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DEBATE: THIS HOUSE BELIEVES THAT PARALLEL PROCEEDINGS IN INVESTMENT ARBITRATION ARE ABUSIVE AND SHOULD BE BANNED

This session was convened at 1:45 p.m., March 24, 2001, by its moderator, Lindsay Gastrell of Arbitration Chambers, who introduced the speakers: Mariam Gotsiridze of the Ministry of Justice of Georgia; Caline Mouawad of Chaffetz Lindsey LLP; Professor Pierre Mayer of the University of Paris I Panthéon-Sorbonne; Professor Jan Paulsson; and Sam Wordsworth QC of Essex Court Chambers.

Introduction

Opening Remarks by Lindsay Gastrell*

Investment treaties, as we know, grant foreign investors certain substantive rights as well as direct remedies for enforcement, in particular access to international arbitration. Yet these rights and remedies are not granted to an investor in a vacuum. They often exist alongside rights under domestic law and contractual regimes. Moreover, when a foreign investment is made through a multilevel corporate structure—as is common—various entities in the chain may have rights under different investment treaties.

What is the result? When the state adopts a measure that interferes with a foreign investment, the investor now has many different avenues through which to seek redress. It may choose one *or* it may choose more than one. For example, let us imagine that a local subsidiary brings a domestic lawsuit, and perhaps also a contractual arbitration, against state entities. At the same time, its direct parent brings a claim against the state under one treaty, and an indirect shareholder of a different nationality brings a claim under a different treaty. The investor, making use of the various rights afforded to it, has increased its chances of prevailing in at least one of the fora.

This outcome may appeal to investors, but states have concerns. They are forced to defend multiple claims arising out of the same dispute, while amassing legal fees and shuttling from hearing to hearing. From this perspective, parallel proceedings are not only chaotic but distort the balance of rights. What could be more prejudicial and abusive? Not to mention that parallel proceedings threaten to undermine the legitimacy of the entire investor-state dispute settlement system.

What is an arbitral tribunal to do? Perhaps more importantly, what *can* a tribunal do? Should the investor's right to bring a claim, expressly laid out in the treaty, be the end of the story? On what basis would arbitrators be permitted to dismiss a valid claim? Or, taking the opposite view, has the claimant forfeited that right by exercising it in an abusive way? Should the tribunal find the claims to be an abuse of process and therefore inadmissible as we saw in *Orascom v. Algeria*?[1]

* Arbitration Chambers, New York.

[1] Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Award (May 31, 2017).

These issues—the complexities and conundrums arising out of parallel proceedings—are increasingly appearing in the cases and are a topic of concern for the UN Commission on International Trade Law (UNCITRAL) Working Group III, which is focused on the reform of investor-state dispute settlement. More importantly for present purposes, these issues are on the table for debate today.

With this background, the audience was invited to vote on the following motion: *This house believes that parallel proceedings in investment arbitration are abusive and should be banned.*

The moderator explained that a second vote would be taken after the arguments, and following that vote, the results of both votes would be revealed and compared.

The moderator also introduced the speakers and their roles. Speaking in favor of the motion was Sam Wordsworth QC. Speaking against the motion was Professor Jan Paulsson. The Tribunal hearing the arguments was composed of Mariam Gotsiridze, Caline Mouawad, and Professor Pierre Mayer as Chair. In the spirit of debate, the participants expressed opinions corresponding to their assigned roles, which did not necessarily reflect their personal views.

The Debate

Opening Statement in Favor of the Motion by Sam Wordsworth QC*

Sometime around 418 B.C., Heraclitus observed that you cannot step into the same river twice. And indeed, applying a strict identity test, it is true. You cannot. When you put your foot back in for the second time, the water has flowed on. And the river is not quite the same. Sometime around October 2003, which, in terms of the development of investment treaty arbitration, is not materially more recent, the two tribunals in the *CME* and *Lauder* cases showed that they were able to agree on one thing—that is, the application of a similarly strict approach to identity.[2] Hence, there was no abuse in two claimants in the same ownership chain bringing virtually identical claims under bilateral investment treaties (BITs) that, however substantially similar, were correctly to be seen as separate.

Leaving to one side the inconvenient fact that the Czech Republic had not assisted its position by a refusal to consolidate, most commentators considered that outcome to be deeply problematic. Intuitively, investors, like claimants more generally, must be bound by the rule that you cannot take two bites out of the same cherry. And here, the two bites resulted in one successful defense by the Czech Republic and one bill for $260 million.

At the same time, however, the difficulty was, and is, that the no-two-bites rule ultimately derives from the laws of physics, while the legal manifestations of the rule, most obviously the rules on *lis alibi pendens* and res judicata, have often been understood as requiring satisfaction of a strict triple identity test.

But in the years since *CME* and *Lauder*, an intense spotlight has been shone on the potential for abuse—both in investment arbitration and, more broadly, with the International Court of Justice (ICJ) recognizing recently in *Equatorial Guinea v. France* that, in exceptional circumstances, a claim based on a valid title of jurisdiction can be rejected on a ground of abuse of process.[3] And I read Professor Paulsson's important new monograph on abuse of rights as being to the

* Essex Court Chambers.

[2] CME Czech Republic B.V. v. The Czech Republic, Partial Award, para. 412 (UNCITRAL Sept. 13, 2001); Ronald S. Lauder v. The Czech Republic, Final Award, para. 174 (UNCITRAL Sept. 3, 2001).

[3] Immunities and Criminal Jurisdiction (Eq. Guinea v. Fr.), Preliminary Objections, 2018 ICJ Rep. 292 (June 6).

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same effect. So even absent a specific rule in an investment treaty, a tribunal applying international law today has a much more well-established basis for declining to hear a parallel claim if there is an abuse of process.

It is not just that there is a rule apt to ban parallel proceedings. It is a rule that has been applied, and with persuasive force, by the notably distinguished tribunals in *Orascom* and *Ampal*.[4] The correct appreciation now is that parallel proceedings not so much should be, but are, abusive and hence banned. The two questions for today are really as follows: What is meant by parallel? And what could be meant by banned?

Of course, these are difficult questions for a ten-minute slot. But in brief terms, it will be rare for there to be sufficient and therefore abusive parallelism between claims that stem from separate legal orders—that is, international law and domestic law—most obviously where a claimant seeks to bring a treaty claim and a contract claim before another forum. Landmark cases like *Vivendi I* have demonstrated how such claims are legally and materially separate, despite whatever overlaps there may be on the facts.[5] And there are multiple other rules that may be applicable to regulate and manage overlapping treaty and contract claims. Similarly, supposedly parallel claims concerning different, though related, areas of international law appear unlikely to be abusive (for example, where a claim brought under a human rights treaty is accompanied by a claim under a BIT, as in the *Yukos* cases).[6] As the ICJ has noted in *Ukraine v. Russia* and various other recent cases, the fact that a dispute before it forms part of a complex situation that includes various matters and various treaties cannot lead the Court to decline to resolve that dispute, provided that the parties have recognized its jurisdiction to do so and the conditions for the exercise of jurisdiction are met.[7]

Why would that approach not apply where legally separate entities in a corporate chain bring claims under two separate investment treaties? Why should that be seen as parallel and abusive? One answer, as follows from the *Orascom* award, lies in the very purpose of investment treaties, which, as the tribunal aptly explained, exist "to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development."[8] And it follows that if the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. The purpose is not served by allowing other entities in the vertical chain, controlled by the same shareholder, to seek protection for the same harm inflicted on the investment. Quite to the contrary.

And for those who are concerned that this might depend on a tribunal's subjective appreciation as to the general purpose of investment treaties, the same basic reasoning could be made by reference to the specific object and purpose of the specific investment treaty that the tribunal is mandated to interpret and apply. On either route, abuse is to be found in the initiation of multiple proceedings to recover for the same economic harm, entailing the exercise of rights for purposes that are alien to those for whom these rights were established.

[4] *Orascom v. Algeria*, *supra* note 1; Ampal-American Israel Corporation and Others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction (Feb. 1, 2016).

[5] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award (Nov. 21, 2000).

[6] Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. 2005-04/AA227 (UNCITRAL); Hulley Enterprises Ltd. (Cyprus) v. The Russian Federation, PCA Case No. 2005-03/AA226 (UNCITRAL); Veteran Petroleum Ltd. (Cyprus) v. The Russian Federation, PCA Case No. 2005-05/AA228 (UNCITRAL); OAO Neftyanaya Kompaniya Yukos v. Russia (Eur. Ct. Hum. Rts.).

[7] *See* Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, 2019 ICJ Rep. 558 (Nov. 8).

[8] *Orascom v. Algeria*, *supra* note 1, para. 543.

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A second, but consistent, answer is to be found in *Ampal*, where it was held that it was an abuse of process for what was, in substance, the same claim to be pursued on the merits before two investment treaty tribunals. Reference was made to *RSM v. Grenada* and the *Apotex Holdings* case, both of which accepted that two entities within the same corporate chain were in privity of interest.[9] Moreover, in *Apotex*, it was not open to the shareholder to rely on an intermediate company to establish ownership of the protected investment whilst, at the same time, seeking to distance itself from that company when it came to res judicata. And what these two cases are doing, and what *Ampal* is also doing, is recognizing the unique jurisdictional and substantive protections that, quite specifically, the investment treaty accords to different legal entities within the same corporate chain, and approaching the issues of identity and abuse with those unique features in mind.

Ultimately, what the tribunal in *Ampal* did was to offer the shareholder a choice: to pursue its claim or that of the intermediate company, but not both. And that is an apt demonstration of why one has to be a little wary of words like "banned." The issues on abuse of process concern admissibility, not jurisdiction, and there may be many appropriate means to address the impermissible.

And in this respect, one notes how UNCITRAL Working Group III in its current focus on multiple proceedings appears to be looking at developing what one delegate called a detailed toolbox. And within that toolbox, the Working Group is looking at tools, such as orders to stay or suspend, and the benefits of consolidation, as well as the possibilities for model treaty clauses, includes waivers and the like. And while some states have or wish to put into treaty form how to regulate overlapping claims, such as at Article 8.24 of the Comprehensive Economic and Trade Agreement (CETA), I note from the Working Group's report, "While there was general support for elaborating on the notion of abuse of process or of claim (including the notion of double recovery) in investor-state dispute settlement (ISDS), it was cautioned that a certain level of flexibility should be provided to ISDS tribunals in applying that notion to achieve effective control over multiple proceedings."[10]

Will such elaboration be useful? No doubt. But the point for now is that the concept of abuse of process, and its potential applicability in the context of parallel proceedings, has become firmly established, and already allows for a certain level of flexibility, as aptly deployed in *Ampal* in putting the claimant to an election.

And to conclude, the real message from Heraclitus is not, of course, that strict identity is always legally significant but rather that time, and with it, legal thinking and understanding of how concepts such as abuse apply in this very specialized field, is always moving on. A ban, or whatever one might choose to call it, is not only essential; it has already been put in place. Thank you very much.

Opening Statement Against the Motion by Professor Jan Paulsson

Whenever you ask a yes or no question of a group of people, you are likely not to get unanimous answer even if the right answer is perfectly clear. Why is this so? I suppose that some people are incorrigibly agreeable, so no matter how absurd the proposition is, they instinctively go along with it. And if to the contrary the proposed proposition is rock solid, some people will say no because they like nothing better than a good argument and an occasion to show how clever they are about undermining what in their view is only ostensibly true. I say this because I know that some of you

[9] RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14; Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1.

[10] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Ninth Session (Vienna, October 5–9, 2020), para. 48, UN Doc. A/CN.9/1044 (Nov. 10, 2020).

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who are listening have voted wrong already and now need to understand why there is no way this proposition can possibly be answered in the affirmative.

Consider the wording: parallel proceedings in investment arbitration are abusive and should be banned. One problem is that the word "parallel" has no meaningful content, let alone an inherently pejorative meaning. If you are in the agreeable category of people who are desperate to assent, you could cheat and change the wording of the proposition thus: "parallel proceedings in investment arbitration are not necessarily abusive and should not be banned unless they are." I would agree with that right away. But this is not allowed. The proposition is the one before you, and you cannot possibly say yes to it.

One initial problem is this: if parallel proceedings in investment arbitration are abusive, it must be because there is something inherently wicked about them, and they must be abusive in all kinds of arbitration. So you would have to reject parallel proceedings in all kinds of arbitration—notably ordinary commercial arbitration. Wow; are you sure?

Leaving that aside, consider this: how many parallel investment arbitrations are there? We know how many are pending before ICSID: the number is 295. I do not know how many are at the Permanent Court of Arbitration (PCA), or in pure ad hoc, or before the Stockholm Chamber of Commerce (SCC), and so forth. And I guess every one of them is parallel with all the others because they are proceeding at the same time. Of course, you are not going to ban 294 out of the 295—that is, every one of them except the very first one, which must be terminated before the second one proceeds, and proceeds alone until it ends, and so forth *ad infinitum* while new cases join the long lineup.

Perhaps some would say that what should be banned are multiple simultaneous (i.e., parallel) cases which are considering the meaning of the same important concept. So if a single arbitration anywhere is wrestling with the definition of "fair and equitable," no other tribunal can proceed to attack the same definitional issue for as many years as it takes the first to decide the matter. And then others can go ahead and decide very quickly because they will have a handy definition of the word "fair." Come on; this is a fantasy. It really cannot be right either, and anyway, by altering the premise you are no longer obeying the assigned task of passing judgment on the proposition that is before us.

So you might tell me to stop being silly and admit that you know what the wording of the proposition intended—namely, to indicate different cases brought at the same time by the same party in relation to the same grievance. Once again, the proposition does not say so, but even if that were true, the same party may believe that the same grievance may be pursued on the basis of disparate causes of action belonging in different fora. Well, you might hear that this would still be a good rule because it will militate against double recovery. Very well, let us consider that, and let us be precise in the definition that will cover the mischief we wish to avoid. So we might say that cases that run the risk of resulting in double recovery should not be allowed. That sounds better, but it really is not a good rule. There is no good reason to prevent a deserving party from chasing different available rabbits if it has the resources to do so. Of course, once it has obtained a remedy in one forum, it cannot continue in another. A different subject is harassment, but that has its own criteria, which are not fulfilled merely because proceedings are parallel.

Mr. Wordsworth was kind enough to mention my book on abuse of right. Anyone who reads it will see that I have no problem with the notion of abuse of process. That is something different. Abuse of process involves an adjudicator's assessment whether there is an abuse of the proceedings before him or her. That is an inherent element of the judicial function. Adjudicators are specialists in process, and judges are expected to know abuse of process when they see it because process is their specialty. But abuse of *rights* may involve an infinite number of rights. And no human being can be a specialist in everything and know when there is an abuse. My research

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on this subject shows that national judges do not at all welcome the notion of abuse of right as something which they should apply, because it is too open-ended. And they do not know what will happen on appeal. And they fear accusations of unpredictability and arbitrariness. They want clear rules of decision, not general abstract expressions.

So in specific areas of the law, substantive areas of the law, "we want more granular definitions. We want to know where we stand. Now comes this new thing—"parallel"—which we are asked to consider might be in and of itself abusive. Why should we accept that "parallel" is per se abusive? We can say that with respect to other notions, such as we do not want double recovery, or we do not want people with the same ultimate beneficial interest to multiply causes of action. And we have means already at our disposal to object to such things. They are known and have long been known in national legal systems, which have been dealing with them for a long time. Common law knows its various forms of estoppel. The French Court of Cassation deals with the problem by means of what it calls the requirement of the *concentration des moyens*. If you have several arguments in support of a claim, you cannot bring one or two of them in one case and keep a few in reserve to start over again with a second or third case. You have to concentrate *les moyens*—raise all the rules which in your view support your demands in a particular case. If you have different claims, you can of course bring different cases, but that is something else. When you get down into details about how this works out, and the difference for example between claimants and respondents, and respondents who did not raise all the arguments which they could have raised, and now invite appellate judges to consider them on appeal, you may have a thorny issue because the first decision is not a negative res judicata because the point was not raised at all. International law, or the diffuse body of general principles of international law that are deemed to be a source of international law, really does not have the richness of detailed applications that lend themselves to resolving such complicated issues. For example, international law tells us very little about even such an oft–encountered distinction as admissibility versus jurisdiction.

And so we are left with the idea that "parallel" in this debated proposition is necessarily abusive, and we know it when we see it, even though some of the cases that arise really do not look as though they have a problem with parallelism at all. Consider the situation of two joint venture parties who have created a company in a third country. And that company is treated in a particular way by public officials, which the partners find objectionable. An international case is brought against the state by the joint venture company. It happens that the two partners have a falling out. And one of them befriends the local government and settles its problem, and perhaps gets advantageous deals in compensation. But the other joint venture partner is still not getting along with the local government, which gives it no redress, no friendly settlement. And it wants to bring a case. It now brings a case in its own name, as a shareholder whose stake in the joint venture has been adversely affected without compensation. That is not a parallel proceeding. That is a sequential proceeding. And what is wrong with it? There is no issue of double recovery. And there is no res judicata. There was a partial settlement. So I fear that, by this kind of a generalization, we get into great difficulty. And we put our arbitrators in the situation of wondering whether they know it when they see it. And that results in a great danger that the international community perceives arbitrariness and unpredictability. Thank you.

Questions from the Tribunal

Professor Pierre Mayer, as Chair of the Tribunal, thanked the debaters and invited his co-arbitrators to pose their questions.

Ms. Gotsiridze noted Mr. Wordsworth's apparent confidence that the principle of abuse of process was already well established in investor-state dispute settlement. However, she observed that

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there are few cases in which tribunals have felt empowered to take a strong position on that issue. Additionally, tribunals continue to apply identity tests quite strictly. Ms. Gotsiridze invited Mr. Wordsworth's views on these points and asked what tribunals should being doing to approach the issue of parallel proceedings more effectively.

Mr. Wordsworth responded that two recent cases show how abuse of process provides the correct answer to the issue of parallel proceedings. In terms of tribunals in other cases continuing to apply the triple identity cases very strictly, Mr. Wordsworth called for caution because triple identity is applied in multiple different circumstances. Cases like *RSM* and *Apotex* reflect a very carefully restricted application of the triple identity test as it applies in the specific context of investment treaties. In fact, the cases on application of triple identity tests are moving hand-in-hand with the cases on abuse of process.

Ms. Gotsiridze then observed that Mr. Paulsson had not excluded the possibility that certain cases of parallel proceedings could, in fact, create harm. He also appeared to accept that concerns voiced in international circles with respect to double recovery, conflicting decisions, and the threat to the legitimacy of the system might be correct. Thus, she asked him to elaborate on what kind of parallel or multiple proceedings he would consider abusive or problematic.

Mr. Paulsson noted that he had given three examples—such as double recovery—where a particular way of proceeding by claimants in different cases could be resisted without talking about parallel proceedings. He suggested that we put on our thinking hats and figure out in granular detail how they apply. As a general proposition, we resist simultaneous claims in different fora by parties who ultimately have the same beneficial interest. One could also mention harassment to put political pressure on respondent states to achieve advantageous negotiations, although that may be rather unlikely because it is a very expensive thing to do. Even then, we would say this is wrong not because it is parallel but rather because it is an abuse of process. And again, abuse of process, to distinguish that from abuse of right, is something which adjudicators can reasonably be presumed to know when they see. For example, when a party asserts that a motion is vexatious or oppressive, the judge agrees or disagrees. Judges know what that means because procedure is their stock in trade. But if you are talking about the myriad other fields of substantive rights, abuse of right does not help.

Caline Mouawad noted that Mr. Wordsworth had spoken about the triple identity test and the need for flexibility for that test. She asked whether he could address with more specificity the content of that test. Without clarity on the contours of the triple identity test, multiple entities in the horizontal chain of corporate ownership may choose to pursue claims because they would not know, from the outset, which entity a tribunal may ultimately deem to be the proper party or which claims may be considered abusive. For example, is the relevant test 80 percent shareholding? 100 percent?

In terms of a triple identity test, Mr. Wordsworth emphasized that the tribunal has to look at the question of what is abusive. It should not be looking at application of strict triple identity tests that derive ultimately from domestic law and domestic legal concepts like *lis alibi pendens*. The nub of the question is really as follows: "Well, hang on a second. Supposing there is not strict identity between claimants, and you have different claimants, one with 80 percent ownership instead of 100 percent, and one with 20 percent. And thus, one could have the situation where the 20 percent owner of a joint venture (or whatever it might be) cannot bring its claim." And that would be an incorrect application of the abuse of process doctrine. That, of course, simply requires the tribunal to focus precisely on identity of claimants. There is no question that you have to identify a beneficial claimant, a beneficial ownership that is in 100 percent ownership, so far as it concerns a particular claim. And what that can mean, as in the *Ampal* case, is that you are not saying there is a complete overlap in terms of the two potential parallel claims. In fact, the overlap in *Ampal* only

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applies with respect to 12.5 percent of the relevant shareholding. So what is required is a very close focus by the tribunal on what is, and what is not, in genuinely common ownership.

Turning to Professor Paulsson, Ms. Mouawad asked him to address the argument about the legitimacy of the investor-state dispute settlement system as a whole, and how parallel proceedings, within the confines that Mr. Paulsson had described, interplay with the legitimacy question at issue today.

Professor Paulsson explained that in terms of consequence on perceptions of legitimacy, he has no difficulty with the idea that abusive claims should be resisted, but he considers the notion of this new idea or buzzword of "parallel proceedings" far too indeterminate to be useful. For example, *Orascom* was an arbitration which ended because one of the two parties acting as a joint venture settled, and then a second case was started separately by the party that was not able to settle. That is sequential. That is not parallel. So it does not help at all to refer to it as such. Professor Paulsson suggested that we examine situations in their full particulars, see whether there was anything abusive about each particular case, and establish criteria for such determinations. Hence his reformulation of the proposition: parallel proceedings are not necessarily abusive and should not be banned unless they are, as indeed may be the case from time to time.

Professor Mayer then asked Mr. Wordsworth whether he made a distinction between (1) parallel proceedings brought by different entities in a chain of companies and (2) parallel proceedings brought by two parties to a joint venture, each one under a different treaty. He also asked whether the second situation would constitute an abuse of process.

In response, Mr. Wordsworth explained that the second situation is very unlikely to be an abuse of process, because the two joint venturers are not pursuing a claim for the same economic harm. That need to identify a claim for the same economic harm is what is at issue in cases like *Orascom* and *Ampal*. In a scenario where you have joint venturer A pursuing, say, 50 percent of the harm and joint venturer B also pursuing 50 percent of that harm, in an ideal world, the cases are heard together. But that is not necessary. It is a potential defect in the system that consolidation is not possible unless the parties agree, but that does not amount to abuse.

Rebuttal Statement by Sam Wordsworth QC

One of the key points that Professor Paulsson is making is that the term "parallel" has no defined meaning. And in a sense, one can agree, but that does not assist him in his argument. What I have tried to do in opening is to show how certain forms of parallelism are legally meaningful in this particular context of abuse, and certain are less meaningful because they are unlikely to lead to a situation of abuse. Hence the examples I gave of claims brought separately under contract and treaty where different legal orders are in play.

Professor Paulsson also said, "Well, there are means at a tribunal's disposal to ensure that there is no double recovery in a series of cases or in a given case. And also there are means available to limit claims to one beneficial owner." That, I think, is certainly true, at least as a matter of the strict legal content, so far as it concerns double recovery, because the tribunal will be applying the *Chorzów Factory* standard. It can only make the claimant whole and will not permit it to recover twice. So it is a useful principle for the tribunal.

But as to an available tool for saying a claim must be limited to one beneficial owner in the same chain, what is that tool? That tool is abuse of process. I am not aware of there being any other reasonably available tool. It is said that international law does not lend itself to resolving these problems. Well, I find that difficult to agree with because one looks at the International Court of Justice, which we do still look at as a touchstone in the investment treaty world. And there, they are spelling

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out in terms that abuse of process is an available tool. The question for now is how it applies in this specific context of investment treaties.

Some points were being made by reference to the *Orascom* case. But that is simply a question that is being raised as to the application of the abuse of process on the facts of a particular case. Now, the tribunal considered that there was indeed an abuse of process because the company owned by the claimant had initially brought a claim and then divested itself of that claim by selling it to a third party, who entered into a settlement agreement which, according to the tribunal, meant that that claim was settled. When the claimant later brings a new claim, one might say indeed, it is abusive. But that is a point of detail, which has to be left to the tribunal in the individual case to decide. That is why abuse of process is such a useful doctrine, because it establishes a framework within which a tribunal can focus on the very specific facts before it and identify abuse or no abuse. Thank you.

Rebuttal Statement by Professor Jan Paulsson

Sorry, we are not entitled to change the question or elude it, by saying that we reject abuse of process, and on that basis vote in favor of the proposition before us. It is worded as we see, it is put the way it is put. Now, listening to my friend Mr. Wordsworth, it comes back to me that he is always the fairest of opponents. He never overstates his arguments, and he never misstates his opponents' arguments. Miraculously he still seems to win most of his cases. In this case, he has been absolutely fair. But in this instance, it undermines his position in two ways. He has recognized a number of things that are not abusive and are actually legitimate parallel claims. He therefore is reduced to talking about something that he calls truly parallel claims. Those, it seems, are ones that are bad because they are somehow *truly* parallel. This really does not help us one bit, because it is just using some sort of a code to get where you want to go.

Once again, we all agree, it seems, that abuse of process should not be allowed. That is within the inherent jurisdiction and authority of adjudicators. And what we should spend our time doing is to define, in a granular and predictable way, what does or does not constitute abuse. "Parallel" does not help.

Observations by the Members of the Tribunal

Remarks by Mariam Gotsiridze*

I will offer three final points. First, in my view, there seems to be a general consensus among the users of the ISDS system that certain types of parallel proceedings raise legitimate concerns. What is at stake is not only the interest of the particular case at hand; the integrity of the entire system is susceptible to harm. Second, in certain cases parallel proceedings could be the result of a legitimate exercise of the legal remedies available to the parties; therefore, an outright ban of parallel proceedings under a very wide concept of "parallel" or "multiple" (as addressed within the framework of the discussions in UNCITRAL Working Group III) or alternatively, within the wide concept of "abusive" conduct, might not be entirely justified. A more reasonable approach might be to define the type of proceeding or practice that is abusive and the circumstances in which tribunals should apply the concept of "abuse of process." As a final point, we can observe that tribunals do not seem to feel

* Arbitration Department of the Ministry of Justice of Georgia.

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empowered to take a strong position against an "abuse of process," and certainly, the conservative approach to the interpretation of applicable legal principles and legal concepts does not help. This would include, for instance, the strict application of so called "triple identity" test. This situation calls for reform in this area and warrants more flexible and evolutionary interpretations of legal principles and concepts by tribunals.

Remarks by Caline Mouawad*

Although Mr. Wordsworth and Professor Paulsson urged opposing votes on the motion as drafted, it appears to be common ground between them that the question of parallel—or rather, multiple—proceedings by related entities with potentially overlapping claims is one that calls for a case- and fact-specific analysis. Mr. Wordsworth speaks of a "very close focus by the tribunal on what is, and what is not, in genuinely common ownership." The degree to which two entities or two claims must be related to be deemed abusive remains an open question, however: 100 percent (*RSM v. Grenada*), 80 percent (*Eskosol v. Italy*), or 12.5 percent (*Ampal v. Egypt*)?[11] Professor Paulsson also presses that what "we need to do is to examine given situations in their full particulars, and see whether there was anything abusive about that particular case, and to establish criteria for such determinations," without defining those criteria. The lack of clarity surrounding the relevant criteria may well invite—out of an abundance of caution—the very multiple claims that are sought to be avoided.

The flexibility that both advocates seem to embrace (with good reason) may raise potential issues of systemic legitimacy, however. As Professor Paulsson cautions, leaving it to the arbitrators to "know" an abusive proceeding when they see it "results in a great danger that the international community perceives arbitrariness and unpredictability." Put differently, defining the parameters for identifying and addressing abusive "parallel proceedings" is as important to safeguarding the legitimacy of the arbitral system as avoiding such abusive proceedings in the first place.

Remarks by Professor Pierre Mayer**

Having heard both speakers, my feeling is that the motion was expressed in a much too broad fashion. One has to distinguish between various situations. For instance, the case of two joint venturers acting in parallel is different from that of two companies forming a chain of ownership of the investment, also acting in parallel. In addition, there may be tools other than the notion of abuse of process that are available to prevent contradictory outcomes or, worse, double recovery.

Still, I think that in some situations having recourse to the notion of abuse of process is the only possible solution. Suppose that there is a group of companies; the direct investor has made a claim against the state for the whole value of the (allegedly) expropriated investment, and the parent company makes the same claim for the whole value of its indirect investment. There is a risk of double recovery if this second arbitration is not suspended until the result of the first one is known. I think it is abusive on the part of the parent company to both make a claim on its own behalf and cause its subsidiary to make a claim based on the same alleged expropriation. That may be the basis for an order to suspend the proceedings.

* Chaffetz Lindsey LLP.

[11] *RSM v. Grenada*, *supra* note 9; Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50; *Ampal v. Egypt*, *supra* note 4.

** University of Paris I Panthéon-Sorbonne and Mayer Greenberg.

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Be that as it may, if I try to synthesize what the members of the panel have said, the simple answer is that the three of us say that the motion, being too broad, should be dismissed.

Results of the Audience Vote

Before hearing the arguments, a majority of the audience (56 percent) voted for the motion. After the debate, the results were reversed: a majority of the audience (55 percent) voted against the motion.

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