Abstract: An investment contract often includes an arbitration clause providing for commercial arbitration. The availability of competing dispute settlement procedures means that two arbitral tribunals will have jurisdiction over the dispute arising from the common factual background. Such jurisdictional overlaps may result in multiple arbitral awards resolving substantially the same dispute or substantially the same issues. This article explores the possibility of recognizing effects of an award rendered in a related contractual dispute in the parallel or subsequent investment arbitration. It investigates arguments and doctrines that may be applied by investment tribunals in order to provide preclusive and conclusive effects to prior commercial awards. It is suggested that investment arbitration requires flexibility in ascertaining identity of the parties and the subject-matter of the disputes. Parent and subsidiary companies on the one hand, as well as states and state entities, on the other hand, may be regarded as a single entity, for the purposes of establishing identity. Claims for relief fundamentally based on breach of contract reinstated as the breach of treaty may be treated as substantially the same claims, notwithstanding the cause of action, and such claims should be dismissed early on in the proceedings. A more limited effect consisting in recognition of conclusive effect as to factual and legal findings of the prior commercial award is appropriate when it is assessed that the treaty claims are not fundamentally based on breach of contract.

Key words: commercial award, investment arbitration, res judicata, collateral estoppels

1. Introduction

Behind every investment dispute there is a contract. Foreign investments are most often implemented through contracts of private law. Parties to these investment contracts may be classified into certain common categories. On the side of
the foreign investor, it may be a natural person or a legal entity incorporated in investor’s home country, but also a subsidiary or an SPV specially incorporated by the investor for the purposes of that investment either in the host country or in a jurisdiction of convenience, such as for example, Delaware or the Netherlands. The other party in the contract may be the host state, its ministry, a local subdivision, a state agency or a state-owned company empowered by a special statute or by general rules of contract law to enter into contracts with foreign investors. Although the other party may also be a non-state (genuinely private) company incorporated in the host country, this type of contract rarely gives rise to an investment arbitration; for that reason it will be removed from the focus of our analysis.

By default, every investment contract contains a dispute resolution clause, usually an arbitration clause providing for institutionally administered or ad hoc commercial arbitration. When things go wrong in the contractual relationship, the parties are entitled to initiate arbitration according to the rules they agreed upon in their contract. The first party (the foreign investor), however, often has an additional option at its disposal, and that is to initiate an investment arbitration pursuant to a treaty arbitration clause, provided that the investor, or his subsidiary or SPV are nationals of the country that has an international investment agreement (an IIA)\(^1\) with the host country. The availability of competing dispute settlement procedures – commercial arbitration and investment arbitration – means that there will be a jurisdictional overlap, a situation when two or more arbitral tribunals have jurisdiction over the dispute arising out of the common factual background.\(^2\) Such overlaps may lead to conflict of fora\(^3\) (the contract tribunal vs. the treaty tribunal), and result in multiple awards (the commercial arbitral award and the investment arbitral award) resolving a substantially same dispute or substantially same issues. While a perfect jurisdictional overlap would occur if arbitral proceedings were brought before different tribunals by the same parties, the reality is that they most often occur in imperfect form, i.e. arbitral proceedings are initiated by different but related parties.\(^4\) The jurisdictional overlap between contract and treaty tribunal may be full or partial, depending on the wording of the arbitration clauses involved, and the scope of jurisdiction that they confer on the respective tribunals. Likewise, the resulting awards may overlap fully or only on certain issues.

\(^1\) This can be either a multilateral or a bilateral international treaty, regulating only investments, or a wider matter, including investments.


\(^4\) Ibidem, p. 9.
This article will explore the effects of an award rendered in a related contractual dispute in the parallel or subsequent investment arbitration. For that purpose, it will investigate arguments and doctrines that may be applied by investment tribunals in order to provide effects to prior arbitral awards rendered in contractual disputes, as well as the appropriateness of tests and requirements that are used to ascertain when those doctrines are applicable. But it will first briefly outline policy reasons for providing such effects and inquire into basis and relevance of the distinction between contract and investment arbitration.

2. Definition of the problem

The discussion has in view a specific situation when there is a prior arbitral award in a contractual dispute, while the investment arbitration in a related dispute has been initiated but has not yet been completed. It is dealing with both parallel and consecutive arbitration proceedings. They may have been parallel at a certain moment in time, but eventually, the commercial arbitration has been completed first or the investment arbitration was initiated only after the commercial arbitration has been completed. Such a situation has already arisen in a number of investment arbitrations, including some of the earliest ones.\(^5\)

The question to be examined is: may the prior commercial award bind the investment tribunal in any way, and if so, to what extent. The relevant situation may be more closely described in the following terms:

- the places of arbitration of the prior and the subsequent arbitrations are usually in different national jurisdictions, or one is held in a national jurisdiction, and another one in an international system like ICSID

- the prior and the subsequent proceedings are based on different arbitration agreements, the first one contained in the investment contract, and the second in the investment treaty and

- the prior and the subsequent proceedings are often held under different arbitration rules.\(^6\)

What they have in common is that each of the arbitrations deals with the same or similar factual issues, sometimes also similar legal issues, and the same or similar requests for relief and that the ultimate beneficiary of the award, if the claim is granted, will be the same or partly the same. For example, if a state entity terminates a privatization contract with an investor claiming that the investor has failed to invest adequate funds, commercial arbitral award will estab-

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lish the factual circumstances that lead to the termination, such as whether the investor invested the necessary amount of funds specified in the contract, and if not, whether there were some exonerating facts, such as force majeure or amendment of contract, that released him from this obligation. It will also determine some legal issues, like whether there was a breach of investment contract, whether the termination was justified, and whether there is a right to restitution or damages. At the same time or later, the investment tribunal will be asked to decide whether the termination of the contract or the conduct related thereto represented illegal expropriation, or breach of fair and equitable treatment pursuant to the treaty, and will be requested to grant compensation for any such breach of the treaty that may be established.

In the above setting, the narrowly defined situation of res judicata will usually not arise, because each of the arbitrations deals with different causes of action, and may also deal with slightly different factual or legal issues. Formally, these are not identical disputes, and usually the parties are not identical either, simply because the commercial arbitration will be initiated by or against the contractual party, which is usually not the state but a state entity, while the investment arbitration will involve the host state as the obligatory respondent. Nevertheless, the proceedings are closely related because they were caused by the same event (the termination of the contract), and their aim is to resolve substantially the same dispute. If the investor has initiated both proceedings, the aim is usually to determine that the other party (the host state including the state entity) is responsible for the end of the contract, and to obtain adequate compensation.

Under these circumstances the parties are likely to be in dispute on whether the award rendered in a prior arbitration is binding, and to what extent. The applicable law in the investment arbitration will not provide much guidance on the effects to be afforded to prior commercial awards. Arbitrators confronted with such an issue should carefully consider the relationship between the prior arbitration and the arbitration in which they have to decide, and should try to avoid potentially conflicting awards if they find that the arbitrations are closely related. In general, they should endeavor to provide full effect to prior commercial award. That means that effects such as claim preclusion, issue preclusion, and enforceability should be recognized and granted.

3. Policy reasons speaking in favor of full effect

This article argues that full effect should be provided to arbitral awards rendered in a related contractual dispute by arbitrators deciding the investment

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dispute. There are multiple policy reasons, but three seem to figure as the most prominent:
- avoiding inconsistent or contradictory decisions (as a tenet of the general principle of legal certainty);\(^8\)
- avoiding duplication of proceedings i.e. preventing re-litigation of the same matters\(^9\) (as a tenet of the general principle of efficiency);\(^10\)
- avoiding double recovery\(^11\) (as a tenet of the general principle of prohibition of abuse of rights).\(^12\)

To those main concerns can be added the following:
- promoting coherence of the system of international settlement of disputes;
- detrimental effects that parallel arbitrations and potentially conflicting decisions may have not only on the parties, but on the law as such;\(^13\)
- the need for finality of arbitral awards;\(^14\)
- protecting legitimate expectations – especially in cases when the treaty arbitration clause existed at the time when the contract arbitration clause was entered into;\(^15\)
- principled approach to resolving legal issues.

4. Basic assumption: the dichotomy between contract and treaty disputes and between commercial and investment arbitration

The dichotomy between contract and treaty claims is well established in International Investment Law.\(^16\) Put in simple terms, the former are based on


\(^12\) *ILA Recommendations* lists: protecting parties from oppressive tactics. Annex 1, para. 2, and sound case management: Annex 1, para. 6.


\(^15\) In SGS v. Pakistan the PSI agreement was concluded before the BIT was in force, while in SGS v. Pakistan it was the other way round.
contract and governed by national law, while the latter are based on treaty and governed by international law.\textsuperscript{17}

The first dichotomy is the very basis for the second: distinguishing between the commercial and investment arbitration. Commentators mostly agree that they operate in distinct legal orders. Consequently, the contractual forum selection clause and \textit{lis pendens} arguments relying on a pending commercial arbitration, have rarely been honored by international investment tribunals when deciding upon their own jurisdiction.\textsuperscript{18} The ICJ in \textit{Certain German Interests} recognized that \textit{lis pendens} could only apply where the tribunals of the same legal order are concerned.\textsuperscript{19} Starting from the assumption that the doctrine of \textit{res judicata}, as a close relative of \textit{lis pendens}, has no better chance of automatically applying between different legal orders, it would inevitably follow that the effects of commercial awards in investment arbitration are nil, unless the whole story of the dichotomy and different legal orders is wrong or irrelevant.

\textbf{4.1. Basis of Distinction between Commercial and Investment Arbitration}

In this section, the basis of distinction between commercial and investment arbitration will be scrutinized.

In both cases there is an arbitral tribunal constituted on the basis of an arbitration agreement between the parties to the dispute, with a task to resolve a dispute according to particular arbitration rules chosen by the parties. In both cases this tribunal will issue an award that will conclusively end the dispute and that is enforceable in national legal orders.

The jurisdiction of the commercial as well as investment tribunal is circumscribed by the parties’ agreement. Yet, there is a difference, according to many authors, which lies in the nature of the dispute and the applicable law. While the commercial arbitration has a task to resolve a dispute concerning contractual liability of a contractual party pursuant to an applicable national law, the investment arbitration is invited to pronounce itself upon non-

\begin{thebibliography}{19}
\bibitem{crawford2} In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract...” \textit{Compañía de Aguas del Aconcagua S.A. and Vivendi Universal S.A. v. Argentine Republic}, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, para. 96.
\bibitem{icj} \textit{Ibidem}, para. 101.
\bibitem{icj2} \textit{Certain German Interests}, PCIJ (Ser. A) No. 6, Judgment of 25 August 1925 at 20.
\end{thebibliography}
contractual international liability of a state pursuant to an international treaty. There is an evident difference between these two categories which confirms that we are dealing with two distinct categories of arbitration. Yet, this neat distinction cannot so easily be drawn in every case, because the line between one and the other may be erased or blurred in various ways.

There are, first of all, possibilities for the investment tribunal to be put in a position to decide upon contractual issues:20

“There are three ways in which a contract-based claim may be brought before a tribunal instituted by a BIT. First, the BIT may define the jurisdiction of the tribunal such that it comprises all claims in relation to an investment regardless of the nature of the claim. Second, the breach of the contract by the state may be such that it amounts to a breach of international law. And third, a so-called umbrella clause in a BIT elevates the contract breach to a treaty claim.

Zeiler further puts an emphasis on BIT clauses that apply broad language:21

“The tribunals in Salini v. Morocco(15) , Vivendi I(16) and SGS v. Philippines(17) attributed a broad meaning to this very general provision and concluded that any dispute in relation to the investment, be it either of a purely contractual nature or a treaty claim, should be covered by it.”

Strict separation of contract and treaty claims can hardly be maintained with umbrella clauses, “any dispute in relation to the investment” clauses, and others, that allow the treaty tribunal to enter into and decide contractual issues.

The reverse is also possible, although it does not occur so often in practice i.e. that a commercial tribunal is invited to apply the investment treaty and to decide upon liability of State under the IIA.22 There would be nothing unusual if such a claim were to be posed, since the IIA may well make a part of the applicable national law, and such claim may well be within the scope of the commercial tribunal’s jurisdiction. It all depends on the breadth of the arbitration clause in the contract.23 This was confirmed by an arbitral tribunal in the context of interpreting the ICC recommended clause:

The International Chamber of Commerce recommended clause which provides for arbitration of ‘all disputes arising in connection with the present contract’ must be construed to encompass a broad scope of arbitrable issues. The rec-

21 Ibidem, p. 327.
22 J. Crawford, op. cit., p. 10 says: “It should be noted that BITs are virtually never relied on as part of the internal law of the host State...”
23 G. Zeiler, op. cit., p. 344-345.
ommended clause does not limit arbitration to the literal interpretation of performance of the contract. It embraces every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute.\textsuperscript{24}

Accordingly, it needs to be recognized that an investment dispute and an investment arbitration may comprise both contractual and treaty aspects. For example, Zeiler asks: “Does the term “investment dispute” refer to a particular process or procedure? Or contrarily, does it refer to the substance of the case?”\textsuperscript{25} and responds: “It should cover any dispute between a foreign investor and its host state in relation to a specific investment. By that definition, the dispute may refer to either a contract-based claim or to a treaty-based claim.”\textsuperscript{25} Thus the term investment dispute is broad, and it includes a commercial dispute, i.e. a contract dispute. Conversely, the term commercial dispute is also broad and covers a range of investment disputes. In that sense, disputes arising out of investment contracts are both commercial and investment disputes.\textsuperscript{26}

Further, if one looks at the arbitral institutions and rules that are available for resolution of one and the other kind of disputes, the distinction is again untenable. Thus, it may be said that most rules are intended as well as well-suited both for commercial and for investment arbitration. This is the case with the International Court of Arbitration of the ICC that has adapted its rules in 2012\textsuperscript{27} so that they can be more comfortably used in investment arbitrations,\textsuperscript{28} and not just in commercial arbitrations. In effect, an ICC arbitration may be launched on the basis of an investment contract as a “commercial” arbitration, and then transformed to an “investment” arbitration, by the claimant or respondent, raising claims based upon the BIT.

Another example is the SCC, that has already had its good share of both commercial and investment arbitration.\textsuperscript{29} Finally, the UNCTIRAL rules have

\textsuperscript{25} G. Zeiler, \textit{op. cit.}, p. 324:
\textsuperscript{27} The 2012 ICC Rules of Arbitration contain provisions that are intended to facilitate and further the participation of states and state entities in ICC arbitration. \textit{The Report of the ICC Commission on Arbitration on States, States Entities and ICC Arbitration}, Publication date: 16 May 2012.
\textsuperscript{28} About 10% percent of arbitrations before the ICC involve state as parties. K. H. Böckstiegel, \textit{op. cit.}, p. 580. Further, statistics says that, 7 out of 450 investment arbitrations under the IIAs until 2011, were conducted before the ICC. UNCTAD Issues Note, 1/2012, p. 2. Serbia includes the ICC as one of the options in its Model BIT arbitration clause. UNCTAD Issues Note, 1/2012, p. 2.
\textsuperscript{29} Twenty-one of 450 investment arbitrations under the IIAs until 2011, were conducted before the SCC. UNCTAD Issues Note, 1/2012, p. 2.
proven their versatility and have been used in state-to-state, investor-to-state and commercial arbitration alike. Another touchpoint of commercial and investment arbitration under all three mentioned sets of rules is that the arbitration is legally (if not factually) conducted in a certain place that determines the legal nationality of the award. As a result, an investment award alike a commercial award is subjected to national arbitration laws and susceptible to challenge before the national courts. In addition, it is recognized as binding and enforceable in other countries pursuant to the rules of the 1958 New York Convention.

The Softwood Lumber Agreement (2006) between Canada and United States has created a “hybrid” of commercial and interstate arbitration. Interstate disputes were referred to commercial arbitration institution (which had no prior practice of handling such disputes) and its Arbitration Rules (as modified by the SLA).\(^{30}\) Pending investor-state arbitrations were terminated, and the right of US or Canadian investors to initiate further NAFTA Chapter XI disputes against US or Canada has been suspended.\(^{31}\)

The availability of the same arbitration rules (e.g. ICC Rules, SCC Rules, UNCITRAL Rules, and LCIA Rules) for both types of arbitration\(^{32}\) indicates that there is no fundamental difference between them. ICSID Rules deserve special attention, because ICSID does have certain features that distinguish it from other institutions. In particular, its awards are non-national, meaning that they do not have “legal nationality” of the country that was determined as the place of arbitration. Consequently they cannot be challenged before the national courts but only before an ad hoc committee constituted according to Article 52(3) of the ICSID Convention. Furthermore, their recognition and enforcement is ensured on the basis of Article 54 of the ICSID Convention. In that sense, they may be characterized as truly international, i.e. not subject to any national law (although, from a strictly legal point of view, in a monist country they result from the national law, since the ICSID Convention makes part of the national law). Nevertheless, it may be too easily forgotten that ICSID does not exclusively serve for resolution of treaty disputes. Its jurisdiction is limited to investment disputes,\(^{33}\) but they may be investment disputes of any kind - either contract or treaty-based. If they are contract-based they may also be qualified as commercial (investment) disputes. ICSID Convention may be said to represent international arbitration law intended for a specific type of disputes – interna-

\(^{30}\) L. Guglya, *op. cit.*, p. 27.

\(^{31}\) L. Guglya, *op. cit.*, p. 43.

\(^{32}\) G. Zeiler, *op. cit.*, p. 353 also mentions VIAC rules, and actually, any other institutional rules may be considered as suitable for both types of arbitration.

\(^{33}\) Article 25(1) of the ICSID Convention refers to “any legal dispute arising directly out of an investment.”
tional investment disputes arising between private investors and states, whatever their basis may be.

The next step in the analysis is the difference based on the applicable law. The theory maintains that treaty disputes are based on treaty, while the contract disputes are based on contract. To a Private International Law scholar this distinction seems dubious since the applicable law in a contractual dispute may consist of both statutory and treaty law, and of both national and international law. For example, an international sale may be subject to the Convention on the International Sale of Goods, and to non-governmental international customary rules such as Incoterms, not to speak of various ways to internationalize a contract, i.e. to subject it solely to international law or to non-governmental principles such as UNIDROIT Principles. It was precisely the doctrine of international commercial arbitration that took care to pave the way for such internationalization. The freedom of the parties in this respect is almost unlimited, especially in a so-called “state contract”, i.e. a contract entered into between a private party and a state or state instrumentality. Furthermore, as stated above, the commercial tribunal may apply the standards of national treatment, most favored nation treatment, fair and equitable treatment, or full protection and security either pursuant to a treaty that part of the applicable law, or pursuant to a national statute that contains equivalent standards. As Zeiler puts it:

“International law applies regardless of the applicable procedure. The arbitrators will have to apply international law even if the arbitration is not conducted under the ICSID Rules but according to other arbitration rules such as the Vienna Rules or the ICC Rules of Arbitration.”

On the other hand, the application of the national (i.e. statutory) contract law is also provided for in the ICSID Convention, as well as in some BITs. Thus, the ICSID Convention provides in Article 42(1) that the applicable law shall be “the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”


36 For example, the Yugoslavian Foreign Investment Act 2001, provides various guarantees to foreign investors in articles 7-13. Among them are “full legal certainty and legal protection”, as well as “national treatment”.

37 G. Zeiler, op. cit., p. 353.
At the same time many BITs contain formulas that the investment must be made “in accordance with the law of the host country” in order to be protected under the BIT provisions. Thus both tribunals, the investment one as well as the commercial one, may be invited to resolve the dispute applying both national and international law.\(^{38}\) They may do so by applying standards of investment protection as well as rules of contract law.

The distinction between commercial and investment arbitration is even more difficult to defend if one thinks in terms of monism, a dominant theory of international law in many countries. According to this theory, international and internal system form a unity. The investment treaty, together with all other ratified treaties of the host state, as well as international customary rules, form a part of the legal order of the host state, together with its contract law. Therefore, from the point of view of the monist state, it cannot be said that the treaty and the contract belong to different legal orders, that they are so separate and distinct that they cannot be decided by the same tribunal.

In summary, investment and commercial arbitration are not that different. Both can be governed by national or international arbitration law, and both can require the application of either national or international substantive law. That law may include investment protection standards, and contract rules of treaty or statutory, governmental or non-governmental origin.

To all this it may be added that it is often the same people that are called to act as arbitrators in these arbitrations. Although there are some exceptions, it may be safely claimed that there are many individuals that are acting interchangeably as either commercial or investment arbitrators.\(^{39}\)

This development [the rise of investment arbitration] has obviously had its impact on the practitioners of arbitration. Many have stayed in commercial arbitration exclusively. Other colleagues have come from public international law as academics or diplomats and became active only in investment arbitration. But many of us find ourselves now practicing both in commercial and investment arbitration.

Thus commercial arbitrators often appear as investment arbitrators and vice versa. When this is acknowledged, the claim that the awards that result from their

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\(^{38}\) For example, Article 2 of *ILA Recommendations on Res Judicata and Arbitration* mentions: “transnational rules applicable to international commercial arbitration”.

deliberations as commercial arbitrators are so different in nature, that they should not be given effect by their colleagues acting as investment arbitrators, becomes even less convincing. Investment arbitrators have “a solid grounding in international commercial arbitration”, they are “well-versed in the commercial arbitration process”. Such individuals should be more than ready to uphold the basic principles of the New York Convention, prevent the abuse of the international commercial arbitration process, and give full effect to arbitral awards rendered by their colleagues in international commercial arbitration. In a couple of recent investment arbitration awards protecting the commercial arbitration process, the New York Convention has provided the substantive legal obligations necessary to establish a violation of public international law by national courts or other State authorities. The New York Convention demands that the national courts of contracting States recognize valid arbitral awards. No less should be required of the arbitrators who are upholding such awards against the States.

4.2. The Possibility of Recognition Between Different Legal Orders

Even if commercial arbitration and investment arbitration are taking place within two distinct orders, is the doctrine that lis pendens and res judicata may not function between different legal orders still a valid rule today. It should be taken into account that it was pronounced long time ago, and without taking account the existence of so closely related and intertwining legal orders such as international commercial arbitration and investment treaty arbitration.

There are instances where an opposite rule is widely recognized. Thus, judgments of international courts, may be recognized full effect in national legal orders. Also, judgments originating in different national legal orders may be and are very often recognized in others. In PIL lis pendens and res judicata do indeed function between distinct (national) legal orders, on the basis of doctrine of mutual recognition, or reciprocity. Even if the principle of mutual recognition does not apply, the existence of a foreign judgment may influence the courts to take it into account as evidence in the subsequent proceeding so that, although it is not binding, it is taken into effect due to procedural efficiency. In light of PIL experience, it would be quite imaginable to contemplate recognition of preclusive and conclusive effects to commercial awards in investment arbitration, eventhough investment arbitration belongs to a different legal order.

40 S. Fietta, J. Upcher, op. cit., p. 221.
41 Ibidem.
42 S. Fietta, J. Upcher, op. cit., p. 194.
43 All jurisdictions require a foreign prior judgment to be recognized before it can have any legal effect F. Kremslehner, op. cit., p. 139:.
44 Ibidem.
5. Doctrines that may be relied on to provide effect

There is more than one doctrine that can be relied on to provide effect to a commercial award in the parallel or subsequent investment arbitration. They shall be briefly examined, with reservation that each of them deserves more detailed consideration that cannot be accomplished here. The examination will take as the departing point the easiest case, when the commercial/contractual arbitration was conducted under the same set of rules as the investment/treaty arbitration. The case is exemplified by the RSM v. Grenada award.\(^{45}\) In that case, the Respondent relied on Article 53 of the ICISD Convention, the *res judicata*,\(^{46}\) collateral estoppel, and abuse of process to seek from the Tribunal to grant effects to the prior ICSID award, rendered in a related commercial dispute. The Tribunal chose collateral estoppel as the main basis for granting effect to the prior award, but also recognized the relevance of other arguments.

5.1. Res judicata

According to an old treatise, the principle of the authority of the *res judicata* is as certain in international as it is in domestic law. The same considerations of social interest, the necessity to see that the disputes are definitely resolved once and for all, the apprehension that contradictory decisions on the same subject may be arrived at, have made that principle solidly established in the two different branches of law.\(^{47}\) National concepts of *res judicata* may differ, but they usually contain a defined set of rules governing the recognition and enforcement of decisions rendered by other courts and arbitral tribunals, even if they are from different legal orders.\(^{48}\) International law sees *res judicata* as a general principle that is binding between the parties and on all international courts.\(^{49}\) There are however, no rules of international law that impose on the investment arbitrators the obligation to recognize the finality of the awards rendered in other arbitrations, especially if they are rendered under a


\(^{46}\) Grynberg v. Grenada, para. 4.2.3.

\(^{47}\) Le principe de l’autorité de la chose jugée est aussi certain en droit international qu’en droit interne. Les mêmes considerations d’intérêt social, la nécessité de voir une fois les litiges définitivement terminés, la crainte d’arriver sur un même objet a des décisions contradictoires, ont fait solidement établir ce principe dans les deux branches différentes du droit. S. Stoykovitch, *De l’autorité de la sentence arbitrale en droit international public*, Paris, 1924, p 8.


national arbitration law, which is usually the case with commercial awards.\textsuperscript{50} The concepts of \textit{res \textit{judicata}} as developed in national laws and in international law cannot always be applied in international arbitration. There is still a need to develop specific rules in international arbitration on how to handle the existence of awards rendered in parallel or prior proceedings.\textsuperscript{51} In 2006, the International Commercial Arbitration Committee of the International Law Association has issued a Resolution that contains recommendations on \textit{res \textit{judicata}} and arbitration (Annex 2). The Committee did not suggest an autonomous definition of the concept due to divergent definitions under various national laws.\textsuperscript{52} The recommendations distinguish between conclusive and preclusive effects of prior arbitral awards. Advocating for such effects, the Committee limits its discussion to the field of international commercial arbitration.\textsuperscript{53} However, Bensuade notes that the ILA Committee’s choice of this issue was inspired by two cases, one of them being the infamous investment arbitration case – the CME v. the Czech Republic, mentioned below.\textsuperscript{54} And for its part, the final report leaves open the question whether an award rendered in a commercial arbitration would have a \textit{res \textit{judicata}} effect in a subsequent arbitration based on a international investment treaty.\textsuperscript{55} An arbitral award may give preclusive and conclusive effects both as to determinations contained in its dispositive part as well as in its reasoning.\textsuperscript{56}

In general terms then, \textit{res \textit{judicata}} ensures conclusive and preclusive effects of prior decisions in subsequent proceedings. The conclusive effects allow a party to enforce the previous decision and to rely upon it in subsequent proceedings. The preclusive effects prevent a party from re-litigating the same subject matter in subsequent proceedings.\textsuperscript{57} To be applicable the \textit{res \textit{judicata}} doctrine usually requires that a decision on merits has been rendered and that

\textsuperscript{50} “There is no effect of res \textit{judicata} from the decision of a municipal court so far as an international jurisdiction is concerned”. I. Brownlie, \textit{Principles of Public International Law}, Oxford University Press, 2008, p.50.

\textsuperscript{51} F. Kremslehner, \textit{op. cit.}, p. 127.

\textsuperscript{52} D. Bensuade, \textit{op. cit.}, p. 415.

\textsuperscript{53} \textit{ILA Recommendations on Res \textit{Judicata} and Arbitration}, Annex 2, paragraphs 1 and 2.

\textsuperscript{54} D. Bensuade, \textit{op. cit.}, p. 415.

\textsuperscript{55} D. Bensuade, \textit{op. cit.}, p. 416, Kremslehner, p. 154.

\textsuperscript{56} \textit{ILA Recommendations on Res \textit{Judicata} and Arbitration}, Annex 2, paragraph 4.1 Such effect applies as to decisions on issues of fact or issues of law that have been debated before the tribunal and determined in the dispositive part of the award, or that are essential to the dispositive part. (paragraph 4.2.)

the decision is final, i.e. not subject to ordinary review.\textsuperscript{58} Or, in terms of the present topic, the award on the merits has been rendered in commercial arbitration, and it has become final.

It seems to be common ground that a previous decision has \textit{res judicata} effect if there is a triple identity between the two disputes: the parties, the subject matter (cause of action) and the relief sought.\textsuperscript{59} The subject matter or cause of action in this formula includes both factual and legal grounds for instituting the two proceedings. It should be emphasized that the formulation of the test is by no means uniform in the literature and awards, especially in regard to the second and third prong.\textsuperscript{60} Besides being insufficiently uniform, this triple identity test is narrow and formalistic, and for those reasons simply inadequate to respond to the concerns raised by the modern multiplicity of dispute-resolution mechanisms. In international arbitration it is inappropriate to adopt a narrow and highly formalistic\textsuperscript{61} approach of this kind. Yet this is precisely what has happened in some arbitrations.

The most flagrant formalism has been enunciated in the application of the first prong of the test. In most cases the \textit{res judicata} effect has been denied on the ground that the parties in two arbitrations are different, although there was a manifestly close connection between them. The best example is found in “the Czech Republic Cases” in which “two arbitral tribunals reached strikingly different conclusions in what was substantively the very same dispute.”\textsuperscript{62} It should be noted that the Czech Republic Cases are only indirectly relevant to the discussion, since both arbitrations were investment treaty arbitrations, and they involved the non-recognition of effects of a prior award of another investment tribunal.\textsuperscript{63} Nevertheless, they are important as they illustrate very well the outcomes of applying a rigid triple identity test. The second (Stockholm) tribunal concluded that the prior award does not have a \textit{res judicata} effect primarily because: “The parties in the London Arbitration differ from the parties in this

\begin{footnotesize}
\begin{itemize}
\item[58] According to \textit{ILA Recommendations on Res Judicata and Arbitration}, Annex 2, paragraph 3.1: “it has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration.”
\item[59] F. Kremslehner, \textit{op. cit.}, 133; \textit{ILA Recommendations on Res Judicata and Arbitration}, Annex 2, paragraph 3. The ILA Reports that preceded the \textit{Recommendations} mention a possible further consideration for an award to be given \textit{res judicata} effect, specifically, identity of legal orders, that the \textit{Recommendations} do not purport to address (D. Bensuade, \textit{op. cit.}, p. 416).
\item[63] The commercial contract proceedings, that also existed, were conducted before the Czech state courts in this case.
\end{itemize}
\end{footnotesize}
arbitration.” But the same tribunal recognized that Mr. Lauder, the initiator of the first arbitration against the Czech Republic brought “virtually identical claims under two separate Treaties”\(^64\) and that he was “the ultimate controlling shareholder of CME”,\(^65\) the company that has initiated the second arbitration.

There is a contradiction between flexible criteria applied when evaluating \textit{ius standi} of direct and indirect shareholders as claimants in investment arbitration, and strict criteria applied when evaluating their identity with the company that is participating as a party in commercial arbitration. Such conceptual contradictions abound in the doctrine of investment arbitration. There is a further one between wide attribution of acts of state entities to the state for the purposes of asserting jurisdiction on the one hand, and the highly formalistic approach when the identity of the parties for the purposes of applying a “triple identity test” is evaluated. The acts of the state entity will be attributed to the respondent state in investment arbitration, but a \textit{res judicata} objection will be rejected on the basis that the parties in two arbitrations (i.e. the state entity in commercial and the state in investment arbitration) are not the same. This has been recognized by the Helnan Tribunal:

“127. The parties to the Cairo arbitration proceedings and the parties to this ICSID arbitration are not the same. EGYPT was not formally a party to the Cairo arbitration proceedings: the Claimant was EGOTH while HELNAN was the Respondent and Counterclaimant. However, this point may be less significant than it may be in different circumstances. Indeed it is HELNAN’s position in this arbitration that EGOTH’s deeds are tantamount to EGYPT’s deeds. Moreover, in its Decision on the Objection to jurisdiction of 17 October 2006, the Arbitral Tribunal has found that EGOTH’s actions within the privatisation process were attributable to the Egyptian State. Last, but not least, it is HELNAN’s position that the initiation of the Cairo arbitration proceedings is one of EGYPT’s breaches of its obligations to provide fair and equitable treatment to the investors. Thus it is not without some contradiction that HELNAN relies on the own legal personality of EGOTH, distinct from the Egyptian State, for the sole purpose of denying the alleged \textit{res judicata} effect of the Cairo Award.”\(^66\)

International arbitrators should apply a more flexible approach to subjective identity. Even in civil law systems that generally apply a strict test of identity, some flexibility is allowed, so that the term “parties” may include not only the claimant and the defendant, but also third parties who have, should have or


could have joined the proceedings.\textsuperscript{67} In common law systems, the \textit{res judicata} effect is generally recognized as between “the same parties or their privies”,\textsuperscript{68} and there are other exceptions from the same party requirement.\textsuperscript{69} In international investment arbitration there seem to be none. The arbitral tribunal in the subsequent investment arbitration needs to determine what is the applicable law and what effect the prior award has under that law.\textsuperscript{70} The effects of prior arbitral awards in further arbitral proceedings may be governed by transnational rules, that will be gradually developed by investment tribunals.\textsuperscript{71} Since the applicable law in investment arbitration is presumably the same law that has determined the question of the nationality of the claimant and attribution, that law should also apply when the identity is decided upon.

With respect to the second and the third prong, the situation is no better, since subject matter/cause of action requirement is understood as literal identity, rather than substantial identity.\textsuperscript{72} This is again expressed without hesitation in the second Czech Republic Case: “Because the two bilateral investment treaties create rights that are not in all respects exactly the same, different claims are necessarily formulated.” Being so understood, the second prong of the test can never be satisfied in the studied situation even if the factual situation is the same, since the legal cause of action in the first case will always be the breach of contract, and in the second, the breach of treaty. Thus, “although the subject matter may be substantially the same, the causes of action are different”\textsuperscript{73} It is due to this narrow understanding of the subject matter identity, that the doctrine of \textit{res judicata} can rarely appear as a successful argument for recognition of conclusive and preclusive effects of prior commercial arbitral awards.

The situation could be different if the two awards were rendered within the same legal order. As stated earlier, this is exemplified by the RSM v. Grenada case, where the prior contractual award was also rendered by an ICSID tribunal.\textsuperscript{74} In the subsequent treaty arbitration, Grenada invoked Article 53 ICSID Convention:

\begin{itemize}
  \item \textsuperscript{67} F. Kremslehner, \textit{op. cit.}, p. 133.
  \item \textsuperscript{68} “Privies” are persons connected together, or having a mutual interest in the same action or thing, by some relation other than that of actual contract between them. Law Dictionary: What is PRIVIES? definition of PRIVIES (Black's Law Dictionary)
  \item \textsuperscript{69} P. J. Martinez-Fraga and H.J. Samra, \textit{op. cit.}, p. 429.
  \item \textsuperscript{70} F. Kremslehner, \textit{op. cit.}, p. 150.
  \item \textsuperscript{71} ILA Recommendations on \textit{Res Judicata and Arbitration}, Annex 2, paragraph 2.
  \item \textsuperscript{73} Helnan International Hotels A/S v. The Arab Republic of Egypt, para. 124.
  \item \textsuperscript{74} The contractual dispute resolution clause called for disputes arising thereunder to be referred to arbitration under the ICSID Convention. \textit{Rachel S. Grynberg, Stephen M. Grynberg},
\end{itemize}

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“The award shall be binding on the parties and shall not be subject to any appeal to any other remedy except those provided for in this convention.”

The Tribunal confirmed that “to re-open the Prior Tribunal’s findings would also violate Convention Article 53.”75 Thus, in addition to principle of collateral estoppel that was the main basis for giving preclusive effect to the prior ICSID award, Article 53 was the additional one. Article 53 may be said to embody the principle of *res judicata* within the particular legal order existing under the Convention. In *obiter dicta*, the Tribunal added that

“Even when the contractual forum is not an ICSID Tribunal, BIT tribunals do not reopen the municipal law decisions of competent *fora*, absent a denial of justice.”76

The basis for this conclusion was found in another ICSID award, rendered in the proceedings between Helnan and the Republic of Egypt,77 which was considered to be persuasive authority, applicable to the case at hand.78 In that case, *res judicata* effect was recognized to the commercial award rendered by a tribunal under the aegis of the Cairo Regional Center for International Commercial Arbitration:

“[The Cairo Award] has been enforced and has *res judicata* effects in the Egyptian legal order. As Egyptian law was applicable to the Management Contract, the present Arbitral Tribunal cannot ignore its effect, unless it would be established that the rendering of the Award was made in breach of the Treaty, or general international law.”

The *Helnan Award* is based on the school of thought that makes a strict distinction between the local/national and the international legal order. The *res judicata* effect in this sense is strictly limited to questions of national/local legal order, and thus cannot rise to a ground for dismissal of the treaty claim.

“106. An ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.

125….an international tribunal must accept the *res judicata* effect of a decision made by a national court within the legal order where it belongs.”79

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75 *Grynberg v. Grenada*, para. 7.1.9.
76 *Grynberg v. Grenada*, para. 7.1.11.
77 *Helnan International Hotels A/S v. The Arab Republic of Egypt*.
79 *Helnan International Hotels A/S v. The Arab Republic of Egypt*. 

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5.2. Collateral estoppel

In RSM v. Grenada, the Respondent relied on the factual and legal findings of the prior tribunal. Grenada, the Respondent in this case relied on Article 53 and collateral estoppel since it conceded that “the requirements of *res judicata* may not have been met.” At the same time, however, the Respondent claimed that collateral estoppel is a species of *res judicata*. According to this doctrine:

“a finding [in the prior award] concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.”

In contrast to *res judicata*, the collateral estoppel by definition does not require full identity of the parties and of the causes of action:

“even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified.”

Collateral estoppel is thus more user-friendly, and the conditions for its existence can be more easily met in commercial/investment paradigm. No perfect identity is required. For example, the *Grynberg v. Grenada* Tribunal found it easy to treat the three sole shareholders of RSM as privies of RSM and to extend the effect of the prior award to them:

“7.1.7 It is true that shareholders, under many systems of law, may undertake litigation to pursue or defend rights belonging to the corporation. However, shareholders cannot use such opportunities as both sword and shield. If they wish to claim standing on the basis of their indirect interest in corporate assets, they must be subject to defences that would be available against the corporation - including collateral estoppel.”

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80 *Grynberg v. Grenada*, para. 4.2.3.
81 *Ibidem*, para. 4.6.5.
82 *Grynberg v. Grenada*, para. 7.1.2. citing *Amoco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Re-submitted Case - Amoco II) (10 May 1988) at para. 30.
83 *Grynberg v. Grenada*, para. 7.1.1.
84 *Southern Pacific Railroad Co v United States*, 168U.S.1, 48-49 (1897).
This doctrine is also more acceptable to the investment tribunals, because it allows only issue preclusion, rather than claim preclusion. It may be said that in contrast to *res iudicata*, collateral estoppel will not ensure full effect of the prior award. The fact that the prior tribunal considered no treaty but only contract issues does not prevent the subsequent tribunal to recognize the contractual issues as settled.\(^85\) This also means that the subsequent tribunal may retain jurisdiction, and at the same time rely on findings of the prior tribunal.\(^86\) For the respondent that won in the prior commercial arbitration, this is not a satisfactory solution, because it has to participate in another arbitration, and incur significant costs, in order to get an award confirming that it also did not breach the treaty. The re-litigation of the matter happens by the very fact that the claimant is allowed to put a new claim, this time based on the treaty, notwithstanding the unfavorable commercial award. The substantive result in *Helnan v. Egypt* Award gives ample illustration of how this works.

5.3. Preventing abuse of process

Notable commentators have advocated that the international tribunals should be regarded as having the power to dismiss proceedings as an abuse of process if they arise out of the same facts, and if they seek the same remedies as another international claim, but they do not satisfy the triple identity test.\(^87\) This argument is based on a universal concept of fair process and litigating in good faith that can also be applied in international commercial arbitration.\(^88\) The Czech Republic sought an award that CME’s case should be dismissed as abuse of process.

“If a Claimant chooses to pursue a contractual remedy in the local courts or private arbitral tribunals, he should not be allowed concurrently to pursue a remedy under the Treaty.”\(^89\)

A very narrow understanding of abuse of process was adopted by the Tribunal in the Partial Award:

“There is also no abuse of the Treaty regime by Mr. Lauder in bringing virtually identical claims under separate Treaties.”\(^90\)

\(^{85}\) *Grynberg v. Grenada*, para. 7.1.3.

\(^{86}\) As to issues that were taken as conclusively established in the *Grynberg v. Grenada*, case, these were simply enumerated in paragraph 7.1.8 of the Award.


\(^{88}\) F. Kremslehner, *op. cit.*, p. 138

The CME tribunal concentrated here on the existence of two parallel treaty claims, while omitting to take position on the existence of a parallel commercial contract litigation initiated by the claimant before the Czech courts. The reluctance to recognize and prevent the abusive tactics of this kind is the consequence of the pro-investment bias that imbues most investment arbitrators. Many of them consider this as a perfectly legitimate strategy: “the investor starts additionally a parallel BIT arbitration to be on the safe side.” Brown admits that the record of application of this doctrine by international tribunals is not good. It has even less prospect of success in the situation when the commercial proceeding based on contract is considered as a national/local in contrast to international one based on the treaty. One of the rare examples when this argument worked is RSM v. Grenada, but it should be borne in mind that in that case, the contract and the treaty arbitration were brought within the same (ICSID) legal order:

“7.3.6 It is true that Claimants style the present arbitration as Treaty claim based. But the difficulty with this is that, as pleaded and argued, 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 and over which the Prior Tribunal had jurisdiction.

7.3.7 Claimants’ present case is thus no more than a contractual claim (previously decided by an ICSID tribunal which had the jurisdiction to deal with Treaty and contractual issues), dressed up as a Treaty case. Having regard to all that has gone before, the Tribunal finds that the initiation of the present arbitration is thus an improper attempt to circumvent the basic principles set out in Convention Article 53 and the procedures available for revision and rectification of awards provided for in Article 51.”

6. Back to Policy Reasons

Coherence of international investment law requires consistent decisions. The lack of consistency leads to legitimacy crisis, such as the one that is currently looming over investment treaty arbitration. There are plenty of inconsistencies with respect to the treatment of prior commercial arbitral awards by investment tribunals, some of which were already mentioned. One of them concerns the fact that international investment

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90 Ibidem, para. 412.
91 K. H. Böckstiegel, op. cit., p. 577.
92 S. Franck, op. cit., p. 1586.
tribunals are increasingly acting as ultimate guardians of the recognition and enforcement of commercial arbitration awards.\textsuperscript{93} This ensues when the judiciary of the host state, after the commercial award is rendered against the state, refuses to enforce it, or the host state tries to evade its obligations under the commercial award in any other way. Then, the investor may initiate an investment dispute and claim denial of due process. If the investment tribunal finds a manifest breach of due process, the host state will be held liable:

“All told, the shadow of public international law looms ever larger over domestic courts and other State authorities in their oversight of the commercial arbitration process. Any bad faith or arbitrary conduct, or serious incompetence, by such authorities in connection with that process is increasingly vulnerable to international censure and, ultimately, to findings of State responsibility.”\textsuperscript{94}

Likewise, investment tribunals have accepted the binding effect of the prior commercial award in a reverse case, where the investor initiated an investment arbitration against a state whose courts have recognized a foreign commercial award.\textsuperscript{95} The underlying assumption in both cases is that the commercial award has a \textit{res judicata} effect within national legal orders, and that such effect should be protected by the investment tribunal in favor of the investor or against him. Investors are more and more often asserting a \textit{res judicata} effect in this context and the investment tribunals often uphold it,\textsuperscript{96} although the threshold that must be reached before the tribunals will intervene to protect commercial arbitration rights from host state intervention is a high one.\textsuperscript{97} For that reason, they should just as readily accept the binding effect of the award when it is raised in another context, as a defense, rather than a sword. If the commercial arbitration exists as an option for the investor, and especially if the proceedings have been initiated and completed under the contract with an unfavorable award for the investor, investment tribunals should be very suspicious against treaty claims alleging that the state violated the treaty in connection with the same contractual relationship.

There is also a slight incongruity between very persistent pleas for recognition of authoritative force of unrelated prior investment awards in investment arbitration, and reluctance to recognize full authoritative force of related prior

\textsuperscript{93} S. Fietta, J. Upcher, \textit{op. cit.}, p. 188.
\textsuperscript{94} S. Fietta, J. Upcher, \textit{op. cit.}, p. 222.
\textsuperscript{96} S. Fietta, J. Upcher, \textit{op. cit.}, p. 221: “Investment arbitration tribunals have shown themselves willing to impose a broad range of remedies against violating State parties in order to ensure respect for the commercial arbitration process.”
\textsuperscript{97} S. Fietta, J. Upcher, \textit{op. cit.}, p. 216.
commercial awards. As an award is said to take effect primarily between the parties, it is hard to conceptualize the theory of authoritative precedent in investment arbitration. Nevertheless, this is advocated, without always acknowledging that it is the at least parties and their privies who should be bound by an award rendered in the commercial arbitration setting. The *res judicata* in investment arbitration should be placed in the context of the broader discussion regarding precedent in international commercial and investor arbitration.

### 7. Conclusion

Investment tribunals have not been disposed to recognize full *res judicata* effects to awards of commercial tribunals. Applying triple identity test, they have often dismissed *res judicata* objections submitted by the respondents. Another obstacle to prior commercial award being treated as a decision precluding the treaty claim has been the conception on different legal orders. A limited *res judicata* effect has been recognized with regard to findings of the prior award on factual and legal issues related to the contractual relationship. This approach permits conclusive effect to be recognized only in regard of certain issues or part of the requested relief, and restricts the current arbitration to the issues and the relief that the prior arbitral award has not dealt with.

Claimant should not be allowed to exploit a dispute under a commercial contract to pursue Treaty proceedings. A broader application of the triple identity test is required, and a more active approach of investment arbitrators to prevent abuse of process. Claims for relief fundamentally based on breach of contract reinstated as the breach of treaty should be treated as substantially same claims, notwithstanding the cause of action (treaty or contract), and such actions should be dismissed. This is especially so when it was possible to invoke the treaty standards in the commercial arbitration, thanks to a broad arbitration clause in the contract. In such circumstances the investor should be precluded from initiating arbitration anew. Direct and indirect shareholders, on the one hand, as well as states and state entities, on the other should be regarded as privies, for the purposes of establishing identity. More limited *res judicata*, i.e. conclusive effect as to factual and legal findings of the prior award is appropriate in those cases when contractual issues appear only as preliminary questions that need to be resolved before the tribunal decides on the main issue, which truly involves the allegations of breach of the treaty standards.

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98 *Ibidem.*

Дејство раније донете арбитражне одлуке у инвестиционој арбитражи

Самостално: Уговор о сахраном узајамно јој правилу садржаети и арбитражну клуазулу којом се уговора међународна јирбовинска арбитражи. Исти срновремено, узајамна може јокренути и инвестициону арбитражи на основу двостране сепаратума о заштитан и унавређену узајамно. Чињеница је да се на основу јој праву консусинуумзи два арбитражна суда која имају конкуренцију надлежности за сјај који још иниције из истио чињеничној сицина. Прекласиране надлежности може имати за јошметду допошне две њу арбитражних одлук којима се решава сушищиски исти сјај или сушищиски исти јавна јишина. У раду се иштитуире могућност ирпозавања јереклузивних и конклюдивних дежисива ранијој арбитражној одлуци доначиго у међународном јирбовиском сјају у яраселуди на накладној инве стиционој арбитражи. Прочувају се доктприне на којо со могу јозвати арбищи у инвестиционој арбитражи како би јоружили шакко дејство ранијој одлуци. Аутор закључује да инвестиционо арбитражака захтевала флексизилност у уживрењану иденситет сијаанака и пределова сјаја. Правило о одобреној јавној личности маиничих дружищава и дружишава кћери, као и државе и државних ензиета, јреба ирменевава врена истио криешерюмима који се јрименују јри уживрења надлежности. Тужбине захтеви који су засновани на јирбовиском уговору, мада се формално јозвавају на икрошу двостране међународној уговора, могу се јиреризиран како сушищиски исти без обзира на различит јавни основ. Такве захтеве јреба одбавцени с јозовом на јереклузива дежисива раније арби јражне одлуке донете у јирбовиском сјају. Тужбине захтеве који нису засновани на јирбовиском уговору, али су у вези са њим, јреба решавању у инвестиционој арбитражи, али јри јом јреба јронизији конклюдиве ефека јеније арбитражној одлуци у иследу уживрењенио ензиетични сицина и маирериалногравних јишина која се односе на уговор.

Кључне речи: јирбовиска арбитражака, инвестиционо арбитражака, јереклузивно и конклюдивно дејство раније арбитражне одлуке