respondent

Five arbitral awards in which Venezuela was the Respondent Party have been issued in 2016[108] and in all these cases Venezuela was condemned to pay a certain amount of money to Claimants. This circumstance may seem surprising, particularly if compared with the low number of cases in which investors have prevailed in investment cases decided in the last year. However, such cases reveal that arbitrators usually assumed a restrictive view of the standards of treatment at stake and have duly taken into account State interests in their decisions.

[108] *Tenaris and Talta*, ICSID Case No. ARB/11/26 *cit. supra* note 28; *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016 (the tribunal was composed of Juan Fernandez-Armesto (President), Francisco Orrego Vicuña and Judge Bruno Simma); *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Republica Bolivariana de Venezuela*, ICSID Case No. ARB/12/23, Award of 12 December 2016 (the tribunal was composed of Juan Fernandez-Armesto (President), Enrique Gómez Pinzón and Brigitte Stern); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Award of 4 April 2016 (the tribunal was composed of Laurent Levy (President), Dean John Y Gotanda and Laurence Boisson de Chazournes); and *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum of 30 December 2016 (the tribunal was composed of Klaus M. Sachs (President), The Honourable Charles N. Brower and Gabriel Bottini).

The main reason why investors started claims against Venezuela (recurring, indeed, in all these cases) was the high number of expropriations and nationalizations which took place during the government of President Hugo Chavez.

In order to assess the Tribunals' approach in these cases, it is first of all worth highlighting that, in those decisions involving a direct expropriation, *the existence of a taking was not even contested by the Respondent*.[109] The discussion in these disputes was then on whether the expropriations respected the terms of the relevant BIT (or any other applicable law) and mainly whether the Respondent followed the proper procedure regarding compensation. After careful analysis, all Tribunals determined that Venezuela did not pay prompt, adequate and effective compensation and, hence, had to indemnify Claimants.

Another relevant aspect regards the fact that in none of these cases considerations regarding the State power to regulate and the necessity to safeguard essential public interests came into play. There has been no opportunity for Tribunals to deal with concepts in the awards involving Venezuela. On the contrary, the expropriatory measures seem to have been mainly inspired by political reasons, as explained by several public (and propagandist) proclamations made by President Chavez and his Ministers that are expressly quoted in the decisions.[110]

Moreover, it is noteworthy in the majority of these cases that Claimants' grievances arising from standards other than expropriation have been dismissed. Only in one case has Venezuela been found in breach of the fair and equitable treatment standard[111] and, in another, responsible for the unlawful restrictions on the transfer of funds.[112] This confirms the idea that Tribunals have been extremely careful in considering the sovereign role of the Respondent State. This is expressly recognized in *Rusoro*,[113] where the Tribunal expressly recognized that "States enjoy extensive discretion in establishing their public policy. It is not the role of investment [T]ribunals to second-guess the appropriateness of the political or economic model adopted by the legitimate organs of a sovereign State". Similarly, in *Crystallex*, the Tribunal stated that "[i]t is necessary for the investor to take into consideration that, in the administrative decision-making process, considerations of public interest […] may counterbalance what the investor would view as an expectation".

In conclusion it must be acknowledged that State interests have been duly evaluated also in the above cases, which prior to a careful reading might still have given an appearance of pro-investors bias.

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[109] See *Saint-Gobain*, *cit. supra* note 108, para. 385 ff.; *Tenaris and Talta*, ICSID Case No. ARB/11/26, *cit. supra* note 28, para. 451; and *Rusoro*, *cit. supra* note 108, para. 409.

[110] See, e.g., *Crystallex*, *cit. supra* note 108, paras. 50 and 682. In the last mentioned paragraph, the Tribunal expressly quoted a statement by Chavez saying that the "revolutionary Government recuperated [the gold]" in Las Cristinas by Crystallex.

[111] *Crystallex*, *cit. supra* note 108, para. 961.

[112] *Rusoro*, *cit. supra* note 108, para. 904.

[113] Para. 385.

5.2. Annulment Decisions

Seven annulment proceedings have been concluded in 2016.[114] Among those proceedings, six were brought by Respondent States and only one by the investor.[115] It is noteworthy, in this regard, that only one out of the seven proceedings was concluded with a partial annulment in favour of the Applicant State,[116] while in all the other cases the applications were dismissed. If this data is compared to the high number of cases where States have prevailed in arbitration proceedings, this could be seen as a form of insensibility of *ad hoc* committees to State interests. However, it is worth noting that the high percentage of dismissals of annulment applications is perfectly compliant with the scope and objective of this remedy according to Article 52 of the ICSID Convention as it has been quite consistently applied by *ad hoc* committees, who have often repeated that they cannot be equated to court of appeals and their task is not to review the merit of tribunals' decisions.[117] *Ad hoc* committees may only review the legitimacy of awards on the basis of the limited grounds set forth in Article 52, which have been usually interpreted in a restrictive manner.

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[114] *Ioan Micula, Viorel Micula and Other v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment of 26 February 2016 (the *ad hoc* Committee composed of Claus von Wobeser (President), Bernardo M. Cremades and Judge Abdulqawi A. Yusuf); *Postova Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Postova Banka's Application for Partial Annulment of the Award of 29 September 2016 (the *ad hoc* Committee composed of Azzedine Kettani (President), Sir David A.O. Edward and Hi-Taek Shin); *EDF International S.A., Saur International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Annulment Proceedings Decision of 5 February 2016 (the *ad hoc* Committee composed of Sir Christopher Greenwood, CMG, QC (President), Teresa Cheng, SC and Yasuhei Taniguchi); *Saur International S.A. v. Republica Argentina*, ICSID Case No. ARB/04/4, Decisiòn sobre la solicitud de anulaciòn de la Republica Argentina of 18 December 2016 (the *ad hoc* Committee composed of Eduardo Zuleta (President), Judge Abdulqawi A. Yusuf and Alvaro Castellanos); *Tidewater Investment SRL and Tidewater Caribe, CA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment of 27 December 2016 (the *ad hoc* Committee composed of Judge Abdulqawi A. Yusuf (President), Tan Sri Dato' Cecil W.M. Abraham and Dr. Rolf Knieper); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment of 1 February 2016 (the *ad hoc* Committee composed of Eduardo Zuleta (President), Teresa Cheng and Alvaro Castellanos); and *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment of 15 January 2016 (the *ad hoc* Committee composed of Piero Bernardini (President), Makhdoom Ali Khan and Jacomijn van Haersolte-von Hof).

[115] The reference applies to *Postova Banka*, *cit. supra* note 114.

[116] *Tidewater*, *cit. supra* note 114.

[117] See the statistics reported in MARCHILI and MCBREARTY, *cit. supra* note 5, pp. 430-431; see also SCHREUER, "Three Generations of ICSID Annulment Proceedings", in GAILLARD and BANIFATEMI (eds.), *Annulment of ICSID Awards*, Huntington, 2004, p. 17 ff.; MARBOE, "ICSID Annulment Decisions, Three Generations Revisited", in BINDER et al. (eds.), *cit. supra* note 104, p. 200 ff. The annulment decisions not perfectly compliant with such a tendency are mentioned in NAIR and LUDWIG, "ICSID Annulment Awards: The Fourth Generation?", 2011, available at: <http://www.lexology.com/library/detail.aspx?g=7218cb56-7a64-426f-8cc0-8475303444e6>.

This strict view of annulment under the ICSID Convention is expressly confirmed by certain *obiter dicta* contained in annulment decisions issued in 2016. It is worth mentioning, in this regard, what has been stated in *Adem Dogan* where "at the risk of repeating itself, the Committee observe[d] that it does not have the authority to sit in judgment of the Tribunal's appreciation and evaluation of the evidence".[118] This means that, even if a Committee does not appreciate the evaluation of facts, the quality of the legal reasoning and the conclusions of a Tribunal, it is not entitled to reviewing its decision and discretionarily substituting the Tribunal's interpretation.[119] Indeed, "the ICSID system annulment is a limited remedy with the aim of achieving a careful balance between the Convention's objective to ensure the finality of awards and the need to guarantee the fundamental integrity of the arbitral process".[120] Indeed, in the only case where the *ad hoc* Committee partially annulled a Tribunal's award in 2016, this happened because the Tribunal's "reasoning [did] not allow a reasonable attentive and willing reader to follow the Tribunal's reasoning and conclusion".[121] In that case, the Tribunal firstly expressly rejected a certain method of quantification of damages and then applied such a method. This obviously amounted to a failure to state reasons, i.e. "the impossibility of following the Tribunal's reasoning from point A to point B".

6. Conclusions

2016 has been a year rich of interesting awards for the ICSID system. These awards are to be located within the intense current debate on the suitability of such a private form of arbitration to solve disputes involving essential public interests. The present note has tried to highlight that arbitral tribunals are demonstrating that they are perfectly aware of the current "sovereign backlash" and are duly taking into account State interests in their decisions. It might, therefore, be said that – contrary to what several commentators stated in the past – currently there appear to be no form of (or at least less) pro-investor bias in tribunals' reasoning.

It is, of course, early to say that this changing approach of arbitrators will be sufficient to stop the various attempts of reforming the mechanism of investment dispute settlement. However, the reading of awards issued in 2016 should lead legislators to make a meaningful reflection on the necessity of hasty modifications to a system that – through a lengthy process of self-adjustments – is evidently fairer than it may have appeared in the past. Indeed, nothing ensures us that a future, unknown, form of investment dispute settlement will be better than the one we currently have.

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[118] *Adem Dogan*, *cit. supra* note 114, para. 149. See, similarly, para. 129 of the same Decision.

[119] See, in this regard, *Tidewater*, *cit. supra* note 114, para. 172.

[120] *Ibid*., para. 22.

[121] *Tidewater*, *cit. supra* note 114, para. 191.