European Investment Law and Arbitration Review

Published under the auspices of Queen Mary University of London and EFILA

VOLUME 5 (2020)

Edited by

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BRILL
NIJHOFF

LEIDEN | BOSTON

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CHAPTER 20

The Proliferation of Courts and Tribunals: Navigating Multiple Proceedings – 5th EFILA Annual Lecture 2019

*Laurence Boisson de Chazournes**

Abstract

Recognising that the settlement of international disputes has always been and continues to be characterised by its plurality, this lecture explores the different ways to achieve a coordinated dispute resolution process, with particular reference to investment disputes. Some of these means come into play at the time of the referral to the courts, thus preventing a situation of multiple proceedings from occurring. Others operate downstream of the referral, in order to coordinate the multiple proceedings arising from the same dispute. The lecture then concludes with an examination of the legal foundations underlying the use of these means.

1 Introduction

In this lecture given on the occasion of the 5th EFILA Annual Lecture, I would like to address a topic on which Nikos Lavranos wrote forward-looking publications at a time when few people were writing on the matter.[1] Nowadays, it is often the case that the same dispute or different aspects of the same dispute may give rise to different proceedings in different fora, be they international or national. While this plurality is not always negative, it does carry certain risks. This lecture aims to assess the many ways of navigating the sometimes turbulent waters of multiple proceedings arising from the multiplication of courts and tribunals.

* Professor of International Law at the University of Geneva. The author wishes to thank Guillaume Guez for his invaluable assistance in the preparation of this contribution.

1 *See,* e.g., N Lavranos, *On the Need to Regulate Competing Jurisdictions between International Courts and Tribunals* (Europa Law Publishing 2009); *idem,* 'Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals' [2005] 14 European Energy and Environmental Law Review 213.

 | DOI:10.1163/24689017_021

2 A Settlement of International Disputes Characterised by Its Plurality

The settlement of international disputes has always been characterised by its plurality.[2] This first resulted in the multiplication of means of dispute resolution. In the early 19th century, the possibility of resolving a dispute through arbitration gained traction. Therefore, negotiations were supplemented by the possibility of recourse to a third party adjudicator. Plurality then took on another expression at the beginning of the 20th century with the multiplication of international adjudicative mechanisms.[3] As a result, the same dispute, or different aspects of the same dispute, could be submitted to different courts or tribunals.

Let me take the case of *Nationality Decrees Issued in Tunis and Morocco* as an example to illustrate this latter point. Following the adoption by France of new nationality decrees for the Protectorates of Tunis and Morocco, the British Government opposed their application to British subjects and requested that the question be submitted to arbitration. France objected, stressing that nationality issues were matters that, under international law, fell exclusively within national jurisdiction.[4] France having refused to submit the dispute to arbitration, Great Britain then referred the matter to the Council of the League of Nations. Discussions were held and the parties agreed on a course of action. A request for an advisory opinion was made to the Permanent Court of International Justice (PCIJ) to determine whether or not the dispute between Great Britain and France was solely a matter of domestic jurisdiction. If the answer was negative, the case was then to be submitted to arbitration or any other judicial settlement agreed to by the parties.[5] As the Court noted, its role was limited to giving "an opinion upon the nature and not upon the merits of the dispute", which may be the subject of a subsequent decision by another judicial body.[6]

2 L Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' [2017] 28 European Journal of International Law 13.

3 In the present contribution, I consider permanent, non-permanent and *ad hoc* means of resolving international disputes. Despite some differences, the common characteristics, values and principles that permeate arbitration and permanent tribunals are evident.

4 PCIJ *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion of 7 February 1923, PCIJ Series B No 4, 7, at 11–21 <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_B/B_04/Decrets_de_nationalite_promulgues_en_Tunisie_et_au_Maroc_Avis_consultatif_1.pdf> accessed on 10 January 2020.

5 *Ibid.*, at 8.

6 *Ibid.,* at 22. The Court eventually decided that the dispute referred was not, by international law, solely a matter of domestic jurisdiction.

In other words, several judicial bodies could have been called upon to entertain different parts of a dispute. Today, this phenomenon can be found in various areas of international law, including international investment law. This is the case in this area for a variety of reasons.

First, several instruments may apply to the same situation, each with its own dispute resolution mechanism. Illustrative of this are the recent cases concerning the gas pipeline linking Russia to Germany via the Baltic Sea. Following amendments to the Gas Directive by the European Commission,[7] *Nord Stream 2*, a purposely established Swiss company, decided to initiate proceedings before the Court of Justice of the European Union. In parallel, it initiated other proceedings under the Energy Charter Treaty.[8]

Second, international investment instruments often afford protection to both direct and indirect investors, so that several entities within the same corporate structure can be protected investors for the same investment. Consequently, each entity in the chain may potentially seek to challenge the same measures taken by the host State and claim compensation for the same damage. This has happened in the well-known cases of *Lauder* v. *Czech Republic* and *CME* v. *Czech Republic*, in which the company and the majority owner of the company sought similar relief under the US-Czechoslovakia BIT and the Netherlands-Czechoslovakia BIT.[9] Likewise, in the recent cases of *Orascom TMT* v. *Algeria* and *Orascom Telecom* v. *Algeria*, two companies complained of the same measures taken by Algeria.[10] As their name suggests, these companies

7 Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas [2019] OJEU L 117/1.

8 *See*, D Charlotin, 'Russian-backed project investor, Nord Stream 2, files arbitration against European Union under the Energy Charter Treaty', IA Reporter, 26 September 2019 <https://www.iareporter.com/Arts/russian-backed-project-investor-nord-stream-2-files-arbitration-against-european-union-under-the-energy-charter-treaty/> accessed on 10 January 2020.

9 *Ronald S. Lauder* v. *The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, <https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf> accessed on 10 January 2020; *CME Czech Republic B.V.* v. *The Czech Republic*, UNCITRAL, Final Award, 14 March 2003 <https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf> accessed on 10 January 2020.

10 *Orascom TMT Investments S.à r.l.* v. *People's Democratic Republic of Algeria*, ICSID Case No ARB/12/35, Final Award, 31 May 2017 <https://www.italaw.com/sites/default/files/case-documents/italaw8973.pdf> accessed on 10 January 2020; *Orascom Telelcom Holding* v. *Algeria*, UNCITRAL, Settlement Agreement, 18 April 2014 <https://www.iareporter.com/Arts/resolution-of-algerian-telecoms-battle-quells-uncitral-arbitration-but-icsid-claim-by-former-owner-of-djezzy-will-continue/> accessed on 10 January 2020.

were not only quasi-homonymous; they formed a vertically integrated chain of companies.[11]

This potential for multiple claims does not only concern proceedings before international courts. Domestic proceedings are also part of this phenomenon. Accordingly, it is not uncommon to see domestic and international proceedings being held in parallel. Traces of this parallel can be found from the beginning of the 20th Century in the case law of mixed arbitral tribunals. For instance, as early as 1922, the Franco-Bulgarian mixed arbitral tribunal received a request either to delay criminal proceedings pending before a Bulgarian court or to stay the proceedings before it.[12] Once more, while concurrent international and domestic proceedings can be observed in many areas of international law, international investment law seems particularly likely to give rise to this phenomenon. This may be explained by various reasons.

First, it is quite common for an investment to be formalised in the form of a contract, for example a concession contract, which contains its own jurisdictional clause referring disputes arising from its application to the domestic courts of the host State. At the same time, a bilateral investment treaty provides its own forum, often in the form of an arbitral tribunal. This results in competing jurisdictional clauses that may be triggered with respect to the same or related issues.

Secondly, it is not unusual for a bilateral investment treaty to refer to domestic court proceedings, either as an alternative to the arbitral tribunal or as a preliminary remedy that must be used for a certain period of time before the arbitral proceedings can be initiated.

Finally, it is increasingly frequent for a State to claim that the investment has been tainted with some form of illegality. In response to this illegality, the State might have initiated criminal proceedings against the investor and a number of related third parties. These proceedings are not suspended or discontinued by the submission to arbitration. Rather, they generally continue at the same time as the arbitral proceedings.

In short, the same dispute, or different aspects of the same dispute may give rise to a variety of proceedings in different fora, whether international or domestic. The purpose of this lecture is not to reject *en bloc* the existence of multiple venues. Rather, it is to examine the legal tools available to mitigate the risks associated with this plurality of proceedings. Risks do indeed exist and

11 *Orascom TMT Investments S.à r.l.* v. *People's Democratic Republic of Algeria* (n 10) para 542.

12 Franco-Bulgarian Mixed Arbitral Tribunal *Battus* v. *Bulgarian State*, 11 February 1922 [1922] 1 Recueil des Décisions des Tribunaux Arbitraux Mixtes Institues par les Traites de Paix 791.

they are varied. The multiplicity of proceedings can lead to contradictory decisions. It also has a cost, which can be misused by one of the parties. Another risk identified is that of double recovery. At times, this multiplicity can even affect the very integrity of one of the proceedings. This is why it is important to assess the tools to avoid these risks.

With these preliminary remarks, we are now ready to cast off. But for which destination? For that of a coordinated settlement of disputes. There are several ways to reach that objective. Some are more systemic than others. One systemic example is the draft Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, which would ensure the exclusivity of European law and its settlement methods in the field of investment law.[13] Other means are more procedural in nature. They will be the focus of this lecture.

3 Reaching a Coordinated Dispute Resolution Process

Just as a carpenter can choose between different tools to craft a cabinet, depending on its size and the type and quality of wood available, there is a whole set of legal tools to coordinate the multiple procedures that can arise from the same dispute. Some are devised by courts, others are established by States. Despite their variety, these coordinating tools lead to essentially the same result, namely that the tribunal seized declines its jurisdiction or stays its proceedings in favour of another court.

These tools offer two intervention times. Some of them come into play at the time of the referral to the courts, thus preventing a situation of multiple proceedings from occurring. Others operate downstream of the referral, in order to coordinate the multiple proceedings arising from the same dispute.

That being said, let me start with the tools that come into play when it is decided that a case is going to court. They are intended to avoid duplication of proceedings from the outset.

13 *See*, D Charlotin, 'Revealed: previously-unseen draft text of EU termination treaty reveals how intra-EU BITs – and sunset clauses – are to be terminated; treaty also creates EU law-focused facilitation process designed to settle pending BIT claims', IA Reporter, 4 November 2019 <https://www.iareporter.com/Arts/revealed-previously-unseen-draft-text-of-eu-termination-treaty-reveals-how-intra-eu-bits-and-sunset-clauses-are-to-be-terminated-treaty-also-creates-eu-law-focused-facilitation-p/> accessed on 10 January 2020.

3.1 *Choosing a Forum ab Initio*

This set of tools is provided by the text of the instruments containing dispute settlement mechanisms. They involve making a choice between the different means of dispute resolution proposed. Once the choice has been made, it is normally no longer possible to resort to the other means. I say normally because some treaties permit an investor to reconsider her choice if she withdraws the proceedings already initiated.[14] This exception aside, once made, the election is deemed to be final to the exclusion of the other. Accordingly, the second court seized of the same dispute must decline jurisdiction.

In practice, these tools take the form of fork-in-the-road provisions and election clauses. The fork-in-the-road rule "refers to an option, expressed as a right to choose irrevocably between different jurisdictional systems".[15] It provides for a choice between local remedies in domestic courts and international arbitration. An example is Article 10(2) of the BIT between Albania and Greece, which reads as follows:

> 2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party, or to an international arbitration tribunal.[16]

In order for a fork-in-the-road clause to preclude claims from being entertained, arbitral tribunals have applied a three-fold identity test, namely that "a claim with the same object, parties and cause of action, is already brought

14 Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands, 26 November 2001, Article X(2): "An investor may decide to submit a dispute to a competent domestic court. In case a legal dispute concerning an investment in the territory of the People's Republic of China has been submitted to a competent domestic court, this dispute may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from the domestic court. If a dispute concerns an investment in the territory of the Kingdom of the Netherlands an investor may choose to submit a dispute to international dispute settlement at any time."

15 *M.C.I. Power Group* v. *Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007, para 181 <https://www.italaw.com/sites/default/files/case-documents/ita0500.pdf> accessed on 10 January 2020.

16 Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments, 1 August 1991, Article X(2).

before a different judicial forum".[17] In applying this test, however, arbitral tribunals have often given a strict interpretation to the criterion of the identity of the cause of action. As a result, they have routinely ruled that contractual claims were legally distinct from treaty claims and that, therefore, the fork-in-the-road provision did not apply.[18] One may wonder whether it would not be appropriate to soften this interpretation somewhat to better accommodate these situations. What would matter is whether the fundamental basis of a claim sought to be submitted to the international forum is autonomous of claims to be heard elsewhere. In other words, it must be determined "whether the claim truly does have an autonomous existence outside the contract".[19] If not, the fork-in-the-road clause applies.

Over time, these fork-in-the-road provisions have been enriched. In investment law, in addition to the requirement to choose between different jurisdictional systems, a second generation of treaties has added the obligation for the foreign investor and any local operating company to waive the right to submit or continue the same dispute elsewhere. Article 1121 of NAFTA, which has been incorporated as it stands in the United States-Mexico-Canada Agreement (also known as USMCA), is a case in point. It provides that:

> 1. A disputing investor may submit a claim under Article 1116 to arbitration only if: [...]
>
> (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 [...][20]

17 *Toto Construzioni Generali S.p.A.* v. *Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, para 211 <https://www.italaw.com/sites/default/files/case-documents/ita0869.pdf> accessed on 10 January 2020.

18 *Ibid.*, para 212.

19 *Pantechniki S.A. Contractors & Engineers* (*Greece*) v. *The Republic of Albania*, ICSID Case No ARB/07/21, Award, 28 July 2009, paras 61, 64 <https://www.italaw.com/sites/default/files/case-documents/ita0618.pdf> accessed on 10 January 2020.

20 North American Free Trade Agreement between Canada, The United States and Mexico (NAFTA), 17 December 1992, Chapter Eleven, Article 1121: Conditions Precedent to Submission of a Claim to Arbitration; *see* also Agreement between the United States of America, the United Mexican States, and Canada (USMCA), 30 November 2018, Chapter Fourteen, Annex 14-D: Mexico-United States Investment Disputes, Article 14.D.5: Conditions and Limitations on Consent.

A third generation of treaties, to which the latest agreements concluded by the European Union belong, extended this prohibition on parallel claims to direct and indirect shareholders where the loss suffered is the same. In this regard, Chapter XIX of the EU-Mexico modernised Global Agreement requires all persons who, directly or indirectly, have an ownership interest in or are controlled by the investor or local operating company, to withdraw or discontinue existing proceedings.[21]

As these different generations of treaties show, the fork-in-the-road clause has been adapted to the new realities that have arisen. As noted earlier, the requirement for the identity of the parties has been expanded to include the multiple levels of the corporate structure. This clause is therefore an essential tool for managing the risk of multiple proceedings.

Operating on the same principle is the election clause. Also known by its Latin nickname of *electa una via*, this clause also assists in ordering, *ab initio*, the multiplicity of proceedings. It is designed to bar multiple litigation in the same legal order. In practice, the claimant is offered a right to choose between different fora of the same jurisdictional system. Once made, the choice is irrevocable. An example of an *electa una via* rule can be found in the trade area, in Article 31.3 of the USMCA (formerly NAFTA Article 2005). In the event of a substantially equivalent obligation between the USMCA and another agreement such as the WTO, the complaining party may select the forum in which to settle the dispute. Once selected, the forum is used to the exclusion of any other.[22]

Such a provision seems to be complementary to the fork-in-the-road clause discussed directly above. In fact, there is a tendency to group these two distinct clauses into a single choice of forum clause. This form of provision requires a choice not only between national and international systems, but also between different international fora.

This exclusive remedy rule finds one of its oldest manifestations in Article 26 of ICSID, which provides that:

21 EU-Mexico modernised Global Agreement (EU-MX MGA), 21 April 2018, Chapter XIX, Article 6; *see* also EU-Vietnam Investment Protection Agreement (EU-VN IPA), 30 June 2019, Chapter III, Article 3.34; EU-Singapore Investment Protection Agreement (EU-SG IPA), 15 October 2018, Chapter III, Article 3.7; EU-Canada Comprehensive Economic and Trade Agreement (CETA), 30 October 2016, Chapter VIII, Article 8.22.

22 USMCA, Chapter Thirty-one, Dispute Settlement, Article 31.3: Choice of Forum; *see* also NAFTA, Chapter Twenty, Article 2005: GATT Dispute Settlement; EU-Vietnam Free Trade Agreement, 30 June 2019, Chapter XV, Article 15.24; CETA, Chapter VIII, Article 29.3.

> [c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.[23]

It has been regularly used by arbitral tribunals to bar parties from bringing related claims before national courts.[24] It also applies in the case of parallel international arbitrations. For instance, in *Ampal-American* v. *Egypt*, the Tribunal found that an abuse of process had crystallised because of the pursuit of the same claims in two arbitral proceedings. On the basis of Article 26, the Tribunal offered the claimant the possibility to elect the forum where it wished to pursue its claims, which it did within the prescribed time limits.[25] As a result, there was no longer any overlap between the two arbitrations. In short, Article 26 prevents parties who have consented to ICSID proceedings from resorting to any other forum, whether national or international.

Similarly, the EU-Mexico modernised Global Agreement, to which I have already referred, specifies that the claimant may only resort to international arbitration if she "withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law".[26] In other words, the claimant chooses to resort to international arbitration to the exclusion of domestic courts and other international fora.

In summary, there is a series of tools that allow the claimant to choose *ab initio* a forum to the exclusion of others. Although these tools can prevent multiple proceedings, there are still situations that can fall through the cracks. This is where a second set of tools comes into play to coordinate the multiple proceedings arising from the same dispute.

3.2 *Coordinating Multiple Proceedings*

To return to our carpentry metaphor used earlier in this lecture, now that the raw cabinet is crafted, the question arises of the finishing touches to get to

23 ICSID Convention (1965), Article 26 <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf> accessed on 10 January 2020.

24 *See*, e.g., *Ceskoslovenska Obchodni Banka, A.S.* v. *The Slovak Republic*, ICSID Case No ARB/97/4, Procedural Order No 3, 5 November 1998, at p. 2 <https://www.italaw.com/sites/default/files/case-documents/italaw8820.pdf> accessed on 10 January 2020.

25 *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Jurisdiction, 1 February 2016, paras 335–339 <https://www.italaw.com/sites/default/files/case-documents/italaw7310.pdf> accessed on 10 January 2020; Decision on Liability and Heads of Loss, 21 February 2017, paras 11–23 <https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf> accessed on 10 January 2020.

26 EU-MX MGA, Chapter XIX, Article 6.

the final product. Again, the carpenter has different tools and materials at her disposal depending on the type of wood or her preferences. The same goes for the coordination of proceedings. In order to achieve a coordinated settlement of disputes, there are different tools whose application will depend on the circumstances.

3.2.1 Step 1: A Referral in Good Faith?

First, it is necessary for a court to establish whether the referral is in good faith or simply serves as a pretext to evade obligations and frustrate the rights of the other party. In its various forms, this *bona fide* requirement can provide a means of sanctioning any party who abuses the multitude of options at its disposal. This was emphasized by an arbitral tribunal in *Transglobal Green Energy LLC and Transglobal Green Panama S.A.* v. *Republic of Panama* when it upheld Panama's objection to jurisdiction "on the ground of abuse by Claimants of the investment treaty system by attempting to create artificial international jurisdiction over a pre-existing domestic dispute".[27]

Among the many forms that the principle of good faith can take is the doctrine of estoppel. Such a doctrine has, for example, been argued in the trade area. In *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, Argentina argued that "Brazil [was] estopped from pursuing the present WTO dispute settlement proceedings", due to the previous challenge of the measures through MERCOSUR.[28] The panel dismissed the objection, holding that the conditions for the application of estoppel were not met. In particular, it could not find "a clear and unambiguous statement" by Brazil that it "would not subsequently resort to WTO dispute settlement proceedings".[29]

Although the principle of estoppel was not applied in the case, this example is indicative of the role it can play in ordering multiple proceedings. The form of estoppel is not the only one that the principle of good faith can take.

Another facet of good faith is the possibility for a tribunal to dismiss claims that are frivolous or vexatious. A frivolous claim is a claim that is "without legal basis or value", "not serious" or "without reasonable cause".[30] Such a possibility is sometimes included directly in the constitutive instrument. This is the case

27 *Transglobal Green Energy LLC and Transglobal Green Panama S.A.* v. *Republic of Panama*, ICSID Case No ARB/13/28, Award, 2 June 2016, para. 118 <https://www.italaw.com/sites/default/files/case-documents/italaw7336.pdf> accessed on 10 January 2020.

28 WTO *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil – Report of the Panel*, Report of the Panel, 22 April 2003, WT/DS241/R, para 7.37.

29 *Ibid.*, para 7.38.

30 B A Garner (ed.), *Black's Law Dictionary*, 8th edn (Thomson West 2004), at 692.

with recent investment treaties concluded by the European Union. For example, Article 8.32 of CETA allows the Tribunal to dismiss at the outset a claim that is manifestly without legal merit.[31]

Sometimes this possibility is not provided for in the constitutive instrument, or the text is silent on the possibility for a tribunal to determine *proprio motu* whether the claim is frivolous. Yet, this should not prevent it from recognising such a power.

As Sir Gerald Fitzmaurice pointed out when speaking of the International Court of Justice:

> [t]he absence of any corresponding 'filter' procedures in the Court's jurisdictional field makes it necessary to regard a right to take similar action, on similar grounds, as being part of the inherent powers or jurisdiction of the Court as an international tribunal.[32]

The same conclusion should be drawn for investment courts and tribunals. They must be able to dismiss *proprio motu* a frivolous or vexatious claim, especially in the context of multiple proceedings.

Last but not least, the *bona fide* requirement may also be expressed in the form of anti-circumvention clauses. These clauses are intended to prevent an investor from bringing a claim when she has acquired an investment for this sole purpose. In this regard, Article 16 of the EU-Mexico modernised Global Agreement establishes that the Tribunal shall decline jurisdiction if the dispute existed or was highly foreseeable at the time the claimant acquired the investment and the main purpose of the acquisition was to submit a claim.[33]

In the absence of such clauses, a similar result can be achieved by means of the doctrine of abuse of rights. This manifestation of the principle of good faith has indeed been used by investment tribunals to reject what has been termed "an abusive manipulation of the system of international investment protection under the ICSID convention and the BIT s".[34] Apart from anti-circumvention,

31 CETA, Chapter VIII, Article 8.32; *see* also EU-MX MGA, Chapter XIX, Article 17; EU-VN IPA, Chapter III, Article 3.44; EU-SG IPA, Chapter III, Article 3.14; ICSID Convention Arbitration Rules, 2006, Rule 41(5).

32 ICJ, *Northern Cameroons* (*Cameroon* v. *UK*), Preliminary Objections, Separate Opinion of Judge Fitzmaurice, ICJ Rep 1963, 97, at 106–107.

33 EU-MX MGA, Chapter XIX, Article 16; *see* also EU-Vietnam Investment Protection Agreement, not yet in force, Chapter III, Article 3.43.

34 *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc.* v. *Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision

abuse of rights can also be used to reject frivolous claims or to sanction the duplication of proceedings at different levels of the vertical corporate chain in relation to the same investment, the same measures and the same harm. Such use was made in the above-mentioned *Orascom TMT* v. *Algeria* case. In this case, as a reminder, the Tribunal was confronted with a claimant who had invoked the protection offered by Algeria's various bilateral investment treaties at various levels of the corporate chain. The Tribunal concluded that such conduct constituted "an abuse of the investment protection system" and consequently declared the claim inadmissible.[35] In particular, it explained that "if the protection is sought at one level of the vertical chain", then it is not necessary to allow "other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm inflicted on the investment".[36]

This first step ensures that the court or tribunal is seized in good faith and not for improper purposes. If this is the case, the tribunal can then proceed to a second step, namely the existence of a preclusion of its action.

3.2.2 Step 2: Is the Tribunal Precluded from Acting?

There are mainly two situations where a tribunal will be precluded from acting: in the event of *res judicata* and in the event of proceedings already brought before another court with concurrent jurisdiction.

The first situation occurs when a claim has already been litigated. The decision is then *res judicata* and cannot be reopened if the subsequent proceedings concern the same object, legal grounds and parties.[37] This principle is intended to ensure finality and certainty in the resolution of disputes.[38] It has its

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on Jurisdiction, 10 June 2010, para 205 <https://www.italaw.com/sites/default/files/case-documents/ita0538.pdf> accessed on 10 January 2020; see also *Philip Morris Asia Limited* v. *The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, paras 538–554 <https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf> accessed on 10 January 2020.

35 *Orascom TMT Investments S.à r.l.* v. *People's Democratic Republic of Algeria* (n 10) paras. 539–545.

36 *Ibid.*, para 543.

37 PCIJ *Interpretation of Judgments Nos. 7& 8 Concerning the Case of the Factory at Chorzow,* Dissenting Opinion of Judge Anzilotti, PCIJ Series A No 13, 23 <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_13/44_Interpretation_des_Arrets_No_7_et_8_Usine_de_Chorzow_Opinion_Anzilotti.pdf> accessed on 10 January 2020.

38 *See*, e.g., ICJ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (*Nicaragua* v. *Colombia*), Preliminary Objections, Judgment of 17 March 2016, ICJ Rep 2016, 100, at 125–126, para 58 <https://www.icj-cij.org/files/case-related/154/154-20160317-JUD-01-00-EN.pdf> accessed on 10 January 2020; ICJ *Request for Interpretation of the Judgment of 11 June 1998 in the Case*

origin in national systems and has been transposed into the international legal order. Regarded as a general principle of law,[39] *res judicata* has been invoked and applied on some occasions in international interstate proceedings.[40]

In the field of investment, its application is less common. While there are some cases where the doctrine has been applied,[41] it is mainly its non-application that prevails. The reason? A triple identity test that is not met. This was the case, for example, in *Lauder* v. *Czech Republic* and CME v. *Czech Republic*. There, the principle of *res judicata* was discarded on the grounds of a very formalistic application of the triple identity test. In particular, the tribunal found that the parties were different, as were the bilateral investment treaties on which they relied.[42] But that leaves aside the relationship between the two applicants (one is the majority shareholder of the other) and the relatively similar wording of the two treaties.

In the end, this formalistic interpretation seems inadequate. It also appears to play into the plaintiff's litigation strategies. A more relaxed interpretation of the criteria could allow for greater use of this principle. So, in addition to the parties to the dispute, the identity of the parties could include the parties with which they stand in privity. This was acknowledged in *Apotex Inc.* v. *United*

Concerning the Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon* v. *Nigeria*), Preliminary Objections, Judgment of 25 March 1999, ICJ Rep 1999, 31, at 36, para 12 <https://www.icj-cij.org/files/case-related/101/101-19990325-JUD-01-00-EN.pdf> accessed on 10 January 2020.

39 ICJ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, ICJ Rep 1954, 47, at 53 <https://www.icj-cij.org/files/case-related/21/021-19540713-ADV-01-00-EN.pdf> accessed on 10 January 2020; B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1994), at 336; H Lauterpacht, *The Development of International Law by the International Court* (CUP 1982), at 19, 325–326.

40 *See*, e.g., PCA *Pious Fund of the Californians* (*U.S.A* v. *Mexico*), 14 October 1902 <https://pcacases.com/web/sendAttach/498> accessed on 10 January 2020; CJEU Cases C-358/85 and C-51/86, *France* v. *Parliament*, [1988] ECR 4821; Court of Arbitration, *Delimitation of the Continental Shelf* (*U.K.* v. *France*), Decision of 14 March 1978, 18 UNRIAA 271 <https://legal.un.org/docs/?path=../riaa/cases/vol_Xviii/3–413.pdf&lang=O> accessed on 10 January 2020.

41 *See* e.g., *Amco Asia Corporation and others* v. *Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, 10 May 1988, paras 47–98: there, the Tribunal had to determine which of the findings of the first tribunal is and is not *res judicata* following the Ad Hoc Committee's decision <https://www.italaw.com/sites/default/files/case-documents/italaw6357_0.pdf> accessed on 10 January 2020; IUSCT *The United States of America* v. *The Islamic Republic of Iran,* Case No A33, Award of 9 September 2004, para 28.

42 CME *Czech Republic B.V.* v. *The Czech Republic* (n 9) paras 432–436.

States of America, where the Tribunal ruled that Apotex-Holdings was bound by the Apotex I and II awards as a "privy" to the plaintiff in these cases.[43]

With regard to the requirement of identity of legal grounds, tribunals should not be satisfied with a mere formal change. In this regard, the tribunal in *RSM* v. *Grenada* disregarded the change in the legal grounds. It considered that, although the current arbitration is treaty-based rather than contract-based as in the first arbitration, "the present case is no more than an attempt to re-litigate and overturn the findings of another ICSID tribunal, based on allegations of corruption that were either known at the time or which ought to have been raised by way of a revision application".[44] It concluded by dismissing the claims as manifestly without legal merit.[45]

In the same vein, more attention could be paid to the rule of issue estoppel. This variant of *res judicata* does not require an identity of object. It applies when a point of law or fact has been definitively established by a court and the same point arises in a later dispute between the same parties. As a result, the subsequent court cannot determine that issue anew.[46]

The second situation in which a tribunal may be precluded from acting is where the same dispute is pending before another court. This situation, also known as *lis pendens*, requires the combination of three elements. First, the parties must be the same. Second, the cause of action should be identical. And third, the object of the dispute must coincide.

Like its *res judicata* counterpart, the *lis pendens* rule seems to suffer from a relatively scarce and chaotic practice. On occasion, its very existence is questioned. For instance, the tribunal in *SPP* v. *Egypt* stated that "[w]hen the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction".[47] In most cases, it is the strict application of

43 *Apotex Holdings Inc. and Apotex Inc.* v. *United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, paras 7.37–7.40 <https://www.italaw.com/sites/default/files/case-documents/italaw3324.pdf> accessed on 10 January 2020; *see* also, *RSM Production Corporation and others* v. *Grenada*, ICSID Case No ARB/10/6, Award, 10 December 2010, paras 7.1.4-7.1.7 <https://www.italaw.com/sites/default/files/case-documents/ita0726.pdf> accessed on 10 January 2020.

44 *RSM Production Corporation and others* v. *Grenada* (n 43) para 7.3.6.

45 *Ibid.*, para 9.1.(a).

46 *See* e.g., *Diag Human Se* v. *The Czech Republic* [2014] EWHC 1639, paras 62–63. In that judgment, Justice Eder found that he was precluded from pronouncing on the binding nature of an arbitral award since the issue had already been decided by the Supreme Court of Austria in an earlier decision.

47 *Southern Pacific Properties* (*Middle East*) *Limited, Southern Pacific Properties Limited* v. *The Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction, 27 November

the triple identity test that results in its dismissal. For instance, in *Benvenuti and Bonfant* v. *Congo*, one of the first ICSID cases to face pending parallel proceedings, the tribunal rejected the *lis pendens* objection on the ground that the identity test was not met.[48] Similarly, in the well-known cases of *Lauder* v. *Czech Republic* and *CME* v. *Czech Republic*, both tribunals dismissed the application of *lis pendens* on the basis of different parties and different causes of action.[49]

All these dismissals call into question the appropriateness of the triple identity test. It appears that it is difficult, if not impossible, to comply with it. A change would appear to be useful. A more flexible attitude could be adopted regarding the criteria of identity of the parties and the cause of action. With regard to the identity of the parties, a more realistic approach could reflect the economic reality. This was done, for example, in *Dow Chemical France, The Dow Chemical Company and others* v. *ISOVER Saint Gobain*, where the Tribunal ruled that:

> irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality of which the arbitral tribunal should take account when it rules on its own jurisdiction.[50]

In other words, as with the evolution of the fork-in-the-road clauses, *lis pendens* should apply to a wider array of parties, ranging from related parent and

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1985 [1995] 3 ICSID Reports 112, at 129, para 84; *see* also *American Bottle Company* (*U.S.A.*) v. *United Mexican States*, 2 April 1929, 4 UNRIAA 435, at 437 <https://legal.un.org/docs/?path=../riaa/cases/vol_IV/435–439.pdf&lang=E> accessed on 10 January 2020; *Certain German Interests in Polish Upper Silesia,* Merits, Judgment of 25 August 1925, PCIJ Series A No 6, 4, at 20 <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_06/16_Interets_allemands_en_Haute_Silesie_polonaise_Competence_Arret.pdf> accessed on 10 January 2020.

48 *S.A.R.L. Benvenuti and Bonfant* v. *People's Republic of the Congo*, ICSID Case No ARB/77/2, Award of 8 August 1980, para 1.14 [1982] 21 International Legal Materials 740, at 744; see also *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID Case No ARB/01, Decision on Objections to Jurisdiction, 6 August 2003, para 182 <https://www.italaw.com/sites/default/files/case-documents/ita0779.pdf> accessed on 10 January 2020.

49 *Ronald S. Lauder* v. *The Czech Republic* (n 9) paras 171–175; *CME Czech Republic B.V.* v. *The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, paras 409–412 <https://www.italaw.com/sites/default/files/case-documents/ita0178.pdf> accessed on 10 January 2020.

50 *Dow Chemical France, The Dow Chemical Company and others* v. *ISOVER Saint Gobain*, ICC Case No 4131, Interim Award of 23 September 1982 [1984] 9 Yearbook Commercial Arbitration 131, at 136.

subsidiary companies to direct and indirect shareholders. What matters is the substantial identity of the parties.

As for the identity of the cause of action, a more lenient approach would permit the replacement of the standard of a strict identity by that of a substantially equivalent cause. As rightly noted, "it would thus appear sensible to regard identically or similarly worded provisions in different BITs as identical grounds".[51]

These changes would restore some vigour to the rule of *lis pendens*. Its potential as a principle for ordering multiple proceedings must not be discounted because of the overly strict application to which it is currently subject. It only requires some minor alterations to cope with the new international environment.

3.2.3 Step 3: Time for Active Cooperation

That said, the tribunal may find itself in a situation where it is not precluded from acting by *res judicata* or *lis pendens*. In this case, a third and final step begins. It consists of active cooperation between the different courts and tribunals. This last step is essentially discretionary. It is based on the judges' awareness of their place in the jurisdictional fabric and the ensuing need for coordinated action.

In this respect, the application of considerations of comity is a striking example. This is not a norm regulating jurisdictional overlaps between courts and tribunals, but only a consideration that the judge may apply at her discretion to determine whether or not to exercise jurisdiction. This consideration comes into play when it appears that proceedings exist before another court and that it may have an impact on the resolution of the claim.

For instance, with regard to the two cases submitted before the WTO DSB and UNCLOS concerning swordfish in the South-Eastern Pacific Ocean,[52] the then President of the International Tribunal for the Law of the Sea (ITLOS) stressed that:

51 A Reinisch, 'The Issues Raised by Parallel Proceedings and Possible Solutions', in M Waibel et al. (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business 2010), at 122.

52 ITLOS *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (*Chile/European Union*), ITLOS Case No 7; WTO *Chile – Measures Affecting the Transit and Importation of Swordfish*, WT/DS/193.

> [j]udicial comity among courts and tribunals should encourage them to cooperate and to act rigorously within their own jurisdictional powers.[53]

Similarly, in *Eureko* v. *The Slovak Republic*, the question arose as to the impact of the infringement case before the European institutions on the arbitral proceedings established under a BIT. The arbitral tribunal found that the impact was minimal and therefore did not involve the application of comity. Nevertheless, it was prepared to reconsider the question should the situation change.[54]

A further example is Article 8.24 of CETA. What is interesting about this article is that it removes the discretionary nature of the consideration of comity. Indeed, should another claim have a significant impact on the settlement of the CETA claim, then the Tribunal must stay its proceedings or ensure that the other proceedings is considered in its decision.[55]

In short, the purpose of comity is to take into account the consequences that a decision to be made in one forum may have on the decision to be rendered in the other. Close to it, and sometimes even confused with it, the principle of *connexité* (related actions) applies when there is a risk that the same question be decided in a contradictory manner by different judicial fora. Essentially, this principle is intended to avoid decisions that could be irreconcilable. It results in the suspension of the proceedings in one of the two courts until the decision is rendered in the other forum.

A telling example is the conciliation between Timor-Leste and Australia. In that case, Australia requested the Conciliation Commission to suspend the proceedings pending a decision by an arbitral tribunal on the validity of the Timor Sea Treaty. In doing so, it stressed the risk that the two institutions

53 ITLOS Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, at 9 <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_291007_eng.pdf> accessed on 10 January 2020.

54 *Eureko* v. *The Slovak Republic*, UNCITRAL, PCA Case no. 2008–13, Award on Jurisdiction, Admissibility and Suspension, 26 October 2010, paras 286–292 <https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf> accessed on 10 January 2020.

55 CETA, Chapter VIII, Article 8.24: "Where a claim is brought pursuant to this Section and another international agreement and: (a) there is a potential for overlapping compensation; or / (b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section, the Tribunal shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award." *See* also, EU-MX MGA, Chapter XIX, Article 8; EU-VN IPA, Chapter III, Article 3.34.

might reach conflicting decisions on this issue. Yet, the Commission rejected the objection, arguing that the question of the validity of the Treaty was not part of its mandate and that any risk of conflicting decisions was therefore excluded.[56] Interestingly, the Commission also enquired whether another specific legal issue was under consideration in the arbitral proceedings. In the light of the negative answer, it concluded that there was "no question on which the two proceedings could come to contradictory results".[57] Accordingly, the principle of *connexité* did not apply and the Commission declined to suspend its proceedings.

In yet other cases, rather than sequencing the proceedings, it may be proper to examine and decide them at the same time. Consolidation of proceedings is available when the claims are linked in one way or another. It results in the combination of the different proceedings, or parts thereof, into one.

Such a tool was adopted very early in practice. It can be traced back to the first cases of the PCIJ.[58] Since then, this tool has been enshrined in a large number of instruments establishing international courts and tribunals. However, this incorporation was not done in a uniform manner. Depending on the instruments, the condition of connection was expressed differently.[59] In the

56 *In the Matter of a Conciliation before a Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, PCA Case No 2016-10, Decision on Australia's Objections to Competence, 19 September 2016, paras 88–89 <https://pcacases.com/web/sendAttach/1921> accessed on 10 January 2020; *see* also *MOX Plant Case* (*Ireland* v. *United Kingdom*), PCA Case No. 2002-01, Order No 3 on Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, paras. 21–28 <https://pcacases.com/web/sendAttach/867> accessed on 10 January 2020.

57 *In the Matter of a Conciliation before a Conciliation Commission Constituted under Annex V* (n 56) para. 89.

58 *See* with regard to PCIJ *Certain German Interests in Polish Upper Silesia,* PCIJ Series E, Annual Reports No 2 (June 15th 1925–June 15th 1926) 109–110 <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_E/English/E_02_en.pdf> accessed on 10 January 2020; PCIJ *Legal Status of the South-Eastern Territory of Greenland*, Order of 2 August 1932, PCIJ Series A/B No 48, 268, at 269–270 <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_AB/AB_48/01_Groenland_ordonnance_19320802.pdf> accessed on 10 January 2020.

59 Compare, for instance, Article 47 of the ICJ Rules (1978), which does not contain any condition of connection to Article 1126(2) of NAFTA, which requires "a question of law or fact in common". In other cases, the connection is defined as concerning the same subject matter. *See*, in this regard, Article 54(1) of the Rules of Procedure of the Court of Justice of the European Union. For a detailed account, *see* G Kaufmann-Kohler, L Boisson de Chazournes, V Bonnin and M M Mbengue, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations

field of investment, the possibility of consolidation has long been absent from investment treaties. The absence of provisions in the ICSID Convention and the ICSID Arbitration Rules speaks for itself. That said, the situation is changing. Consolidation is now present in almost all recent investment treaties.[60]

However, there is a difficulty, if not specific to the investment field, at least strongly present in it. In many cases, investments are fragmented into different instruments, each with its own dispute settlement clause. While this has not prevented some tribunals from consolidating claims on certain occasions, such as when arbitration clauses are identical or compatible,[61] the issue is quite different when each clause refers to a different arbitral institution. This raises the question of cross-institution consolidation. It has gained traction in commercial arbitration. The Singapore International Arbitration Centre proposed in 2017 a protocol permitting the cross-institution consolidation of arbitral proceedings subject to different institutional arbitration rules.[62] In the same vein, the ICC Court President called for greater cooperation between arbitral institutions.[63] It would be important for a similar step to be taken in investment arbitration, particularly in the context of the current reform process.

Finally, cooperation among courts can take a more informal dimension. In particular, the courts can coordinate by adapting the time limits for submitting pleadings or the requirement of confidentiality. For example, in the case of *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, the Annex VII arbitral tribunal granted extensions in the filing of written pleadings to allow the parties to take into account the ITLOS judgment also

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Be Handled Efficiently? Final Report on the Geneva Colloquium held on 22 April 2006' [2006] 21 ICSID Review – Foreign Investment Law Journal 59, at 85–86.

60 USMCA, Chapter Fourteen, Annex 14-D: Mexico-United States Investment Disputes, Article 12: Consolidation, *see* also NAFTA, Chapter Eleven, Article 1126: Consolidation; EU-MX MGA, Chapter XIX, Article 28; *see* also EU-VN IPA, Chapter III, Article 3.59; EU-SG IPA, Chapter III, Article 3.24; CETA, Chapter VIII, Article 8.43.

61 *See*, e.g., *Cambodia Power Company* v. *Kingdom of Cambodia*, ICSID Case No ARB/09/18, Decision on Jurisdiction, 22 March 2011, para 162 <https://www.italaw.com/sites/default/files/case-documents/italaw6345.pdf> accessed on 10 January 2020; *see* also *China International Economic and Trade Arbitration Commission*, Arbitration Rules (2015), Article 19(1)(c) <http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en> accessed on 10 January 2020.

62 *See,* SIAC, 'Proposal on Cross-Institution Consolidation Protocol', 19 December 2017 <http://www.siac.org.sg/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol> accessed on 10 January 2020.

63 *See*, Atlanta International Arbitration Society's Hendrix Lecture by ICC Court President Alexis Mourre, 6 March 2018, quoted in A Ross, 'Mourre calls for institutions to join forces', Global Arbitration Review, 9 March 2018 <https://globalarbitrationreview.com/article/1166513/mourre-calls-for-institutions-to-join-forces> accessed on 10 January 2020.

concerning the Bay of Bengal.[64] Likewise, in the *Arbitration under the Timor Sea Treaty*, the Tribunal lifted the obligation of confidentiality imposed by Article 26(5) of the Rules of Procedure "insofar as is required for either Party to submit copies of correspondence, pleadings, and transcripts relating to this arbitration in the proceedings initiated by Timor-Leste before the International Court of Justice".[65]

In another example of cooperation, an arbitral tribunal ordered the sharing of documents and records between an LCIA and an ICSID proceedings. With few exceptions, all documents in the ICSID proceedings were to be disclosed on an ongoing basis to the LCIA arbitral tribunal and to the parties, and vice versa.[66]

4 The Legal Foundations Underlying the Use of the Tools

We are reaching the end of our journey. There remains, however, one final question: how can a tribunal use the tools just described?

Obviously, it is first necessary to consider whether the treaties establishing the courts and tribunals expressly provide for tools organising their relations with other courts and tribunals. As we have seen, while some tools are often found in the constitutive instruments, others are rarely mentioned. In the absence of any express provision, a tribunal must then resort to other means. This includes the principle of *compétence de la compétence* and the exercise of inherent powers.

The principle of *compétence de la compétence* refers to the power of an international court or tribunal to determine, either *ex officio* or in the event of a dispute, whether or not it has jurisdiction to decide a dispute on the merits or to take any other act of jurisdiction.[67] This principle has two components, namely, the "jurisdiction over jurisdiction" and the "jurisdiction over

64 *Bay of Bengal Maritime Boundary Arbitration* (*Bangladesh* v. *India*), PCA Case no. 2010–16, Award, 7 July 2014, paras 27–36 <https://pcacases.com/web/sendAttach/383> accessed on 10 January 2020.

65 *Arbitration under the Timor Sea Treaty* (*Timor-Leste* v. *Australia*), Procedural Order No. 2 (Waiver of Confidentiality Requirements), 7 January 2014, para. 1.1 <https://pcacases.com/web/sendAttach/2108> accessed on 10 January 2020.

66 *Vale* v. *BSG Resources Limited,* LCIA Arbitration No 142683, Award, 4 April 2019, para 37 <https://www.courtlistener.com/recap/gov.uscourts.nysd.514267/gov.uscourts.nysd.514267.4.1.pdf> accessed on 10 January 2020.

67 I F I Shihata, *The Power of the International Court to Determine Its Own Jurisdiction: Compétence de la Compétence* (M. Nijhoff 1965) 5–8.

admissibility". In other words, a tribunal must not only find that it has jurisdiction, but that "the conditions upon which the exercise of this jurisdiction is dependent are all fulfilled".[68] These two aspects can play a role in the management of the plurality of international courts and tribunals. They can be used by a court to dismiss frivolous cases outright by concluding that there is no legal basis or no reasonable cause. They can also be invoked in case of abuse of rights.

On occasion, certain courts and tribunals have added a third facet to the principle of *compétence de la compétence*.[69] After determining jurisdiction and admissibility, a court may consider whether it should act in the circumstances of the case.[70] This third facet allows an international court or tribunal to assess the desirability of exercising jurisdiction at a given time and, if necessary, to adjourn the proceedings. This encompasses, *inter alia*, considerations of comity and *connexité*.

Apart from the principle of *compétence de la compétence*, an international tribunal may also act through its general powers to conduct the proceedings. These may have a textual basis where the constitutive instrument provides that the tribunal shall decide on any question of procedure not expressly dealt with.[71] Where such empowerment is lacking, an international court has inherent powers "to deal with any issues necessary for the conduct of matters falling within its jurisdiction".[72] These inherent powers are attached to any court or

68 PCIJ *Mavrommatis Palestine Concessions*, Objection to the Jurisdiction of the Court, Judgment of 30 August 1924, PCIJ Series A No 2, 6, at 10 <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf> accessed on 10 January 2020.

69 *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 Constitutes a Case for Application of the Clause in Article 2(e) of Annex I A of the 1953 Agreement on German External Debts Between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the One Hand and the Federal Republic of Germany on the Other* (*Belgium.* v. *Federal Republic of Germany*), Decision of 16 May 1980, 19 UNRIAA 67, at 88, para. 6 <https://legal.un.org/docs/?path=../riaa/cases/vol_XIX/67–145.pdf&lang=O> accessed on 10 January 2020.

70 *See,* L Boisson de Chazournes, 'The Principle of *Compétence de la Compétence* in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals', in M Arsanjani, J Cogan and S Weissner (eds.), *Looking to the Future: Essays in Honor of W. Michael Reisman* (Martinus Nijhoff 2010).

71 ICSID Convention, Article 44; Statute of the International Court of Justice, Article 30.

72 ICTY *Prosecutor* v. *Beqa Beqaj,* Case No. IT-03-66-T-R77, Judgment on Contempt Allegations, 27 May 2005, paras 9–10 <https://www.icty.org/x/cases/contempt_beqaj/tjug/en/050527.pdf> accessed on 10 January 2020.

tribunal "as a judicial organ".[73] They are intended to ensure "a good and fair administration of justice"[74] and to safeguard the basic judicial functions.[75]

The management of multiple proceedings before several jurisdictions falls squarely between the goals pursued by the inherent powers. It is indeed the proper administration of justice that requires that no frivolous and vexatious proceedings be tolerated. It is invariably the proper administration of justice that dictates that no two conflicting judgments be made in the same dispute. It is finally in the name of the proper administration of justice that two related cases should be tried together rather than separately.

Throughout this lecture, we have seen the role that international courts and tribunals and States, as legislators, can play in the management of multiple proceedings. But there is one last actor that should be mentioned, namely the parties. They are instrumental in preventing multiple proceedings and their risks. It is primarily because they resort to several courts and tribunals that problems may arise. They must therefore ensure that they act in good faith and not use this plurality of options inappropriately.

73 ICJ *Nuclear Tests* (*Australia* v. *France*), Judgment of 20 December 1974, ICJ Rep 1974, 253, at 259–260, para 23 <https://www.icj-cij.org/files/case-related/58/058-19741220-JUD-01-00-EN.pdf> accessed on 10 January 2020.

74 Special Tribunal for Lebanon, *Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing,* 10 November 2010, CH/AC/2010/2, para 45 <https://www.stl-tsl.org/crs/assets/Uploads/20101110_CH_AC_2010_02_AC_Decision_EN1.pdf> accessed on 10 January 2020.

75 ICJ *Nuclear Tests* (*Australia* v. *France*) (n 73) para 23.