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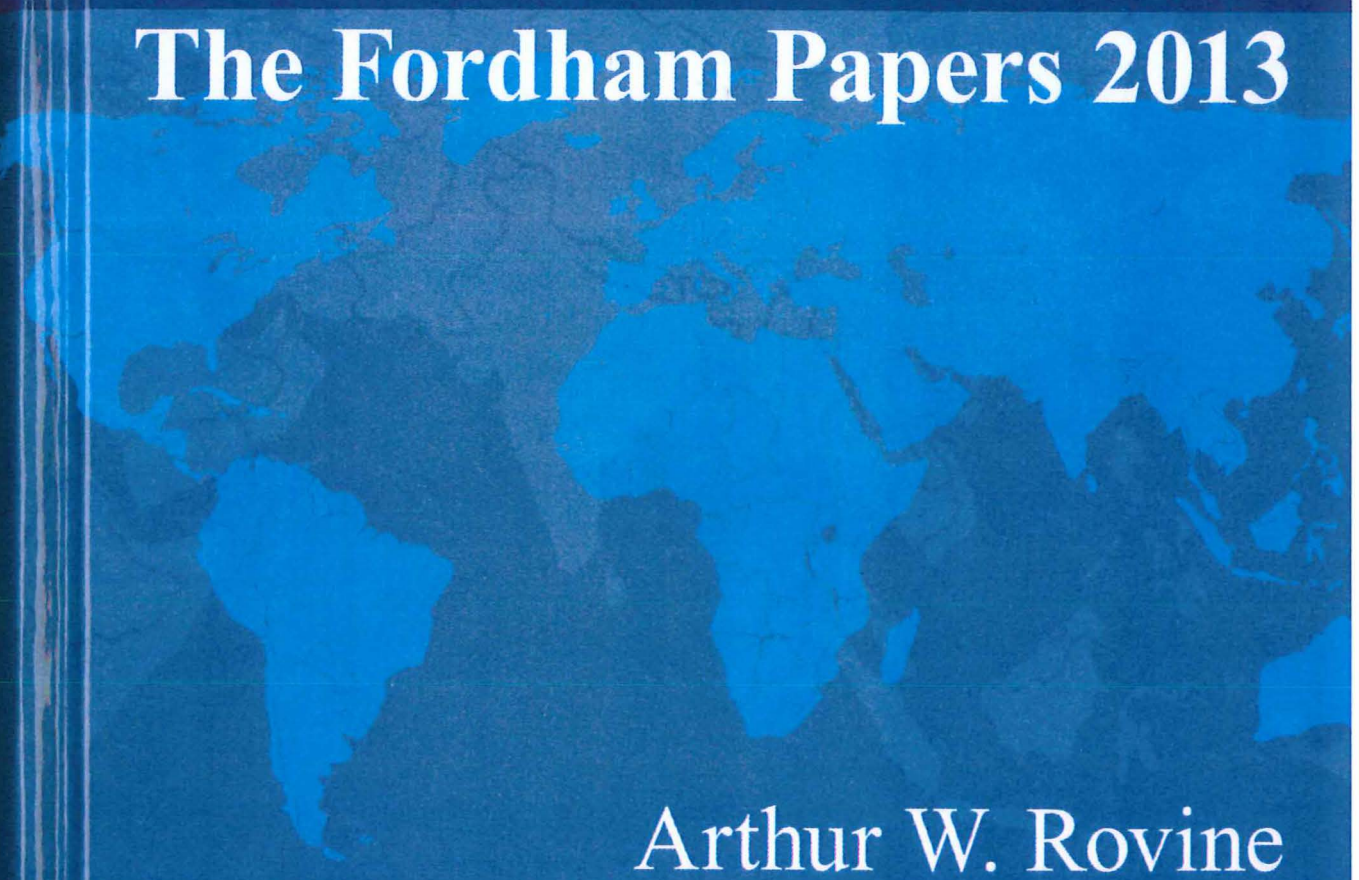

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Keynote Address

Multiple Proceedings—New Challenges for the Settlement of Investment Disputes

Gabrielle Kaufmann-Kohler

UNCTAD's Annual Report on investment cases for 2012 shows again a record year with 58 new arbitrations out of a total of 514 known cases.[1] Since its beginning when it was almost dormant in the eighties, investment arbitration has surged. As a result, it has attracted public attention and given rise to debate and criticism. The public discourse about investment arbitration essentially centers on the lack of consistency of outcomes, on an alleged pro-investor bias, on issues of impartiality of arbitrators and conflicts of interest, and on the lack of transparency of the process.

The public discourse about investment arbitration has not yet focused on another issue that creates increasing difficulties: multiple proceedings.[2] This issue is best illustrated by the following hypothetical:

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1 UNCTAD Recent Developments in Investor-State Dispute Settlement (ISDS), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf; UNCTAD World Investment Report 2013, p. XXI http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf. The majority of the cases has been brought under the ICSID Convention and the ICSID Additional Facility Rules (314 cases) and the UNCITRAL Rules (131 cases). The number of proceedings initiated by investors from developing or transition economies has increased from 10% in five years to 36%. Similarly, 34% of the new cases are brought against developed countries, an increase from 31% five years ago.

2 On the protection of shareholders in international law and in international investment law, see in particular Christoph Schreuer, "Shareholder Protection in International Investment Law", *Transnational Dispute Management*, 2005, vol. 3, pp. 1–21; Stanimir A. Alexandrov, "The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as 'Investors' and Jurisdiction *Ratione Temporis*", *The Law and Practice of International Courts and Tribunals*, 2005, vol. 4, pp. 19–59; Dolores Bentolila, "Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration", *Trade Law and Development*, 2010, vol. 2(1), pp. 87–144; Joseph D'Agostino, "Rescuing International Investment Arbitration: Introducing Derivative Actions, Class Actions and Compulsory Joinder", *Virginia Law Review*, 2012, vol. 98, pp. 177–230; Abby Cohen Smutny, "Claims of Shareholders in International Investment Law", in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Eds. Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich, Oxford University Press, 2009, pp. 363–376. On contract and treaty claims, see among others, James Crawford,

- A foreign investor forms a local company in the host State of the investment and that company enters into a contract with the host State for the exploration of oil. After a number of years of peaceful exploration, the host State terminates the contract and grants the exploration rights to a third party investor. The local company starts proceedings against the host state under the contract dispute resolution clause and claims that the contract termination was unlawful.

- In addition, the local company and its majority foreign shareholder start a treaty arbitration claiming that the contract termination was an expropriation and a breach of fair and equitable treatment in violation of the investment treaty concluded by the host State and the national State of the foreign shareholder.

- The local company also has foreign minority shareholders. Assume that rather than joining in the arbitration brought by the majority shareholder, these minority shareholders start one or several arbitrations of their own, for instance because they hold other nationalities than the majority shareholder and thus benefit from the protection of other BITs or simply for tactical reasons.

- Assume further that the shareholders of the shareholders who hold interests further up in the corporate chain also file one or several treaty arbitrations.

- As a result, the host state faces one contract arbitration and three or more treaty arbitrations. All these arbitrations deal with the same state measure—the termination of the exploration contract—and seek compensation for (all or part of) the same loss—the deprivation of the exploration rights.

The reasons for the multiplicity of proceedings are obvious from this hypothetical. One discerns essentially three categories of reasons: first, the multiplicity of *actors*; second, the multiplicity of *legal bases* or sources of the claims; and, third, the multiplicity of available *fora*.[3]

"Treaty and Contract in Investment Arbitration", *Arbitration International*, 2008, pp. 351–374; Pierre Mayer, "Contract claims et clauses juridictionnelles des traités relatifs à la protection des investissements", *Journal du Droit International*, 2009, pp. 71–96.

3 Hanno Wehland, "The Coordination of Multiple Proceedings in Investment Arbitration", Oxford University Press, 2013, para. 2.02, p. 17.

Let us first turn to the *actors*. Among them, one counts the local company which was the State's contract partner and the direct and indirect as well as majority and minority shareholders of the local company. The shareholders do not claim for the injury to the shareholder's rights in the strict sense (including voting rights, right to dividends, and right to a share in the liquidation of the corporation). They claim for the reflective loss, that is the diminution of the value of their shares as a result of the deprivation of the corporation's contract rights.[4] This claim must be distinguished from a derivative action under national law where shareholders are allowed to litigate on behalf of the company and where the cause of action remains vested in the company.[5] The shareholders are entitled to bring a claim for reflective loss because most treaties expressly provide that shares are deemed investments and are protected and because tribunals have also granted protection to minority shareholders.[6]

The second reason for the multiplicity of proceedings lies in the different *legal bases* upon which the claims are brought. The contract arbitration is brought on the basis of the exploration contract and the treaty arbitrations on the basis of the investment treaties. Depending on the nationality of the claimant, different investment treaties may come into play.

The third and last reason for the multiple proceedings is the *availability of several fora*. First, there is a forum for contract disputes, which may either be the local courts, or local arbitration, or international arbitration. Further, there are investment treaty fora, generally arbitration, typically under the auspices

4 Zachary Douglas, "The International Law of Investment Claims", Cambridge University Press, 2009, p. 402, para. 759; Bas J. De Jong, "Shareholders' Claims for Reflective Loss: a Comparative Legal Analysis", *European Business Organization Law Review*, 2013, vol. 14(1), pp. 97–118, 99.

5 Carsten A. Paul, "Derivative Actions Under English and German Corporate Law—Shareholder Participation Between the Tension Filled Areas of Corporate Governance and Malicious Shareholder Interference", *European Company and Financial Law Review*, 2010, vol. 7, pp. 81–115, 82.

6 Protection was granted to minority shareholders, for 29.42% of the capital, in *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction of 17 July 2003, *International Legal Materials*, 2003, vol. 42(4), *ICSID Reports*, 2005, vol. 7, para. 51; and for 35.263% in *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004, *International Law in Brief*, paras. 39, 44, 49, available at: http://www.asil.org/ilib/Enron.pdf. Protection was granted to indirect shareholders for instance in *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, para. 137 available at https://icsid.worldbank.org.

of ICSID,[7] often also under UNCITRAL Rules, and less frequently under other rules such as those of the Stockholm Chamber of Commerce or the ICC.[8]

Having identified the causes for the multiplicity of proceedings, the next task is to assess the situation as a matter of *policy*. Is the multiplicity good or bad policy-wise? Is it a blessing or a plague?

Under the rubric of blessing, one might argue that the multiplicity of proceedings maximizes or at least diversifies the chances of success for the investor in the sense that if the investor does not succeed in one forum, he may still prevail in another. Conversely, the multiplicity minimizes or diversifies the risk of loss for the state.

Under the rubric of plague, the multiplicity of proceedings entails a number of obvious drawbacks. First, the multiplicity triggers a waste of resources. This is obvious for the state which must defend several times against claims brought on the basis of the same measure and for (partially) the same economic damage. If one looks to the claimant parties in their globality for the claimant side, it is equally evident that multiple proceedings are far from cost effective. Second, there is a risk of contradictory decisions or inconsistency of the outcomes. The best known example is the saga in *CME* and *Lauder v. Czech Republic*.[9] Third and finally, there is a risk of double recovery. In fact, in the example set out above the risk is rather one of triple or quadruple recovery.

So far, arbitral tribunals have essentially stated that awards could avoid double recovery.[10] Looking at the chronology of the decisions potentially made in multiple proceedings, this may not always be true. If the claim of the local company, the investment vehicle, is decided first and damages are awarded,

7 39 out of 58 cases in 2012 according to UNCTAD, *supra* fn. 1.

8 Among the rest of the cases, 7 are filed under the UNCITRAL Rules, 5 under the Stockholm Chamber of Commerce Rules, 1 under ICC Rules and 1 under the Rules of the Cairo Regional Centre for International Commercial Arbitration, according to UNCTAD, *supra* fn. 1.

9 *CME Czech Republic BV v. The Czech Republic*, UNCITRAL Arbitration in Stockholm, Final Award of 14 March 2003 available at http://italaw.com/cases/documents/282; *Lauder v. The Czech Republic*, UNCITRAL Arbitration in London, Final Award of 3 September 2001 available at http://www.italaw.com/cases/610.

10 E.g. *Camuzzi International S. A. v. the Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction of 11 May 2005, para. 91 available at https://icsid.worldbank.org; *Suez Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of 16 May 2006, para. 51 available at https://icsid.worldbank.org/; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction of 11 May 2005, para. 102 available at https://icsid.worldbank.org.

then the value of that company is arguably restored. Since the shareholders claim compensation for the reflective loss, i.e. for a reduction in value of their shares as a consequence of the damage incurred by the company, once that damage is repaired, the shareholders should logically be said to have no claim left. By contrast, if the claim of the shareholder is decided first and damages are awarded, it is unclear how this award will be credited to the company. Another question that arises in this context relates to the position of third party creditors. Should third party creditors not have priority over the shareholders? This would certainly be the position under most national insolvency laws. As can be seen, the label "double recovery" covers a number of distinct issues.

Because of the clear prevalence of the drawbacks over the advantages, it appears reasonable to conclude that the multiplicity of proceedings is an unwelcome phenomenon as a matter of legal policy.

Having reached that conclusion from a policy perspective, the next question is whether and how multiplicity can be avoided. In different words, how can closely related disputes be concentrated in one set of proceedings? Procedural tools for the concentration of proceedings do exist. They exist in national civil procedures and to a much lesser extent also in arbitration.

- One procedure for concentration is *consolidation* as it is for instance known under Article 1126 of the NAFTA. Consolidation is the aggregation of two or more arbitral proceedings that are pending before different tribunals into one.[11] To be available, consolidation requires consent, either ad hoc consent or consent given by way of a treaty provision or an institutional rule.[12] Assuming this hurdle is overcome, another difficulty looms: how to consolidate "across institutions" or "across different rules"? For instance, how can an arbitration pending under the ICSID Convention be consolidated with another one pending under the UNCITRAL or ICC Rules? So far, in the

11 Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin, Makane noïse Mbengue, "Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently? Final Report on the Geneva Colloquium Held on 22 April 2006", *ICSID Review*, 2006, vol. 21(1), pp. 59–125, 80.

12 The Respondent state would give its consent by ratifying a treaty providing for consolidation or by incorporating into the treaty a reference to the institutional rules in the treaty, and the investor would give its consent by filing an arbitration request under the relevant treaty and institutional rules.

absence of specific treaty language,[13] no solutions appear to have emerged to resolve this latter question.

- Similar considerations apply to the *joinder* or the *intervention* of a third party into an existing proceeding. Through a joinder, upon the request of a party to the arbitration, a third party is added to the arbitral proceedings, while in an intervention it is the third party which requests to be added as a party to the arbitration.[14]

- At first sight at least, *res judicata* and *lis pendens* may also provide relief against multiple proceedings. However, the main difficulty with these concepts is that in general they come into play only if the so-called triple identity test is met. The triple identity test requires identity of facts, parties and causes of action.[15] In investment arbitration, one of the reasons for multiple proceedings is precisely that the proceedings are initiated by different actors. Consequently, the triple identity test and in particular the requirement related to identical parties will not be satisfied. It is true that some voices advocate the application of a relaxed notion of *res judicata* and *lis pendens* in investment arbitration.[16] However, it is unclear how this relaxed standard could be justified and what its precise content would be.

- Still another procedural mechanism that may assist in resolving the dilemma of multiple proceeding is *collateral estoppel* or *issue preclusion.* Collateral estoppel precludes contradiction of issues or legal consequences of facts discussed in earlier proceedings regardless of the identity between causes of actions, as long as the issues are the same and they constitute an essential

13 For example, Article 1126 of the NAFTA provides that the so-called consolidation tribunal is established under the UNCITRAL Rules, which means that an investor who initiated its claim under the ICSID (Additional Facility) Arbitration Rules can be required to arbitrate under the UNCITRAL Rules if its claim is included in the consolidated proceedings.

14 Gary Born, "International Commercial Arbitration", Kluwer Law International, 2009, p. 2067, fn. 3.

15 Filip de Ly, Audley Sheppard, "ILA Final Report on *Res Judicata* and Arbitration", *Arbitration International*, 2009, vol. 25(1), pp. 67–82, para. 29; Silja Schaffstein, "The Doctrine of Res Judicata Before International Arbitral Tribunals", PhD Thesis, University of Geneva and University of London, 2011, p. 147 (publication forthcoming 2014); ICC Case No. 6363, *Yearbook of Commercial Arbitration*, 1992, vol. XVII, para. 35.

16 Schreuer, *supra* fn. 1, p. 14. For a detailed examination of the subject and citations, see Schaffstein, *supra* fn. 15, paras. 713–715.

part of the previous proceedings.[17] Yet, these theories are largely unknown in civil law countries and thus difficult to apply on the international level. Moreover, they also require identity of parties or at least privity between the parties to the two proceedings.[18]

- In spite of these obstacles, the tribunal in *RSM v. Grenada* did apply collateral estoppel.[19] The application was certainly facilitated by the fact that there was no disagreement between the parties on the applicability of the doctrine of collateral estoppel.[20] The first proceedings were between RSM Production Corporation as claimant and Grenada as respondent and the second between RSM Production Corporation and its three shareholders as claimants and Grenada as respondent. The parties in the second proceedings agreed that issues addressed in the prior proceedings between RSM and Grenada concerning rights, questions of law or facts could not be relitigated if (a) they were directly put in issue in the first proceedings, (b) the first court or tribunal actually decided them, and (c) the resolution of these issues was necessary to resolve the claims before the first court or tribunal.[21] The tribunal advanced three reasons to apply collateral estoppel in respect of the claims of the shareholders: (i) the shareholder claimants were the only shareholders of RSM, which was the party to the first arbitration,[22] (ii) the three shareholders controlled the entire operations,[23] and (iii) the shareholders sought compensation for loss which they had suffered indirectly due to violations of RSM's rights.[24] Accordingly, the tribunal held that "if they wish to claim standing on the basis of their indirect interest in corporate assets, they must be subject to defenses that would be available against the corporation—including collateral estoppels."[25]

17 Audley Sheppard, "Res Judicata and Estoppel", *Dossier of the ICC Institute of World Business Law: Parallel State and Arbitral Procedures in International Arbitration*, 2005, pp. 219–238, 225; Schaffstein, *supra* fn. 15, para. 55.

18 Peter R. Barnett, "Res Judicata, Estoppel and Foreign Judgments", Oxford University Press, 2001, para. 3.01; Schaffstein, *supra* fn. 15, para. 55.

19 *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award of 10 December 2010 available at https://icsid.worldbank.org.

20 *Ibid.*, para. 7.1.1.

21 *Ibid.*

22 *Ibid.*, para. 7.1.5.

23 *Ibid.*, para. 7.1.6.

24 *Ibid.*

25 *Ibid.*, para 7.1.7.

- Further, some treaty specific rules may contribute to diminishing the number of proceedings, such as *fork-in-the-road, waiver*, and *umbrella clauses*. Fork-in-the-road clauses require the claimant to make an irrevocable choice of forum between proceedings in the host state court and investment arbitration.[26] Waiver clauses require the investor to waive all other available *fora* before applying to investment arbitration.[27] Umbrella clauses guarantee the observance of obligations assumed by the host state vis-à-vis the investor.[28]

- Another possible avenue may be the adoption of a more restrictive notion of shareholder protection than the one applied so far in investment arbitration. One proposal is that shareholders' claims for reflective loss should be limited to situations where (i) the assets of the local company have been expropriated so that the company has become worthless or (ii) the local company is deprived of the right or of the factual possibility to act itself.[29]

- Still another avenue may be to consider that actions by certain indirect shareholders are barred on the ground of insufficient causality. Indeed, the indirect shareholders are farther away from the measures than the company or the direct shareholders. Depending on the level of "indirectness", the distance between the measures and the damage may be such that the causal link is broken.[30]
  Similarly, one could envisage limiting the protection to shareholders with a controlling interest by specific treaty wording.[31]

- In addition, the theory of *abuse of right* or abuse of process may be a remedy in certain circumstances. So far there are no cases addressing the abuse of rights in the context of multiple proceedings; however there are several that address abuse of rights as a bar to investor rights in the context

26 Kaufmann-Kohler et al., *supra* fn. 11, p. 67. See for instance Argentine-France BIT art. 8(2) available at http://unctad.org/sections/dite/iia/docs/bits/france_argentina_fr.pdf.

27 *Ibid.* p. 68. See for instance NAFTA Art.1121(1); Canada-China BIT Article 21, not yet in force, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng.

28 Rudolf Dolzer, Christoph Schreuer, "Principles of International Investment Law", Oxford University Press, 2012, p. 166.

29 Douglas, *supra* fn. 4, pp. 415–416.

30 Thomas W. Wälde, Borzu Sabahi, "Compensation, Damages and Valuation in International Investment Law", *Transnational Dispute Management*, 2007, vol. 4(6), p. 42; Bentolila, *supra* fn. 2, p. 140.

31 Bentolila, *supra* fn. 2, p. 113; Alexandrov, *supra* fn. 2, p. 30.

of jurisdiction and admissibility.[32] Due to its stringent requirements, the theory of abuse of right will necessarily be of limited application in the present context.[33]

- Finally, one cannot ignore mass arbitrations, which are an obvious way of concentrating multiple claims in one litigation or arbitration. *Abaclat* and *Ambiente Ufficio* provide practical examples.[34] The very principle of mass investment arbitration remains controversial, not to speak of the practical difficulties of implementing mass claims procedures under rules meant for arbitrations with only two or at most a limited number of multiple parties.[35]

Where does this all leave us? The purpose of this address is not to provide answers. It is rather to alert to issues, flag avenues, and call for further thinking and action. This said, three tentative findings can be ventured:

- First, there is today no ready-made solution available to avoid or reduce multiple proceedings;

- Second, in specific instances, depending on the facts, on the treaty language, on the content of the applicable institutional rules, there might be solutions, for instance by resorting to the doctrine of abuse of rights, to mass arbitration, to consolidation if it is provided, possibly also by re-centering the notion of shareholder as protected investor;

32 For instance; in *Phoenix Action Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 9 April 2009, pp. 142–144, available at https://icsid.worldbank.org/, the tribunal held that an investment made for the sole purpose of obtaining jurisdiction was abusive; in *Mobil Corp. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction of 10 June 2010, paras. 205–207, available at https://icsid.worldbank.org/, the tribunal decided that restructuring in order to obtain BIT jurisdiction over pre-existing disputes was abusive.

33 On the application of abuse of rights to multiple proceedings, see Wehland, *supra* fn. 3, paras. 7.29–7.52.

34 *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011, paras. 294–298, available at https://icsid.worldbank.org/; *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of 8 February 2013, paras. 119–120, available at https://icsid.worldbank.org/.

35 *Abaclat and Others v. Argentine Republic, supra* fn. 36, Georges Abi-Saab's Dissenting Opinion of 28 October 2011, *i.a.* paras. 139, 143, 238, 239, available at https://icsid.worldbank.org/.

- Third and last, beyond these occasional remedies, a serious effort is needed to elaborate more general solutions, an effort on the part of all involved—academics for analysis and creative thinking, states in their treaty drafting and negotiation processes, arbitral institutions when drafting their rules, and arbitral tribunals where they are given some discretion. The effort is needed in the interest of a fair, coherent, and efficient system for the settlement of investment disputes.