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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in investment treaty arbitration.

Although many useful treatises on investment treaty arbitration have been written, the relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This eighth edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Honlet Legum Arbitration
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Chapter 17

RES JUDICATA

Junu Kim and Joanne Bae[1]

I INTRODUCTION

By simple definition, *res judicata* refers to a doctrine that precludes re-litigation of a matter that has already been adjudicated by a court or an arbitral tribunal. The decision of the respective court or tribunal is considered to be final with binding effect over the same parties concerning the same subject matter or relief on the same legal grounds.[2] In general, the fundamental principles underlying the doctrine in most jurisdictions appear to be (1) the interest of the state that there be an end to litigation and (2) the ideal that no person should be sued twice for the same cause.[3]

Although the application of this doctrine differs by jurisdiction, there seems to be a general consensus that the basic concept of *res judicata* is commonly incorporated into many domestic legal systems. In common law jurisdictions, the rules of *res judicata* are generally based on juridical authority. For example, in England, the four legal concepts that give the effect of *res judicata* to a decision are cause of action estoppel, issue estoppel, former recovery and abuse of process.[4] On the other hand, in civil law jurisdictions such as France and Belgium, the doctrine is generally codified in statutes based on a 'triple identity' test based on the following requirements: same parties, same claim and same legal grounds.[5]

Res judicata is also accepted as part of the public international law regime as a 'general principle' of international law within the meaning of Article 38(1)(c) of the Statute of the

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2 International Law Association (ILA), 'Interim Report: "Res judicata" and Arbitration' (2004) (ILA Interim Report, 2004), p. 2 ('The term *res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties').

3 Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgements* (Oxford, 2001), p. 10; Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue* (Kluwer Law, 2020), Paragraph 1,015.

4 Barnett, op. cit. note 3, above, Paragraph 10; Hanotiau, op. cit. note 3, above, Paragraph 1,018.

5 Hanotiau, op. cit. note 3, above, Paragraph 1,023.

International Court of Justice (ICJ).[6] In this regard, it has also been confirmed that arbitral awards have *res judicata* effect, as set out in various international conventions, institutional rules or domestic arbitration laws.[7]

Res judicata has been applied to prevent double recovery and inconsistent decisions resulting from duplicative proceedings.[8] This aspect involves consideration of public policy and justice, as emphasised by Gary Born:

> *Deeply rooted considerations of public policy underlies rules of preclusion in national and international law. These policies focus on the injustice of permitting a party to re-litigate the same claims and issues against an adversary in repeated proceedings imposing both litigation costs and risk as well as the damage that such tactics goes to the credibility and resources of the legal systems.*[9]

Multiple treaties reflecting the general international practice[10] explicitly uphold the *res judicata* doctrine, stating that the cases that have already been decided are final with binding and enforceable effect. However, as it precludes reconsideration of the subject matter of a decided case,[11] there could be a prejudicial effect to the parties who wish to bring the case to a different forum; therefore, it is important to correctly understand the nature, advantages and disadvantages of the *res judicata* doctrine.

Jurisprudence on *res judicata* under international law seems to be developing still, with many complex issues remaining unanswered, particularly in the field of international investment arbitrations where public international law comes into play.[12] This chapter

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6 ILA Interim Report, p. 18 ('It is widely accepted that *res judicata* is also a rule of international law'); M Kinnear, G R Fischer, J M Almeida, L F Torres and M U Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID*, 'Res Judicata', (Wolters Kluwer, 2015, Chapter 5), p. 56 ('Res judicata is widely recognized across national legal orders, and universally accepted by international courts and tribunals as a rule of general international law'); Jacob van de Velden, *Finality in Litigation and Practice of Preclusion – Res Judicata (Merger and Estoppel), Abuse of Process and Recognition of Foreign Judgments*, (Kluwer Law International, 2017), p. 30.

7 See, e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), Article 3; Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Articles 53(1) and 54(1); International Chamber of Commerce (ICC) Rules, Article 35–6; London Court of International Arbitration (LCIA) Rules (2020), Article 26.8; United Nations Commission on International Trade Law (UNCITRAL) Rules (2013), Article 34–2; Singapore International Arbitration Centre (SIAC) Rules, Article 30.1; 1996 English Arbitration Act, Article 58.

8 M Kinnear et al. (op. cit. note 6, above), p. 55.

9 Gary Born, *International Arbitration* (Kluwer Law, 2021), p. 1943.

10 For example, ICSID Convention, Article 53(1) stipulates: 'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.' New York Convention, Article III provides: 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following argument.' See also ILA Interim Report, 2004 (op. cit. note 2), p. 2 ('*Res judicata* is said to have: a positive effect (namely, that a judgment or award is final and binding between the parties and should be implemented, subject to any available appeal or challenge) . . . The positive effect is largely uncontroversial.').

11 id. ('namely, . . . the subject matter of the judgment or award cannot be relitigated a second time, also referred to as *ne bis in idem*').

12 P J Martinez-Fraga and H J Samra, 'The Role of Precedent in Defining Res Judicata in Investor-State Arbitration' (2012) *International Law*, pp. 421, 423–24, 433; A Aman Prasad, *Res Judicata: A Boon or A*

attempts to shed some light on the overall landscape of various approaches to issues revolving around *res judicata* in the context of international investment arbitration. To this end, the following sections focus on, among other topics, the concept of *res judicata* (Section II), the elements of the doctrine (Section III), its scope and effect (Section IV) and waiver (Section V).

II CONCEPT OF RES JUDICATA IN INTERNATIONAL INVESTMENT ARBITRATION

In many jurisdictions, *res judicata* is generally considered to be an issue of admissibility as a procedural question.[13] To this extent, *lex fori* becomes the law applicable to *res judicata* in most cases.[14] However, in the case of international arbitration, there seems to be an increasing tendency to advocate the application of transnational principles. Before discussing the transnational principles applicable to *res judicata* in international investment arbitration, it may be useful to ascertain other legal concepts similar to, but distinguished from, the doctrine of *res judicata*. These include *stare decisis* and *lis pendens*, which are (with *res judicata*) often used interchangeably to cope with concurrent or multiple proceedings.

i Stare decisis

Stare decisis (meaning 'stand by what is decided'), or the doctrine of precedent, is a common law principle requiring a specific principle of law – created by a court – to be binding on another court when deciding on identical issues over similar facts.[15] Although both *res judicata* and *stare decisis* concern the binding effect of an adjudicative decision on a subsequent court, they are substantially different. For instance, *stare decisis* applies not only to the parties of the previous case but also to other non-parties, whereas *res judicata* binds only the same parties of the prior decision in the subsequent case.[16] Further, *stare decisis* applies as a law governing subsequent cases with similar issues and facts, whereas *res judicata* works as a final conclusion of a specific dispute with a preclusive effect, preventing the same dispute from reopening.[17]

Bane for International Investment Tribunals? (Uppsala University, 2020), pp. 5, 7.

13 Christer Soderlund, 'Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings', *Journal of International Arbitration* 22(4) (2005), p. 301.

14 See, e.g., G Born, C Bull, et al., 'The Law Governing Res Judicata in International Commercial Arbitration', in N Kaplan and M Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International, 2018, Chapter 1), p. [ ] ('Kaj Hobér, in his major study of *res judicata*, speaks about the "inclination of some tribunals to rely on the *lex fori* when interpreting and applying the principles of *res judicata*"').

15 S Wilson, H Rutherford, T Storey, N Wortley and B Kotecha, 'English Legal System', *An overview of the English legal system* (Oxford University Press (OUP), 2020, Chapter 2), p. 36 ('the doctrine of *stare decisis* (stand by what is decided), indicating when one court is bound by a principle of law coming from another court').

16 M Thomas and C McGourlay, *English legal system concentrate: law revision and study guide* (2nd edn., OUP, 2020), p. 96 ('there is a presumption known as stare decisis . . . which means "to stand by decisions". This presumption exists only in cases of binding authority and does not apply to persuasive authorities. It is important to note . . . that there is a difference between *stare decisis* and *res judicata*; the latter referring to the binding nature of the decision on the parties to that case, as opposed to other parties. The Latin phrase translates roughly to "the matter has been settled" and refers to situations where the case has now concluded for those parties').

17 id.

Although the concept of *stare decisis* usually applies within a domestic judicial system (particularly in common law jurisdictions), it is understood to be inapplicable to disputes brought under public international law before international courts or arbitral tribunals.[18] This is expressly stated in Article 59 of the Statute of the ICJ: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'[19] Further, a number of tribunals of investment arbitrations share the same view for arbitral awards,[20] noting that such arbitral precedents would only serve, at best, as persuasive authorities for comparable legal questions.[21]

However, given that it is not unusual in investment arbitration for different cases with similar factual patterns to occur, particularly with different cases challenging a single state measure or group of measures affecting several investors,[22] there is a view that the establishment of, and due deference to, a body of jurisprudence in investment arbitrations may be warranted in those cases. For instance, in *PV Investors v. Spain*, an arbitral award was made in a string of investment arbitrations over Spain's legal reforms affecting the renewable energy sector.[23] The dissenting arbitrator criticised the majority's decision to reject the claimants' primary claim based on an analysis of 'eighteen known awards involving the same treaty, the same Respondent State, and the same measures as are at issue in the [*PV Investors v Spain* case], fifteen [of which were] found for the Claimants'.[24] The arbitrator noted that the majority decision went against 'every one of the eleven renewable energy awards against Spain issued by other arbitral tribunals to date, arising out of the same controversy and facts not credibly distinguishable from those of the present case, has done'[25] and opined that claimants' primary claim should prevail 'since like cases should be treated alike'.[26]

18 A Gillespie and S Weare, *The English legal system* (7th edn., OUP, 2019); M Dixon, R McCorquodale and S Williams, *Cases & materials on International law* (6th edn., OUP, 2016), p. 114 (in *Trendtex Trading Corp v. Central Bank of Nigeria*, a famous English Judge Lord Denning also acknowledged that '[i]nternational law knows no rule of *stare decisis*' [1977] QB 529, 554).

19 Statute of the International Court of Justice, www.icj-cij.org/en/statute (accessed 27 April 2023).

20 For example, the tribunal of *AES Corporation v. Argentine Republic* said that '[t]here is no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party . . . Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem.' (ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005), Paragraphs 23(d), 30).

21 For instance, the tribunal of *Liberian Eastern Timber Corporation v. Republic of Liberia* stated that 'though the tribunal is not bound by the precedents established by other ICSID tribunals, it is nonetheless instructive to consider their interpretations' (ICSID Case No. ARB/83/2).

22 International Bar Association, Report on 'Consistency, efficiency and transparency in investment treaty arbitration' (November 2018), p. 7.

23 As at April 2023, 20 arbitral decisions have been rendered in these renewable energy investment cases based on the Energy Charter Treaty, with more than 50 cases being lodged under the Treaty. For a list of cases instituted under the Energy Charter Treaty, visit www.energychartertreaty.org/cases (accessed 27 April 2023).

24 *PV Investors v. Spain*, Permanent Court of Arbitration, Case No. 2012-14, Concurring and Dissenting Opinion of Charles N Brower, Paragraph 3.

25 ibid., Paragraph 1

26 ibid., Paragraph 4.

ii Lis pendens

Lis pendens (meaning a 'lawsuit pending') describes a 'situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different fora at the same time'.[27] The concept of *lis pendens* differs from *res judicata* as it primarily concerns the concurrent state of pending disputes involving the same parties with identical causes of actions.

A *lis pendens* situation occurs when there is a repetition of a lawsuit already in progress and, therefore, there are redundant claims. One may determine duplicative claims by applying a 'triple identity test' that requires the same party, the same object and the same cause of action to be found in the concurrent claims.[28] This triple identity test is also used when applying *res judicata* to determine the identity of prior and subsequent cases.[29]

However, this test conflates the nature of the two doctrines because their effects are starkly different. *Lis pendens* would not deprive the parties of opportunities to pursue remedies through these concurrent claims (for instance, by consolidating the cases), whereas *res judicata* would not allow such opportunities because the reopening of the same dispute is prohibited from the outset. Consequently, an adjudicator, whether a court judge or arbitral tribunal, usually applies stricter identity tests for *res judicata* than *lis pendens*.[30]

III ELEMENTS OF RES JUDICATA

Traditionally, *res judicata* is applicable in two different disputes only when the following five conditions are met:[31]

a same legal order;
b same parties;
c same object (*petitum*);
d same ground of case (*causa petendi*); and
e finality and binding effect of the prior award.

27 ILA, 'Final Report on Lis Pendens and Arbitration' (2006), Paragraph 1.2 (ILA Final Report); J Fawcett (ed.), 'Declining Jurisdiction in Private International Law', Report to the XIVth Congress of the International Academy of Comparative Law, 1994 (OUP, Oxford, 1995), p. 27 (emphasis added).

28 H Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (OUP, 2013), Paragraph 4.81; UNCITRAL (49th session), 'UN General Assembly: Concurrent proceedings in international arbitration' (2016) (UNCITRAL Report on Concurrent Proceedings), p. 7.

29 ILA Interim Report, 2004 (op. cit. note 2, above), p. 2.

30 UNCITRAL Report on Concurrent Proceedings (op. cit. note 28, above), Paragraph 26 ('The Brussels Regulation 1215/2012 . . . may shed some light on the application of *lis pendens* to concurrent proceedings as it provides less strict conditions. Article 29(1) of the Brussels Regulation provides an illustration of a *lis pendens* mechanism in the context of civil litigation proceedings . . . Article 30 of the Brussels Regulation also sets out a discretionary rule for "related actions", allowing for concentration of related or connected disputes in one forum. Article 30.3 provides that "actions are deemed to be related where they are so connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings".').

31 Martinez-Fraga and Samra (op. cit. note 12, above), p. 421; Prasad (op. cit. note 12, above), pp. 9–10; ILA Interim Report, 2004 (op. cit. note 2, above), pp. 19–22; ILA Final Report (op. cit. note 27, above), Paragraph 29; M Kinnear et al. (op. cit. note 6, above), pp. 56–57.

The conditions in points (b) to (d), taken together, constitute the triple identity test discussed in Section II. Some commentators combine *petitum* and *causa petendi* into one element by considering whether there is 'the identity of question or issue' between two disputes.[32] Each of these elements is further examined below.

i Same legal order

The doctrine of *res judicata* may apply in the context of international arbitration only if both the preceding and subsequent proceedings share the same legal order.[33] For example, in *Helnan International Hotels v. Egypt*, the tribunal found that a national court and a commercial arbitral tribunal have different legal orders and, therefore, their decisions cannot preclude each other under the doctrine of *res judicata*:

> *A national court and even less a private arbitral tribunal do not have the same authority. They are not performing their duties in the same legal order and their jurisdiction does not have the same scope . . . a decision by a national court or a private arbitral tribunal cannot be opposed as res judicata to the admissibility of an action filed with an international arbitral tribunal. Indeed, either the national court or the private arbitral tribunal did not dispose of that action or had no jurisdiction to do it.*[34]

Similarly, given that the legal order of international investment arbitration is different from that of national courts, tribunals of the former are not bound by the decisions of the latter.[35] Furthermore, as there is a difference between international investment and commercial arbitrations, the International Law Association (ILA) viewed that the investment dispute regime 'pertains more to public international law than to international commercial arbitration or at least to the hybrid legal order of BIT [bilateral investment treaty] arbitrations'.[36]

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32 W S Dodge, *Res Judicata* (2006), Max Planck Institute for Comparative Public Law and International Law, see title B. 2; A Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3, *The Law & Practice of International Courts and Tribunals*, see title VIII at p. 61.

33 K Hobér, *Res Judicata and Lis Pendens in International Arbitration*, Hague Academy of International Law, Recueil des Cours Vol. 366 (Martinus Nijhoff, 2014), see generally pp. 126–90; Prasad (op. cit. note 12, above), pp. 14–15. On the other hand, a 'legal order' refers to 'an aggregate or a plurality of general and individual norms that govern human behaviour, that prescribe, in other words, how one ought to behave'. Hans Kelsen, 'The Concept of the Legal Order', translated by Stanley L Paulson (from 'Der Begriff der Rechtsordnung' in *Logique et Analyse*, Vol. 1 (1958), pp. 150–67).

34 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB 05/19 (3 July 2008), Paragraphs 124–25. Same position is found in *Industria Nacional de Alimentos, SA and Indalsa Perú, SA v. The Republic of Peru* (Decision on Annulment, ICSID Case No. ARB/03/45 (September 2007), Paragraph 87) and in *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1 (20 November 1984), Paragraph 177).

35 ILA Interim Report, 2004 (op. cit. note 2, above), p. 19 ('International dispute settlement organs are not considered to be bound by decisions of national courts or tribunals'); I Brownlie, *Principles of Public International Law* (6th edn., Clarendon Press, Oxford, 2003), p. 50 ('There is no effect of *res judicata* from the decision of a municipal court so far as an international jurisdiction is concerned').

36 ILA, Recommendations on Lis Pendens and Res Judicata and Arbitration (2006) (ILA Recommendations, 2006), see the preamble. However, the ILA did not deny a possibility of its Recommendations' indirect relevance for investment arbitration. See ILA Final Report (op. cit. note 27, above), Paragraph 36 ('the [ILA] Recommendations may still have some indirect relevance for BIT arbitrations'). In this regard, the ILA's reports and recommendations will continue to be referenced to the extent necessary.

The ILA, therefore, indicated that its policy recommendation on *res judicata* for commercial arbitration did not apply to international investment disputes. To this extent, national courts, commercial arbitration and investment arbitration seem to have different legal orders from each other, precluding the *res judicata* effect among themselves.

A fork-in-the-road clause is generally intended to have a preclusion effect similar to *res judicata*, as it normally requires an investor to choose to bring its claims before either the host state's domestic court or an international arbitral tribunal.[37] However, this choice neither results from, nor stands for, *res judicata*. A fork-in-the-road clause would be applicable only when a relevant investment treaty contains it as agreed by the contracting parties of the underlying treaty. On the contrary, *res judicata* does not need to be included in a treaty unless the contracting parties otherwise agree to exclude the application of the doctrine.[38]

ii Same parties

In addition to the identity of legal orders between two cases, the identity of the parties between the previous and subsequent disputes must also be scrutinised before applying *res judicata*. This test seems to be required for any *res judicata* principles existing across jurisdictions.[39]

The detailed standard applicable to this factor or the degree of assessment needed for the identity is still unclear in the context of investment arbitration.[40] The main issues often arising from investment arbitrations include, among other things, (1) whether a controlling shareholder of a company and the company under his or her control, or (2) companies under the same business group or those controlled by the same shareholders, respectively, should be considered the 'same parties' for the purpose of *res judicata*.[41] The relevant jurisprudence shows differing views on these matters.[42]

First, there is a line of jurisprudence that takes an 'economic approach' by flexibly categorising a group of affiliate entities into the same party.[43] This approach, which is observed more often in ICSID arbitrations than in other forums, is generally intended to prevent individual companies of a single economic entity (e.g., a corporate group) from re-litigating 'the same dispute under the disguise of separate identities'.[44]

37 R Dolzer, C Schreuer, *Principles of International Investment Law* (2nd edn., OUP, 2012), p. 267.

38 Prasad (op. cit. note 12, above), p. 7 (*res judicata* 'can be applied by international courts and tribunals even in the absence of express treaty language, unless the intent to negate the application of the rule is clearly expressed').

39 B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953), p. 340; ILA Recommendations, 2006 (op. cit. note 36, above), Article 3.4; ILA Interim Report, 2004 (op. cit. note 2, above), p. 21.

40 M Kinnear et al. (op. cit. note 6, above), pp. 58–59.

41 ibid., p. 58 ('With respect to the identity-of-parties requirement, the jurisprudence is inconsistent regarding whether the controlling shareholders of a company and the company itself should be considered the "same parties" for purposes of *res judicata*').

42 See, e.g., *CME Czech Republic BV v. The Czech Republic*, UNCITRAL Final Award (14 March 2003) (*CME v. Czech Republic*), Paragraph 432; *RSM Production Corp. et al v. Grenada*, ICSID Case No. ARB/10/6, Award (10 December 2010), Paragraph 7.1.5. See also Wehland (op. cit. note 28, above), Paragraph 6.117.

43 C Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), Article 25, Paragraph 216; ILA Interim Report, 2004 (op. cit. note 2, above), p. 21.

44 Reinisch (op. cit. note 32, above), p. 59 ('If such an "economic approach" is accepted for jurisdictional purposes it would appear that the same standard should also apply for purposes of *lis pendens* and

For example, in *Orascom v. Algeria*, the tribunal dismissed an investor's claim as it was brought by the same investor who had commenced a separate investor-state arbitration against the same state through its parent company. Specifically, a Luxembourgish investor made investments in an Algerian telecommunications service provider through a minority shareholding in an Egyptian holding company and commenced an ICSID arbitration against Algeria in October 2012 under the Algeria–Belgium–Luxembourg Economic Union bilateral investment treaty (BIT).[45] The tribunal noted that the Egyptian holding company, in which the investor had a direct shareholding, also commenced a similar ad hoc arbitration against Algeria under the UNCITRAL Arbitration Rules and the Egypt–Algeria BIT in April 2012, and this arbitration was eventually settled in April 2014.

Given the repetitive nature of these two cases, the tribunal decided that the Luxembourgish investor's claim was inadmissible because the two cases shared the same parties.[46] The tribunal viewed that the claimant committed an 'abuse of rights' by utilising corporate entities with the same economic interest in initiating two redundant proceedings:

> *In particular, an investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state . . . In other words, several corporate entities in the chain may be in a position to bring an arbitration against the host state in relation to the same investment. This possibility, however, does not mean that the host state has accepted to be sued multiple times by various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm.*[47]

Although the tribunal did not specifically mention the doctrine of *res judicata* in its award, it implied a basis to assess the identity of parties from two different cases for the purpose of *res judicata* analysis in investment arbitration.

Another line of jurisprudence suggests a 'formalistic approach' that strictly draws a distinction between individual entities existing within the same economic group. The seminal cases are *CME v. Czech Republic* and *Lauder v. Czech Republic*. These two arbitral cases were both brought against the Czech Republic under UNCITRAL Arbitration Rules based on, respectively, the Netherlands–Czech Republic BIT and the United States–Czech Republic BIT. The claimants in these cases (i.e., CME Czech Republic BV and Mr Ronald S Lauder), were in the same corporate group, as the former was entirely controlled by the latter.

The tribunal in the *Lauder* case decided in 2001 that the investor (Mr Lauder) was not entitled to any damages.[48] The CME tribunal decided to the contrary in 2003, however, ordering the state to compensate the investor (CME Czech Republic BV).[49] In these disputes,

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res judicata. Otherwise individual companies of a corporate group (constituting a single economic entity) might avail themselves of the possibility to endlessly re-litigate the same dispute under the disguise of separate legal identities').

45 *Orascom TMT Investments Sàrl v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award (31 May 2017), Paragraph 485

46 ibid., see particularly Paragraphs 495–505, 521, 524, 539–45.

47 ibid., Paragraph 542.

48 *Ronald S Lauder v. The Czech Republic*, UNCITRAL Final Award (3 September 2001) (*Lauder v. Czech Republic*), Paragraphs 234–35.

49 *CME v. Czech Republic* (op. cit. note 42, above), Paragraph 423.

the CME tribunal did not give any *res judicata* effect to the *Lauder* award by finding that the two claimants were not identical and that their claims were grounded on different investment treaties.[50]

This formalistic approach has been heavily criticised as it resulted in starkly different outcomes, even though the two investors were within a large corporate group with the same economic interests.[51] However, this negative view on the approach should be qualified to the extent that the Czech government in the *CME* case expressly waived its right to raise any objection on grounds of either *lis pendens* or *res judicata*.[52] The result could have differed if the Czech government did not waive its *res judicata* objection.

iii Same question or issue

Another essential element to invoke *res judicata* is the identity of question or issue. This element requires both identity of object (*petitum*) and identity of ground (*causa petendi*) between two claims.[53] Identical 'object' (*petitum*) means that the same type of relief is sought, and identical 'ground' (*causa petendi*) refers to a situation in which the same rights and legal arguments – constituting the same cause of action – are asserted in two separate cases.[54]

Most legal commentators indicate that the identity of *petitum* and *causa petendi* must be determined through a holistic and substantive approach that requires a review of all relevant facts and circumstances.[55] However, arbitral tribunals appear to take differing views depending on the underlying treaties of investment arbitrations.

For example, in the *Southern Bluefin Tuna* case, which concerned Japanese fishing practices in 2000 under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the tribunal opted for the holistic approach.[56] Although the claimant asserted its claims based on UNCLOS, the tribunal ruled that the claim was the same as that of another dispute arising from a different international convention: the Convention for the Conservation of Southern Bluefin Tuna 1993 (the Bluefin Convention). Although the

50 *Lauder v. Czech Republic* (op. cit. note 48, above); *CME v. Czech Republic* (op. cit. note 42, above), Paragraphs 431–32.

51 A Reinisch, 'The Issues Raised by Parallel Proceedings and Possible Solutions' in M Waibel, A Kaushal, K H Chung, C Balchin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010), pp. 121–22; see, also, B M Cremades and I Madalena, 'Parallel Proceedings in International Arbitration', 24 *Arbitration International* (2008).

52 *CME v. Czech Republic* (op. cit. note 42, above), Paragraphs 430–31; G Emmanuel, *Parallel Proceedings: Investment Arbitration* (2019) Max Planck Institute Luxembourg for Procedural Law, Paragraph 58.

53 ILA Recommendations, 2006 (op. cit. note 36, above), Articles 3.2, 3.3; ILA Interim Report, 2004 (op. cit. note 2, above), pp. 20–21; ILA Final Report (op. cit. note 27, above), Paragraphs 42–43; Dodge (op. cit. note 32, above), Paragraphs 7–10.

54 Reinisch (op. cit. note 32, above), p. 62.

55 ILA Interim Report, 2004 (op. cit. note 2, above), p. 20 ('A number of commentators favour an approach that looks at the underlying nature of a dispute and not at its formal classification'); ILA Final Report (op. cit. note 27, above), Paragraph 43 and note 109 ('Cause of action may be construed broadly as all facts and circumstances arising from a single event and relying on the same evidence which are necessary to give rise to a right to relief'); Reinisch (op. cit. note 32, above), pp. 64, 72 ('Instead of rigid identity tests, an overall assessment of the parties involved, the legal grounds invoked, the objects pursued and the underlying facts will be necessary in order to avoid a multiplication of proceedings with its inherent danger of conflicting outcomes').

56 *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility (4 August 2000), 39 ILM 1359, Paragraphs 47–54.

tribunal construed the two conventions to be irreconcilable,[57] it found that the legal questions, along with the parties and legal orders, of the two disputes were identical;[58] therefore, the UNCLOS tribunal found no jurisdiction over the case as it was barred by the *res judicata* of the prior decision rendered under the Bluefin Convention tribunal.[59]

On the other hand, in *CME v. Czech Republic*, the UNCITRAL tribunal took a more formalistic approach in determining the identity of *petitum* and *causa petendi* between the two arbitral cases (i.e., *CME* and *Lauder*). It held that the legal questions raised in the two cases were not identical because they arose from two different international investment agreements.[60] Accordingly, as discussed in Section III.ii, the CME tribunal did not apply *res judicata* to prevent the re-litigation of the issues previously resolved in the *Lauder* case.[61]

iv Existence of a final and binding decision

The last element of *res judicata* in international investment arbitration concerns whether an arbitral award in the earlier proceedings is final and binding.[62] This element would be met only when the previous arbitral award can no longer be challenged before a national court in the place of arbitration,[63] and this final nature of the award is fully accepted in the forum where *res judicata* is invoked.[64] A few issues, which still remain unexplored in the field of international arbitration, could arise from this element, particularly regarding whether certain types of decisions are final and binding. In the arbitration setting, these include, among other things, (1) partial awards, (2) decisions on preliminary objections and (3) decisions on provisional or interim measures.

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57 ibid., Paragraph 59 (the tribunal construed Bluefin Convention to exclude the UNCLOS procedures by stating that 'Article 16 of the 1993 Convention "exclude[s] any further procedure" within the contemplation of Article 281(1) of UNCLOS [United Nations Convention on the Law of the Sea]').

58 ibid., Paragraph 52 ('the Tribunal concludes that the dispute between Australia and New Zealand, on the one hand, and Japan on the other, over Japan's role in the management of [southern bluefin tuna] stocks and particularly its unilateral experimental fishing program, while centered in the 1993 Convention, also arises under the United Nations Convention on the Law of the Sea'); ibid., Paragraph 54 ('the Parties to this dispute – the real terms of which have been defined above – are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS, which is distinct from the dispute that arose under the CCSBT [Commission for the Conservation of Southern Bluefin Tuna], would be artificial').

59 ibid., Paragraph 65 ('It follows from the foregoing analysis that this Tribunal lacks jurisdiction to entertain the merits of the dispute brought by Australia and New Zealand against Japan.').

60 *CME v. Czech Republic* (op. cit. note 42, above), Paragraph 432 ("The Tribunal further is of the view that the principle of *res judicata* does not apply in favour of the London Arbitration for more than one reason. The parties in the London Arbitration differ from the parties in this arbitration. Mr Lauder is the controlling shareholder of CME Media Ltd, whereas in this arbitration a Dutch holding company being part of the CME Media Ltd Group is the Claimant. The two arbitrations are based on differing bilateral investment treaties, which grant comparable investment protection, which, however, is not identical. Both arbitrations deal with the Media Council's interference with the same investment in the Czech Republic. However, the Tribunal cannot judge whether the facts submitted to the two tribunals for decision are identical and it may well be that facts and circumstances presented to this Tribunal have been presented quite differently to the London Tribunal.').

61 id.

62 ILA Recommendations, 2006 (op. cit. note 36, above), Article 3.1; G Derbushev, *Res judicata and arbitral awards* (Central European University, 29 March 2019), p. 74.

63 ILA Final Report (op. cit. note 27, above), Paragraph 31; Derbushev (op. cit. note 62, above), pp. 74–75.

64 ILA Final Report (op. cit. note 27, above), Paragraph 33; M Kinnear et al. (op. cit. note 6, above), p. 57.

Partial awards

There seem to be differing views on whether a partial award could have *res judicata* effect. The ILA takes a positive position that both final and partial awards may have *res judicata* because they could entail the final disposition of disputes.[65] Further, a line of ICSID jurisprudence seems to follow this position, as indicated by the majority opinion in *ConocoPhillips v. Venezuela*.[66]

ConocoPhillips was a seminal case in which an ICSID tribunal delved into the *res judicata* effect of a partial award rendered in an earlier stage of the same proceedings.[67] The majority found a *res judicata* effect even though new prima facie evidence, which was inadvertently missing in an earlier stage, showed a material error in the partial award.[68] The dissenting opinion heavily criticised the majority's conclusion, stating that the *res judicata* effect granted under those circumstances was inconsistent with ICSID's unique procedural rules and systems, which was a *lex specialis* to those of general international law.[69]

The majority appears to have emphasised procedural clarity and efficiency, given arbitral practice in recent years that tends to resolve a single proceeding for a bifurcated (or even trifurcated) procedural stage. However, as many commentators still take positions sympathetic to the dissenting opinion,[70] more detailed discussions are likely to follow before legal scholars and practitioners reach a certain level of consensus on this question.

Decisions on preliminary matters

Preliminary matters, such as questions relating to arbitral jurisdiction, admissibility and applicable laws, generally do not concern substantive disputes regarding the merits of the case. The finality and binding effect of preliminary decisions remains without clear answers. Some commentators deny the *res judicata* effect of preliminary matters in the first place,[71]

65 ILA Final Report (op. cit. note 27, above), Paragraph 19.

66 *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Bolivian Republic of Venezuela*, ICSID Case No. ARB/07/30 (*ConocoPhillips v. Venezuela*), Decision on Respondent's Request for Reconsideration (10 March 2014).

67 M Kinnear et al. (op. cit. note 6, above), p. 65.

68 *ConocoPhillips v. Venezuela* (op. cit. note 66, above), Paragraphs 20–21 ('As noted, the Respondent characterises the Decision as "interim" or "preliminary" and, accordingly, capable of being reconsidered, perhaps on an informal basis. The only reason suggested in its submissions is the temporal one: a further stage in the proceedings, relating to quantum, remains. The Decision does not however take an interim or preliminary form in respect of the matters on which it rules . . . Those decisions in accordance with practice are to be incorporated in the Award. It is established as a matter of principle and practice that such decisions that resolve points in dispute between the Parties have *res judicata* effect').

69 *ConocoPhillips v. Venezuela* (op. cit. note 66, above), Dissenting Opinion of Georges Abi-Saab (10 March 2014), see particularly Paragraphs 56–67.

70 M Kinnear et al. (op. cit. note 6, above), pp. 66–69.

71 Dodge (op. cit. note 32, above), Paragraph 13 ('In general, decisions on preliminary objections lack *res iudicata* effect').

whereas other commentators, including the ILA, take the position that a tribunal's preliminary dispositions, such as a decision on jurisdiction, may have *res judicata* effect towards the subsequent adjudication on the same matter.[72]

On the other hand, there have been arbitral tribunals that have taken a middle ground, as in *Waste Management, Inc v. Mexico*.[73] In this case, an ICSID tribunal viewed that *res judicata* for a jurisdictional decision under Chapter 11 of the North American Free Trade Agreement (NAFTA) should be denied except when an identical issue is disputed again during the merits phase:

> *in general, the dismissal of a claim by an international tribunal on grounds of lack of jurisdiction does not constitute a decision on the merits and does not preclude a later claim before a tribunal which has jurisdiction. The same is true concerning inadmissibility.*[74]
>
> *. . . But at whatever stage of the case it is decided, a decision on a particular point constitutes a res judicata as between the parties to that decision if it is a necessary part of the eventual determination and is dealt with as such by the tribunal.*[75]

Decisions on provisional or interim measure

Finally, there seems to be a consensus that an arbitral tribunal's decision on provisional or interim measures does not constitute *res judicata*.[76] For instance, the tribunal in *Millicom v. Senegal* denied the *res judicata* of provisional measures by indicating that provisional measures 'do not have the same authority as an issue already judged':

> *It should be added that provisional measures, which are temporary in nature and by definition, may be modified or cancelled at any time by the Arbitral Tribunal, do not have the same authority as an issue already judged (res judicata), are valid only for as long as the proceedings last and become automatically null and void if the Arbitral Tribunal rules that it does not have jurisdiction to hear the dispute.*[77]

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72 ILA Final Report (op. cit. note 27, above), Paragraph 20 ('As to awards on jurisdiction and subject to the applicable law, the Recommendations do not exclude giving such awards conclusive and preclusive effects. An award declining jurisdiction entails a decision that there is no agreement to arbitrate or that the dispute does not fall within the ambit of the arbitration agreement, and accordingly the general jurisdiction of domestic courts may revive. Positive rulings on jurisdiction in which an arbitral tribunal accepts jurisdiction, may also constitute *res judicata*').

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

74 ibid., Paragraph 43.

75 ibid., Paragraph 45.

76 M Kinnear et al. (op. cit. note 6, above), p. 60, note 23 ('A consensus seems to have emerged concerning the lack of *res judicata* effect of decisions on provisional or interim measures'); ILA Final Report (op. cit. note 27, above), Paragraph 19 ('the Recommendations are not intended to cover any such preliminary or provisional determinations since this solution does not correspond to practice and perceptions in international commercial arbitration').

77 *Millicom International Operation BV and Sentel GSM SA v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures (9 December 2009), Paragraph 38. For the same position, see *Victor Pey, Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures (25 September 2001), Paragraph 14.

v Autonomous approach to elements of res judicata in international arbitration

The triple identity test has remained as a controlling principle for the doctrine of *res judicata* in international arbitration settings. However, there is an increasing trend to apply an autonomous approach to the doctrine, independent of the traditional principle. Many commentators support this approach of assessing various elements of arbitral proceedings, such as the parties' objectives and expectations, the arbitration agreement and the parties' desire to deal with their disputes in a centralised proceeding.

Against this backdrop, the ILA issued its 'Final Report on Lis Pendens and Arbitration', recommending an autonomous approach to *res judicata*.[78] For example, one of the recommendations provides that 'the conclusive and preclusive effects of arbitral awards need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration'.[79] To this extent, the report defines this autonomous *res judicata* effect of an international arbitral award as follows:

> *An arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in the award, provided that the raising of any such new claim, cause of action or new issue of act or law amounts to procedural unfairness or abuse.*[80]

The arbitral tribunal in *CMS v. Czech Republic* took a similar view:

> *International tribunals have also been aware of the risk that if they use too restrictive criteria of identity of 'object' and 'grounds', the doctrine of res judicata would rarely apply: if only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds) in a second case would be precluded as a result of res judicata, then litigants could easily evade this by slightly modifying either the relief requested or the grounds relied upon . . . This would be the case, for instance, if in a typical investment dispute, involving allegations of fact amounting to expropriation, the investor first sought restitutio in integrum as relief from the host state and in a later litigation changed the 'object' of this case requesting compensation.*[81]

Based on this pioneering view advanced by academia and the dicta of a few arbitral awards, the tribunal in *Pantechniki v. Albania* applied an autonomous approach to determine whether two cases were identical. In this case, the autonomous approach adopted focused on the 'fundamental basis' of a case to compare two disputes instead of the triple identity test.

> *To the extent that this prayer was accepted it would grant the Claimant exactly what it is seeking before ICSID – and on the same 'fundamental basis.' The Claimant's grievance thus arises out of the same purported entitlement that it invoked in the contractual debate[.] The Claimant chose*

78 ILA Final Report (op. cit. note 27, above), p. 2.

79 ibid., Recommendation No. 2.

80 ibid., Recommendation No. 5.

81 *CME Czech Republic v. Czech Republic*, UNCITRAL Arbitral Proceedings (Quantum), Legal Opinion (Christoph Schreuer and August Reinisch, 20 June 2002), Paragraph 45.

> *to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim. Having made the election to seise the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID.*[82]

Although the autonomous approach adopted in *Pantechniki* was considered in conjunction with a fork-in-the-road clause, this case appears to implicate the potential application of the autonomous approach with regard to the elements of *res judicata*.

IV SCOPE OF RES JUDICATA IN INTERNATIONAL ARBITRATION

The next question that could be raised about *res judicata* is the exact scope of its application. More specifically, it could be argued that either the effect of *res judicata* is limited only to the operative part (the *dispositif*) of the earlier decision or it could be extended to cover some or all of its reasonings (the motifs).[83] The general principle is that *res judicata* is limited to the operative part of the award and does not normally extend to the reasons, which are only considered to determine the meaning and the scope of the operative part.

In *Apotex v. US*, the ICSID tribunal, which was constituted under NAFTA Chapter 11, closely addressed this issue with great detail based on various precedents from international courts and arbitral tribunals.[84] The *Apotex* tribunal explained that a tribunal must consider both the *dispositif* and the motifs to find the relevant portion of the prior decision for *res judicata* purposes, indicating that 'international tribunals regularly look to the prior tribunal's reasons and indeed also to the parties' arguments, to determine the scope of what was finally decided in that earlier proceeding'.[85] On this basis, it concluded that 'relevant reasons can be read together with the operative part for the purpose of applying the doctrine of *res judicata* in this arbitration, similarly to the position under international law'.[86]

On the other hand, there has been a line of jurisprudence that *res judicata* extends to the reasons that are a necessary adjunct to the decision (i.e., the *ratio decidendi* of the award), apart from the purpose of determining the scope of the *dispositif*. For example, a legal expert opinion submitted in an ICC arbitration case[87] states as follows:

> *The binding effect of the first award is not limited to the contents of the order hereof adjudicating or dismissing certain claims, but it extends to the legal reasons that were necessary for such order, i.e., to the ratio decidendi of such award. Irrespective from the academic views that may be entertained on the extent of the principle of res judicata on the reasons of a decision, it would be unfair to both parties to depart in a final award from the views held in the previous award, to the extent they were necessary for the disposition of certain issues.*[88]

82 *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (Jan Paulsson), Paragraph 67.

83 M Kinnear et al. (op. cit. note 6, above), p. 59.

84 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014), Part VII – Res Judicata: Jurisdiction and NAFTA, Article 1139.

85 id., Paragraph 7.30 (emphasis added).

86 id., Paragraph 7.35. The ILA takes the same approach. See ILA Recommendations, 2006 (op. cit. note 36, above), Article 4.

87 ICC Case No. 2367, Award (28 March 1984).

88 ibid.

It, therefore, could be argued that *res judicata* could extend to this *ratio decidendi* of the award rendered by a tribunal in an international investment arbitration case. However, this also raises a concern that certain issues that were not sufficiently addressed could have a *res judicata* effect to the subsequent proceedings.[89] This aspect could undermine the foreseeability and stability of arbitration systems, which are the policy interests underlying the doctrine of *res judicata*.[90]

On the other hand, the *res judicata* of an annulment decision rendered pursuant to Article 52 of the ICSID Convention may be more limited than the effect of a decision on the merits. For instance, the tribunal in *Amco Asia Corporation v. Indonesia* reasoned that, given the limited role of ad hoc committees as envisioned in the ICSID Convention, *res judicata* would attach only to the *dispositif* of an annulment decision, not to its reasoning.[91]

V WAIVER

In commercial arbitration, where party autonomy dictates, parties may agree to waive *res judicata* of a disposition rendered by a previous tribunal.[92] However, no substantive discussion has developed on this issue in connection with investment arbitration. In *CME v. Czech Republic*, as discussed in Section III.i, the Czech Republic explicitly waived its *res judicata* defence without any objection to this waiver, and the tribunal considered this fact in denying the *res judicata* of the Lauder award.[93] The *CME* tribunal, therefore, could not have any chance to substantively review the validity of the Czech Republic's waiver of *res judicata*. That said, in principle, it could be argued that a party's waiver would not be allowed in investment arbitration, given that the public nature of the international investment law regime would prohibit the waiver by a private decision.[94]

89 South West Africa, Second Phase (*Ethiopia and Liberia v. South Africa*), Dissenting Opinion of Judge Tanaka, ICJ Reports (1966), 261.

90 Wehland (op. cit. note 28, above), Paragraph 6.78.

91 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/8, Award in resubmitted Proceeding (10 May 1988), Paragraphs 30–46; Dodge (op. cit. note 32, above), Paragraph 14 ('In the light of the above determinations of annulment, and the rejection of annulment in the other claims listed above, the present Tribunal issued on 21 December 1987 a Provisional Indication as to what had been annulled and what remained as *res judicata*. It provisionally indicated that the Award on the Merits of 21 November 1984 was annulled in respect of the following matters').

92 Derbushev (op. cit. note 62, above), p. 13 ('*res judicata* may also be affected by the agreement of the parties'); ILA Final Report (op. cit. note 27, above), Paragraphs 70–71 ('the parties may waive the application of conclusive and preclusive effects of arbitral awards . . . the fact that Recommendation is based on the principle that *res judicata* does not pertain to public policy and can be waived by a party'); Born, Bull et al. (op. cit. note 14, above), fn 48.

93 *CME v. Czech Republic* (op. cit. note 42, above), Paragraph 431 ('the Respondent expressly and impliedly waived any *lis pendens* or *res judicata* defence').

94 ILA Interim Report, 2004 (op. cit. note 2, above), pp. 7, 15, 27, fn 80; ILA Final Report (op. cit. note 27, above), Paragraph 71. ILS Interim Report pointed out that '[p]ublic policy may be a bar to giving *res judicata* effect to a prior judgment' (p. 7).

VI CONCLUSION

In the international investment law regime, uncertainty seems to be the only certainty, with many unsettled legal questions that need to be further explored. The doctrine of *res judicata*, which is an important legal mechanism to prevent unjust double recovery or unnecessary, repetitive legal proceedings, is not an exception to that uncertainty. Although the *res judicata* principle applicable in national courts generally is based on well-established rules under domestic laws, the same does not apply to international investment arbitration. Although a few general aspects of *res judicata* under domestic laws could be applied to international investment arbitration, far more areas of international investment arbitration remain uncharted for *res judicata*.

Against this backdrop, a legal practitioner should treat the relevant discussions found in arbitral precedents or opinions of legal commentators as a starting point for further research rather than as established rules. Jurisprudence in this area requires close and consistent monitoring in the future.