THE INTERFACE BETWEEN INVESTMENT ARBITRATION AND THE "OUTSIDE WORLD": AN ANALYSIS THROUGH THE PRISM OF 2019 CASE LAW

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1. INTRODUCTION

At first glance, it seems that the 2019 arbitral case law did not produce significant developments for international investment law, even though a rather high number of arbitral awards was issued during this year.[1] While in the last five years we had the opportunity to read ground-breaking decisions which influentially innovated the international law on investment claims,[2] there is no trace of this kind of award in the most recent case law. Arbitrators mainly dealt with subjects which have already been largely discussed, such as the definition of investments, the arbitrability of disputes arising from intra-EU investment treaties, and the concept of legitimate expectations.

However, some elements of originality can be found by approaching the 2019 case law from a different perspective, i.e. trying to understand the reasons behind arbitrators' choices. This will be done by making an *introjection* into the arbitrator's mind and asking ourselves how tribunals are influenced by concerns regarding the perceptions that their decisions may generate in the outside world, i.e. domestic legal systems, other branches of international law and also public opinion. In this regard, it is arguable that, while in taking some decisions (e.g. in jurisdictional matters) tribunals completely disregard the effects of their *dicta* on other areas of law, in other cases (e.g. when dealing with transparency matters) arbitrators are more willing to take into account the interface of investment arbi-

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[1] It is not possible to provide readers with the precise number of arbitration cases decided in 2019, considering that several cases are often unknown due to their confidential nature. As to ICSID, 34 arbitration proceedings and 1 re-submission were concluded in 2019. 12 of these were settled or otherwise discontinued, and 23 were decided by tribunals. Of the cases decided by tribunals, four awards declined jurisdiction, eight tribunals rejected all of the investors' claims, and 11 awards upheld the investors' claims in part or in full. One award embodied the parties' settlement, and 11 cases were discontinued at the request of one or both parties. See ICSID, "2019 Annual Report", available at: <https://icsid.worldbank.org/en/Documents/ICSID_AR19_EN.pdf>, p. 29. However, the Centre only registered 39 new cases in 2019 (a substantial decrease from approximately 56 cases registered in 2018). See ICSID, "ICSID Caseload – Statistics", available at: <https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf>, p. 7.

[2] It will suffice here to mention the case law developed in relation to the admissibility of human rights counterclaims; see *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016; *David Aven et al. v. Costa Rica*, ICSID Case No. UNCT/15/3, Final Award of 18 September 2018.

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tration with the outside world and the perceptions generated by arbitral awards in public opinion.

For the sake of completeness, this kind of research also requires a look at the attitude of national courts – which several times in 2019 have been called upon to review arbitral proceedings – towards investment arbitration, trying to understand how domestic jurisdictions effectively perceive the role of arbitrators. In this regard, we will try to highlight that domestic courts tend to be inspired by the so-called *favor arbitrati*[3] and are willing, therefore, to recognize – to a large extent – the primacy of investment arbitration over domestic proceedings in all the circumstances where a valid consent to arbitration exists.

The study of the interface of investment arbitration proceedings with the outside world will start from the analysis of awards relating to the jurisdiction of arbitral tribunals (Section 2) and then move to procedure (Section 3), merits (Section 4) and enforcement (Section 5) phases.

2. Safeguarding *Kompetenz-Kompetenz*: the Absolute Independence of Arbitral Tribunals from the Outside World at the Jurisdictional Phase

Arbitral jurisdiction is regulated by the *kompetenz-kompetenz* principle, according to which tribunals are the first (and, in ICSID cases, the only) judges of their jurisdiction.[4] This principle finds expression, e.g., in Article 41 of the ICSID Convention, according to which:

> (1) The Tribunal shall be the judge of its own competence.
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

The 2019 case law shows that arbitrators are (correctly) somewhat *jealous* of their jurisdiction and have not allowed *external influences* to affect their evaluation of their power to decide disputes. This attitude can be discerned through analysis of the most recent cases relating to the definition of "investment", the concept of "foreign control"[5] and intra-EU investment cases. The autonomy of

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[3] For a closer analysis of this concept see Zarra, "Il principio del *favor arbitrati* e le convenzioni arbitrali patologiche nei contratti commerciali internazionali", Rivista dell'arbitrato, 2015, p. 138 ff.

[4] Zarra, "The Annulment of the Negative Jurisdictional Ruling in *GPF v. Poland*. Did the English Judge Go Too Far?", DCI, 2018, p. 818 ff.

[5] The topic of foreign control will not be subject to analysis in the present paper as there were no significant developments in this regard in 2019. Contrary to what was stated by the ICJ in the well-known case of *Barcelona Traction, Light and Power Company, Limited*, Judgment of 5 February 1970, ICJ Reports, 1970, p. 3 ff. (where it was said that claims based on a reflec-

arbitrators in determining their jurisdiction also finds confirmation in a domestic court decision issued in 2019 (briefly analysed below). However, it is worth noting that investment tribunals are not isolated from the rest of international law: to determine their jurisdiction, arbitrators often take into account customary international law, the practice of the ICJ and the work of the ILC. Two recent decisions concerning the notion of "dual nationals" and the most favoured nation (MFN) clause are evidence of this dialogical attitude.

Prior to starting with the detailed analysis of the above concepts it is, however, worth highlighting a recent case in which – confirming their absolute *ownership* over jurisdictional analyses – arbitrators have clarified that the determination of jurisdiction is a pre-requisite to all considerations concerning the merits of disputes and that tribunals may examine jurisdiction even when objections are not timely filed. In *Oded Besserglik v. Mozambique*,[6] the claim was started in accordance with the Mozambique-South Africa BIT and the ICSID Additional Facility Rules. The Respondent objected to the jurisdiction of the Tribunal claiming that the BIT was not in force. This affirmation was, *inter alia*, confirmed by certain diplomatic notes exchanged between the two States.[7] The Claimant replied that this objection was not timely[8] and that Mozambique was estopped from raising it.[9] The Respondent argued that the delay was justified because the circumstance that the BIT was not in force was unknown to the State's lawyers (*sic*!)[10] because the ICSID website showed that the BIT was in force.[11] While recognizing that a State should be aware of the international commitments it enters into,[12] the Tribunal ruled that it

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tive injury to shareholders are generally barred), indeed, arbitral tribunals continue to accept jurisdiction over claims brought by final owners of investments and by shell companies. See *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award of 21 June 2019, para. 444 (Tribunal composed of Stephan Drymer (President), Brigitte Stern and David Williams): "a majority of the Tribunal concludes that the signatories of the Treaty did not exclude the possibility that multiple sources of foreign control of a domestic entity could be identified, as well as the very real possibility that a person having direct or indirect – though not necessarily the 'ultimate' – control could bring a claim under the Treaty so long as that person is a national of the non-host State party. It is not for the Tribunal to limit or curtail such an intentionally broad and open-ended definition".

[6] ICSID Case No. ARB(AF)/14/2, Award of 28 October 2019 (Tribunal composed of Makhdoom Ali Khan (President), Yves Fortier and Claus von Wobeser).

[7] *Ibid*., para. 186.

[8] Art. 45 of the ICSID Additional Facility Rules requires that any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General as soon as possible after the constitution of the Tribunal and in any event no later than the expiration of the time limit fixed for the filing of the counter-memorial. Mozambique, on the contrary, filed the objection to jurisdiction in the rejoinder. This article therefore does not preclude the possibility that a jurisdictional objection may be raised *ex officio*.

[9] *Ibid*., paras. 242-243.

[10] This is the only exception under Art. 45. The burden of proof is on the Respondent.

[11] *Ibid*., para. 276.

[12] *Ibid*., paras. 268 and 276.

> would have been inclined to rule the objection out of consideration had the matter been one where Respondent by its delay had secured a procedural advantage or raised a defense of a non-fundamental nature. The objection in this case, however, is that the BIT is not in force. If that be the case, then Respondent cannot be said to have given its consent to ICSID arbitration. Without consent there can be no ICSID arbitration. The objection, therefore, goes to the very root of the jurisdiction of this Tribunal.[13]

For this reason, it stated that the objection was to be independently examined by arbitrators without relying on a party's conduct in this regard. A treaty which is not in force cannot be deemed in force due to the delay or silence of the respondent and a tribunal is bound to consider whether its jurisdiction has been validly conferred, even if the issue has come to light due to an objection that was not raised in a timely manner.[14] A jurisdictional objection which goes to the very heart of the existence of an arbitration (i.e. consent) can be raised *ex officio*. The correctness of the Tribunal's approach can also be re-affirmed considering that, had the Arbitrators issued a decision on the merits, this decision would have certainly been subject to annulment proceedings, with a substantial increase in time and costs. Hence, the decision also complies with the canon of judicial economy.

2.1. The definition of "investment"

The definition of investment for the purposes of international law (and investment tribunals' jurisdiction) is independent from any other existing definition of investment. Hence, this is an ambit in which there is little dialogue between investment arbitration and the outside world. In this regard, while BITs usually affirm that "every kind of asset" may be considered as an international investment, it is often said that the main elements of an international investment for the purpose of ICSID arbitration are (i) an economic commitment by the investor; (ii) a certain duration (there are no instantaneous investments); (iii) the assumption of a risk; and (iv) a contribution to the development of the host State. These requirements were developed in *Salini v. Morocco*[15] and have been frequently taken into account by other tribunals.[16]

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[13] *Ibid*., para. 315.

[14] *Ibid*., paras. 319-320.

[15] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 31 July 2001.

[16] SAVARESE, *La nozione di giurisdizione nel sistema ICSID*, Napoli, 2012, p. 66 ff.; ZARRA, "Investment Arbitration 2018: Back to Basics", IYIL, 2018, p. 425 ff. This does not mean that they are binding for future tribunals, considering that there is no binding precedent in investment arbitration. See PALOMBINO, *Fair and Equitable Treatment and the Fabric of General Principles*, Heidelberg, 2018, p. 143 ff.

The applicability of the so-called *Salini* test was a subject of discussion in the 2019 case law and, surprisingly, it found greater application outside the ICSID framework than within it.

Indeed, in the ICSID context, the test was not even discussed in *Magyar v. Hungary*,[17] where the Tribunal stated that the existence of an investment must be assessed holistically, i.e. looking at the investment as a whole and ascertaining whether the dispute has a sufficiently direct link with the overall investment. Similarly, in *Standard Chartered v. Tanzania*,[18] the Tribunal expressly said that

> [the] *Salini* factors are not to be taken as prescriptive or dispositive but merely as indicative of typical elements that the Tribunal could consider in determining whether the subject matter from which the dispute has arisen is an '*investment*' contemplated by the ICSID Convention. This flexible approach is consistent with the objective of ICSID Convention as set out in the Executive Director's Report.

Outside the ICSID context, the *Salini* test was boldly applied by a PCA Tribunal (in agreement with the parties) in *Doutremepuich v. Mauritius*.[19] However, in *Clorox v. Venezuela*,[20] the Tribunal expressly disregarded *Salini*, by saying that

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[17] *Magyar Farming Company Ltd et al v. Hungary*, ICSID Case No. ARB/17/27, Award of 13 November 2019, paras. 274-276 (Tribunal composed of Gabrielle Kaufmann-Kohler (President), Stanimir Alexandrov and Inka Hanefeld).

[18] *Standard Chartered Bank (Hong Kong) Limited v. Tanzania*, ICSID Case No. ARB/15/41, Award of 11 October 2019, para. 200 (Tribunal composed of Lawrence Boo (President), David Unterhalter and Khamal Hossain). Here, in line with previous awards, the Tribunal stated that loans can be considered as protected investments also in cases of assignment of the receivables. According to the Tribunal, "the risks undertaken by the original Lenders are now borne by the Claimant because the original Lender could not or would not be in a position to do so. Although the construction of the Facility was completed, the Claimant carries the continuing risks of the operation" (para. 223). In *Anglo-Adriatic Group v. Albania*, ICSID Case No. ARB/17/6, Award of 7 February 2019, para. 230 ff. (Tribunal composed of Juan Fernandez-Armesto (President), Georg von Segesser and Brigitte Stern), it has also been indirectly accepted that an investment may be owned through a trust, provided that evidence is given that the Claimant is the beneficial owner of the trust.

[19] *Christian Doutremepuich and Antoine Doutremepuich v. Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction of 23 August 2019, para. 118 (Tribunal composed of Maxi Scherer (President), Olivier Caprasse and Jan Paulsson). It is interesting to note that, in addition to the *Salini* test, the Tribunal at para. 143 clarified the meaning of the requirement of duration, stating that there can be no fixed minimum duration requirement. Rather, the duration has to be assessed in light of all the circumstances of the situation as a whole.

[20] *Clorox Espana SL v. Venezuela*, CPA Case No. 2015-30, Award of 20 May 2019, para. 820 (Tribunal composed of Yves Derains (President), Bernard Hanotiau and Raul Vinuesa). In this case the Tribunal declined jurisdiction saying that the Claimant did not have any investment in Venezuela because it did not pay any amount for its participation in the Venezuelan company that it considered to be its investment. On the basis of the wording of Art. 1 of the Spain-Venezuela BIT, the Tribunal stated that the concept of investment necessarily involves

> el Tribunal no necesita referirse a una jurisprudencia arbitral desarrollada dentro del marco del arbitraje CIADI y que evolucionó con poca coherencia, para interpretar el término inversión según el Tratado.

Jin Hae Seo v. Korea,[21] a case started under the 2007 United States-Korea Free Trade Agreement (KORUS FTA) and brought before the Hong Kong International Arbitration Centre, represents a mid-way approach. The case concerned the alleged expropriation of a building in Korea which was bought by an individual for the purpose of both having a private dwelling and a rental income from letting parts of the building. The Respondent argued that the host State did not benefit in any way from the Claimant's business; moreover, the capital invested by the Claimant originated in Korea and was, in any case, of a non-significant amount. On the basis of the *Salini* criteria, therefore, the Tribunal lacked jurisdiction. In addition, the Respondent argued that there was no investment because there was no expectation of gain or profit by the Claimant.

The Tribunal noted that Article 11.28 of the KORUS FTA expressly mentions three characteristics of investments, but the Tribunal clarified that this list is not exhaustive. The KORUS-FTA requires a holistic approach to the evaluation of the existence of an investment.[22] Indeed, in a non-ICSID context – while the elements of the *Salini* test may be taken into account – a rigorous application of the *Salini* approach, involving a rigid application of the four elements individuated by the Tribunal in that case, cannot find application. The Arbitrators therefore stated that they lacked jurisdiction on the basis of both elements lacking in the *Salini* test and elements involved in it. The Tribunal, indeed, considered that: (i) it was highly unlikely that at the time of purchase the Claimant had any expectation of profit,[23] as the Tribunal expressed serious doubts as to whether the Claimant had initially intended to rent out parts of the building; and (ii) it was equally doubtful that the purchase involved a real assumption of risk (as in the types of risk ordinarily associated with a commercial investment) by the Claimant.[24]

The above confirms, on the one hand, that tribunals are free not to apply the *dicta* of previous tribunals, and, on the other hand, that the *Salini* test is – nevertheless – a fundamental starting point of analysis in many investment cases.

2.2. Intra-EU investment cases

The issue of the arbitrability of disputes arising from intra-EU investment agreements has been widely debated in arbitral case law and scholarship.

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an *activity* on the side of the Claimant and, in this case, this activity did not take place. See para. 831.

[21] HKIAC Case No. 18117, Final Award of 27 September 2019 (Tribunal composed of Bruno Simma (President), Benny Lo and Donald McRae).

[22] Para. 101.

[23] Paras. 126-128.

[24] Paras. 133-134.

Arbitrators, as well as experienced lawyers and academics, have already demonstrated that (i) disputes initiated by investors on the basis of investment treaties stipulated between two or more EU Member States prior to the accession to the EU of one of them are within the jurisdiction of arbitral tribunals; and (ii) the consent expressed in intra-EU BITs is still valid and the host States' alleged misconduct may be evaluated on the basis of the substantive standards of treatment enshrined in these BITs.[25] This approach has been unanimously confirmed by awards issued in 2019,[26] regardless of the fact that the EU Commission continues

[25] The argument according to which the standards of treatment and arbitration clauses contained in BITs have been superseded by EU Treaties on the basis of the mechanism of Art. 30 of the Vienna Convention on the Law of Treaties (succession of treaty norms between the same parties and on the same object) has been extensively discussed and discarded. See ZARRA, "The Enforceability of Arbitral Awards Deriving from Intra-EU Investment Agreements: Reflections on Treaty Law Issues and on the EU's Unsustainable Position", DCI, 2018, p. 891 ff.; SAVARESE, "Intra-EU BITs, ECT and the EU Competence on FDI. *Greentech v. Italy* and the Tower of Babel", DCI, 2019, p. 323 ff. On the issue of the applicability of Art. 30 VCLT to dispute resolution clauses, see also *CMC Muratori Cementisti CMC di Ravenna Soc. Coop. et al. v. Mozambique*, ICSID Case No. ARB/17/23, Award of 24 October 2019, para. 223 ff. (Tribunal composed of John Townsend (President), Brian Casey and Peter Rees), where the Tribunal discussed the relationship between the arbitral clause contained in the 1998 Italy-Mozambique BIT and the arbitration mechanism of the 2000 Cotonou Convention.

[26] *United Utilities*, *cit. supra* note 5; *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on the Inapplicability of the Energy Charter Treaty to Intra-EU Disputes of 7 May 2019 (Tribunal composed of Jean Kalicki (President), Brigitte Stern and Guido Santiago Tawil); *Belenergia S.A. v. Italian Republic*, ICSID Case No. 15/40, Award of 6 August 2019 (Tribunal composed of Yves Derains (President), Bernard Hanotiau and Juan Carlos Fernandez Rozas); *Rockhopper Italia S.p.A. et al. v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on Intra-EU Jurisdictional Objection of 26 June 2019 (Tribunal composed of Klaus Reichert (President), Charles Poncet and Pierre-Marie Dupuy); *CEF Energia BV v. The Italian Republic*, SCC Arbitration V (2015/158), Award of 16 January 2019 (Tribunal composed of Klaus Sachs (President), Klaus Reichert and Giorgio Sacerdoti); *Magyar*, *cit. supra* note 17; *WA Investments-Europa Nova Limited v. Czech Republic*, PCA Case No. 2014-19, Award of 15 May 2019 (Tribunal composed of Hans van Houtte (President), John Beechey and Toby Landau); *Voltaic Network GMBH v. Czech Republic*, PCA Case No. 2014-20, Award of 15 May 2019 (Tribunal composed of Hans van Houtte (President), John Beechey and Toby Landau); *Photovoltaik Knopf Betriebs-Gmbh v. Czech Republic*, PCA Case No. 2014-21, Award of 15 May 2019 (Tribunal composed of Hans van Houtte (President), John Beechey and Toby Landau); *I.C.W. Europe Investment Limited v. Czech Republic*, PCA Case No. 2014-22, Award of 15 May 2019 (Tribunal composed of Hans van Houtte (President), John Beechey and Toby Landau); *9Ren Holding S.A.R.L. v. Spain*, ICSID Case No. ARB/15/15, Award of 31 May 2019 (Tribunal composed of Ian Binnie (President), David Haigh and VV Veeder); *BayWa r.e.Renewable Energy GMBH and BayWa r.e. Asset Holding GMBH v. Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019 (Tribunal composed of James Crawford (President), Horacio Grigera-Naon and Loretta Malintoppi); *Cube Infrastructure Fund SICAV and others v. Spain*, ICSID Case No. ARB/15/20, Award of 15 July 2019 (Tribunal composed of Vaughan Lowe (President), James Jacob Spiegelman and Christian Tomuschat); *Landesbank Baden-Wurttemberg et al. v. Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection of 25 February 2019 (Tribunal composed of Christopher Greenwood (President), Rodrigo Oreamuno and Charles Poncet); *NextEra Energy Global Holding BV and NextEra Energy Spain Holdings*

to argue in favor of the inarbitrability of intra-EU investment disputes and that, in this *crusade*, it is supported by the *Achmea* decision of the Court of Justice of the European Union[27] and by the Member States of the EU, which have, in two Declarations of 15 and 16 January 2019, affirmed that – pursuant to the *Achmea* Decision – intra-EU arbitral proceedings should be avoided and resulting awards should not be enforced.[28]

In this paper we will neither deal again with the treaty law issues raised by intra-EU investment disputes, nor further criticize the EU's unsustainable position, considering that these arguments have been the subject of analysis in previous issues of the IYIL.[29] For the sake of the present analysis, however, it is worth emphasizing again that the position assumed in arbitral case law and scholarship against the approach of EU institutions is fully justified by the necessity of avoiding a situation where the principle of primacy of EU law allows a complete overcoming of the applicable rules and principles of international law.

The awards issued in 2019 also contain some new arguments further explaining why intra-EU investment disputes are arbitrable. We will analyse them in this Section. We will also briefly deal with a very recent decision by the UK Supreme Court,[30] concerning the relationship of the ICSID Convention with EU Treaties and confirming that the latter do not have any abrogative effect on the former.

First of all, it is worth mentioning a passage of the *Eskosol* decision, where – arguing on the basis of the 2006 ILC Report on Fragmentation of International Law – the Tribunal brilliantly argued why the *Achmea* decision, which is part of EU law, does not bind an investment arbitration tribunal. Indeed, as the CJEU recognized in *van Gend en Loos*,[31] EU law is a *sui generis* legal order, which is

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BV v. Spain, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019 (Tribunal composed of Donald McRae (President), Yves Fortier and Laurence Boisson de Chazournes); *RWE Innogy GMBH and RWE Innogy Aersa SAU v. Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues on Quantum of 30 December 2019 (Tribunal composed of Samuel Wordsworth (President), Anna Joubin-Bret and Judd Kessler); *SolEs Badajoz GMBH v. Spain*, ICSID Case No. ARB/15/38, Award of 31 July 2019 (Tribunal composed of Joan Donoghue (President), Giorgio Sacerdoti and David Williams); *Stadtwerke Munchen GMBH et al v. Spain*, ICSID Case No. ARB/15/1, Award of 2 December 2019 (Tribunal composed of Jeswald Salacuse (President), Kaj Hober and Zachary Douglas). For the sake of this article, we also considered, due to the original solution the Tribunal reached, an award issued in 2020: *The PV Investors v. Spain*, PCA Case No. 2012-14, Final Award of 28 February 2020 (Tribunal composed of Gabrielle Kaufmann-Kohler (President), Charles Brower and Bernardo Sepulveda Amor).

[27] Case C-284/16, *Slowakische Republik v. Achmea BV*, Judgment of 6 March 2018, para. 33 ff.

[28] Declarations of the Member States of 15 and 16 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection, available at: <https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf>.

[29] Zarra, *cit. supra* n. 16; Zarra, "Investment Arbitration 2017: Towards Adulthood?", IYIL, 2017, p. 395 ff.

[30] *Micula and Others v. Romania*, Judgment of 19 February 2020, [2020] UKSC 5.

[31] Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Netherlands Internal Revenue Administration*, [1963] ECR 1, at Section B.

autonomous with respect both to the law of the Member States and to international law. The Tribunal then explained that "the international legal system is a general system without any central authority from whom the entire system flows. It is composed of different legal sub-systems which have independent life, even if at times there may be interactions between them".[32] The EU and the Energy Charter Treaty (ECT) are therefore two independent subsystems of international law in which different conclusions on the same issue may legitimately be reached. The different opinions of arbitration tribunals and EU organs on intra-EU investment arbitration

> creates a clear contradiction of positions. However, faced with such a contradiction, a tribunal situated on the international plane is not bound by the views adopted by the CJEU, i.e., within a regional sub-system of international law. As the ILC itself recognized in its 2006 Report on Fragmentation of International Law, when conflicts emerge between treaty provisions that have their home in different regimes, care should be taken so as to guarantee that any settlement is not dictated by organs exclusively linked with one or the other of the conflicting regimes. Nor can the notion of harmonious interpretation, while no doubt a desirable outcome […] be transformed into a principle that compels an international law tribunal to abandon an international law conflicts analysis in favor of a very different conflicts analysis derived from EU law.[33]

Regardless of the opinion that one may have on the idea of fragmentation of international law,[34] it is undeniable that this decision demonstrates – on the basis of the same arguments that the CJEU uses to demonstrate the special nature of EU law – that the EU position concerning intra-EU arbitration is simply indefensible.

Additionally, in *Landesbank*, it was noted that, in the past, the CJEU did not rule out the possibility of a court established by an international treaty (and thus rooted in public international law) being able to decide a dispute involving an EU Member State and the consideration of EU law. The reference applies to the tasks carried out by the European Court of Human Rights, in respect of which the Tribunal noted that, like in the case of arbitral tribunals constituted under the ECT,

> [t]he jurisdiction of the European Court of Human Rights covers all EU Member States (and many States outside the EU) and the European Court of Human Rights has held that an EU Member State may be held responsible for a violation of the European

[32] *Eskosol*, *cit. supra* note 26, para. 181.

[33] *Ibid*., para. 183.

[34] For a detailed analysis of this concept see GRADONI, *Regime failure nel diritto internazionale*, Padova, 2009.

> Convention on Human Rights even when that State is applying EU law. Moreover, in determining in such a case whether or not the respondent State has violated the European Convention on Human Rights, the European Court of Human Rights may well have to interpret EU law. For example, there appears to be no barrier to an investor from one EU Member State bringing a claim for expropriation against another EU Member State before the European Court of Human Rights as a complaint under Article 1 of the First Protocol to the Convention.[35]

This confirms that the position of the EU organs on intra-EU arbitration is based on a preconception and cannot be accepted on the basis of any legal argument.

It is also worth noting that, in five cases issued in 2019,[36] Arbitrators explained the irrelevance in investment cases of the Declarations of 15 and 16 January 2019. In these Declarations, Member States informed the investor community that no new intra-EU investment arbitration proceeding should be initiated and that intra-EU investment treaties will be terminated. Actually, the Tribunals correctly showed that these Declarations do not have any legal standing: they are expressed in indeterminate, aspirational words, i.e. they do not involve the assumption of any undertaking. Therefore, they cannot be considered as subsequent treaties[37] and do not establish or reflect subsequent practice in the application of existing investment treaties (such as the ECT).[38] Indeed, the Declarations do not actually purport to "interpret" any particular term of the underlying treaty.[39]

Closely related to the above is the argument introduced by respondent States according to which intra-EU awards in favour of investors shall not be enforced in Member States because they constitute illegal State aid. Various tribunals have clarified that the possibility that their awards may not be enforced in some States does not exempt them from the task of issuing a valid award which is potentially

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[35] *Landesbank*, *cit. supra* note 26, para. 152. On the other hand, it is necessary to distinguish between intra-EU arbitration cases and the *MOX Plant* arbitration. As noted in *Belenergia*, *cit. supra* note 26, para. 331, in this case "[t]he Commission brought infringement proceedings against Ireland for having instituted arbitration proceedings against the UK on the basis of Chapter VII of UNCLOS. Although the UNCLOS is a mixed agreement like the ECT, Article 282 UNCLOS provides that dispute settlement procedures under general, regional or bilateral agreements '*shall apply in lieu of the procedures provided for in this Part* [i.e. in UNCLOS]*, unless the parties to the dispute otherwise agree*'". This, differently from investor-State arbitration, clearly would have run against the exclusive competence of the CJEU in disputes between Member States.

[36] *SolEs*, *cit. supra* note 26, para. 253; *RWE*, *cit. supra* note 26, para. 372; *Magyar*, *cit. supra* note 17, para. 217 ff.; *Eskosol*, *cit. supra* note 26, para. 217 ff.; *Belenergia*, *cit. supra* note 26, para. 329 ff.

[37] *Eskosol*, *cit. supra* note 26, para. 219 ff.

[38] *SolEs*, *cit. supra* note 26, para. 253.

[39] *Eskosol*, *cit. supra* note 26, para. 222; *Magyar*, *cit. supra* note 17, paras. 217-218. On this subject see MAROTTI, "L'interpretazione autentica dei trattati in materia di investimenti", DCI, 2018, p. 651 ff.

enforceable.[40] In this regard, it is worth mentioning that, on 19 February 2020, the UK Supreme Court finally enforced the *Micula* ICSID Award,[41] explicitly recognizing that the obligation to enforce ICSID awards is a self-standing obligation which binds all the Parties of the 1965 Washington Convention and prevails over EU Treaties in accordance with the provision of Article 351 TFEU (according to which EU law does not impair the application of obligations assumed by Member States with third parties prior to the Member States' accession to the EU).[42]

In conclusion, it is worth noting that all these discussions have simply been avoided in four PCA cases against the Czech Republic, which were seated in Geneva, Switzerland. Indeed, considering that the seat of arbitration determines the procedural law governing the arbitration, and likely imposes procedural rules by which all parties must comply, the tribunal must be satisfied that

> all Parties to this arbitration have complied with all relevant legal requirements at the seat of the arbitration throughout the arbitral process, and that there is no issue with respect of its jurisdiction as far as its seat is concerned.[43]

For this reason, the Tribunal excluded that any analysis of EU law was necessary in order to determine the arbitrability of the dispute before it.

2.3. Dual nationals

An effort to engage in dialogue with customary international law was made by the *Ballantine v. Dominican Republic* Tribunal (and in Ms Cheek's dissenting opinion)[44] in relation to the concept of dual nationals. The dispute concerned a claim brought under the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) by two individuals who were both nationals of the US and of the Respondent State. In this regard, Article 10.28 of the DR-CAFTA states that "a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality". In order for the Tribunal to accept jurisdiction, therefore, it should have been ascertained that the dominant or effective nationality of the Claimants was US American.

Both the Tribunal and the dissenting arbitrator acknowledged that through the use of the phrase "dominant and effective nationality", the DR-CAFTA Parties adopted the customary international law standard for determining nationality of

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[40] *Eskosol*, *cit. supra* note 26, para. 233 ff.

[41] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013.

[42] *Micula*, *cit. supra* note 30, para. 84 ff.

[43] See, e.g., *Voltaic Network*, *cit. supra* note 26, para. 350.

[44] *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Award of 3 September 2019 (Tribunal composed of Ricardo Ramirez Hernandez (President), Marney Cheek and Raul Vinuesa).

dual citizens.[45] However, as set out in paragraph 530 of the Award, the Tribunal noted that it should only "take guidance from customary international law, taking into account Article 10.28 particular context, within DR-CAFTA general object and purpose". However, according to the dissenting Arbitrator, rather than merging the customary standard in the BIT context, the customary international law standard referenced in DR-CAFTA should be applied *tout court*, without altering that test in an investment treaty-specific context.

Moving to the content of customary international law, it is commonly said that the concept of dual nationality shall be construed according to what said by the ICJ in *Nottebohm* according to which: "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties".[46] A factual based case-by-case approach is therefore required of arbitral tribunals. The Majority and the dissenting arbitrator, however, were in disagreement on the time spectrum to be analysed. While the Majority – arguing that the DR-CAFTA looks at the concept of nationality for determining the foreign nature of investments – said that this should be the time in which the investment and the claim arose, Ms Cheek proposed a holistic approach and stated that "while dominant and effective nationality must be assessed on the date the claim arose and the date the claim was submitted for purposes of jurisdiction, *the relevant period of time for determining dominant and effective nationality on those dates is an individual's contacts over a lifetime*".[47] Consequently, while the Tribunal (looking at a more reduced period of time starting from 2010) recognized that in the present case the dominant nationality was Dominican, the dissenting arbitrator stated that an overall analysis of the Claimants' lives should have led the Tribunal to consider the Claimants as US nationals.[48]

Although current customary international law does not seem to offer any guidance on the issue at stake and both the solutions are in principle applicable to the dispute at hand, it seems that the Majority's approach is more compliant with the object and the purpose of the DR-CAFTA (aimed at regulating international investment) and therefore the solution reached in the Award is certainly to be welcomed.

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[45] See para. 529 of the Award and para. 3 of the Dissenting Opinion.

[46] *Nottebohm Case (second phase) (Lichtenstein v. Guatemala)*, Judgment of 6 April 1955, ICJ Reports, 1955, p. 4 ff., p. 23.

[47] Dissenting Opinion, para. 11.

[48] See para. 29 of the Dissenting Opinion, where it is said: "In this case, these two US nationals acquired a second nationality in 2010 in an effort to help their investments thrive. Under those circumstances, the second nationality does not become the dominant one by virtue of the investment-related motivations of the Claimants. Instead, the test for dominant and effective nationality remains a holistic one that focuses on the totality of one's personal, familial, economic, and civic ties over a lifetime. Under that test, both Lisa and Michael Ballantine are US nationals who qualified as US investors under the DR-CAFTA at the time of the alleged breach and at the time they submitted their claims against the Dominican Republic".

2.4. MFN clauses and jurisdiction

Another example of dialogue of investment arbitration with the outside world is the application that the Tribunal in *Doutremepuich v. Mauritius* made of the 2015 ILC Report on Most Favoured Nation Clauses. There is huge debate concerning the possibility of a tribunal extending a jurisdiction-conferring clause contained in one BIT to a claim under another BIT, on the basis of the MFN clause contained in the latter. Many tribunals examined the issue and reached very different outcomes.[49] In accordance with the ILC, the Tribunal in *Doutremepuich* explained that "the question is truly one of treaty interpretation that can be answered only in respect of each particular case" and that "there is no need for tribunals interpreting MFN provisions in BITs to engage in any enquiry into whether such provisions may in principle be applicable to dispute settlement provisions".[50] For this reason, trying to avoid any preconceived position on the matter, the Tribunal stated that it

> agrees with the general principle that consent to arbitrate must be clear and unequivocal and thus cannot be assumed but must be proven by claimants. However, the Tribunal sees no reason to deduce therefrom that an MFN clause must expressly refer to dispute resolution for those matters to be included. Indeed, when interpreting an MFN clause, as any other clause in a treaty, the Tribunal applies neither a restrictive nor an expansive but an even-handed approach.[51]

However, the Tribunal stated that MFN clauses may operate only between two treaty clauses regulating the same matter (*ejusdem generis* principle). As a consequence, through an MFN clause, it is possible to enlarge an arbitration clause in a treaty which does not refer to a form of arbitration that is accepted in another treaty. As the ILC in its 1978 Draft Articles on MFN clauses clearly explained "[u]nless this process is strictly confined to where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated"[52] and this would run against the idea that States are bound only to obligations that they expressly assume. In the present case, Article 9 of the 1978 France-Mauritius BIT did not contain any arbitration clause, but only a *pactum de contrahendo* that only allows French investors (or rather: France, as

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[49] An accurate analysis of the case law is present in LAMPO, "La clausola della nazione più favorita come strumento per l'estensione degli obblighi pattizi in materia di investimenti: il caso *Tatneft v. Ukraine*", Rivista dell'arbitrato, 2019, p. 555 ff.

[50] *Doutremepuich*, *cit. supra* note 19, para. 198, referring to the ILC 2015 Report, paras. 162-163.

[51] *Ibid.*, para. 204.

[52] Draft Articles on Most-Favoured-Nation Clauses with Commentaries, 1978, commentary to Articles 9 and 10, para. 11.

a Contracting State) to impose on the Respondent the inclusion of an arbitration clause in any investment contract it enters into with French nationals. For this reason, it was impossible for the investor to "borrow" the arbitration clause contained in another treaty without going against the *ejusdem generis* principle.[53]

2.5. Revision of jurisdiction by national courts

The idea that arbitrators are, as a matter of principle, sovereign in determining their jurisdiction is also confirmed by a recent domestic decision in which the Ontario Superior Court of Justice expressly stated that

> [g]iving effect to the *competence-competence* principle requires that parties to an arbitration, where jurisdiction is challenged, have strong incentives to bring forward, to the extent possible, all of their evidence at the hearing before the tribunal.[54]

In this case, the Canadian Judge refused to accept new evidence adduced by Russia in its application to the court for review of the arbitrators' decision on jurisdiction. The Judge stated that the possibility of introducing new evidence in such an application for review is acceptable only in very rare circumstances.[55] According to the Court, the admission of new evidence (and a revision of jurisdiction) was not possible because

> [i]n this case there has been a robust process with full opportunity to advance each side's evidence and arguments and to confront and challenge the evidence and arguments of the other side. Both parties were well represented by experienced counsel before an expert tribunal. There was a lengthy hearing. The fairness of that hearing is not in question. On the basis of that robust process, the tribunal rendered a lengthy and detailed decision.[56]

The Canadian Judge expressly distinguished the Canadian approach in reviewing arbitral awards from the English one, by saying that in Canada

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[53] Accordingly, see LAMPO, *cit. supra* note 49, p. 574, where it is said that the jurisdiction of arbitral tribunals shall be explicitly accepted by the contracting parties in the relevant BIT and is not enlargeable through the MFN clause.

[54] *The Russian Federation v. Luxtona Limited*, 2019 ONSC 4503, Decision of 23 October 2019, para. 60.

[55] These circumstances are (*ibid*., para. 69): 1) the evidence could not have been obtained using reasonable diligence; 2) the evidence would probably have an important influence on the case; 3) the evidence must be apparently credible; and 4) the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at the hearing, be expected to have affected the result.

[56] *Ibid*., para. 64.

> a true jurisdictional challenge […] is a review on correctness, without any deference, in which the court must come to its own conclusion on whether the tribunal had jurisdiction, but a 'review' nevertheless. This is a profoundly different approach from that propounded by the cases from the London Commercial Court, which generally describe the court's role on a challenge under s. 67 of the UK Arbitration Act as a trial *de novo*.[57]

Generally speaking, it is possible to say that – for reasons ranging from the desire to facilitate transnational transaction, to the need to reduce the number and the length of domestic proceedings – national courts are showing deference towards arbitrators and that the principle of *favor arbitrati* is now commonplace in several domestic systems of law.[58]

3. Interfaces in the Management of Proceedings: a Matter of Perceptions

The case law issued in 2019 contains relevant developments concerning arbitration procedure, which can be linked to the perceptions that the outside world has of arbitration as a valuable method of dispute settlement. On the one hand, tribunals have cared about ensuring the efficiency and transparency of their proceedings in order to answer certain criticisms that have been levelled against investment arbitration for a long time; on the other hand, States are making efforts aimed at reinforcing the perception that they do not obstruct the regular continuance of arbitration proceedings. We will analyse these two perspectives in turn.

3.1. Efficiency and transparency: arbitral tribunals' response to criticisms

3.1.1. Efficiency

Investment arbitration has been criticized for not being time and cost efficient. Lengthy and sometimes very expensive proceedings are not what the parties are looking for when choosing arbitration. In addition, it may happen that multiple cases arise from the same facts (think about the arbitrations that arose from the Spanish measures deleting the incentives for the production of renewable energies) and it is highly undesirable that several tribunals assessing the same facts reach different decisions.

A solution to this kind of problem is therefore required in order to raise the credibility of investment arbitration in public opinion and, relatedly, improve the perception of the efficiency of this method of dispute settlement.

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[57] *Ibid*., para. 58.

[58] Mayer, "The Second Look Doctrine: The European Perspective", American Review of International Arbitration, 2010, p. 201 ff.

Two valuable examples of efficient management of proceedings can be found in the 2019 case law.

In four claims brought against the Czech Republic,[59] in which the Claimants were represented by the same law-firm, the Parties agreed to appoint the same tribunal, which issued four very similar awards on the same day (15 May 2019) and also ordered the Claimants to pay the same amount of costs for the proceedings (aprox € 49,000). This is a valuable example of *quasi-consolidation*,[60] a technique to efficiently face the issue of parallel proceedings through the appointment of the same tribunal for parallel cases. This allows information relating to the various cases to be kept confidential, avoids the risk of conflicting outcomes (i.e. different decisions on the same facts), and reduces the costs of the proceedings, considering that the relevant set of facts shall be analysed only by one tribunal.

Another example of coordination of cases based on similar facts is given by two cases against Laos. These cases may be defined as parallel, considering that the Respondent in the two cases was the same and the two Claimants were companies of the same group and represented the same centre of interests; the disputes arose under different BITs but the issues to be decided were substantially identical. The Parties agreed to appoint the same Arbitrators, while the Presidents of the two Tribunals were different. However, recognizing the similarity of the issues to be decided, the two Tribunals decided – in agreement with the Parties – to arrange for joint hearings (mainly in Singapore).[61] The two parallel cases also ended with similar outcomes and the two Awards were issued on the same day.

Efficiency was also at the core of the discussions that took place in Procedural Order No. 3, issued in the *Rand v. Serbia* case.[62] The issue to be decided was a typical one for the initial phase of arbitrations: whether to take the opportunity to bifurcate proceedings in light of a jurisdictional objection. Usually, tribunals will make a prognostic evaluation of the chances of success of the objection and will consider it worthwhile to bifurcate whenever it is likely that the decision on jurisdiction will be negative and thus will be the end of the proceedings. The choice to bifurcate is, therefore, a decision on how to better preserve efficiency.[63] In the

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[59] *WA*, *cit. supra* note 26; *Voltaic Network*, *cit. supra* note 26; *Photovoltaik Knopf*, *cit. supra* note 26; *I.C.W. Europe Investment Limited*, *cit. supra* note 26.

[60] Zarra, *Parallel Proceedings in Investment Arbitration*, Torino/Den Haag, 2017, p. 84 ff.

[61] *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, Ad Hoc Arbitration registered at the PCA (and brought under the 1993 China-Laos BIT), Award of 6 August 2019, para. 66 (Tribunal composed of Andres Rigo Sureda (President), Bernard Hanotiau and Brigitte Stern); *Lao Holdings NV v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6 (case brought under the 2003 Netherlands-Laos BIT), Award of 6 August 2019, para. 68 (Tribunal composed of Ian Binnie (President), Bernard Hanotiau and Brigitte Stern).

[62] *Rand Investments Ltd. et al. v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3 of 24 June 2019 (Tribunal composed of Gabrielle Kaufmann-Kohler (President), Baiju Vasani and Marcelo Kohen).

[63] See *ibid*., para. 15, where it is said: "As a general matter, the Tribunal considers that it is good practice to deal with jurisdictional objections in a preliminary phase to avoid imposing full-fledged proceedings on a party who disputes having consented to arbitration, whenever bi-

present case, although the Tribunal found that the Respondent's objection did not appear frivolous, the Tribunal chose not to bifurcate because efficiency suggested that, due to the uncertain outcome of the objection, it was worth dealing with jurisdiction and the merits together. This also in light of the circumstance that the facts likely to be involved in determining the Respondent's jurisdictional objections appeared wide ranging and intertwined with the merits. The Tribunal, moreover, clarified that

> [i]n reaching this result, it has in particular taken into consideration that the Respondent would suffer no prejudice in light of the content of the objections and of their interaction with the merits, not to speak of the fact that any extra costs possibly incurred in vain could be compensated by way of an award of costs.[64]

However, the Procedural Order is accompanied by a strong Dissenting Opinion by Prof. Marcelo Kohen. This comes as a surprise given that – at least in the context of investment arbitration – dissenting opinions to procedural orders are very rarely issued. However, this dissenting opinion is a good opportunity for scholars to analyse in depth the reasoning behind a choice to bifurcate. According to Kohen, any jurisdictional objection should – in principle – be analysed separately and only in exceptional circumstances (i.e. when jurisdiction is inextricably linked to the merits) should the analysis of the two aspects be joined. It is the same rationale of preliminary objections to require treating them preliminarily[65] and, in Kohen's opinion, the ICJ offers the best practice in this regard.[66] In the Dissenter's words, the explanation for this approach is the following:

> Efficiency (I would prefer to use the expression '*procedural economy*') is not merely a question of cost and time. It is not an absolute criterion either. Alleged 'efficiency gains' cannot be imposed, and even less assumed – as is necessarily the case here –, against basic elements of a sound administration of justice. The discussion here is essentially an issue of jurisdiction: the general rule is that it cannot be required from a party to discuss the merits of an issue for which it has not given its consent. Procedural economy dictates that a court or tribunal deciding on preliminary objections first must do so *at the earliest opportunity*. Forcing the parties to argue and present their arguments on the merits (and even worse, also on quantum) to then reach the conclusion that the court or tribunal cannot decide on the merits is the very opposite of procedural economy. I do not consider here the argument of the potential psychological impact of

furcation may result in increased efficiency in terms of time and costs. By contrast, if the bifurcation is unlikely to produce efficiency gains, a tribunal should be disinclined to bifurcate".

[64] *Ibid*., para. 19.

[65] Dissenting Opinion, para. 6.

[66] *Ibid*., para. 4.

> having studied the entire merits of the case on a decision regarding jurisdiction.[67]

In other words:

> until it is not known whether the objections are accepted or not, it cannot be determined whether the bifurcation will have saved time and costs. It is obvious that if the objections are upheld and the case stops at that phase, there will be absolute 'efficiency' in terms of time and costs. If they are rejected or considered that they do not possess a preliminary character, then the proceeding will be, at different possible degrees, more time and cost consuming. This risk is always present in the scenario of a challenge to jurisdiction, all the more so (but not exclusively) at the international level.[68]

On the basis of the above considerations Kohen states that in this case it was appropriate to bifurcate due to the fact that there was not an inextricable link between the arguments to be treated at the jurisdictional phase and at the merits phase. This approach seems in principle the best suited to ensure efficiency of arbitration proceedings, but *in concreto* might become an instrument for parties in bad faith to delay the end of arbitrations. It is reasonable to admit that to solve a matter like this there is no preferable path and that only with hindsight is it possible to know which choice was the most appropriate.

3.1.2. Transparency

The alleged lack of transparency has traditionally been a crucial problem of investment arbitration. In an often-cited article by the New York Times, published in 2001, investment arbitration under NAFTA was described, in non-complimentary terms, as follows:

> Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged.[69]

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[67] *Ibid*., para. 7.

[68] *Ibid*., para. 8.

[69] "Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say", The New York Times, 11 March 2001, available at: <https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>.

As a matter of principle, it is for the parties to agree on the level of confidentiality they wish to attribute to their arbitration. Similarly, no arbitration award will be published without the consent of the parties. However, it is also generally accepted that arbitrations involving States or State entities are more or less public, or semi-public. Some of the cases even attract publicity outside the specialist arbitration journals. Indeed, awards are in the vast majority of cases public and available on the web.[70]

The issue of transparency has been recently debated in the *Rand v. Serbia* case,[71] where the Claimants, noting that the arbitration was initiated both under the Canada-Serbia BIT (by 5 Claimants out of 6) and under the Cyprus-Serbia BIT (by the sixth Claimant), observed that while the former treaty imposes certain transparency requirements, the latter is silent on the issue. In the circumstances, so said the Claimants, the arbitration should have been conducted in compliance with the transparency requirements of the Canada-Serbia BIT, the silence of the Cyprus-Serbia BIT not ruling out transparency. Other ICSID tribunals faced with similar circumstances had adopted the same approach. Considering that the facts and legal arguments supporting the claims brought under the Cyprus-Serbia BIT were partially coincident with those supporting the claims under the Canada-Serbia BIT, the Claimants said that it would have been "very difficult" if not "outright impossible" and "uneconomical" to separate from the rest of the case the few parts of the Parties' submissions on jurisdiction and merits that related exclusively to the claims under the Cyprus-Serbia BIT. The Respondent opposed the application of the transparency provisions of the Canada-Serbia BIT to the entire proceeding. It (surprisingly, considering that the Respondent should represent public interests) argued that, as the Cyprus-Serbia BIT contains no transparency rules, the ICSID Convention and the Arbitration Rules should have governed the case. Those instruments do not provide for a presumption of transparency and require, for instance, the consent of all disputing parties for the publication of the award.[72] It was the Claimants' choice to initiate this arbitration under two different treaties and they were then barred from insisting that one treaty trumps the other. In fact, the Respondent suggested the application of two different transparency regimes in the arbitration and – with regard to the sixth claim – it opposed the publication of the records of the proceedings (while it accepted the publication of the final award).

The Tribunal noted that

> [a]bsent an agreement between the disputing parties, matters of procedure are within the powers of the Tribunal pursuant to Article 44 of the ICSID Convention, and there is no doubt that issues of transparency and confidentiality are matters of procedure. The

[70] MISTELIS, "Confidentiality and Third Party Participation", Arbitration International, 2005, p. 211 ff.

[71] *Rand*, *cit. supra* note 62, Procedural Order No. 5 of 29 August 2019.

[72] Art. 48(5) of the ICSID Convention prohibits the publication of awards without the consent of the parties.

> Tribunal therefore has the power to determine whether to allow the disclosure of the record in respect of the claims brought under the Cyprus-Serbia BIT.[73]

For this reason, the arbitrators decided to allow such disclosure, considering that it would have been inefficient to have separate transcripts (and, consequently, pleadings) only for one Claimant out of six. This was also in light of the fact that the claims under the two BITs were strictly intertwined.

However, Prof. Kohen – again – issued a Dissenting Opinion against the Procedural Order. According to Prof. Kohen's reasoning, it is not possible to impose a certain conduct on States, considering that, while States are free to do whatever is not prohibited to them by international law, this reasoning does not apply to tribunals. Considering that arbitration is a private form of dispute resolution, the tribunal is not free to depart from the consent of the respondent in deciding on the publication of the records. In the absence of a rule of customary international law imposing transparency – and differently from some human rights regimes and the WTO, where transparency is the rule – this regime cannot be imposed on the respondent.[74]

To the Majority's consideration that matters of transparency regard procedure, Kohen replied:

> I strongly disagree. Confidentiality and transparency are not 'matters of procedure' for which Article 44 of the ICSID Convention would be applicable, thus leaving the Tribunal with entire freedom to decide […]. In my view, matters of procedure concern pleadings, evidence, time limits, form of decisions, but not the confidentiality and transparency of the procedure itself.[75] […] The path followed by the majority is a dangerous precedent of enlargement of the powers of ICSID arbitral tribunals beyond what has been agreed by the authors of the Convention. Even assuming that publicity would be a procedural issue and that there would be a lacuna, the Tribunal could not fill the gap by going beyond the basic framework of the applicable treaties and one of the foundations of its very existence: consent. If the relevant applicable BIT is silent, the rules of the ICSID Convention apply. And the ICSID Convention neither provides for the publicity of the records of the proceedings without the consent of the parties, nor authorises the tribunals to decide so.[76]

Kohen argued that it would have been bizarre if the ICSID Convention requires the consent of the parties for the publication of awards but not of the records. While he is aware of the need for transparency in investment arbitra-

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[73] *Rand*, *cit. supra* note 62, para. 27.
[74] Dissenting Opinion, para. 4.
[75] *Ibid*., para. 6.
[76] *Ibid*., para. 8.

tion, his argument is that "the Tribunal cannot decide *sub specie legis ferendae*" (paragraph 11) and substitute its views on transparency for the views of one of the Parties.

It is very complicated to take a position on this matter. While the Majority's reasoning appears convincing from the point of view of the correct and efficient management of the proceedings, a strictly formal view of the existing law regulating the matter points towards Prof. Kohen's view. However, after careful reflection, it seems that the Majority's view is certainly the more appropriate: given that Serbia accepted the publication of the entire final award, it would seem absurd not to publish the records of part of the proceedings. Had Serbia requested to split the proceedings and to keep entirely confidential the one under the Cyprus-Serbia BIT, Prof. Kohen's opinion would have been more sustainable but – in light of the actual facts – the Majority's approach is certainly to be welcomed, also in light of the strong policy concerns in favour of transparency in arbitration.

3.2. States' pro arbitration attitude: Reinforcing the perception of favor arbitrati

As already said, States are eager to give the perception that their legal systems are pro-arbitration. This helps a State to attract proceedings to its local arbitral institutions and increases the trust of the market in a certain legal system. *Favor arbitrati*, discussed above, is an attitude which certainly is determined by the desire of States to be perceived as pro-arbitration seats.

India – which until the recent past was perceived as not being a jurisdiction particularly favourable to arbitration – is certainly making significant efforts in this direction. In *Union of India v. Khaitan Holdings (Mauritius)*,[77] the State (acting as Plaintiff in domestic proceedings) applied to the High Court of Delhi for an injunction restraining the Defendants (who were Claimants in related arbitration proceedings) or any other person purporting to act for and on their behalf from continuing any further with the arbitration proceedings titled *Khaitan Holdings Limited (Mauritius) v. Republic of India* (PCA Case No. 2018-50). Recognizing the already mentioned *kompetenz-kompetenz* principle, the Indian Court stated that it would have been inappropriate to obstruct the prosecution of arbitral proceedings. The Court, hence, refused to do so by saying that

> [a]n assurance given under any BIT signed by the Republic of India constitutes a solemn promise by the country for being a destination for safe foreign investment. The BIT provides for obligations and remedies which are not dependent on any other statutes or laws. The BIT is self-contained and is primarily governed by principles of public international law. […] *Interference with the BIT dispute resolution mechanism in the case of a genuine investor dispute could*

[77] High Court of Delhi at New Delhi, Decision of 29 January 2019.

> *lead to erosion of investor confidence and also dislodge the fundamental precincts on which BITs are based*.[78] (emphasis added)

It is self-evident that the decision is driven by a clear policy objective: giving the perception that India is a pro-arbitration seat and that – differently from the past[79] – private parties should not be worried about the arbitrary interference of Indian courts with arbitration proceedings. This is certainly a development to be welcomed.

4. Different Interpretations of Similar Rules at the Merits Phase: a Matter of Perceptions (Again)

Needless to say, when deciding a case, arbitrators also care about the effects that the decision on the merits will generate in the relevant community. This elementary truth will never be part of a tribunal's reasoning but, nevertheless, a careful reader will always be able to understand the policy choices which determine the outcome of cases. Looking at awards from this perspective, it is easier to understand why in relation to similar matters tribunals often reach very different results.

We will test the above opinion through two case studies: the protection of legitimate expectations and the approach to corruption.

4.1. Legitimate expectations

It has clearly and correctly been demonstrated that the protection of legitimate expectations is a general principle that has specific relevance in the area of international investment law as it is one of the prongs that constitute the fair and equitable treatment of foreign investment.[80] It has also been shown that the general idea upon which such a protection rests is that a State may generate a *legitimate* expectation when it *induces* investors to act in a certain manner through its promises and/or representations.[81] Nevertheless, there is still debate between tribunals on when an expectation is legitimate and – surprisingly enough – some tribunals have reached different outcomes when presented with exactly the same set of facts.

The case of investment arbitrations brought against Spain under the ECT after the withdrawal of incentives for investments in renewable energies is significant in this regard. It is well-known that – with the aim of attracting foreign

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[78] *Ibid*., para. 23.

[79] Lew, Mistelis and Kroll, *Comparative International Commercial Arbitration*, Den Haag, 2003, p. 364, note that Indian and Pakistani courts were in the past particularly prone to grant anti-arbitration injunctions.

[80] Palombino, *cit. supra* note 16, p. 85 ff.

[81] *Ibid*., p. 113 ff.

investments in this field – Spain enacted an advantageous legal regime. In particular, through several statements and assurances, as well as certain legislative acts (mainly Royal Decree 661/2007), Spain tried to incentivise companies to invest heavily in the Spanish electricity sector promising a favourable regime for the duration of a plant's lifetime (20 years). To avoid repeating a very well-known pattern of events, suffice it to say that, after the 2008 economic crisis, this regime was gradually dismantled. Many arbitrations were, therefore, started. However, while a great number of tribunals found that the commitment from Spain could not have been clearer and that this was a clear case of generating legitimate expectations, leading to a declaration of full responsibility on the part of the Respondent;[82] others found that Spain only granted a "reasonable rate of return" to investors and therefore proportionally limited the damages to be paid by the Respondent State.[83] One Tribunal, however, found that Spain did not guarantee to set its legal framework in stone and had the Claimant carried out an appropriate due diligence it would have realized that no legitimate expectation existed.[84] The claim was entirely rejected.

The last Award clearly goes against the wording of the relevant legislative acts and completely deprives the principle of legitimate expectations of its meaning; it seems driven by an excessive tendency to accommodate State reasons and shall be, therefore, rejected. The other two approaches, on the contrary, are both fully sustainable on the basis of the wording of Spanish laws. The former is probably more compliant with a formal view of such wording, while the latter is more balanced and compliant with an overall assessment of the claims. Certainly, the latter approach – as a matter of perceptions – may be better accepted by both businessmen and respondent States.

4.2. Corruption: zero tolerance or eyes shut approach?

There is unanimity among scholars on the necessity to fight corruption, considered to be "more odious than theft",[85] as "one of the most heinous crimes of global proportion"[86] and something which "crushes the potential benefits of free market forces",[87] as well as "raising serious moral and political concerns, under-

[82] See the cases against Spain mentioned *supra* note 26, except those mentioned *infra* notes 83 and 84.

[83] *PV*, *cit. supra* note 26, para. 587 ff. (but see the Dissenting Opinion by Charles Brower on this point); see also the Dissenting Opinion by Tomuschat in *Cube*, *cit. supra* note 26.

[84] *Stadtwerke*, *cit. supra* note 26, para. 281 ff.

[85] NAPPERT, "Nailing Corruption: Thoughts for a Gardener. A Comment on World Duty Free Company Ltd. v. the Republic of Kenya", Transnational Dispute Management, 2013, p. 1 ff.

[86] *World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award of 4 October 2006, para. 173.

[87] POPE, "Corruption in Africa: The Role for Transparency International", Commonwealth Law Bulletin, 1994, p. 1470 ff.

mining good governance and economic development, and distort[ing] international competitive condition".[88]

However, with regard to the ways in which corruption should concretely be tackled, two approaches have emerged.[89] According to the first of them, the so-called "zero-tolerance approach", all claims arising from corruption have no legal standing and shall be entirely rejected. Such an approach is based on the existence of a widespread consensus against corruption and on the assumption according to which *ex iniuria jus non oritur* (so-called clean hands doctrine), viz. he who has committed an offence cannot ask for justice in relation to such an offence. Secondly, but not less importantly, this approach recognizes that arbitrators carry out a public function and cannot allow investment arbitration to become a shelter for corrupt practices. The burden of proof for proving corruption shall be the ordinary one, i.e. the "preponderance of evidence".[90]

The second possible approach to deal with corruption issues in investment arbitration, called the "eyes-shut" approach, provides for a more permissive attitude. Starting from the idea that arbitrators should "reconcile both [their] loyalty towards the parties and [their] adherence to the international legal order",[91] scholars endorsing this approach think that if arbitral tribunals deprive the investors' claim of its legal standing once corruption is ascertained, States could avoid fulfilling their investment obligations by proving that there has been corruption, notwithstanding the circumstance that a State official took part in the corrupt scheme and the fact that the State has nonetheless got certain advantages from the investment. It would therefore be unfair to let only the investors pay the costs of corruption.[92] For this reason, "clear and convincing evidence" is necessary to prove corruption.

Corruption has been the subject of four decisions in 2019 and the approach applied to this issue was not universal.

In *Niko Resources et al. v. Bangladesh*, while the Tribunal said that it was not comfortable with any of the abovementioned standards of proof and opted for a non-formalistic approach, it said that in corruption matters a heightened standard of proof was nonetheless appropriate.[93] Contrariwise, in *Glencore and Prodeco v. Colombia*, the Tribunal perceived no reason to depart from the tradi-

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[88] SINLAPAPIROMSUK, "The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?", Transnational Dispute Management, 2013, p. 1 ff.

[89] ZARRA, "Corruption in International Investment Arbitration: In Defence of the 'Zero Tolerance' Approach", DCI, 2017, p. 1037 ff.

[90] CRIVELLARO, "The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption", Transnational Dispute Management, 2013, p. 21 ff.

[91] FORTIER, "Arbitrators, Corruption and the Poetic Experience: 'When Power Corrupts, Poetry Cleanses'", Arbitration International, 2015, p. 369 ff.

[92] RAESCHKE-KESSLER and GOTTWALD, "Corruption in Foreign Investment – Contracts and Dispute Settlement between Investors, States and Agents", Journal of World Investment & Trade, 2008, p. 16 ff.

[93] ICSID Cases No. ARB/10/11 and ARB/10/18, Decision on the Corruption Claim of 25 February 2019, para. 804 ff. (Tribunal composed of Michael Schneider (President), Campbell McLachlan and Jan Paulsson).

tional standard of preponderance of the evidence, since neither the Treaty nor the ICSID Arbitration Rules impose a different standard.[94] Finally, in *Sanum*[95] and *Lao Holdings*,[96] the joint Tribunals – after having clarified that the prohibition of corruption (as recognized in the 2005 UN Convention Against Corruption) today constitutes a customary rule – tried to apply both the abovementioned standards and to reach a solution that was justified under both of them. While this approach seems not entirely convincing (the two standards being substantially incompatible), the Tribunals' approach is notable in applying the doctrine of estoppel to corruption. Having applied the preponderance of evidence approach and concluded that the Claimants had paid bribes, the Tribunal nonetheless refused to declare the claim inadmissible because the Respondent State – which knew about the bribery – failed to investigate and prosecute (on the domestic level) persons who had allegedly accepted bribes. For this reason, it was estopped from raising this defence in the arbitration.[97]

Concluding on this point, it is obvious that the *Sanum* and *Lao Holdings* Tribunals' approach was influenced by the willingness to accommodate the opinions of the supporters of both the abovementioned approaches; this intention was also present in *Niko*, where – nevertheless – the Tribunal showed a preference for the eyes-shut approach, which is the approach most appreciated by businessmen. Contrariwise, in *Glencore*, the Tribunal seems not to have cared about the existing debate and opted for the zero tolerance approach, certainly preferred by scholarship and States.

5. The Interface at the Enforcement Stage

As already noted in this paper, an accurate analysis of the relationship between investment arbitration and the outside world necessarily involves reading domestic court decisions on requests for annulment of (non-ICSID) investment awards.[98]

Preliminarily, it is interesting to note that the enforcement of certain awards against Venezuela in US Courts has become the subject of a political clash between the Maduro and Guaidó governments, both of them claiming to be the legitimate representative of the Venezuelan population. On 23 January 2019, Trump's government recognized Juan Guaidó's Presidency as the legitimate one. However, recently, representatives of President Maduro claimed to be the legitimate representatives of Venezuela in US Courts proceedings. The matter

[94] ICSID Case No. ARB/16/6, Award of 27 August 2019, para. 669 (Tribunal composed of Juan Fernandez-Armesto (President), Oscar Garibaldi and Christopher Thomas).

[95] *Cit. supra* note 61, paras. 103 and 138.

[96] *Ibid*., paras. 105 and 161-162.

[97] *Sanum*, *cit. supra* note 61, para. 109; *Lao Holdings*, *cit. supra* note 61, para. 111.

[98] As is well-known, ICSID is a self-contained regime in which it is possible to challenge an award only through the annulment mechanism set forth in Art. 52 of the Convention. State courts' involvement can only take place when execution is materially requested and, according to Art. 55, domestic judges may rule on State immunity from execution.

was analysed in *Rusoro v. Venezuela* by the Court of Appeals for the District of Columbia Circuit,[99] where, following well-established case law, it was stated that "what government is to be regarded here as representative of a foreign state is a political rather than a judicial question, and is to be determined by the political department of the government". Therefore, the executive branch's action in recognizing a foreign government is conclusive on all domestic courts, which are bound to accept that determination. A similar decision was reached in *OI European Group v. Venezuela*.[100] In *Crystallex v. Venezuela*, the Court of Appeals for the Third Circuit, while following the existing case law, showed a certain disappointment with it. The Court held that "[a]s a practical matter, there is reason to believe that Guaidó's regime does not have meaningful control over Venezuela or its principal instrumentalities";[101] for this reason it seems that the Court would have been inclined to recognize Maduro's Government as the legitimate one. The latter approach certainly better complies with the requirements for the existence of an effective government in international law,[102] but the conclusion reached by all the courts was foreseeable, given the significant political weight that a contrary outcome would have carried.

Apart from the above, certain enforcement proceedings are noteworthy for the pro-arbitration stance assumed by domestic courts. In this regard, it is worth highlighting that the requests for either annulling or not enforcing international awards resulting from investment disputes have – to the knowledge of this author – all been refused.[103]

Among these decisions, in the present paper it is worth spending some words on *PL Holdings v. Poland*,[104] where the SVEA Court of Appeal (Sweden) had to consider whether an intra-EU investment award was in violation of EU public

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[99] Order of 1 May 2019, USCA Case #18-7044, Doc. No. 1785518.

[100] District Court of Columbia, Civil Action No. 16-1533 (ABJ), Memorandum Opinion of 21 May 2019, paras. 16-17.

[101] D.C. Civil Action No. 1-17-mc-00151, Opinion of 29 July 2019, page 11, fn. 2.

[102] Palombino, *Introduzione al diritto internazionale*, Roma/Bari, 2019, p. 5 ff.

[103] Cour d'Appel de Paris, *Oxus Gold Plc. v. Uzbekistan*, Decision of 14 May 2019. It is also worth referring to the *Kazakistan v. Stati* saga: French-speaking court of First Instance, Brussels, Civil Section, *Kazakistan v. Anatolie Stati et al.*, Case 18/1312./A, Decision of 20 December 2019; Luxembourg Superior Court of Justice, Judgment No. 133/19 of 19 December 2019; Decision of the Nacka District Court (Nacka tingsrätt) of 5 July 2019, Case No. Ä 6686-17; Decision of Amsterdam Court of Appeal of 7 May 2019, Case No. 200.234.096/01 KG; US Court of Appeals for the District of Columbia Circuit, Judgment of 19 April 2019, Case No. 18-7047. Finally, in *Eiser Infrastructure Ltd v. Kingdom of Spain*, [2020] FCA 157, the Federal Court of Australia, Spain objected that a State could not be involved in domestic proceedings due to its immunity from jurisdiction. The Court rejected the objection by expressly distinguishing immunity from jurisdiction (regarding the arbitral proceedings) and immunity from execution (which regards the State's assets and is the only argument available to States pursuant to ICSID proceedings according to Art. 55 of the Convention). Finally, in Paris Court of Appeal, *Russia v. JSC*, Decision of 19 February 2019, No. RG 19/04161, the State challenged a PCA award by saying that its enforcement (jointly with the other awards in which Russia was found liable) would have imposed too heavy an economic burden on the State. The Court, however, refused this argument.

[104] Para. 5.2.4 ff.

policy (as incorporated in Swedish law) in light of the already mentioned *Achmea* ruling. The Swedish judge noted that

> the CJEU distinguished between what the court refers to as commercial arbitration based on the party autonomy, and a mechanism for resolving disputes between Member States where an investor in a Member State may initiate arbitral proceedings against another Member State before an arbitral tribunal whose jurisdiction that Member State is obligated to accept [i.e. arbitration arising from BITs]. The Court of Appeal has already noted that this does not prevent Member States, in individual cases, from entering into an arbitration agreement with an investor, i.e. based on an expression of party autonomy.

As the dispute at hand was a contractual case, no violation of Swedish *ordre public* took place. The decision is certainly correct and it seems that Swedish judges took advantage of one of the several inaccuracies contained in *Achmea*, i.e. the ban on investment arbitrations arising from BITs but not on those arising from contracts.

In conclusion, all the above shows that it is possible to affirm that arbitral tribunals and domestic courts are working towards an *efficacious interaction*, which is certainly to be welcomed in the interests of an efficient and correct administration of justice.

6. Conclusions

This paper analysed the 2019 case law (both arbitral and domestic) related to international investments in an attempt to identify the reasons behind arbitrators' choices. The contention of the paper is that, while sometimes tribunals completely disregard the effects of their *dicta* on other areas of law, in other cases arbitrators are significantly influenced by concerns regarding the impact of their decisions on the outside world, as well as by the perceptions generated by arbitral awards in public opinion.

This argument was demonstrated through the analysis of decisions taken by arbitrators in the various phases of proceedings, i.e. jurisdiction, procedure and merits. 2019 awards demonstrate that, while at the jurisdictional phase of proceedings tribunals try to be as autonomous as possible and to isolate their decision making from external influences, the approach in deciding matters of procedure and merits is the opposite.

The other side of the coin is represented by States' domestic court decisions regarding the relationship of domestic court proceedings with investment arbitrations. In this regard, it has been demonstrated that national courts usually assume a pro-arbitration stance and avoid interfering with the regular prosecution of arbitral proceedings. This approach has generated an *efficacious interaction* that will certainly benefit the efficacious administration of justice.