

ARBITRATING INVESTMENT DISPUTES INVOLVING STATES WITH COMPETING GOVERNMENTS (ON THE EXAMPLE OF VENEZUELA)

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Abstract

The present article analyses whether investment tribunals are competent to determine which representatives are entitled to act on behalf of respondent states with competing governments. The examination of existing case law and theoretical background suggests that investment tribunals have incidental jurisdiction to decide on the representation issue. In this case, the representation issue is resolved for the sole purpose of proceeding to consideration of claims, which are properly within the tribunals' jurisdiction *ratione materiae* and the decision on this issue is not included in the *dispositif* of the awards and lacks *res judicata* effect. The most plausible approach to decide the representation issue is to conduct a substantive analysis of the government's entitlement to act on behalf of the state. The alternative avoidance techniques to resolve the representation issue are questionable from the perspectives of their logical coherence, practical convenience and safeguarding the parties' procedural rights. This analysis should be conducted in accordance with the criteria of customary international law. The legitimacy of a government's origin is just one of these criteria and has a limited role in the overall test for identifying the government which is entitled to act on behalf of the state. Finally, this analysis should also take into account the considerations of procedural fairness, which depends on the factual circumstances of each specific case.

Key words

investment arbitration, representation of states in arbitration, Venezuela, inherent jurisdiction, incidental jurisdiction, recognition of governments

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Introduction

In the recent arbitrations against Venezuela, investment tribunals have faced the issue concerning Venezuela's representation by two competing governments (hereinafter — representation issue). This issue arose from the 2019 presidential crisis in Venezuela. As a result, Juan Guaidó, who proclaimed himself the interim president of Venezuela and was recognised as the legitimate head of state by numerous states, fled the country, while Nicolás Maduro, whose presidency has been extended for a second term due to disputed presidential elections, remains Venezuela's *de facto* and effective leader. However, the lack of effectiveness did not preclude Mr Guaidó from appointing his nominees as high-ranking Venezuelan public officials. Mr Guaidó's appointment of José Ignacio Hernández as the Special Attorney General on 27 February 2019 enabled the latter to intervene into Venezuela's ongoing investment arbitration proceedings as the state's representative and instruct another law firm to assist Venezuela.

This article aims to determine (i) whether arbitral tribunals have jurisdiction to decide the representation issue, and, if so, (ii) what are the proper techniques to identify a state's representative. This task is accomplished against the background of limited academic writing on this issue.²

Accordingly, this article examines whether arbitral tribunals are entitled under bilateral investment treaties (hereinafter — BITs) to decide on the representation issue; whether the doctrines of inherent

¹ The views expressed in this article are the author's personal views and do not belong to Monastyrsky, Zyuba, Stepanov & Partners.

² As of the time of writing, the topic of the present article had been discussed only in the following contributions: Baptista K. *New Actors in Investment Arbitration: The Legitimate Government // Transnational Actors in International Investment Law I* ed. by A. Gourgourinis. Cham : Springer, 2021; Papp R. *Representation of States in Investment Arbitrations Involving Governments Competing for International Recognition // Investments in Conflict Zones: The Role of International Investment Law in Armed Conflicts, Disputed Territories, and 'Frozen' Conflicts I* ed. by T. Ackermann., S. Wuschka. Leiden : Brill | Nijhoff, 2021; Mancaux S. *The Representation of States before ICSID Tribunals // Journal of International Dispute Settlement*. Vol. 2. 2011. № 1. P. 87–96.

powers and incidental jurisdiction expand the tribunals' jurisdiction to resolve this issue; and which additional considerations should be given effect by tribunals while performing this task.

In line with this, Section 1 gives an outline of the representation issue, the related theoretical and practical challenges, and describes the approaches of other international dispute settlement bodies. Section 2 analyses whether investment tribunals have jurisdiction to decide on the representation issue, including on the basis of the doctrines of inherent powers and incidental jurisdiction. Section 3 describes other aspects that should be considered by tribunals while deciding on the representation issue, such as issues of applicable law, annulment and enforcement concerns, procedural fairness, and judicial propriety. The inferences drawn from this analysis are summarised in the Conclusion.

1. Mapping the issue: competing governments before international courts and tribunals

The present Section outlines the factual background that led to the emergence of the representation issue in the Venezuelan investment proceedings and describes the approaches taken by the respective tribunals. The solutions proposed by these tribunals are then considered in the light of the case law of other international courts and tribunals.

1.1. Background of the Venezuelan precedents

In 2018, presidential elections took place in Venezuela for the upcoming 5-year presidential term. Although the elections resulted in the re-election of Nicolás Maduro, it was commonly believed that the elections were deeply flawed.³ Numerous states refused to recognise the legitimacy of the elections.⁴

The crisis resulted in the self-proclamation of Juan Guaidó, the opposition leader at the National Assembly, as the Interim President pursuant to Article 233 of the Venezuelan Constitution on 23 January 2019.⁵ He was recognised by approximately 60 states.⁶

On 5 February 2019, the National Assembly passed the so-called Statute Governing the Transition to Democracy and the Reestablishment of the Constitution (hereinafter — Transition Statute), which incorporated the desired political changes.⁷ It also empowered Mr Guaidó to appoint senior officials, including the Special Attorney General representing Venezuela in international arbitration proceedings.⁸ Mr Guaidó appointed José Ignacio Hernández as the Special Attorney General.

However, the Transition Statute was annulled by the Supreme Tribunal of Justice (hereinafter — STJ), as it was adopted by the National Assembly in violation of the Constitution.⁹ The STJ also annulled the appointment of Mr Hernández as the Special Attorney General on 11 April 2019.¹⁰ Despite this, Mr Hernández — later replaced by Enrique Sánchez Falcón — started intervening into Venezuela's ICSID arbitration proceedings,¹¹ which were being managed by Reinaldo Enrique Muñoz Pedroza, the Venezuelan Attorney General appointed by Mr Maduro.¹² While Mr Pedroza instructed De Jesús & De

³ Faiola A. *Venezuelan President Nicolás Maduro wins reelection amid charges of irregularities* // The Washington Post. 20 May 2018. URL: https://www.washingtonpost.com/world/the_americas/crisis-weary-venezuelans-are-voting-in-election-decried-as-a-maduro-power-grab/2018/05/20/cb7b579e-57d6-11e8-9889-07bcc1327f4b_story.html (accessed: 18.06.2023).

⁴ Sequera V., Buitrago D. *U.S., EU say they do not recognize Venezuela parliamentary vote* // Reuters. 7 December 2020. URL: <https://www.reuters.com/article/us-venezuela-election-results-idCAKBN28H0L3> (accessed: 18.06.2023).

⁵ Hernandez A., Melimpoulos E. *Venezuela opposition leader declares himself interim president* // Aljazeera. 24 January 2019. URL: <https://www.aljazeera.com/news/2019/1/24/venezuela-opposition-leader-declares-himself-interim-president> (accessed: 15.12.2023).

⁶ Paddeu F., Dunkelberg A. *Recognition of Governments: Legitimacy and Control Six Months after Guaidó* // *Opinio Juris*. 18 July 2019. URL: <http://opiniojuris.org/2019/07/18/recognition-of-governments-legitimacy-and-control-six-months-after-guaido/> (accessed: 18.06.2023).

⁷ *Venezuelan Parliament approves law governing political transition* // The Quint World. 6 February 2019. URL: <https://www.thequint.com/news/hot-news/venezuelan-parliament-approves-law-governing-political-transition> (accessed: 18.06.2023).

⁸ Hernández J. I. *The Statute that Governs the Transition to Democracy and the International Recognition of the Venezuela Interim President* // *International Legal Materials*. Vol. 61. 2022. № 5. P. 820.

⁹ *El TSJ de Venezuela declara nulo el Estatuto de la Transición aprobado por el Parlamento* // *Notimérica*. 11 February 2019. URL: <https://www.notimerica.com/politica/noticia-tsj-venezuela-declara-nulo-estatuto-transicion-aprobado-parlamento-20190211121618.html> (accessed: 18.06.2023).

¹⁰ *Deutsche Bank AG London Branch v. Central Bank of Venezuela* [2022] EWHC 2040 (Comm), §101.

¹¹ *Valores Mundiales S.L. and Consorcio Andino S.L. v. Venezuela*, ICSID Case № ARB/13/11, Annulment Proceedings, Procedural Order № 2, 29 August 2019, §1; *Mobil Cerro Negro Holding et al. v. Venezuela*, ICSID Case № ARB/07/27, Decision on the Respondent's Representation in this Proceeding, §8, 24.

¹² *Valores Mundiales S.L. and Consorcio Andino S.L. v. Venezuela*, Award, 25 July 2017, p. i (list of party representatives); *Mobil Cerro Negro Holding et al. v. Venezuela*, ICSID Case № ARB/07/27, Decision on the Respondent's Representation in this Proceeding, §2.

Jesús, Mr Falcón instructed Curtis, Mallet-Prevost, Colt & Mosle LLP as counsel.¹³ Against this background, several ICSID tribunals considered the representation issue in separate procedural decisions.

1.2. Jurisdiction and applicable law in the Venezuelan precedents

In general, ICSID tribunals considered that they are entitled to decide on the representation issue — to a limited extent — because this is merely a procedural issue. In *Valores Mundiales v. Venezuela* and *Mobil Cerro v. Venezuela*, the tribunals held that they lack powers to identify the legitimate representative but noted that there was no need for such an exercise, as the decision on the representation is made strictly for the purposes of the proper conduct of proceedings and thus is a procedural decision.¹⁴ The tribunals cited Article 44 of the ICSID Convention, under which “[i]f any question of procedure arises which is not covered by... the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question”.¹⁵ Still, in *Heemsen v. Venezuela* and *Longreef v. Venezuela*, the tribunals held that they lack jurisdiction to resolve the related matter whether the procedural actions of Mr Pedroza could be declared invalid in the light of the National Assembly’s statement on the illegality of his authority.¹⁶

No less controversial is the question which law should be applied while deciding the representation issue. Some tribunals thoroughly analysed the authority of the competing representatives. Thus, in *Mobil Cerro v. Venezuela* and *Valores Mundiales v. Venezuela*, the tribunals examined the issue from the perspective of both national and international law. Both tribunals found that, in terms of international law, it is the effective government that should represent the state in the proceedings.¹⁷ But they also took cognizance of the fact that the STJ had declared the appointment of Mr Hernández invalid and stated that only Mr Pedroza can represent Venezuela in the proceedings.¹⁸

1.3. Various approaches to the representation issue in the Venezuelan precedents

The first approach adopted by tribunals can be characterised as the *status quo* approach. It boils down to allowing the counsel on the record, i.e. Mr Pedroza and De Jesús, to continue Venezuela’s representation.¹⁹ Its main advantage is simplicity. It also preserves the respondent state’s procedural rights and ensures that the investor does not have to face an additional legal team advancing its opponent’s interests, which would definitely place extra procedural burden on the claimant. Still, this solution is more practical than legal. Furthermore, neither tribunal, which followed the described approach, supported its conclusion with a strong line of legal arguments.

More nuanced is the approach of the *Mobil Cerro* tribunal.²⁰ It started its analysis by outlining the reasonableness of the *status quo* approach, which “provides continuity in the interest of orderly proceedings and the right of defence of the Respondent”.²¹ This conclusion was backed by a substantive analysis of the representatives’ entitlement to act on behalf of Venezuela. From the perspective of Venezuelan law, after noting the STJ’s annulment of the “the basis of the appointment of Mr Falcón’s predecessor”, the tribunal held that it “has not been convinced that Mr Falcón’s appointment is formally valid under domestic Venezuelan law”.²² As regards international law, the tribunal noted that “Mr. Falcón has not been shown to be the representative of an effective government”.²³ In addition, Mr Guaidó’s recognition by other states, in the tribunal’s view, often expressed mere political support rather than abrogated Mr Maduro’s powers as the state’s effective leader.²⁴

This solution appears to be preferable compared to the first one, as it engages in an analysis of the entitlement to represent the respondent state and arrives at a decision, which is legally justified rather than convenient. Moreover, selecting the “incorrect” representative can jeopardise the respondent state’s

¹³ *Ibid.* §7, 29.

¹⁴ *Valores Mundiales v. Venezuela*, Procedural Order № 2, §31–38; *Mobil Cerro v. Venezuela*, §43–46.

¹⁵ Convention on the settlement of investment disputes between States and nationals of other States, 575 U.N.T.S. 159 (1965).

¹⁶ *Enrique Heemsen and Jorge Heemsen v. Venezuela*, PCA Case № 2017–18 and *Longreef Investments AVV v. Venezuela*, ICSID Case № ARB/11/5, Annulment Procedure, cited in *Valores Mundiales v. Venezuela*, Procedural Order № 2, §36.

¹⁷ *Valores Mundiales v. Venezuela*, Procedural Order № 2, §42; *Mobil Cerro v. Venezuela*, §56.

¹⁸ *Valores Mundiales v. Venezuela*, Procedural Order № 2, §43–47; *Mobil Cerro v. Venezuela*, §55–57.

¹⁹ *Agroinsumos Ibero-Americanos S.L. et al. v. Venezuela*, ICSID Case № ARB/16/23, Procedural Order № 13, 13 January 2020, cited in *ConocoPhillips Petrozuata B.V. et al. v. Venezuela*, ICSID Case № ARB/07/30, Recommendation, 10 July 2020, §40.

²⁰ For a similar line of argumentation see also *Valores Mundiales v. Venezuela*, Procedural Order № 2, §42–49.

²¹ *Mobil Cerro v. Venezuela*, §52.

²² *Ibid.* §55.

²³ *Ibid.* §56–57.

²⁴ *Ibid.* §60.

right to be heard. This, in turn, would adversely affect the claimant's interest in enforcing the arbitral award, as a substantial violation of the right to be heard might lead to annulment or serve as a ground for denying recognition and enforcement.²⁵ Thus, in *ConocoPhillips v. Venezuela*, the investor considered these enforcement-related risks sufficiently substantial to ask the tribunal to allow the participation of both representatives for Venezuela.²⁶

A third approach was adopted in *ConocoPhillips v. Venezuela*, where both representatives were allowed to represent Venezuela. In the Decision of Rectification, the tribunal considered that at that stage the issue of representation was moot, as no conflicting submissions were filed by Curtis and De Jesús, which would jeopardise the proceeding.²⁷ The issue was also considered in the Order on Respondent's Representation issued by the Annulment Committee upon De Jesús' request to exclude Curtis from the proceedings.²⁸ De Jesús' request was filed after both firms concurrently applied for the annulment of the award and commented on the schedule of proceedings.²⁹ Although the Order on Representation admitted the existence of a risk that the representatives might make different arguments, the Annulment Committee opined that this "does not mean that their arguments and theses would not be heard and answered, separately" and that, in any case, it is Conoco who bears the burden of answering two lines of defences.³⁰ Finally, the issue was discussed once again in Lord Phillips' Recommendation on De Jesús' proposal to disqualify all members of the ICSID Annulment Committee because "the terms of the Order on Representation demonstrate that each of the three members of the Committee cannot be relied upon to exercise independent judgment".³¹ Lord Phillips noted that the concurrent work of two legal teams complementing each other would be beneficial for Venezuela.³² But he also made a disclaimer that where there is a "conflict between the cases that the two [representatives] sought to advance", "it would cease to be procedurally viable for them both to represent Venezuela".³³ Consequently, this situation "might lead to a procedural impasse".³⁴ The only solution, in Lord Phillips' opinion, would be the cancellation of the Order on Representation.³⁵ Finally, he also noted that, possibly, "the appropriate course that the Committee should have taken was to resolve, as best it could, the question of which of the two rival contenders had the better case to represent Venezuela".³⁶

Lord Phillips' comments clearly show the main drawbacks of concurrent representation by two non-cooperating legal teams. Where their positions are contradictory, it is unclear whose arguments should be given prevalence by the tribunal. It is also imaginable — if the representation issue arises early in the proceeding — that the legal teams might present conflicting facts, further complicating the case. Finally, the opposing party has to defend itself against two concurrent lines of arguments, which increases its expenses on the proceeding and the time required to adequately answer all arguments. This scenario thus also raises concerns about preserving the equality of parties. Although this latter problem did not occur in *ConocoPhillips* (as Conoco expressly agreed to bear this additional procedural burden to avoid enforcement-related risks),³⁷ it might well play a substantial role in cases initiated by claimants lacking the requisite financial resources. An adequate solution to avoid such complications, as admitted by Lord Phillips, is to choose one representative. In the author's view, the *ConocoPhillips* approach would only be at least viable if the rival counsels work hand-in-hand and produce a single position for the respondent state. But it is very unlikely that in circumstances similar to Venezuela's case such cooperation can be achieved.

²⁵ Article 52(1)(d) of the ICSID Convention; Article V(1)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3 (1958).

²⁶ *ConocoPhillips v. Venezuela*, Order on Applicant's Representation, 3 April 2020, §28.

²⁷ *ConocoPhillips v. Venezuela*, Decision on rectification, 29 August 2019, §25.

²⁸ *ConocoPhillips v. Venezuela*, Order on Applicant's Representation, §17.

²⁹ *Ibid.* §1–10.

³⁰ *Ibid.* §36.

³¹ *ConocoPhillips v. Venezuela*, Recommendation, §9.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.* §112.

³⁶ *Ibid.*, §123. The same idea was expressed in *Kimberly-Clark Dutch Holdings B.V. et al. v. Venezuela*, ICSID Case № ARB(AF)/18/3, 15 October 2019, Order on Venezuela's Representation, cited in *ConocoPhillips v. Venezuela*, Recommendation, §38: "the arbitration cannot proceed with two representatives of one and the same party who are in conflict with each other".

³⁷ See above fn. 25.

Finally, another option considered in *Valores Mundiales v. Venezuela* is to defer the decision on the representation issue to another body, namely the Administrative Council of the ICSID.³⁸ But it was rejected, as due to Venezuela's denunciation of the ICSID Convention it was no longer represented in the Council.³⁹ Still, one could imagine the possibility of deferring this question, e.g. to the International Court of Justice (hereinafter — ICJ), which can decide "all cases which the parties refer to it".⁴⁰ But this approach does not seem to provide a sound solution. The problem is that the ICJ cannot decide the question without proper jurisdictional bases. In any case, the ultimate course of action for the tribunal in regards to the ongoing arbitration proceedings while the ICJ is considering the representation issue remains unclear. The suspension of proceedings for a long time is a serious prejudice to the rights of both parties. And if tribunals have jurisdiction to decide the representation issue (see below), such an approach would result in a denial of justice for the parties.⁴¹

Thus, while there was a consensus among the tribunals that they lack jurisdiction to determine who is Venezuela's legitimate representative, they adopted various techniques to manage the proceedings. Some techniques — such as allowing the counsel on the record to continue representing the state (*status quo* approach) and allowing both representatives to act for the state — provide rather practical solutions and were adopted without a detailed legal analysis. Nevertheless, other tribunals combined the *status quo* approach with a substantive analysis of the respective representatives' entitlement to act on Venezuela's behalf under both national and international law.

1.4. The representation issue before other international fora

The representation issue was also considered in other fora. In *Cyprus v. Turkey*, the European Commission of Human Rights faced Turkey's argument that Cyprus lacked standing for lodging an application, as the government lodging the application was not the legitimate government of Cyprus. This argument was rejected by the Commission, which referred to related Security Council resolutions recognising the government in the proceeding and the fact that the representatives of this government consistently acted on behalf of Cyprus in ratifying treaties and no objections were raised against these acts.⁴²

Yugoslavia made a similar argument in the *Bosnian Genocide* case, where it argued that the president of Bosnia and Herzegovina was not authorised to file claims with the ICJ due to the violation of domestic procedures. The ICJ considered that municipal law is irrelevant to the question and opined that under international law "there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations". The Court referred to the recognition of Mr Izetbegović's presidential status by the UN and the fact that he signed numerous treaties.⁴³

The representation issue also arose before the Prosecutor of the International Criminal Court (hereinafter — ICC)⁴⁴ when the ex-president of Egypt, Mr Morsi, communicated to the ICC his request to initiate an investigation with respect to governmental activities taken in times of civil unrest in Egypt in 2013 with a declaration for Egypt's accession to the Rome Statute. However, the ICC Prosecutor decided that the documents were filed by unauthorised persons and, thus, Egypt's consent for the exercise of the ICC's jurisdiction could not be established. The Prosecutor argued that according to official UN documents other persons are listed as Egypt's president, prime minister and minister of foreign affairs, even though the international community refused to recognise the new government. The Prosecutor also considered that under international law the test of effective control shall be determinative of a government's power to act on behalf of the state. Considering that the Morsi government was ineffective, the Prosecutor decided not to proceed with the communication and the declaration.⁴⁵

³⁸ *Ibid.* §62.

³⁹ *Ibid.*

⁴⁰ Article 36(1) of the Statute of the International Court of Justice, XV U.N.C.I.O. 355 (1945).

⁴¹ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment of 2 February 2017, I.C.J. Reports 2017, §132.

⁴² *Cyprus v. Turkey*, European Commission on Human Rights, (Applications Nos. 6780/74 6 and 6950/75), Decision of 26 May 1975. P. 135–136.

⁴³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 11 July 1996, I.C.J. Reports 1996, §44.

⁴⁴ Although the ICC Prosecutor is not a dispute resolution body, for the purposes of the present Article this difference plays a limited role.

⁴⁵ *The determination of the Office of the Prosecutor on the communication received in relation to Egypt* // Press Release of the Office of the Prosecutor of the International Criminal Court. ICC-OTP-20140508-PR1003. 8 May 2014. URL: <https://www.icc-cpi.int/news/determination-office-prosecutor-communication-received-relation-egypt> (accessed: 18.06.2023).

The above conclusions differ from the ones reflected in the Venezuelan precedents. The European Commission of Human Rights, the ICJ and even the ICC Prosecutor considered that they are entitled to identify governments. There is also a consensus among them that the question must be resolved exclusively on the basis of international law.

2. Jurisdiction of investment tribunals over issues concerning state representation

2.1. Jurisdiction of investment arbitration tribunals over issues extraneous to the applicable BIT

The scope of investment tribunals' jurisdiction depends on the wording of BITs' dispute resolution clauses. Some provide for jurisdiction over disputes relating to the breach of the BIT or matters regulated thereby.⁴⁶ Others contain clauses allowing to arbitrate *all* or *any* disputes relating to an investment.⁴⁷

This broad wording does not limit tribunals' jurisdiction solely to breaches of the applicable BIT and could encompass not only BIT claims, but also contractual claims and claims under national law or treaties extraneous to the BIT. However, the possibility of such a broad interpretation remains unsettled, as evidenced by the notorious example of the *SGS v. Philippines*⁴⁸ and *SGS v. Pakistan*⁴⁹ cases, in which tribunals interpreted identical dispute resolution clauses differently. In *SGS v. Philippines*, the tribunal opined that the phrase "disputes with respect to investments" is sufficiently broad to include contractual claims, and only express wording to the opposite could exclude such claims from the tribunal's jurisdiction.⁵⁰ On the contrary, in *SGS v. Pakistan*, an identically drafted clause was interpreted as allowing to bring within the tribunal's purview only violations of the BIT.⁵¹

Such a narrow interpretation does not seem completely inapposite. It is logical to assume that BITs' dispute resolution clauses provide for a forum to consider violations of the respective BIT rather than extending arbitral jurisdiction to issues under other legal instruments.⁵² Still — at least in the academic community — the expansive interpretation seems to prevail, so that BITs' broad dispute resolution clauses allow bringing claims under other treaties or customary international law insofar as they relate to an investment.⁵³

But even broadly worded dispute resolution clauses cannot justify the resolution of the representation issue by an investment tribunal, as this issue does not relate to an investment.⁵⁴ Therefore, investment tribunals lack jurisdiction to decide the representation issue as a separate claim.

2.2. Inherent powers as a potential basis for resolving the representation issue

The majority of the Venezuelan precedents confirm that investment tribunals have jurisdiction to resolve the representation issue as a procedural question pursuant to Article 44 of the ICSID Convention.⁵⁵ This

⁴⁶ Examples of such BITs are provided, e.g. in Schreuer C. *Jurisdiction and Applicable Law in Investment Treaty Arbitration* // McGill Journal of Dispute Resolution. Vol. 1. 2014. № 1. P. 7–8.

⁴⁷ *Ibid.*

⁴⁸ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case № ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004.

⁴⁹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case № ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003.

⁵⁰ *SGS v. Philippines*, §132. For similar argument see, e.g. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case № ARB/00/4, Decision on Jurisdiction, 31 July 2001, §59.

⁵¹ *SGS v. Pakistan*, §161. For similar argument see, e.g. *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire*, ICSID Case № ARB/03/08, Award, 10 January 2005, §25.

⁵² Gaillard E. *Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses* // New York Law Journal. Vol. 234. 2005. № 68. P. 3.

⁵³ Schreuer C. *Jurisdiction and Applicable Law...* P. 7–9; Douglas Z. *The Enforcement of Environmental Norms in Investment Treaty Arbitration // Harnessing Foreign Investment to Promote Environmental Incentives and Safeguards* / ed. by P.-M. Dupuy, J. Viñuales. Cambridge : Cambridge University Press, 2013. P. 415, 424–425; Viñuales J. E. *Foreign Investment and the Environment in International Law: An Ambiguous Relationship* // British Yearbook of International Law. Vol. 80. 2009. № 1. P. 256–257; Demirkol B. *Non-treaty Claims in Investment Treaty Arbitration* // Leiden Journal of International Law. Vol 31. 2017. № 1. P. 66; Alexandrov S. *Breach of Treaty Claims and Breach of Contract Claims: When Can an International Tribunal Exercise Jurisdiction? // Arbitration Under International Investment Agreements: A Guide to the Key Issues* / ed. by K. Yannaca-Small K. Oxford : Oxford University Press. 2nd ed. 2018. P. 375–376, §15.22–15.24.

⁵⁴ There are several ways to interpret the phrase "relating" to an investment. Some authors consider that a claim under an extraneous treaty (i.e. extraneous to the BIT) meets this test if the violation of this treaty affects the investment or is directed at it, see Demirkol B. *Non-treaty Claims...* P. 56–57. Another possible interpretation is that this wording includes "any disputes that are factually related to investments", see Douglas Z. *The International Law of Investment Claims*. New York : Cambridge University Press. 2009. P. 238. The representation issue thus cannot be considered as "relating" to an investment under either of these approaches.

⁵⁵ Article 44 of the ICSID Convention states in the relevant part: "If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question".

provision incorporates the inherent powers of tribunals to “resolve procedural questions in the event of *lacunae*”.⁵⁶ These powers entitle tribunals to take measures necessary for the administration of justice,⁵⁷ i.e. have a functional justification.⁵⁸ The oft-cited examples of inherent powers include *compétence de la compétence*, the power to issue procedural orders, interpret the parties’ claims, impose interim measures, permit intervention, allow the participation of *amici curiae*, bifurcate the proceedings, decide on issues of evidence, decide counterclaims, interpret and revise decisions.⁵⁹

Despite the existence of scholarly opinion that the inherent powers doctrine entitles the tribunals to decide the representation issue,⁶⁰ the present article takes the opposite view. Inherent powers are mostly applicable to procedural issues.⁶¹ But the representation issue cannot be characterised as a purely procedural one.⁶² As shown below, the logical prerequisite to the resolution of the representation issue is the determination of the government, which is entitled to act on behalf of the state. This question of entitlement is an issue of substance rather than procedure.⁶³ Therefore, the inherent powers doctrine cannot *per se* serve as a basis for rendering a decision on the representation issue.

2.3. Incidental jurisdiction over substantive issues

2.3.1. Incidental jurisdiction in general

The doctrine of incidental jurisdiction is invoked in cases, where international courts and tribunals are required to consider issues falling outside of the scope of their jurisdiction (i.e. external issues). This doctrine allows to bring within the scope of arbitral jurisdiction external issues, which are *incidental* or *ancillary* to issues that are properly within their jurisdiction (i.e. inside issue), for the purpose of deciding on such inside issues.⁶⁴ Thus, incidental jurisdiction should be distinguished from the doctrine of inherent powers, which relates to the exercise of procedural powers.⁶⁵

The consent-based nature of arbitral jurisdiction serves as a reason for criticising the doctrine of incidental jurisdiction⁶⁶ — which does not require the parties’ consent⁶⁷ — or, at the very least, for urging to exercise cautiousness in its application.⁶⁸ But one should also avoid the opposite extreme when the exercise of jurisdiction is denied without sufficient grounds.⁶⁹

⁵⁶ Schreuer C. et al. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2010. P. 688, §54; Paparinskis M. *Inherent Powers of ICSID Tribunals: Broad and Rightly So // Investment Treaty Arbitration and International Law* / ed. by I. Laird, T. Weiler. Juris Publishing, 2012. P. 9.

⁵⁷ Shelton D. *Form, Function, and the Powers of International Courts // Chicago Journal of International Law*. Vol. 9. 2009. № 2. P. 546; Bjorklund A., Brosseau J. *Sources of Inherent Powers in International Adjudication // European International Arbitration Review*. Vol. 6. 2018. № 2. P. 5.

⁵⁸ Paparinskis M. *Inherent Powers of ICSID Tribunals...* P. 9; Brown C. *Inherent Powers in International Adjudication // The Oxford Handbook of International Adjudication* / ed. by C. Romano et al. New York : Oxford University Press, 2014. P. 838–840; Orakhelashvili A. *The Concept of International Judicial Jurisdiction // The Law & Practice of International Courts and Tribunals*. Vol. 2. 2003. № 3. P. 536.

⁵⁹ Pauwelyn J. *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*. Cambridge: Cambridge University Press, 2003. P. 447–448.

⁶⁰ Papp R. *Representation of States in Investment Arbitrations...* P. 264–267.

⁶¹ Brown C. *Inherent Powers ...* P. 846: “the exercise of such powers usually relates to procedural issues, rather than the endgame of international proceedings”; Weiss F. *Inherent Powers of National and International Courts: The Practice of the Iran-US Claims Tribunal // International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* / C. Binder et al. Oxford : Oxford University Press, 2009. P. 188: “Inherent powers... are therefore needed to enable courts and tribunals ... to deal with a great many procedural matters occurring in proceedings”.

⁶² Baptista K. *New Actors in Investment Arbitration...* P. 90.

⁶³ See generally *Valores Mundiales v. Venezuela*, Procedural Order № 2, §36. There, the tribunal considered that a request to declare the procedural acts performed by the purported state representative was of a *substantive* nature. In the author’s view, this position applies in a more general manner. If the choice of an unauthorised representative leads to the invalidity of his acts and thus produces substantive effects, a decision on the representation issue is properly characterised as an issue of substance.

⁶⁴ Devaney J. *Introduction to the Symposium on Incidental Jurisdiction // AJIL Unbound*. Vol. 116. 2022. P. 160.

⁶⁵ Tzeng P. *The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction // New York University Journal of International Law and Politics*. Vol. 50. 2018. № 2. P. 454, fn. 31; Marotti L. *Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals // Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* / ed. by A. del Vecchio, R. Virzo. Cham : Springer, 2019. P. 389.

⁶⁶ Advocate General Warner in his Opinion to *Camera Care Ltd v. Commission*, Case 792/79R, 1980 ECR 119, 135.

⁶⁷ García-Revilla M. G. *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea*. Leiden : Brill | Nijhoff, 2015. P. 203; Radović R. *Incidental Jurisdiction in Investment Treaty Arbitration and the Question of Party Consent // AJIL Unbound*. 2022. Vol. 116. P. 184.

⁶⁸ Cassese A. *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia // European Journal of International Law*. Vol. 18. 2007. № 4. P. 662–663.

⁶⁹ Akhavan P., Borge E. *Between Consent and Coherence: Incidental Questions in an Imperfect World // AJIL Unbound*. Vol. 116. 2022. P. 165; *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §11.

2.3.2. Criteria of exercising incidental jurisdiction in the case law of international courts and tribunals

A. Characterisation and logic-based approaches

International case law suggests that there are two competing tests for determining whether incidental jurisdiction can be exercised or not. In P. Tzeng's terminology, these approaches can be labelled as the "characterisation approach" and "logic-based approach".⁷⁰ According to the former, one has to determine where the centre of the dispute's gravity lies: if it relates to the inside issue, then it is possible to exercise incidental jurisdiction, but in case it rather pertains to the external issue, there is no jurisdiction.⁷¹

Under the latter approach the tribunal has to establish the logical relationship between the external and inside issues: if the resolution of the inside issue is impossible without a prior determination of the outside issue, the tribunal cannot exercise incidental jurisdiction to overcome this deficiency.⁷² But the below practice reveals the absence of consensus on the proper approach.

One of the first cases involving incidental questions was *Certain German Interests in Polish Upper Silesia* decided by the Permanent Court of International Justice (hereinafter — PCIJ). The dispute arose from Poland's nationalisation of the Chorzow nitrate factory owned by German companies. Germany contended that Poland's actions were in breach of Articles 92 and 297 of the Treaty of Versailles and Article 6 of the Geneva Convention concerning Upper Silesia. Poland argued that the PCIJ lacked jurisdiction to consider these claims, as they were not encompassed by the compromissory clause in Article 23 of the Geneva Convention, which referred to "differences of opinion respecting the construction and application of Articles 6 to 22 [of the Geneva Convention] that arise between the German and Polish Governments".⁷³ According to Poland, German nationals never had had property rights to the facility in question in accordance with Article 256 of the Treaty of Versailles and the Protocol of Spa. Considering that the dispute thus concerned obligations arising out of the Treaty of Versailles and the Protocol of Spa, Poland submitted that this dispute fell outside the scope of Article 23 of the Geneva Convention.⁷⁴ However, the PCIJ did not side with Poland's position and stated that although "the application of the Geneva Convention is hardly possible without interpreting Article 256 of the Treaty of Versailles," these are questions *preliminary or incidental* to the inside issue, i.e. the claim under the Geneva Convention.⁷⁵ The PCIJ concluded that "the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction".⁷⁶ The PCIJ thus adopted the characterisation approach, as it regarded the issue of the interpretation of extraneous instruments as a *preliminary or incidental*, i.e. minor, issue.

The characterisation approach was again relied on in the *Chagos Marine Protected Area Arbitration*.⁷⁷ Mauritius instituted these proceedings after the UK established a Marine Protected Area around the Chagos Archipelago in 2010. It claimed that this was contrary to the 1982 United Nations Convention on the Law of the Sea (hereinafter — UNCLOS), as the UK was not the "coastal State" within the meaning of the UNCLOS.⁷⁸ The tribunal opined that the relevant test boils down to determining "where the relative weight of the dispute lies".⁷⁹ The tribunal allowed "making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it," insofar as the "real issue" relates to the UNCLOS.⁸⁰ The tribunal characterised the dispute as one concerning sovereignty over the Chagos Archipelago and declined to exercise jurisdiction over the claim.⁸¹ Nevertheless, the tribunal noted that the possibility of deciding sovereignty issues cannot be altogether excluded where this issue is actually ancillary to the claims under the UNCLOS.⁸²

⁷⁰ Tzeng P. *The Implicated Issue Problem...* P. 473.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, № 6. P. 13.

⁷⁴ *Ibid.* P. 15–17.

⁷⁵ *Ibid.* P. 18.

⁷⁶ *Ibid.*

⁷⁷ *Chagos Marine Protected Area Arbitration (Mauritius v. UK)*, PCA Case № 2011-03, Award, 18 March 2015.

⁷⁸ *Ibid.* §5–7.

⁷⁹ *Ibid.* §211.

⁸⁰ *Ibid.* §220.

⁸¹ *Ibid.* §212, 547(A)(1).

⁸² *Ibid.* §221.

The logic-based approach was relied on in the *South China Sea Arbitration* in the course of deciding whether the tribunal can rule on the parties' sovereignty over certain maritime features in the South China Sea.⁸³ The tribunal held that the dispute might be deemed a sovereignty dispute, if "(a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty".⁸⁴ However, the tribunal found that this test was not met, as there was no need to render a decision on the sovereignty issue. The tribunal considered that it was possible to proceed on the assumption that China has sovereignty over certain features.⁸⁵

All in all, international adjudicatory bodies remain split on the relevant test for the permissibility of exercising incidental jurisdiction. While the characterisation approach is sometimes reprimanded for being too subjective and obscure,⁸⁶ strict adherence to the logic-based approach would leave most tribunals without jurisdiction over the main dispute.⁸⁷ This problem of the logic-based approach is well illustrated in the *South China Sea Arbitration*, where the tribunal tried to circumvent the limitations imposed by the logic-based approach by introducing a presumption that China has sovereign rights over certain marine features. While it would appear to be acceptable to make a factual presumption, it is hard to see any justification for introducing a legal presumption about the existence of disputed rights. Therefore, the characterisation approach is more suitable for determining whether the power to make incidental determinations might be used.

B. *Res judicata* effect

Another significant aspect in defining the limits of incidental jurisdiction is the issue whether determinations on incidental questions have a *res judicata* effect. It is settled that courts and tribunals cannot include their incidental determinations in the *dispositif* and give a *res judicata* effect thereto.

This aspect was highlighted by Judge D. Anzilotti in his dissenting opinion to the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* case.⁸⁸ When considering the effect of the incidental determination on the German owner's rights over the nitrate factory, he expressly stated that such an incidental finding has no *res judicata* effect and cannot be binding on the parties in other proceedings.⁸⁹

In the *Arctic Sunrise Arbitration*, the tribunal found itself incompetent to reach a conclusion on the issue whether the arrest and detention of the vessel's crew violated human rights law.⁹⁰ However, the tribunal did not exclude the possibility of taking into account international human rights standards in order to determine whether the arrest and detention were compatible with the UNCLOS.⁹¹

In *Croatia v. Serbia*, the ICJ admitted that Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter — the Genocide Convention) limits its jurisdiction to disputes relating to the interpretation and application of the Genocide Convention.⁹² But this "does not prevent the Court from considering, in its reasoning, whether a violation of international humanitarian law or international human rights law has occurred to the extent that this is relevant for the Court's determination of whether or not there has been a breach of an obligation under the Genocide Convention".⁹³

This practice suggests the existence of a clear consensus that incidental issues cannot be decided as independent claims, included in the *dispositif* and have a *res judicata* effect. These aspects are also supported by existing doctrine.⁹⁴

⁸³ *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case № 2013–19, Award on Jurisdiction and Admissibility, 29 October 2015.

⁸⁴ *Ibid.*, §153.

⁸⁵ *Ibid.*

⁸⁶ Papadaki M. *Incidental Questions as a Gatekeeping Doctrine* // AJIL Unbound. Vol. 116. 2022. P. 170; Marotti L. *Between Consent and Effectiveness...* P. 393–394.

⁸⁷ Tzeng P. *The Implicated Issue Problem...* P. 499.

⁸⁸ *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów) (Germany v. Poland)*, Judgment of 16 December 1927, P.C.I.J. Ser. A № 13, Dissenting Opinion of Judge Anzilotti.

⁸⁹ *Ibid.*, P. 16; *Factory at Chorzów (Merits) (Germany v. Poland)*, Judgment of 13 September 1928, Dissenting Opinion by Judge Ehrlich. P. 76.

⁹⁰ *Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case № 2014-02, Award on the Merits, 14 August 2015, §198.

⁹¹ *Ibid.* See also *Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case № 2014-07, Award, 5 September 2016, §207–210; *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case № 2015-28, Award, 21 May 2020, §808–809, 1094(B)(2).

⁹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, I.C.J. Reports 2015, §85.

⁹³ *Ibid.* See also *Jadhav (India v. Pakistan)*, Judgment of 17 July 2019, I.C.J. Reports 2019, §36–37.

⁹⁴ Cheng B. *General Principles of Law as Applied by International Courts and Tribunals*. Cambridge: Cambridge University Press, 1953, 2006. P. 267; Radović R. *Incidental Jurisdiction in Investment Treaty Arbitration ...* P. 184; Harris C. *Incidental*

C. Necessity for the sole purpose of deciding the inside issue

Another important aspect of having recourse to incidental jurisdiction is that it can be exercised only insofar as this is necessary for the resolution of the claims within the scope of mainline jurisdiction.

In this respect, a significant precedent was set by the ICTY's Appeals Chamber in *Prosecutor v. Dusko Tadić*, where the defendant raised as a jurisdictional objection relating to the illegality of the ICTY's creation. The Appeals Chamber considered that its Statute defines only the ICTY's *primary* jurisdiction, but this is without prejudice to its *incidental* jurisdiction, which "derives automatically from the exercise of the judicial function".⁹⁵ The Appeals Chamber held that the question of the legality of its establishment is an incidental issue and has to be decided for the *sole purpose* of exercising its mainline jurisdiction over the criminal case and, thus, it can review the legality of its establishment.⁹⁶

In the *Qatar ICAO Appeal* cases, the ICJ noted that the "integrity of the Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the exclusive purpose of deciding a dispute, which falls within its jurisdiction".⁹⁷

The necessity criterion suggests that incidental determinations should not be superfluous or have the character of an *obiter dictum*. Instead, they should lead the tribunal to the resolution of the inside issue.

2.3.3. Conclusion on incidental jurisdiction

In general, investment arbitration tribunals have the power to make incidental legal determinations, where (i) the resolution of the incidental question is necessary for deciding on the main claims and (ii) the incidental issue does not form the centre of gravity of the dispute or remains a peripheral issue, (iii) the incidental findings are not included in the *dispositif*.

The application of this test to the representation issue suggests that investment arbitration tribunals do have the power to make incidental determinations on the representation issue. The resolution of the representation issues is necessary for deciding on the BIT claims, as otherwise the conduct of proceedings would be hardly imaginable. Further, the representation issue clearly remains an ancillary issue and does not go to the heart of the investment dispute.

3. Resolving the representation issue: balanced argumentation and judicial propriety

The overview of case law on the representation issue displayed the multitude of possible ways to approach the issue and find a convenient solution thereto. The present Chapter focuses on finding a reasonable and balanced argumentation to identify the authorised state representative. For this purpose, the issues of applicable law, enforcement, procedural fairness, and judicial propriety are considered.

3.1. Applicable law and issues of recognition and legitimacy

Existing case law on the representation issue demonstrates the lack of consensus regarding the applicable law. While the Venezuelan precedents paid attention to Venezuelan law, the decisions in *Cyprus v. Turkey*, *Bosnian Genocide* case, and the ICC Prosecutor's determination with respect to Egypt's communication reflect the reluctance to consider municipal law.

The latter approach is the preferable one. International law has its own criteria of governments, and national law has a limited role in this analysis.⁹⁸ There is little dispute that under international law a

Determinations in Proceedings Under Compromissory Clauses // International & Comparative Law Quarterly Vol. 70. 2021. № 2. P. 425–426.

⁹⁵ *Prosecutor v. Dusko Tadić*, §14.

⁹⁶ *Ibid.*, §20–22.

⁹⁷ *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and UAE v. Qatar)*, Judgment of 14 July 2020, I.C.J. Reports 2020, §61; *Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and UAE v. Qatar)*, Judgment of 14 July 2020, I.C.J. Reports 2020, §61. See also *The "Enrica Lexie" Incident*, §808; *Chagos Marine Protected Area Arbitration*, §220.

⁹⁸ Magiera S. *Governments* // Max Planck Encyclopedias of International Law, 2007. §13–27. URL: <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1048?prd=EPIL> (accessed: 18.06.2023); Pavlopoulos N. *Contested Governments and State Representation before International Courts and Tribunals* // EJIL: Talk! 29 September 2021. URL: <https://www.ejiltalk.org/contested-governments-and-state-representation-before-international-courts-and-tribunals/> (accessed: 18.06.2023).

government must meet — at the very least — the criteria of effectiveness,⁹⁹ independence and a certain level of international recognition.¹⁰⁰ In controversial cases — where the constitutionality of the government is questionable — the criterion of recognition might be in tension with the criterion of effectiveness. As shown above, in such circumstances the ICC Prosecutor relied on the effectiveness of Mr Mansour's government, even despite the recognition concerns.¹⁰¹ Thus, it seems that where the Security Council has not taken a stance on the legitimacy or recognition of a government, effectiveness prevails over considerations of legality and recognition.¹⁰²

The reason for this is that the right to democratic governance¹⁰³ is supported by only a handful of examples and remains a doctrinal concept.¹⁰⁴ It is premature to speak of an emerging rule of customary international law in this respect.¹⁰⁵ In any case, recognition has several meanings¹⁰⁶ and is often granted or withheld based on political rather than legal reasons.¹⁰⁷ Recognition by other states should thus be carefully analysed on a case-by-case basis without giving it much evidential weight automatically.¹⁰⁸ In the light of this, both recognition — if furnished not by the Security Council or, arguably, if not universal — and legitimacy play a limited role in the analysis of a government's entitlement to act on behalf of a state under international law.

All in all, the question of a government's entitlement to represent a state should be decided based on the criteria under international law, i.e. effectiveness, independence, recognition, and legitimacy. Despite the sympathy that arbitrators might feel towards constitutionally elected or illegitimately overthrown governments, considerations of recognition, legitimacy and democracy play a secondary role with the rare exceptions of Security Council or universal recognition.

3.2. Annulment and enforcement concerns

Another potential concern is the effect of this decision¹⁰⁹ on the future enforcement of the award, which is, undoubtedly, the claimants' ultimate interest in any arbitral proceeding. Arguably, deficiencies might lead to the annulment of an award pursuant to Article 52(1)(d) of the ICSID Convention or the denial of recognition and enforcement based on Article V(1)(b) of the New York Convention.¹¹⁰ Both provisions address irregularities of procedure, which can encompass situations where a party failed to present its case due to its representation by authorised persons.¹¹¹

⁹⁹ International Law Association, *Recognition/Non-Recognition in International Law* // Johannesburg Conference. Third Report. 2016. P. 3; International Law Association, *Recognition/Non-Recognition in International Law* // Sydney Conference. Fourth (Final) Report. 2018. P. 479; *Tinoco Concessions Arbitration*, 1923, I RIAA 369, 381.

¹⁰⁰ Magiera S. *Governments*, §13–27; Talmon S. *Who is a legitimate government in exile? Towards normative criteria for governmental legitimacy in international law* // *The Reality of International Law. Essays in Honour of Ian Brownlie* / ed. by G. Goodwin-Gill, S. Talmon. Oxford : Oxford University Press, 1999. P. 34. URL: https://www.ilsa.org/Jessup/Jessup12/Talmon_Who%20is%20a%20legitimate%20government%20in%20exile.pdf (accessed: 18.06.2023).

¹⁰¹ Yihdego Z. *Democracy, Peoples' Uprising and Unconstitutional Change of Government in Egypt: The African Union Principles and Responses* // EJIL: Talk! 8 July 2013. URL: <https://www.ejiltalk.org/democracy-peoples-uprising-and-unconstitutional-change-of-government-in-egypt-the-african-union-principles-and-responses/> (accessed: 18.06.2023).

¹⁰² Shaw M. *International Law*. Cambridge: Cambridge University Press, 2017. P. 338: "Where recognition has been refused because of the illegitimacy or irregularity of origin of the government in question, rather than because of the lack of effectiveness of its control in the country, such non-recognition loses some of its evidential weight".

¹⁰³ Franck T. *The Emerging Right to Democratic Governance* // *American Journal of International Law*. Vol. 86. 1992. № 1. P. 50; d'Aspremont J. *Legitimacy of Governments in the Age of Democracy* // *New York University Journal of International Law and Politics*. 2006. Vol. 38. P. 903.

¹⁰⁴ Marks S. *What has Become of the Emerging Right to Democratic Governance?* // *European Journal of International Law*. Vol. 22. 2011. № 2. P. 511–513; Talmon S. *Who is a legitimate government in exile? Towards normative criteria for governmental legitimacy in international law...* P. 10.

¹⁰⁵ Murphy S. *Democratic Legitimacy and the Recognition of States and Governments* // *International and Comparative Law Quarterly*. Vol. 48. 1999. № 3. P. 574.

¹⁰⁶ Talmon S. *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*. Oxford: Oxford University Press, 2011. P. 21–23.

¹⁰⁷ Crawford J. *Brownlie's Principles of Public International Law*. Oxford: Oxford University Press, 9th ed., 2012. P. 143; International Law Association, *Recognition/Non-Recognition in International Law...* P. 482. Also see *Salimoff v. Standard Oil Co.* (1933) 262 NY 220, 224: "The refusal of the Government of the United States to accord recognition to the Soviet regime is not based on the ground that the regime does not exercise control and authority in territory of the former Russian Empire, but on other facts".

¹⁰⁸ Talmon S. *Recognition of Governments in International Law...* P. 42. For the limited role of Mr Guaidó's recognition as Venezuela's Interim President see Janik R. *European Recognition Practice on Venezuela: The Devil in the Details* // *Opinio Juris*. 8 February 2019. URL: <https://opiniojuris.org/2019/02/08/european-recognition-practice-on-venezuela-the-devil-in-the-details/> (accessed: 18.06.2023).

¹⁰⁹ Horvath G. *The Duty of the Tribunal to Render an Enforceable Award* // *Journal of International Arbitration*. Vol. 18. 2001. № 2. P. 135–158.

¹¹⁰ The Convention does not provide for the grounds for setting aside an arbitral award. In practice these grounds often mirror the ones for denying recognition and enforcement. Therefore, the present analysis is also relevant for the setting aside of awards.

¹¹¹ Schreuer C. et al. *The ICSID Convention: A Commentary...* P. 990, §317; Baptista K. *New Actors in Investment Arbitration...* P. 94–98.

But there is a clear tendency to treat tribunals' procedural decisions with great deference in the light of their general procedural discretion to design proceedings.¹¹² Therefore, in cases where the tribunal gives sufficient consideration and weight to the parties' arguments in rendering a decision on the representation issue, it can be hardly argued that this constitutes an abuse of discretion and, accordingly, a procedural irregularity, which serves as a ground for annulment or denying recognition and enforcement.¹¹³

Another potential risk is the risk of denying recognition and enforcement due to the violation of the enforcement forum's public policy.¹¹⁴ Still, it seems questionable whether the enforcing state's policy of recognising governments is an issue of public policy.¹¹⁵

Finally, considerations relating to the future enforceability of an award are usually speculative and ultimately can serve merely as a "guiding light" for the tribunal.¹¹⁶ The enforcement forum can remain unknown during the conduct of proceedings or there might be multiple enforcement forums. It is therefore highly doubtful that the tribunal should give much weight to this argument.

3.3. Procedural fairness and judicial propriety

A final point in deciding on the representation issue is the issue of procedural fairness and judicial propriety. The tribunals in the Venezuelan precedents placed much emphasis on the issue of procedural fairness and decided the representation issue mainly by having regard to the parties' procedural interests. But procedural fairness remains only one aspect of a complex problem.

Substituting holistic argumentation — which considers all the relevant aspects — by this one aspect is questionable. It is likely that tribunals opted for this technique to avoid deciding on a sensitive and politicised question. But if tribunals lack jurisdiction to deal with the representation issue in the first place, it is highly doubtful whether the absence of jurisdiction can be cured by such circumvention.

Investment tribunals are entitled to resolve the representation issue by exercising incidental jurisdiction. It is questionable whether refraining from exercising these powers would serve the interests of the parties or judicial propriety. The approach adopted by most tribunals, whereby it is the representative on the record who is entitled to continue to act on behalf of the respondent state, creates a risk that the award will be annulled or denied recognition and enforcement due to procedural irregularities, which affected the state's right to present its case. The only reasonable possibility to exclude this risk is to identify the persons who are authorised to act on behalf of the state.

Finally, investment tribunals do not exist in a legal vacuum. The application of extraneous norms of public international law could contribute to the increase of coordination with other dispute settlement bodies, consistency with other areas of international law and eventually to the mitigation of the ongoing fragmentation of international law.

Conclusion

The present article analysed whether investment tribunals are competent to identify governments that are entitled to act on behalf of states. Investment tribunals have incidental jurisdiction to decide on the representation issue for the sole purpose of considering claims that are properly within their jurisdiction and if the decision on this issue is not included in the *dispositif* of the awards and lacks *res judicata* effect.

The most plausible approach to decide the representation issue is to conduct a substantive analysis of the government's entitlement to act on behalf of the state. Alternative avoidance techniques to resolve the representation issue are questionable from the perspectives of their logical coherence, practical convenience and safeguarding the parties' procedural rights.

¹¹² Born G. *International Commercial Arbitration*. The Hague: Kluwer International, 2023. §26.05[C][5][a][iii].

¹¹³ Report and Recommendation of the United States District Court for the District of Columbia, *Valores Mundiales v. Venezuela*, Case № 19-cv-46-FYP-RMM, 3 August 2022: "ICSID decided the question about Venezuela's proper representation for purposes of the ICSID arbitration and consistent with ICSID's arbitration rules and procedures, including ICSID's rules for conflicts of law. Now, 'having been unsuccessful in convincing the ad hoc committee' of its position, representatives of Mr. Guaidó's government may not 'reopen those questions in a collateral attack' in this Court".

¹¹⁴ Article V(2)(b) of the New York Convention. Arguably, such an approach is expected from the French courts, see Baptista K. *New Actors in Investment Arbitration...* P. 96–97 (referring to a French case in which France's recognition of Libya's National Transitional Council as the government had a direct effect on the treatment of claims filed by the representative appointed by the Gaddafi government with the French courts).

¹¹⁵ *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974); *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 820 (D. Del. 1990).

¹¹⁶ Boog C. *The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award* // Kluwer Arbitration Blog. 28 January 2013. URL: <https://arbitrationblog.kluwerarbitration.com/2013/01/28/the-lazy-myth-of-the-arbitral-tribunals-duty-to-render-an-enforceable-award/> (accessed: 18.06.2023).

This analysis should be conducted in accordance with the criteria of customary international law. The issue of the legitimacy of a government's origin is but one of these criteria and has a limited role in the overall test for identifying the government, which is entitled to act on behalf of the state. Finally, this analysis should also consider procedural fairness, which depends on the factual circumstances of each specific case.

РАССМОТРЕНИЕ ИНВЕСТИЦИОННЫХ СПОРОВ В АРБИТРАЖЕ С УЧАСТИЕМ ГОСУДАРСТВ С КОНКУРИРУЮЩИМИ ПРАВИТЕЛЬСТВАМИ (НА ПРИМЕРЕ ВЕНЕСУЭЛЫ)

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Аннотация

В настоящей статье рассматривается вопрос о наличии у составов арбитража, рассматривающих инвестиционные споры, компетенции определять представителей, имеющих право действовать от имени государств-ответчиков с конкурирующими правительствами. Изучение имеющейся международной практики и доктрины позволяет предположить, что составы арбитража обладают «сопутствующей» компетенцией для решения вопроса об уполномоченном представителе. В этом случае вопрос об уполномоченном представителе решается с единственной целью перейти к рассмотрению требований, которые надлежащим образом входят в компетенцию составов арбитража, и решение по этому вопросу не включается в резолютивную часть арбитражных решений и не обладает свойством исключительности. Наиболее приемлемым подходом к решению вопроса о представительстве является проведение материально-правового анализа права правительства выступать от имени государства. Альтернативные «обходные» методы для решения вопроса о представительстве сомнительны с точки зрения их логической последовательности, практичности и обеспечения процессуальных прав сторон. Данный анализ должен проводиться в соответствии с критериями обычного международного права. Вопрос легитимности правительства является лишь одним из этих критериев и играет ограниченную роль в общем тесте для определения правительства, которое имеет право действовать от имени государства. Наконец, также необходимо учитывать соображения процессуальной справедливости, которая зависит от фактических обстоятельств каждого конкретного дела.

Ключевые слова

инвестиционный арбитраж, представление государств в арбитраже, Венесуэла, неотъемлемая компетенция, компетенция в отношении сопутствующих вопросов, признание правительств

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¹¹⁷ Мнения, представленные в настоящей статье, выражают исключительно позицию автора и никоим образом не отражают позицию любого другого лица или организации, в частности Коллегии адвокатов «Монастырский, Зюба, Степанов и Партнеры».

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