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The Role of Precedent in Defining Res Judicata in Investor–State Arbitration

By Pedro J. Martinez-Fraga*[*] *and Harout Jack Samra*[**]

Abstract: As international arbitration, and investment arbitration in particular, becomes more prevalent, the risks of doctrinal fragmentation also increase, in part driven by the disparate treatment of the doctrine of res judicata throughout most jurisdictions, and in the arbitration context. Notwithstanding the general consensus regarding the broad contours of res judicata and its firm position as a principle of international law, there is little agreement regarding how it is to be administered. These developments threaten to undermine the international arbitration system, wresting from it normative legitimacy. The U.S. common law version of res judicata, which is distinct from res judicata as developed in many civil law jurisdictions, may serve as a substantial conceptual foundation upon which civil law and other common law res judicata precepts may merge to fashion a uniform doctrine applicable in international arbitration that is expansive, substantive/transactional-based as to criteria, and non-formalistic in its application so as to avert and discourage the doctrine's circumvention through the use of legal fictions.

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Oedipus: Let it be then; have your way only if come he must, I beg of you my friend, do not grant them jurisdiction to rule on my fate.

Thesus: Sir, there is no need for you to plea a second time.

- Sophocles, Oedipus at Colonus[1]

I. INTRODUCTION AND BACKGROUND

While economic globalization has found its legal counterpart in international trade law, juridical globalization in the field of cross-border contentions is yet to arise. The virtually monolithic configuration of international trade law stands in sharp relief with the fragmented body of principles of international public law governing investor–state arbitrations.

[1] SOPHOCLES, OEDIPUS AT COLONUS, at 260 (F. Storr ed., Loeb Classical Library ed. 1981) (c. 406 B.C.E.) (translation by author) (ΟΙΔΙΠΟΥΣ: έστω δ' ούν όπως ύμϊν φίον. μόνον, ξέν, είπερ κεϊνος ώδ' ελεύσεται, μηδείς κρατείτω τής έμής ψυχής ποτε. ΘΗΣΕΥΣ: άπαξ τα τοιαϋτ, ούχί δίς χρήζω κλύειν, ώ πρέβυ).

Yet, these non-uniform and fragmented principles of private and public international law serve a decisive role in administering the relationship between capital-exporting and capital-importing countries. Thus, their role is pivotal to the material effects of economic globalization. Many commentators have expressed concern that as international arbitration, and investment arbitration in particular, becomes more prevalent, the risks of doctrinal fragmentation also increase, both undermining the international arbitration system and wresting from it normative legitimacy. This risk is underscored generally by the disparate treatment of the doctrine of res judicata throughout most jurisdictions, and, more specifically, as the doctrine applies to international commercial and investor–state arbitration.

There is a general consensus in international arbitration with respect to two issues: first, arbitral tribunals universally accept the principle of res judicata, or claim preclusion—the principle that, once adjudicated, a claim cannot be raised again. Second, arbitral tribunals accept what is referred to as the "triple identity" test as the determinative standard for the application of res judicata to a further proceeding. The triple identity test in res judicata prevents relitigation of claims (1) between the same parties (2) regarding the same subject matter, and (3) on the same legal grounds.[2] Because of the ostensible simplicity of the triple identity test, together with the international adoption of the doctrine, one might reach the misguided proposition that the current formulation of the res judicata doctrine as applied in international arbitration is not meaningfully or materially wanting. Such an assumption, however, obfuscates the multiple salient problems that command the fashioning of the application of a uniform doctrine applicable to international arbitration.

At the very outset, there is a lack of uniformity in the application of the doctrine because judicial tribunals, understandably as an expression of sovereignty, apply fixed rules of res judicata to a specific jurisdiction for purposes of determining the effect of an award on a further proceeding.[3] The doctrine of res judicata, however, varies—often materially—among states and different legal systems, thus hampering application of the doctrine in the context of international arbitration in ways that would preserve and foster uniformity.

While certainly arbitral tribunals are not required to apply a doctrine of

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[2] Generally, but far from universally, the triple identity test proscribes a further proceeding between (i) the same parties, (ii) arising from the identical transaction or causes of action, and (iii) seeking the same relief. *See* Int'l Law Ass'n, Berlin Conference, Berlin, China, 2004, *International Commercial Arbitration Interim Report: "Res judicata" and Arbitration*, 2. *See also* Factory at Chorzów (Ger. v. Pol.), Interpretation of Judgments Nos. 7 & 8, 1927 P.C.I.J. (ser. A) No. 13, at 23 (dissenting opinion of Judge Anzilotti).

[3] This use of res judicata with the aim of proscribing a further or subsequent contention is often referred to as "negative res judicata" as opposed to "positive res judicata," which concerns the use of an award to enforce its terms. This contribution shall be limited only to analysis of "negative res judicata."

res judicata in the same manner as national courts, it is evident that the manner in which res judicata is applied by arbitral tribunals and to arbitral awards may not be altogether severed from the elements of the res judicata doctrine that municipal courts apply to judgments, notwithstanding the uniquely salient features of international arbitration—namely, that it is bottomed on a private foundation for jurisdiction,[4] removed from a sovereign's exercise of sovereignty, its emphasis on a consensual precept in the selection of arbitrators (decision makers), and its reliance on institutional internationalized procedures, the applicability of which are also founded on party-autonomy, and a consensual arrangement.

The U.S. common law version of res judicata may serve as a substantial conceptual bastion from which civil law and common law res judicata precepts may merge in fashioning a uniform doctrine that is expansive, substantive/transactional-based as to criteria, and non-formalistic in its application so as to avert and discourage the doctrine's circumvention through the use of legal fictions. This expansive version of the doctrine is particularly well suited to address the complexities of applying res judicata in the context of investor–state arbitration.

Following a succinct introduction that traces the contours of the origins of res judicata in international law, including references to the precedent and Statute of the International Court of Justice (ICJ), a detailed discussion of the fragmented system of res judicata ensues in Section III. This analysis will include a review of the civil law and common law approaches to the doctrine, with particular attention placed on the approach adopted in United States jurisprudence. A review of the application of this doctrine in the context of international arbitration, including investor–state arbitration, follows in Section IV. Finally, emerging issues in investor–state arbitration that implicate the development of res judicata in that arena shall be considered.

II. THE ORIGINS OF PRECEDENT AND RES JUDICATA IN INTERNATIONAL LAW: AN ANALYSIS OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

This paper begins with a consideration of the origins of the doctrine of res judicata in international law, including the development of its acceptance. The Statute of the ICJ and the ample precedent that this international judicial body has generated provide a vast source of

[4] This "private" foundation is cognizable in investor–state arbitration pursuant to the "offer-acceptance" theory of consent arising from a national investor-protection statute that serves as an offer that in turn may be deemed accepted, among different ways, by the actually filing of an arbitration demand. *See* David D. Caron, *The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN, 649, 649 (Mahnoush H. Arsanjani et al. eds., 2011).

substantial authority. Indeed, in a 1954 ICJ case, res judicata was recognized as a "well-established and generally recognized principal of law."[5] This conclusion follows the precedent established—in dissent—by a distinguished Permanent Court of International Justice (PCIJ) jurist, Judge Dionisio Anzilotti, who observed that res judicata was among the "general principles of law recognised by civilised nations."[6] The significance of the specific language that the ICJ and its predecessor the PCIJ adopted arises from the terms of Article 38 of the ICJ Statute:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[7]

As is readily discernible, the normative use of the doctrine of res judicata by ICJ tribunals directly rests on the determination that the doctrine is a "general principle[] of law recognized by civilized nations," a determination which, over eighty years since Judge Anzilotti's famous exegesis, is firmly fixed in the firmament of international jurisprudence, including that of numerous recently issued international arbitral tribunals. However, as shall be detailed, notwithstanding the general consensus regarding the broad contours of the doctrine and its firm position as a principle of international law, there is little agreement regarding how it is to be administered.

III. THE FRAGMENTED CONFIGURATION OF RES JUDICATA

Despite the apparent uniformity with respect to the viability of res judicata in international law, and the general agreement that this doctrine is best administered through the application of the triple identity test, there is in fact virtually no agreement as to how *any* of the three prongs of that test should be applied in practice. Because of the universal acceptance of the doctrine's general contours, it is unsettling and deeply problematic that there is so much dissonance concerning the doctrine's application. Analysis

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[5] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 53 (July 13).

[6] Factory at Chorzów (Ger. v. Pol.), Interpretation of Judgments Nos. 7 & 8, 1927 P.C.I.J. (ser. A) No. 13, at 27 (dissenting opinion of Judge Anzilotti).

[7] Statute of the International Court of Justice art. 38.

of national law, including—broadly speaking—the codifications adopted in numerous civil law jurisdictions and the United States common law, renders several readily identifiable categories of res judicata that are hardly harmonized. As we shall demonstrate, these rubrics can be categorized as being either formalistic or substantive/transactional. This article contends that it is the latter that is most compatible with the juridical globalization of international commercial arbitration and investor–state arbitration.

A. The Civil Law Approach

Although res judicata has been codified in most civil law jurisdictions in Europe, Latin America, and the Middle East, rudimentary elements of the doctrine are not uniformly articulated, let alone expansively applied. Each individual civil law jurisdiction administers its own unique version of the doctrine, typically pursuant to a methodology that emphasizes legal formalism extremely narrow in scope. These narrow, formalistic applications of the doctrine are, therefore, ill-suited to the broad, complex legal arrangements that characterize transnational commerce in a global economy. An analysis of the res judicata provisions adopted by several civil law jurisdictions reflects a significant lack of uniformity with respect to each prong of the triple identity test. Nevertheless, despite the numerous differences, the narrow, formalistic approach to the doctrine's application appears to be pervasive.

With respect to the first prong of the triple identity test, which requires the identity of the parties to be the same, the jurisdictions analyzed can be divided into four identifiable categories. First, the applicable code of some jurisdictions only references "the same party."[8] Second, other jurisdictions even further limited conceptually the first prong by identifying "the same parties in the same or identical capacities."[9] A third category applies "the same parties and heirs" test, arguably adopting a more expansive approach

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[8] *See, e.g.*, CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL CODE] art. 301 (Braz.): "*Uma ação é idêntica à outra quando tem as mesmas partes, a mesma causa de pedir e o mesmo pedido.*" ["An action is identical to another when they have the same parties, the same cause of action, and the same request."]

[9] *See, e.g.*, CODE CIVIL [C. CIV.] art. 1351 (Fr.):

> *L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité*. [The authority of res judicata does not occur only with respect to the subject of the judgment. It is necessary that the thing sought is the same, that the application is based on the same cause; that the application is between the same parties, and formed by them and against them in the same capacity.]

to the doctrine's application.[10] Fourth, in some jurisdictions, the first prong has been crafted as pertaining to "the same parties" (an explicit provision for no third parties), leaving no doubt as to the narrow and formal application of the prong.[11]

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[10] *See, e.g.*, CÓDIGO DE PROCEDIMIENTO CIVIL [CÓD. PROC. CIV.] [CIVIL PROCEDURE CODE] art. 177 (Chile):

> *La excepción de cosa juzgada puede alegarse por el litigante que haya obtenido en el juicio y por todos aquellos a quienes según la ley aprovecha el fallo, siempre que entre la nueva demanda y la anteriormente resuelta haya:*
>
> *1. Identidad legal de personas;*
> *2. Identidad de la cosa pedida; y*
> *3. Identidad de la causa de pedir.*
>
> *Se entiende por causa de pedir el fundamento inmediato del derecho deducido en juicio.*
>
> [The doctrine of res judicata may be invoked by the litigant who has obtained a judgment at trial and all those who, by law, are included in the decision whenever the new claim and the previous result share:
>
> 1. Legal identity of persons;
> 2. Identity of the thing asked; and
> 3. Identity of the cause of action
>
> Cause of action refers to the immediate legal grounds decided in the previous judgment.]

[11] *See, e.g.*, CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVILCODE] arts. 469–70 (Braz.):

> *Art. 469 - Não fazem coisa julgada:*
>
> *(I) os motivos, ainda que importantes para determinar o alcance da parte dispositiva da sentença;*
> *(II) a verdade dos fatos, estabelecida como fundamento da sentença;*
> *(III) a apreciação da questão prejudicial, decidida incidentemente no processo.*
>
> *Art. 470 - Faz, todavia, coisa julgada a resolução da questão prejudicial, se a parte o requerer (arts. 5º e 325), o juiz for competente em razão da matéria e constituir pressuposto necessário para o julgamento da lide.*
>
> [Article 469 – Res Judicata does not apply to:
>
> (I) the rationale, except that which is important to determine or advance the dispositive portion of the judgment;
> (II) the true facts, established as the foundation of the sentence;
> (III) consideration of the question, incidentally decided in the process.

A strict "same party" scheme leaves room for subsidiary or affiliate corporate entities to circumvent res judicata finality. Similar gamesmanship is readily available with respect to representatives, agents, principals, and other similar legal fictions. Likewise, pursuant to this rubric, an individual in her or his personal capacity in the first action and as the solitary shareholder of a corporation in the further proceeding would theoretically be able to challenge quite meaningfully the doctrine's application.

The second prong of the triple identity test suffers from want of uniformity and excessive formality. A number of the jurisdictions analyzed seemed to define the second prong of the triple identity test as the "same cause of action."[12] Others focused on what might best be characterized as the "same underlying occurrence or transaction."[13] In a third category, the language was inconclusive for purposes of definitively identifying whether cause of action or underlying transaction or occurrence was intended.[14]

Article 470 – It is, however, res judicata the resolution of the certified question, if the part requires it (arts. 5 and 325), the court has jurisdiction in the matter and provide the necessary presupposition for the trial of the suit.]

[12] *See, e.g.*, Montana v. United States, 440 U.S. 147, 153 (1979).

[13] CODE CIVIL [C. CIV.] art. 1351 (Fr.):

L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité. [The authority of res judicata does not take place only with respect to the subject of the judgment. It is necessary that the thing sought is the same; that the application is based on the same cause; that the application is between the same parties, and formed by them and against them in the same capacity.]

[14] *See, e.g.*, CÓDIGO PROCESAL CIVIL [CIVIL CODE] art. 123 (Peru):

Una resolución adquiere la autoridad de cosa juzgada cuando:

> *1. No proceden contra ella otros medios impugnatorios que los ya resueltos; o*
> *2. Las partes renuncian expresamente a interponer medios impugnatorios o dejan transcurrir los plazos sin formularlos.*

La cosa juzgada sólo alcanza a las partes y a quiénes de ellas deriven sus derechos. Sin embargo, se puede extender a los terceros cuyos derechos dependen de los de las partes o a los terceros de cuyos derechos dependen de los de las partes, si hubieran sido citados con la demanda.

La resolución que adquiere la autoridad de cosa juzgada es inmutable, sin perjuicio de lo dispuesto en los Artículos 178 y 407.

Finally, none of the jurisdictions studied specified the particular type of relief that would give rise to satisfaction of the third prong of the test. Practically all identified the relief sought as "the same objective or object."[15] Under this formulation, a formalistic, non-substantive/transactional approach to the application of this third prong is problematic. By way of example, a strict application of the civil law codified doctrine generally would defeat application of the res judicata doctrine where the first action alleged *prohibitory* injunctive relief and the further proceeding averred *mandatory* injunctive relief. Similar nuanced and less subtle machinations concerning the prayer for relief can be devised without much challenge to the imagination with respect to, for example, specific performance. As to a straightforward pecuniary/quantum application for damages, the ambiguity in the second prong—underlying transaction/cause of action—can certainly justify non-application of the doctrine merely by ascribing the damages petitioned in the further action as arising from a different cause of action distinct from that asserted in the first proceeding and predicated on a part of the underlying occurrence or transaction that was not litigated or framed by the pleadings in the first action.

[A judgment acquires the authority of res judicata when:

1. No other challenges other than those already resolved are pending against it; or
2. The parties expressly waive any further challenges or permit deadlines to pass without being acted upon.

Res judicata extends only to the parties and those who derive their rights therefrom. However, it can be extended to third parties whose rights depend on the rights of the parties or to third parties whose rights depend on the parties, if they had been summoned to the lawsuit.

The resolution that acquires the authority of res judicata is immutable, notwithstanding the provisions of Articles 178 and 407.]

[15] *See, e.g.*, CODE CIVIL [C. CIV.] art. 23 (Belg.).

L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet de la decision. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité. [The authority of res judicata does occur only with respect to the subject of the decision. It is necessary that the thing sought is the same; that the application is based on the same cause; that the application is between the same parties, and formed by them and against them in the same capacity.]

B. The U.S. Common Law Approach

The common law res judicata regime stands in stark contrast with its civil law counterpart. The common law res judicata construct is materially less formal and, therefore, significantly more expansive. Thus, it meaningfully amplifies the doctrine's application.

1. Common Law Public Policy

Contrary to the majority of civil law jurisdictions, the United States Supreme Court, in *Southern Pacific Railroad Company v. United States*,[16] set forth two tenets upon which res judicata as a juridical doctrine constituted an integral part of judicial public policy. First, the Court observed that "[t]his general rule [res judicata] is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination."[17] Second, it was observed that:

> [the] enforcement [of res judicata] is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals concerning all matters properly placed at issue, and actually determined by them.[18]

The Court supplemented these two policy precepts by recognizing that a fundamental objective of the doctrine is "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."[19]

Consonant with its status as a matter of public policy, however, res judicata, contrary to the majority of civil law jurisdictions, may be raised

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[16] 168 U.S. 1, 18 (1897).

[17] *Id.* at 48.

[18] *Id.*

[19] *See* Montana v. United States, 440 U.S. 147, 153 (1979); *see also* Geoffrey C. Hazard, Jr., *Res Nova in Res Judicata*, 44 S. CAL. L. REV. 1036, 1042–43 (1971); Allan D. Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857, 858 (1965). This staunchly entrenched public policy status notwithstanding, the U.S. common law res judicata scheme contemplates waiver of the doctrine's applications if not timely raised by a party. *See, e.g.*, Arizona v. California, 530 U.S. 392, 410 (2000) ("We disapprove the notion that a party may wake up because a 'light finally dawned' years after the first opportunity to raise a defense [of res judicata] and effectively raise it so long as the party was (though no fault of anyone else) in the dark until his late awakening."); *see also* Pangburn v. Culbertson, 200 F.3d 65, 68 (2d Cir. 1999).

sua sponte by a court of competent jurisdiction.[20] A predicate to judicial initiative of this sort is that the Court must be "on notice that it has previously decided the issue presented . . . even though the defense [res judicata] has not been raised."[21]

The common law public policy standing of res judicata also adopts the time-honored tradition and general rule that a party "is not bound by judgment *in personam* in a litigation in which he is not designated as party or to which he has not been made a party by service of process."[22]

2. The U.S. Common Law "Triple Identity" Test

The triple identity test is an integral part of the U.S. common law res judicata doctrine. Despite multiple iterations of the test over time and in the development of jurisprudence, a key recitation of the test provides that:

> a right, question, or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, 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.[23]

The "sameness" or "identity" predicate, which arguably promotes a broad application of the doctrine, finds eloquent expression in no fewer than six exceptions to the rule against non-party claim preclusion, which considerably temper the seemingly limiting character of the first prong same party element. These exceptions are wholly foreign to civil law jurisdictions.

The first exception provides that "[a] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement."[24] Two examples of this situation would be indemnity and insurance arrangements.

A second exception arises from preexisting juridical relationships between the person to be bound and the party to the judgment.[25] These relationships would include assignee and assignor, bailee and bailor, and persons with interest in property (titleholders).[26]

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[20] *Arizona*, 530 U.S. at 412.

[21] *Id.*

[22] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969).

[23] S. Pac. R.R. Co. v. United States, 168 U.S. 1, 48 (1897).

[24] DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 77–78 (2001); *see also* California v. Texas, 459 U.S. 1096, 1097 (1983).

[25] *See* Richards v. Jefferson County, 517 U.S. 793, 798 (1996).

[26] *See* RESTATEMENT (SECOND) OF JUDGMENTS §§43–44, §52, §55 (1982); *see also* Taylor

A third exception arises where a non-party who was "adequately represented by someone with the same interests who [was] a party" to the suit, and, therefore, the non-party may be bound by the judgment in the first action.[27] Examples of representative actions that may have preclusive effect on non-parties are (i) class actions, (ii) suits filed against trustees, (iii) actions against guardians, and (iv) proceedings against fiduciaries.[28]

Fourth, where a non-litigant assumes control over a litigation in which judgment was rendered, the non-party exercising control shall be bound by the issuing judgment.[29]

The fifth exception is triggered where a party seeks to re-litigate a case through a proxy. Preclusion attaches when a party who did not participate in the first-filed action files a claim as the designated representative of a person who was a party in the first-adjudicated proceeding.[30]

The sixth exception is found where specific statutory enactments foreclose successive litigation by non-parties, such as in probate and bankruptcy proceedings.[31]

For the sake of being comprehensive, it should be noted that in 2008 the Supreme Court abolished a "virtual representation" exception to the non-party exception preclusion that primarily had been developed by the Eighth, Ninth, and D.C. Circuit Courts of Appeals.[32] Patently contradicting the Supreme Court's holding in *Richards*,[33] these circuit courts relied upon a multifactor standard for virtual representation that allowed for non-party

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v. Sturgell, 553 U.S. 880, 894 (2008) ("These exceptions originated 'as much from the property law as from the values of preclusion by judgment.'").

[27] *Taylor*, 553 U.S. at 881 (citing *Richards*, 517 U.S. at 798).

[28] *Richards*, 517 U.S. at 798.

[29] Montana v. United States, 440 U.S. 147, 155 (1979). In this case the Supreme Court found that the subject non-party bound by the judgment, the United States, had an active role in:

> (i) requiring the first suit to be filed,
> (ii) reviewing and approving the complaint,
> (iii) assuming responsibility for attorney's fees and costs,
> (iv) strategizing and directing an appeal from a State District Court to a State Supreme Court,
> (v) entering an appearance and submitting a brief in the capacity of *amicus* before a State Supreme Court,
> (vi) directing the filing of a notice of appeal to the U.S. Supreme Court, and
> (vii) causing petitioner abandonment of judicial appeal pursuant advice of the Solicitor General of the United States.

Id. *Montana* suggests that the standard for "controlling a proceeding" entails a totality of circumstances analysis. *Id.*

[30] Chicago, R.I. & P.Ry. Co. v. Schendel, 270 U.S. 611, 620–23 (1926).

[31] Martin v. Wilks, 490 U.S. 755, 762 (1989).

[32] *See Taylor*, 553 U.S. at 880.

[33] 517 U.S. at 793.

preclusion in cases beyond the six exceptions identified.[34]

The U.S. common law second prong of the triple identity test—cause of action or subject matter—is similarly broader than that of its civil law counterpart. Specifically, while the standard res judicata triple identity test recitation merely states that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action,"[35] res judicata precludes re-litigation of all causes of action, defenses, and affirmative defenses that were available to a litigant in the first action but not raised at that time.[36] This framework, which extends to causes of action not even raised in the first proceeding, let alone not identical to those asserted in the further action, is both theoretically and practically alien to the triple identity test examined in civil law jurisdictions. This expansive approach furthers the policy of finality that res judicata seeks to accomplish by virtue of focusing on the actual substantive and transactional configuration of the proceedings instead of relying on the narrow and formalistic mechanics that undermine the doctrine.

3. Collateral Estoppel

The schism between civil and common law jurisdictions is substantially enhanced by the U.S. common law doctrine of collateral estoppel and the multiple nuances that define the doctrine. The collateral estoppel nomenclature, for example, has been used to define the res judicata effect against a non-party. In *Montana v. United States*, for example, the Supreme Court observed that "preclusion of such non-parties falls under the rubric of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action."[37] These references notwithstanding, the Restatement (Second) of Judgments treats res judicata as "claim preclusion" and collateral estoppel as "issue preclusion."[38] "Defensive collateral estoppel" constitutes an occurrence where a defendant attempts to proscribe a plaintiff from re-litigating an issue that the plaintiff previously had litigated unsuccessfully in a prior action against the *same* or a *different* party.[39] Moreover, offensive collateral estoppel has been defined as instances where a plaintiff aspires to foreclose a defendant from re-litigating an issue that the defendant previously had unsuccessfully litigated

[34] While the Sixth Circuit in *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 143 F.3d 415, 423 (6th Cir. 1999), held that "virtual representation" was no broader than "adequate representation" as the Supreme Court had defined in *Richards*, the test enunciated by the Eighth, Ninth, and D.C. Circuits, amplified the Supreme Court's holding in *Richards*. This conflict between the Circuits and the Supreme Court was expressly and directly laid to rest by the Court in *Taylor*. *See Taylor*, 553 U.S. at 894.

[35] Montana v. United States, 440 U.S. 147, 153 (1979).

[36] Brown v. Felsen, 442 U.S. 127, 131 (1979).

[37] *Montana*, 440 U.S. at 154.

[38] *See* RESTATEMENT (SECOND) OF JUDGMENTS §27 (1982).

[39] *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979).

in a prior proceeding against the *same* or a *different* party.[40]

Collateral estoppel may apply either to issues of fact or law and application of the doctrine is triggered by the triple identity test.[41] As with res judicata, collateral estoppel does not require exact *identity* of the parties. Instead, substantial identity shall suffice, assuming meaningful commonality of interest.[42]

Notably, the doctrine of estoppel recognizes an exception for "unmixed questions of law" in successive actions involving substantially unrelated claims.[43] Here the adjective "unmixed" and the adverb "substantially" are paramount. Even though preclusive effect conclusively attaches in a further litigation to issues of fact or law that were raised or that could have been raised in a prior proceeding, an exception is amply recognized where, in deciding a case, a court has articulated a rule or principle of law; a party to a subsequent proceeding—upon a different demand—is not estopped from arguing that the law is otherwise..[44] This exception, however, is limited only to cases where a pure legal issue was pronounced in the first action (an unmixed question of law) and contested in a subsequent proceeding that must be based upon a different demand: "[b]ut a *fact*, *question*, or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."[45]

The U.S. common law doctrine of collateral estoppel carves out yet another distinction that still furthers the gap between common and civil law doctrine on preclusion that, in turn, is applicable to international arbitration. The doctrine of collateral estoppel amply broadens the scope of this

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[40] *See* Alfred J. Weisbrod, *Offensive Collateral Estoppel*, 6 AM. J. TRIAL ADVOC. 257, 257–58 (1983).

[41] *Montana*, 440 U.S. at 154–55.

[42] *See, e.g.*, In Re Gottheiner, 703 F. 2d. 1136, 1140 (9th Cir. 1983); *see also* Stratosphere Litigation LLC v. Grand Casinos, 298 F.3d 1137, 1142 n.3 (9th Cir. 2002) (finding privity when a party is "so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved"); Shaw v. Hahn, 56 F.3d 1128, 1131–32 (9th Cir. 1995) (finding privity when the interests of the party in the subsequent action were shared with and adequately represented by the party in the former action); United States v. ITT Rayonier, Inc., 627 F.2d. 996, 1003 (9th Cir. 1980) ("[A] 'privy' may include those whose interests are represented by one with authority to do so.").

[43] *See Montana*, 440 U.S. at 163.

[44] This is underscored by Fed. R. Civ. P. 11 and its related jurisprudence, which precludes the imposition of sanctions on a party who in good faith argues for "an extension, modification or reversal of existing law." *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1537 (9th Cir. 1986).

[45] United States v. Moser, 266 U.S. 236, 242 (1924) (emphasis added). This exception is commonly referred to as the "Moser Exception" based upon the style of the seminal case on this point.

preclusive effect as to both legal and factual premises upon which the actual ruling is predicated. Therefore, the likelihood of forum shopping and strategic gamesmanship—seeking "a second bite at the apple"—is measurably and substantially curtailed. In this regard, the fundamental tenets of international arbitration (party autonomy, uniformity, transparency of standard, efficiency, and finality) are both furthered and achieved. The substantive/transactional rubric of the U.S. common law preclusion doctrine, despite its multiple exceptions and subtleties, is a clearly defined system that militates towards uniformity in this otherwise fragmented field. What we urge here is not the unbridled wholesale engrafting of U.S. common law res judicata and collateral estoppel doctrine on international commercial and investor–state arbitration. Instead, we suggest something considerably more modest and less bold; we underscore the possible virtues of a substantive/transactional approach that transcends boilerplate application of extremely narrow and formalistic precepts that are conducive to a disparate and fragmented rubric of preclusion doctrine that further invites the circumvention of res judicata. Along these lines, the exigency of a substantive/transactional standard governing res judicata is highlighted and rendered all the more apparent in a context of international dispute resolution that is yet to fashion a universally accepted doctrine of binding precedent or *stare decisis*.[46]

IV. ADDRESSING RES JUDICATA IN INTERNATIONAL ARBITRATION

The very exigent and fundamental inquiry as to the manner in which res judicata should apply to treaty-based arbitration is yet to be determined. Indeed, this critical issue has been the subject matter of scant commentaries despite a plethora of authority recognizing res judicata as a settled and important principle of public international law. It cannot, however, be considered in a vacuum, but rather must be placed in the context of the broader discussion regarding precedent in international commercial and investor–state arbitration, a subject with respect to which considerable ink has been spilled.[47] Several categories of concern readily can be identified, including instances in which international arbitration tribunals sharply have

[46] Obviously, the theoretical and mechanical application of the res judicata and collateral estoppel doctrines are not without their own difficulties. To cite one illustrative example, the scope of the Moser Exception often presents difficulties in delineation, most notably where there is partial congruence in the subject matter of the further disputes. These challenges notwithstanding, if uniformity in the application of res judicata is to be taken seriously, it follows that questions of public policy, waiver, reform of the triple-identity test, and scope as to the dispositive certainly do stand to benefit from a cross-cultural and a cross-system study of the doctrine with emphasis on those systems that stress an expansive substantive criteria.

[47] *See, e.g.*, Tai-Hend Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014 (2006–07); W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010).

differed with respect to the interpretation of most-favored nation clauses,[48] the scope of umbrella clauses,[49] the meaning of "investment,"[50] the elements of binding consent arising from national legislation on investment protection,[51] and the definition of "state of necessity."[52] Indeed, even the very existence of international minimum standards is debated.[53]

One scholar described these divergences as among the "dangers" of the "proliferation of investment arbitration."[54] These situations are profoundly troubling to the extent that they involve direct conflicts with respect to substantive issues that are likely to arise again in future arbitrations. They

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[48] *Compare, e.g.*, Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Objections to Jurisdiction, (Jan. 25, 2000), 5 ICSID Rep. 396 (2002) *with* Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, (Feb. 8, 2005), 44 ILM 721 (2005).

[49] *Compare, e.g.*, SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Objections to Jurisdiction, (Aug. 6, 2003), 18 ICSID Rev.-FILJ 301 (2003), 42 ILM 1290 (2003) *with* SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Objections to Jurisdiction, (Jan. 29, 2004), 8 ICSID Rep. 515 (2004).

[50] *Compare, e.g.*, Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award, ¶¶ 13.5–13.6 (Nov. 27, 2000), 5 ICSID Rep. 483 (2006) *with* Salini Costrutorri, S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (July 23, 2001), 42 I.L.M. 609 (2003).

[51] *Compare, e.g.*, Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction, (Apr. 14, 1988) *with* Československa Obchodní Banka, a.s. v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶¶ 35–6 and 46 (May 24, 1999); Zhinvali Development Ltd. v. Republic of Georgia, ICSID Case No. ARB/00/1, Award, ¶339, (Jan. 24, 2003).

[52] *Compare* CMS Gas Transmission Co. v. The Argentine Republic, ICSID Case No. ARB/01/8, Award, (May, 12, 2005), 44 I.L.M. 1205 (2005) *with* LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, (Oct. 3, 2006), 46 ILM 40 (2007). Indeed, the confusion with respect to the interpretation of state of necessity was exacerbated by the decision of the ad hoc committee in Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Annulment Decision, (June 29, 2010), 49 I.L.M. 1445 (2010).

[53] *See* Maximo Romero Jiminez, *Considerations of NAFTA Chapter 11*, 2 CHI. J. INT'L L. 244 (2001); *see also* Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365 (2003). In this connection, at least pursuant to NAFTA Chapter 1105, one NAFTA tribunal affirms that irrespective of the ongoing debate concerning the existence of international minimum standards and the extent to which it applies at all, the doctrine exists at least with respect to NAFTA's signatories, the United States, Mexico, and Canada. *See* ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, ¶ 179, (Jan. 9, 2003) (The tribunal observed that the relevant provision in NAFTA on international minimum standards, Article 1105(b), "clarifies that so far as the three NAFTA Parties are concerned, the long-standing debate as to whether there exists such a thing as a minimum standard of treatment of non-nationals and their property prescribed in customary international law, is closed.").

[54] *See* August Reinisch, *The Proliferation of International Dispute Settlement Mechanisms*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: FESTSCHRIFT IN HONOR OF GERHARD HAFNER 107, 114 (Isabelle Buffard et al. eds., 2008).

are particularly disturbing when they arise, as in the state of necessity context, when the different disputes involve the same respondents.[55] Nevertheless, these concerns pale in comparison with the circumstance discussed below: divergent holdings in parallel proceedings arising from the same underlying facts and involving the same parties.

A. The Czech Republic Cases: *Lauder* and *CME*

Described by one commentator as the "ultimate fiasco in investment arbitration,"[56] the *Lauder*[57] and *CME*[58] arbitrations against the Czech Republic (the "Czech Republic Cases") compellingly illustrate the need for a sensible approach to res judicata and *lis pendens*[59] in the context of international arbitration. While the precedents referenced in the previous section represent instances in which arbitral tribunals have diverged with respect to the interpretation of BIT provisions in different cases—a troubling pathology, indeed—the Czech Republic Cases are quite remarkable in that the two arbitral tribunals reached strikingly different conclusions in what was substantively the very same dispute.

The core issues in both arbitral proceedings arose from a rather complex dispute relating to the management and ownership of a recently privatized television network in the Czech Republic. The first of these proceedings, *Lauder*, was initiated on August 19, 1999 pursuant to the BIT between the Czech Republic and the United States, of which Mr. Lauder was a citizen.[60] During the pendency of the *Lauder* proceeding, on February 22, 2000, CME Czech Republic B.V., a Dutch company controlled by Mr. Lauder, also initiated a proceedings against the Czech

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[55] *See* Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Objections to Jurisdiction, (Jan. 25, 2000), 5 ICSID Rep. 396 (2002); Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, (Feb. 8, 2005), 44 ILM 721 (2005). These cases illustrate this same point with respect to conflicting precedent regarding most-favored nation doctrine involving the very same plaintiff.

[56] Reinisch, *supra* note 54, at 116. Another commentator, perhaps more diplomatically, referred to the cases as being "the object of severe criticism." *See* Bernardo M. Cremades & Ignacio Madalena, *Parallel Proceedings in International Arbitration*, 24 ARB. INT'L 507, 515 (2008).

[57] Lauder v. Czech Republic, 14 WORLD TRADE & ARB. MATERIALS, no. 3 at 35 (UNCITRAL 2001).

[58] CME v. Czech Republic, Final Award, 15 WORLD TRADE & ARB. MATERIALS, no. 4 at 83 (UNICITRAL 2003) [hereinafter *CME, Final Award*]; *see also* CME v. Czech Republic, Partial Award, 14 WORLD TRADE & ARB. MATERIALS, no. 3 at 109 (UNICITRAL 2001) [hereinafter *CME, Partial Award*].

[59] Though conceptually similar to res judicata, *lis pendens* applies when the parallel proceedings are ongoing. Res judicata, in contrast, relates to the binding and preclusive effects of completed proceedings. *See, e.g.*, INT'L LAW ASS'N, REPORT OF THE SEVENTY–FIRST CONFERENCE HELD IN BERLIN 1 (2004); INT'L LAW ASS'N, REPORT OF THE SEVENTY–SECOND CONFERENCE HELD IN TORONTO 1 (2006).

[60] *CME, Final Award*, *supra* note 58, at ¶ 5.

Republic under the BIT between the Czech Republic and the Netherlands.[61] The two arbitrations proceeded in parallel until September 3, 2001, when the tribunal in *Lauder* issued its Final Award in which it concluded that the Czech Republic bore no liability for its acts.[62] A mere ten days later, on September 13, 2001, the tribunal in the *CME* arbitration issued a Partial Award in which the tribunal reached exactly the opposite result, concluding that the Czech Republic was liable for its breach of the Czech-Dutch BIT.[63] In its Final Award, issued on March 14, 2003, the *CME* tribunal imposed nearly $270 million in damages on the Czech Republic.[64] Although the Czech Republic had instituted vacatur proceedings before Swedish courts not long after the issuance of the Partial Award in *CME* (the *CME* tribunal was seated in Stockholm), this petition was not resolved until May 15, 2003, when the Swedish Court of Appeal rejected the motion.[65]

Both the *CME* and *Lauder* tribunals dispatched arguments relating to the res judicata or *lis pendens* effects of the parallel arbitral proceeding. Each tribunal, after engaging in highly formalistic triple identity analysis, perhaps not surprisingly reached the same result.[66] Acknowledging that international tribunals have accepted the triple identity test for res judicata, the *CME* tribunal rightfully stated that it requires "the 'same' dispute, identical parties, the same subject matter, and the same cause of action."[67] However, several paragraphs before describing the test that it would apply, the tribunal had already outlined its conclusion:

> The parties in the [*Lauder*] 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. . . .Because the two bilateral investment treaties create

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[61] *See id.*

[62] *See Lauder*, *supra* note 57, ¶ 407, at 107–08. Notably, although the tribunal chose not to impose liability on the Czech Republic, it nevertheless concluded that it had breached the U.S.–Czech BIT. *Id.*

[63] *CME*, *Partial Award*, *supra* note 58, ¶ 624, at 286–87.

[64] *CME*, *Final Award*, *supra* note 58, ¶¶ 648–49, at 243.

[65] Svea hovrätt [Court of Appeals] 2003-3-15 T8735-01 (Swed.) *translated in* 15 WORLD TRADE & ARB. MATERIALS, no. 5 at 171 (2003).

[66] It should be noted that in addition to the triple-identity analysis, both tribunals also engaged in a waiver analysis, which also justified the decision to move forward on the basis of the Czech Republic's alleged refusal to agree to the consolidation of the two arbitrations. *See CME*, *Final Award*, *supra* note 58, ¶¶ 426–30, at 181–82; *see also Lauder*, *supra* note 57, ¶ 173, at 69. In addition, the *CME* tribunal also grounded its conclusion that the Czech Republic had waived any res judicata arguments on the formalistic ground that, rather than specifically invoking res judicata, the Czech Republic instead invoked the argument of "abuse of process." *See CME*, *Final Award*, *supra* note 58, ¶ 431, at 182.

[67] *CME*, *Final Award*, *supra* note 58, ¶ 435, at 183.

> rights that are not in all respects exactly the same, different claims are necessarily formulated.[68]

The tribunal neglected to mention that the claimant "Dutch holding company," that it referred to as merely "being part of the CME Media Ltd Group" (CME Czech Republic B.V.) was the undisputed controlling party of the CME Media Ltd Group.[69] Thus, although the distinction surely existed in form, it remains questionable to what extent it existed in substance.

The tribunal in *Lauder* went one step further than the *CME* tribunal as it willfully suspended disbelief:

> The Arbitral Tribunal considers that the Respondent's recourse to the principle of *lis alibi pendens* to be of no use, since all the other court and arbitration proceedings involve different parties and different causes of action. . . . [N]o possibility exists that any other court or arbitral tribunal can render a decision similar to or inconsistent with the award which will be issued by this Arbitral Tribunal, i.e., that the Czech Republic breached or did not breach the Treaty, and is or is not liable for damages towards Mr. Lauder.[70]

Once again, while this assertion was true formally, it does not comport with the dissonant reality that the conflicting awards in these parallel proceedings produced.

One fascinating element present in the *CME* Final Award is an explicit reference and reliance upon the *Lauder* tribunal. Specifically, the *CME* tribunal asserts that the *Lauder* tribunal essentially waived aside the risk of conflicting decisions:

> This holding of the Tribunal is supported by the London [*Lauder*] Tribunal's findings, according to which the Respondent's recourse in the London [*Lauder*] Arbitration to the principle of *lis alibi pendens* was held to be of no use, since all the other court and arbitration proceedings involved different parties and different causes of actions. The London [*Lauder*] Tribunal considered the risk that the two Tribunals may decide differently. It identified the risk that damages could be concurrently granted by more than one court or arbitral tribunal, in which case the amount of damages granted by the second deciding court or arbitral tribunal could take this fact into consideration when addressing the final damage . . . . It did not see an issue in differing decisions, which is a normal fact of forensic life, when different parties litigate the same dispute (which is not

[68] *Id.* ¶¶ 432–33, at 182.
[69] *See Lauder*, *supra* note 57, ¶ 77, at 51.
[70] *Id.* ¶ 171, at 68.

necessarily the case in all respects in this arbitration).[71]

In fact, however, the *Lauder* tribunal did express some concern with respect to the possibility of conflicting decisions, but ultimately relied upon a rather formalistic rationale:

> There might exist the possibility of contradictory findings of this Arbitral Tribunal and the one set up to examine the claims of CME against the Czech Republic under the Dutch-Czech Bilateral Investment treaty. Obviously, the claimants in the two proceedings are not identical. However, this Arbitral Tribunal understands that the claim of Mr. Lauder giving rise to the present proceeding was *commenced before* the claims of CME was raised and, especially, the Respondent itself did not agree to a de facto consolidation of the two proceedings by insisting on a different arbitral tribunal to hear CME's case.[72]

That the *Lauder* tribunal referenced the first-filed principle to assuage its concerns of the very real possibility of "contradictory findings" not only elevates procedural niceties, but also should have served as a shot across the *CME* tribunal's bow. Essentially, the *Lauder* tribunal sought to establish its primary jurisdiction on the basis of its chronological precedence.

Despite the extensive analysis of the tribunals, the proceedings were substantively identical. Indeed, before examining the Czech Republic's res judicata and *lis pendens* arguments, the tribunal in *CME* candidly acknowledged that the *Lauder* arbitration "in substance dealt with the same dispute that is the object of these proceedings."[73] Nevertheless, the mechanical analysis of both tribunals—standing in stark contrast to the substantive/transactional approach that we advocate—demonstrably failed to address the novel circumstance. Given the rapid proliferation of investment treaties and the increasingly complex nature of international corporate structures, the consequences of this failure, and the implications of these decisions "will not remain an isolated incident."[74]

B. *Southern Bluefin Tuna* and the Emergence of a Substantive/Transactional Approach in UNCLOS Arbitration

In contrast to the classical formalism that the tribunals in the Czech Republic Cases employed, the tribunal in the 1982 United Nations

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[71] *CME, Final Award*, *supra* note 58, ¶ 434 (citing *Lauder*, *supra* note 57, ¶¶ 171–72, 174, at 68 & 69).

[72] *Lauder*, *supra* note 57, ¶ 173, at 69 (emphasis added).

[73] *CME, Final Award*, *supra* note 58, ¶ 25, at 95–96.

[74] August Reinisch, *The Use and Limits of* Res Judicata *and* Lis Pendens *as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 LAW & PRACTICE OF INT'L COURTS & TRIBUNALS 37, 41 (2004).

Convention on the Law of the Sea (UNCLOS) arbitration widely referred to as the *Southern Bluefin Tuna* case adopts a refreshingly resourceful approach, much akin to the substantive/transactional test advocated for in this article.[75] Essentially, the tribunal was confronted with a circumstance in which two separate treaties, UNCLOS and the Convention for the Conservation of Southern Bluefin Tuna (CCSBT), seemingly applied to the matter, yet provided differing dispute resolution terms. Even though the *Southern Bluefin Tuna* tribunal was not confronted with res judicata or *lis pendens*, its analysis nevertheless relied strongly on both of those concepts. Instead of focusing on procedural niceties and distinguishing between the two treaties with which it was confronted, the tribunal instead looked directly to the substance of the claim:

> The Tribunal accepts Article 16 of the [CCSBT] . . . as an agreement by the Parties to seek settlement of the instant dispute by peaceful means of their own choice. It so concludes even though it has held that this dispute, while centered in the . . . [CCSBT], also implicates obligations under UNCLOS. It does so because 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 would be artificial.[76]

Its conclusion that treating the disputes under the UNCLOS and CCSBT as distinct would be artificial is arresting, if only for its simple and manifest rationality.

Although some have construed this decision narrowly, concluding that it largely applies to the second prong of the triple identity test (identity of grounds or subject matter),[77] the substantive/transactional approach adopted by the tribunal also lends itself to a broader construction that can be applied to all prongs of the triple identity test. This more flexible interpretation draws us ever closer to the U.S. common law analysis, which we suggest could serve as an effective model for the substantive/transactional approach.

C. Emerging Challenges in ICSID Arbitration: *Saipem*, *GEA Group*, and the Rise of "Supervisory-Supervisory" Authority in Investor-State

[75] *See* Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan), Case No. 3 & 4, Award on Jurisdiction & Admissibility (Aug. 4, 2000).

[76] *Id.* ¶ 54, at 39.

[77] *See* Reinisch, *supra* note 74, at 64. *Compare Southern Bluefin Tuna* (Austl. & N.Z. v. Japan), Case No. 3 & 4, Award on Jurisdiction & Admissibility on Aug. 4, 2000) *with CME, Final Award*, *supra* note 58 and *Lauder, Final Award* (demonstrating differences in the way that the court analyzed what constitute the same parties in *Southern Bluefhin Tuna* and the United States and Dutch BITs in the Czech Republic Cases).

Arbitration

The immediacy of addressing the concerns involving supervisory-supervisory authority arises from the award of the ICSID tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh*,[78] and more recently, the ICSID award in *GEA Group Aktiengesellschaft v. Ukraine*[79] (*GEA Group* or *GEA*). Even though considerable ink has been spilled analyzing this authority, more so in the case of the *Saipem* award, the issues raised in both of these proceedings have not been addressed within finality, a preclusion context, or within a res judicata framework. Further, even though the *Saipem* award deservedly has garnered meaningful disapproval in the form of academic critique, the tribunal in *GEA Group* almost regrettably limits its disavowance, as shall be discussed in detail, to technical grounds framed by the very narrow issues that the parties presented in *GEA Group*, and based upon drawing factual but not conceptual distinctions.

Professor Reisman aptly has written that, "*Saipem* if ultimately cautious in its holding, is, nonetheless far-reaching in its implications, for it adapts the mechanisms of international investment law as expressed in bilateral investment treaties, to serve as a review of the proper discharge by national courts of their responsibilities under the New York Convention."[80] In this way, Professor Reisman conceptualizes the novel role that the tribunal in *Saipem* has carved out for international tribunals as supervisory-supervisory fora.

Extrapolating just ever so slightly on Professor Reisman's observations, the *Saipem* award, despite being cloaked with the mantle of a very narrow and singular ruling limited only and exclusively to an extraordinarily particular set of facts, has the practical and theoretical effects of: (i) wresting from municipal courts their normative obligations with respect to the New York Convention; (ii) transforming and deforming international tribunals into second-instance appellate venues sitting in judgment of the manner in which municipal courts process applications for the recognition and enforcement of foreign judgments; (iii) substantially limiting the scope of the New York Convention; (iv) fashioning a new category of "investments" under Article 25 of the ICSID Convention; (v) denaturalizing international commercial arbitration; (vi) providing more duplicative arbitral proceedings; and (vii) undermining the elementary precepts that underlie international arbitration generally.

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[78] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction, (Mar. 21, 2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC529_En&caseId=C52.

[79] *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, (Mar. 31, 2011), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2131_En&caseId=C440.

[80] W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 5, 39 (2011).

A second commentator quite thoughtfully criticized *Saipem* for permitting commercial arbitration cases to be "dressed up" as investor-state treaty disputes.[81] Reflecting on *Saipem*, post-*GEA Group*, certain commentators have ventured to opine that *Saipem* is hardly "precedent." In a very carefully considered commentary, it was noted that "[a]s far as precedent goes, the *Saipem* decision has proved to be controversial."[82] The author explains how subsequent tribunals "have tended to tread very carefully to avoid being seen as sitting in judgment over the decisions of national courts and performing the role of a supra-national appellate body"[83] and "in many respects, the *Saipem* approach has come to be considerably diluted."[84]

The numerous debilities and uncertainties incident to the very doctrine of precedent in investor-state arbitration calls into question whether, doctrinally, the issues that the *Saipem* award raises should be addressed and discussed within the parameters of the law of precedent. If transparency and certainty are to be taken seriously, this dialogue must be had pursuant to a different doctrinal construct. It is here that the principle of res judicata becomes determinative. In addition, the most recent ICSID award to date that addresses *Saipem* and that is bottomed on analogous averments—*GEA Group*—at least from a procedural posture and pursuant to petitioner's averments, falls far short from *conceptually* disavowing *Saipem*.

1. Saipem v. Bangladesh

The claimant, Saipem S.p.A (Saipem), on February 14, 1990, executed a contract with The Bangladesh Oil, Gas and Mineral Corp. (Petrobangla), a state entity. The contract's objective was to build a pipeline of 400 kilometers for purposes of transporting condensate and gas to locations in the northeast section of Bangladesh. Significantly, the project was to be completed by a certain date, but was materially delayed. The causes for the delay were attributed to a dispute between the parties, and after negotiated extensions, disagreement concerning compensatory damages arising from the delays precipitated the filing of an arbitration request on June 7, 1993, consonant with an arbitral clause calling for ICC arbitration.

Despite Petrobangla's unsuccessful application to multiple tribunals seeking revocation of the ICC proceeding and a stay, on April 30, 2001, the ICC tribunal resumed proceedings and finally issued an award approximately two years later on May 9, 2003. The tribunal held that

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[81] Ruth Teitelbaum, *Case Report on* Saipem v. Bangladesh, 26 ARB. INT'L 313 (2010).

[82] Promod Nair, *State Responsibility for Non-Enforcement of Arbitral Awards: Revisiting* Saipem *Two Years On*, Kluwer Arbitration Blog (Aug. 25, 2011), http://kluwerarbitrationblog.com/blog/2011/08/25/state-responsibility-for-non-enforcement-of-arbitral-awards-revisiting-saipem-two-years-on/ (last visited Sept. 5, 2012).

[83] *Id.*

[84] *Id.*

Petrobangla had breached its contractual obligation to compensate Saipem for the time extension and additional work and ordered Petrobangla to pay Saipem the total amount of USD $6,148,770.80 plus €110,995.92 (USD $142,584.39).[85]

The Bangladeshi courts annulled the ICC award, and on October 5, 2004, Saipem filed a request for arbitration with the International Center for Settlement of Investment Disputes. The tribunal ruled in Saipem's favor and observed:

> After having carefully reviewed the arguments of the parties in having taken into account all the circumstances of the case, and in particular the fact that the expropriation rites at hand were Saipem's residual contractual rights under the investment as crystallized in the ICC Award . . . the Tribunal considers that in the present case the amount awarded by the ICC Award constitutes the best valuation of the compensation due under the *Chorzów Factory* principle.[86]

By adopting the amount awarded by the ICC tribunal in the underlying arbitration award that the Bangladeshi courts vacated, the tribunal unavoidably highlighted the indivisibility of the two arbitration proceedings.

2. GEA Group v. Ukraine

As in *Saipem*, the petitioner GEA Group entered into contractual relationships with Oriana, a state-owned (in this case Ukrainian) company, pursuant to which GEA Group[87] would provide Oriana with 200,000 tons of NAPHTA fuel for conversion.[88] Later agreements with Oriana relating to delivery of the "Conversion Contract" products were executed (a "Settlement Agreement" and a "Repayment Agreement"). Unable to resolve indebtedness disputes resulting from the differences between those

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[85] *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, ¶ 48 (Mar. 21, 2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC529_En&caseId=C52.

[86] *Id.* ¶ 202.

[87] Its predecessor in interest was Klöckner & Co. Aktiengesellschaft (referenced as "New Klöckner" throughout the award). A recitation of relevant name changes and corporate mergers concerning GEA Group's predecessors of interest is set forth with careful detail that includes a chart illustrating the various partnerships, subsidiaries and operative relationships between and among these predecessors. *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, ¶¶ 32–43 (Mar. 31, 2011), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2131_En&caseId=C440.

[88] *See id.* ¶ 44. During a two-year time frame (between 1996 and 1998) the operative contract for the provision of the NAPTHA fuel for conversion ("Conversion Contract") was significantly amended (147 out of a total of 154 amendments).

products that should have been delivered and those products that either actually were delivered or that were then available for delivery gave rise to an ICC arbitration against Oriana.[89] The tribunal entered an award in the GEA Group's favor in the amount of USD $30,381,661.44 for compensatory damages, in addition to interest, arbitration costs, and attorney's fees.[90]

GEA's application to the Appellate Court of the Ivano-Frankivsk Region was unavailing on the ground that Oriana was not duly authorized pursuant to Ukrainian legislation to tender payments for the product received.[91]

Consonant with Saipem's strategy, GEA Group filed an arbitration against Ukraine pursuant to the BIT between the Federal Republic of Germany and Ukraine.[92] Significantly, the tribunal primarily ruled in Ukraine's favor and against GEA Group on four distinct grounds following a classical analysis and never considering, even in "dicta," a claim preclusion theory.

First, the tribunal analyzed the ICC award as the third category of averred investments comprising claimant's basis for relief.[93] Focusing on the criteria of Article 1 of the BIT or Article 25 of the ICSID Convention, it reasoned that "the ICC Award—*in and of itself*—cannot constitute an 'investment.' Properly analyzed, it is a legal instrument, which provides for the disposition of rights and obligations arising out of the Settlement Agreement and Repayment Agreement (neither of which was itself an 'investment'). . . ."[94]

Indeed, the grammatical structure and syntax establishes that the tribunal ruled that the award—in and of itself—cannot constitute an investment, *only* because it rests on instruments that themselves in turn do not constitute investments. The tribunal, highlighting claimant's reliance

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[89] *Id.* ¶¶ 51–52, 56–57.

[90] *Id.* ¶ 62.

[91] The Appellate Court ruled: "Considering the case, the court ascertained that the [Repayment Agreement] was concluded and signed in contradiction to the Ukrainian effective legislation by the representatives of OJSC "'Oriana' without duly authorized powers." *Id.* ¶ 65. Following a series of appeals, the Supreme Court of Ukraine rejected GEA's cassation complaint. *Id.* ¶ 67.

[92] Vertrag zwischen der Bundesrepublik Deutschland und der Ukraine über die Förderung und den gegenseitigen Schutz von Kapitalanlagen [Agreement between the Federal Republic of Germany and Ukraine on the Promotion and Mutual Protection of Investments], Ger.–Ukr., Feb. 15, 1993, ICSID Rep v. 5.

[93] The tribunal observed that "[t]he Claimant argues that the ICC Award, in and of itself, falls under Article 1(1)(c) of the BIT because it liquidated the amount due under the Settlement Agreement and Repayment Agreement as of 2002." *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, ¶ 159 (Mar. 31, 2011), *availalable at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2131_En&caseId=C440.

[94] *Id.* ¶ 161.

on *Saipem*, stated that the tribunal in that case fashioned propositions that are "difficult to reconcile," such that:

> the ICC arbitration is part of the investment (under the heading: "Has Saipem made an investment under Article 25 of the ICSID Convention?'); that the ICC Award is not part of the investment (under the heading: "Does the dispute arise directly out of the Investment?"); and that it is unnecessary to decide whether the ICC award is part of the investment (under the heading "Jurisdictional objections under the BIT")."[95]

However, it never entertained a preclusive effect theory or doctrine.[96]

Second, addressing the parties' contentions as to *expropriation*, the tribunal engaged in a contra-factual analysis and notably refrained either from (i) flatly disagreeing with the *Saipem* award on conceptual grounds (i.e., under no reasonable analysis should a commercial arbitration award constitute an investment and an unsuccessful enforcement action a taking), or (ii) engaging in a doctrinally preclusive exegesis. Instead, it proceeded to distinguish *Saipem* in an unremarkable common-law like analysis.

After disagreeing with the *Saipem* tribunal's analysis,[97] it identified a "discriminatory law" standard and found that:

> contrary to *Saipem*, the Tribunal has been presented with no evidence that the actions taken by the Ukrainian courts were "egregious" in any way; that they amounted to anything other than

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[95] *Id.* ¶ 163.

[96] *See id.* ¶¶ 163–64.

[97] The *GEA Group* tribunal summarized the *Saipem* analysis as follows:

> In *Saipem*, the Bangladeshi courts annulled an ICC Award in Saipem's favour. In ¶ 133 of its award, the tribunal stated that setting aside an arbitral award cannot, in and of itself, amount to an expropriation:
>
> > [T]he Tribunal agrees with the parties that the substantial deprivation of Saipem's ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts' intervention is tantamount to an expropriation. If this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds.
>
> The tribunal then concluded that, based on the circumstances of that case, the non-enforcement of the ICC Award amounted to an expropriation due to the particularly egregious nature of the acts of the Bangladeshi courts.
>
> The Claimant attempts in this case [*GEA Group*] to deploy this standard, contending that Ukraine committed "a travesty of justice in applying a discriminatory law to avoid enforcement of GEA's Award."

Id. ¶¶ 233–35.

> the application of Ukrainian law; or that they were somehow deliberately taken to thwart GEA's ability to recover on the ICC Award.[98]

Third, as to a violation of fair and equitable treatment, again after restating that it already had found that the ICC Award itself did not constitute an investment, the tribunal, applying the *Mondev International Ltd. v. United States of America* test agreed to by the parties,[99] enunciated that:

> [it] does not have any "justified concerns as to the judicial propriety of the outcome" of the decisions of the Ukrainian courts in view of "generally accepted standards of the administration of justice." Accordingly, the Tribunal concludes that there is nothing "clearly improper and discreditable" with respect to those decisions, with the result that the Claimant's claim that, if the ICC Award would have been considered an investment, its investment has not been subject to fair and equitable treatment is rejected.[100]

Fourth and finally, the tribunal's application of the National Treatment and Most Favored Nation standards is equally disappointing because of its narrow methodology. It merely sought to distinguish factually GEA Group's reliance on the claims of the Seychelles Company that were adjudicated in *Regent Company v. Ukraine*.[101] Here the emphasis on merely distinguishing the case could not be more glaring. The *GEA Group* award in relevant part reads:

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[98] *Id.* ¶ 236.

[99] At paragraph 312, the tribunal states:

> The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.

Id. ¶ 312 (quoting Mondev Int'l Ltd. v. United States (Can. v. U.S.), ICSD Case No. ARB(AF)/99/2, Award, 6 ICSID Rep. 192 (2004).

[100] *Id.* ¶ 319.

[101] Regent Co. v. Ukraine, Application No. 773/03, EUR Ct. H.R. (2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=773/03&sessionid=86286133&skin=hudoc-en (emphasis in original).

> With respect to the purported unequal treatment between the Claimant and the Seychelles company, the Tribunal *is not convinced that the situation of the Seychelles company is comparable to that of GEA*. In the Tribunal's view, the simple fact that the claim of the Seychelles company was not time-barred does not, in and of itself, mean anything in particular taking into account the differences in the procedural posture between that case and the one at hand.[102]

Following this line of thinking, the tribunal found analytical support in drawing a distinction between the pre-investment and post-investment strictures of Article 6 of the Law on Foreign Economic Activities. It thus observed that while this particular legislation indeed imposes on foreigners greater obstacles to investment than it does with respect to nationals, the post-investment regime applies equally and in the same manner to both nationals and foreigners, a distinction that in itself exalts form over substance. Both arguments taken in tandem, distinguishing the immediate investor from the Seychelles Company claimant and reconciling the asymmetries as to Article 6, facilitated rejection of GEA Group's claim that it was discriminated against in violation of Article 3 of the BIT.[103]

It would be misguided to conclude that the tribunal in *GEA Group* was right for the wrong reasons. In the final analysis, the tribunal reached its holding by timidly finding that "the ICC Award—*in and of itself*—cannot constitute an investment."[104] This statement, however, cannot be severed from its syntax. It ultimately proceeded to qualify the proposition by conceptually connecting the premise to the underlying facts of the case—namely that the award "provides for the disposition of rights and obligations arising out of the Settlement Agreement and Repayment Agreement (neither of which was itself an investment). . . ."[105]

The analysis in *GEA Group* is disappointing. Specifically, it did not go far enough, and dared not, at least in part, premise its findings and ruling on the inevitable and necessary consequences of denaturalizing the underlying international commercial arbitration and transforming it into an investor–state dispute. At the same time, it enshrined treaty-based arbitrations as sitting in judgment of the conduct of national courts and their application of the New York Convention—a framework that undermines both international commercial arbitration and investor–state arbitration.

The logical corollary to the tribunal's narrow investment analysis is that an ICC Award, when tested against the criteria of the applicable article of the BIT at issue or Article 25 of the ICSID Convention—in and of

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[102] *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, ¶ 342 (Mar. 31, 2011), *availalable at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2131_En&caseId=C440.

[103] *Id.* ¶¶ 344–45.

[104] *Id.* ¶ 161 (internal quotation omitted).

[105] *Id.* (internal quotation omitted).

itself—shall constitute an investment. That is true so long as, when properly analyzed, the award provides for the dispositions of rights and obligations arising out of legal instruments that—in and of themselves—properly constitute "investments" under the standard of the operative BIT or Article 5 of the Convention.

Quite remarkably, both *Saipem* (reaching a wrong result but based on a contradictory analysis that in general terms acknowledges the folly of having a commercial arbitration award constitute an investment under a BIT) and *GEA Group* (reaching a correct result but on a weak analysis that conceptually, contingent on the happenstance of a fact pattern, leaves open the possibility for the recognition as a principle of international law that an international commercial arbitral award may constitute an investment pursuant to a BIT and within the purview of Article 25 of the Convention) are narrowly tailored opinions that leave much to be desired. The undue emphasis on specificity is not helpful for other tribunals that will continue to face the same aberrant procedural configuration. Therefore, both awards contribute to the possibility, and now likelihood, of duplicative arbitration, protracted proceedings, uncertainty, and a diminished view of national courts under the New York Convention. They have also likely contributed to greater costs and inefficiencies in international arbitration. The time-honored precepts of party autonomy, predictability, uniformity, transparency of standard, and efficiency, were not best served by either award, notwithstanding the *GEA Group* award's ruling.

Both awards highlight the need for the application of a res judicata doctrine to investor–state arbitration. The uncertain status of the role of precedent in international arbitration additionally buttresses the need for the application of a res judicata doctrine.

To be sure, the application of res judicata, particularly in the context of investor–state arbitration, certainly is not without its challenges. Most notably, the further case (i.e. the investor–state arbitration that follows an international commercial arbitration, where recognition and enforcement were denied) almost of necessity will not meet the *same parties* prong of the triple identity test. An expansive iteration of the doctrine premised on a substantive/transactional standard would be responsive to this specific obstacle. The res judicata doctrine would obviate the waste, time, and inefficiencies that even a surface analysis of both *Saipem* and *GEA Group* reveals, as neither proceeding justified a full merits hearing. Thus, while productive for the arbitrators and the lawyers, the non-application of the doctrine was a disservice to the parties and to arbitration generally. The very fact that res judicata, albeit different species of the doctrine, is universally accepted and codified as applicable to international commercial arbitration should herald the use of the doctrine in investor–state disputes. However, only an expansive substantive/transactional version of the doctrine akin to that explored here, and pursuant to the U.S. common law paradigm, would meaningfully address the singular issues endemic to

investor–state arbitration.

The treatment of an international commercial arbitration award as an investment far exceeds the already immense consequences of elevating a commercial contractual dispute into an international treaty-based contention governed by international public law. It, in effect, represents an extreme application of an omnibus umbrella clause, as it incorporates directly and explicitly non-treaty premised contractual causes of action and, therefore, incident defenses and affirmative defenses as well. This phenomenon should not and cannot be analyzed as an aberrant doctrinal development occurring in a void that is filled by the particularity of an isolated dispute—one that may give rise to the premises from which counsel and arbitrators alike may infer a new category of investment (i.e., an actual commercial arbitration award).

Quite the contrary, it is but the continuation of a well-defined and discernable trend that aspires to the "internationalization of state-contracts." Pursuant to this school of thought, an expansive and non-restrictive reading of bilateral investment treaties is encouraged so as to maximize the panoply of doctrinal protections accorded to investors at the price of limiting the host state's (typically a capital importing country) regulatory ambit. This theory seeks to promote the purported stability of state contracts by removing them from the sphere of municipal law (i.e., that of the host state). In turn, it advocates for the importation of "principles of international law" into the arena of investor–state disputes so that investors' rights are protected beyond the doctrinal gamut embodied in investment protection treaties.

The net effect is the wholesale importation of private international law doctrine into public international law, which far exceeds the expectations of the contracting parties who sought equal and equitable bilateralism or multilateralism in negotiating, executing, and implementing investment treaties. An international investment treaty, at least from a theoretical configuration, aspires to symmetry/parity between the member contracting states with respect to protection. This aspiration is fundamentally frustrated when contractual claims are brought before international tribunals and international arbitral tribunals are charged with the imperative of overseeing the propriety of compliance with mere contractual obligations and, in many instances, pre-entry investment representations.[106] The expansive review of international investment treaties and the attribution of special normative status to state contracts render the workings of bilateral investment treaties wholly asymmetrical. It is true that even the most rudimentary choice of law test when applied to state contracts would suggest that domestic law is applicable, certainly when measured by place of performance, location of resources, negotiation, and collateral effects. However, the dual contention

[106] Admittedly, there is a paucity of authority finding a violation of a treatment standard based upon pre-entry investment treatment violations.

that a state contract is quasi-public and entails an arguably international obligation has been deemed dispositive in removing the doctrinally applicable host state's substantive law from representing even a partially determinative element of the analysis. Instead, international principles are applied, without sustained explanation, with respect to significant queries that need to be addressed.

By way of example, it can be argued that there is no single comprehensive body of international public law addressing substantive principles of contract law. In this same vein, the selection of "applicable international law principles" is not guided by any single criteria, and therefore, by necessity is rendered circumstantial and arbitrary. In the selection of these principles often the penchant of arbitrators who seek to promote investment protection despite the need to safeguard the host state's regulatory sphere prevails as a decisive factor in this exercise of "principle selection." Despite the legal fiction that state contracts are somehow quasi-public, claims asserted by multinational corporations should not be allowed to elevate principles of private international law so that they may attain treaty status. It is legitimate to inquire whether a private entity or natural person would even have sufficient international standing or personality to modify the scope of treaties negotiated and executed by contracting states and not individuals. Can a private entity or natural person have standing to contest a purely commercial contractual dispute in an arena of public international law? Should multinational corporations be accorded authority to amend treaty claims to include commercial causes of action arising from non-investments in the realm of private international law?

It would be a mistake to read *Saipem v. Bangladesh* and *GEA v. Ukraine* as idiosyncratic cases, narrowly tailored to their facts. The demise of traditional conceptions of sovereignty fosters both the expansive construction of international investment treaties and the importation of international law principles into the substantive law arena of disputes concerning state contracts.

V. CONCLUSION

Economic globalization commands a juridical counterpart in the field of international dispute resolution. International arbitration serves that function and will continue to do so until such time as transnational tribunals of civil procedure come into being. The uncertain nature and application of the doctrine of precedent—*stare decisis*—in international arbitration underscores the immediate need (i) for application of a transnational res judicata doctrine, and (ii) uniformity in the elements and application of the doctrine. Regrettably, although universally accepted, the doctrine in its current status is fragmented because it is territorially based and ill-suited for use in an environment of economic globalization that aspires to be monolithic, at least with respect to the scope of a global market economy

that finds no historical precedent.

Even among civil law jurisdictions the basic elements of the triple identity test vary significantly. The nature and character of this fragmented civil law regime are made worse by the disparities between it and the configuration of the doctrine in common law jurisdictions, particularly U.S. common law. Such rudimentary questions as the extent to which res judicata is a matter of public policy that may be raised by a decision maker *sua sponte*, whether the doctrine applies to the ruling or disposit only and not the grounds or reasons underlying, as well as if, how, and to whom it applies in the context of non-parties are essential to the uniform application of the doctrine. Attendant to these irregularities are equally fundamental disparities among nations between the plain language of the codified doctrine and the actual practice in its application, not to mention virtually endless permutations of each element of the triple identity test.

The U.S. common law version of res judicata may serve as a substantial conceptual bastion from which civil law and common law res judicata precepts may merge in fashioning a uniform doctrine that is expansive, substantive/transactional-based as to criteria, and non-formalistic in its application so as to avert and discourage the doctrine's circumvention through the use of legal fictions. This expansive version of the doctrine is particularly well-suited to address the complexities of applying res judicata in the context of investor–state arbitration. This is demonstrated by the conflicting lines of awards in *Saipem* and *GEA Group*, together with the paucity of conceptual development that both tribunals exemplified in addressing unvarnished examples of duplicative arbitrations that never should have been brought in the first instance, which only served to fuel flames that were always smoldering. The non-application of the doctrine to investor–state arbitrations, among other concerns, denaturalizes (i) international commercial arbitration, (ii) treaty-based arbitration, and (iii) the rule of domestic courts and their responsibilities under the New York Convention. The doctrine is ripe for development.