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CONSOLIDATION OF PARALLEL PROCEEDINGS IN INTERNATIONAL INVESTMENT ARBITRATION

The article covers application of consolidation of claim in international investment dispute. At the outset, the article provides a brief comparison of legal tests of consolidation in international commercial arbitration and international investment arbitration, with a focus on the latter one. The second part of the article offers an analysis of regulation and case law concerning consolidation of investment disputes. The relevant provisions of NAFTA, US's and Canadian Model BITs, of mega-regional free trade agreements as well as NAFTA and ISCID jurisprudence are addressed. The author also makes distinction between consolidation *stricto sensu* and *de facto* consolidation with reference to respective international investment disputes that exemplify particularities of de facto consolidation both types. The concluding part of the article provides an overview of pros and contras the consolidation of claims implies when dealing with parallel proceedings in international investment arbitration.

Keywords: consolidation of claims, international investment arbitration, parallel proceeding, ICSID, NAFTA, bilateral investment treaty, *de facto* consolidation, related claims.

Business relations, likewise the commercial disputes, can and do often involve different parties and contracts. In the event of two or more disputes arise between several parties, these parties may consider the dispute settlement under a single proceeding to be more favorable and efficient. In this respect, consolidation of claims has been widely applied in international arbitration, especially in the commercial disputes, in order to align several parallel or multiple proceedings.

Consolidation in International Commercial Arbitration

Consolidation of claims denotes a procedural device that combines two or more claims into one single proceeding that involves all parties to and all disputes[1] arising out of consolidated claims.

In international commercial arbitration, several types of consolidation are to be distinguished: (i) consolidation of two or more arbitration proceedings; or (ii) consolidation of the judicial and arbitration proceedings[2].

Taken into the principle of party autonomy, existence of the parties' consent (or of a relevant agreement) is a decisive factor for the authorized court when deciding whether to consolidate the claims[3].

In the absence of the agreement between the parties concerning consolidation, the authorized court or arbitration tribunal must determine two principal issues: 1) is the consolidation of claims an appropriate measure under the given circumstances; and 2) what is the legal basis for such a consolidation (source of law)[4].

In respect of the second point, scholars[5] distinguish three types of sources of law: i) arbitration agreement as such; (ii) rules of an arbitration institution (e.g., Art. 11 of the Swiss Rules of International

[1] Yannaca-Small, C. (2006). Chapter 8: Consolidation of Claims: A Promising Avenue for Investment Arbitration? in *International Investment Perspectives.* Paris: OECD Publishing, 226.
[2] Born, G.B. (2012). *International Arbitration: Law and Practice*. London: Wolters Kluwer, 222.
[3] Born, G.B. (2012). *International Arbitration: Law and Practice*. London: Wolters Kluwer, 223.
[4] Yannaca-Small, C. (2006). Chapter 8: Consolidation of Claims: A Promising Avenue for Investment Arbitration? in *International Investment Perspectives*. Paris: OECD Publishing, 227.
[5] Yannaca-Small, C. (2006). Chapter 8: Consolidation of Claims: A Promising Avenue for Investment Arbitration? in *International Investment Perspectives*. Paris: OECD Publishing, 228. *See also:* Kaufmann-Kohler, G., et al. (2006). 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: Foreign Investment Law Journal*, *21(1),* 80.

Arbitration[1] and Art. 7 of the Rules of Arbitration of the Arbitration Center of Mexico[2]); and (iii) national arbitration laws.

Consolidation in International Investment Arbitration

NAFTA[3] was the first multilateral agreement to prescribe consolidation of international investment disputes[4]. According to NAFTA Art. 1126, consolidation is possible while meeting the following conditions: (i) the claims at issue have been filed in accordance with Art. 1120 of NAFTA; (ii) the majority of claims have questions of law or fact in common; (iii) such consolidation is in the interests of fair and efficient resolution of the claim; and (iv) the disputing parties have been heard with regard to appropriateness of consolidation.

The possibility of consolidation of claims is enshrined in the US Model BIT[5] (Art. 33), Canada Model BIT[6] (Art. 32) and the relevant investments chapters of the US' and Canadian FTAs with some countries. The consolidation provision is also prescribed in the ISDS chapters of the "mega-regional" preferential trade agreements, such as Trans-Pacific Partnership Agreement (Art. 9.28)[7], Canada-EU Comprehensive Economic and Trade Agreement (Art. 8.43)[8], the draft articles of EU-US Transatlantic Trade and Investment Partnership Agreement (Art. 27)[9].

Noteworthy is that contrary to Art. 1126 of NAFTA, the provisions on consolidation of the "mega-regional" PTAs contain a stronger threshold and require that claims subject to consolidation do not merely *have a question of law or fact in common*, but also *arise out of the same events or circumstances*.

Back in 2006, Gabriel Kaufmann-Kohler claimed that the success of consolidation of claims depends on two factors: 1) if there is a connection between the proceedings; and 2) if it contributes to efficient dispute settlement[10].

As for the notion of the "interconnected claims", according to Kaufmann-Kohler, the EU's approach under Art. 30 of the Brussels I Regulation[11] may offer a guideline applicable to the legal test of consolidation in international investment disputes[12]. Arts. 30.1 and 30.2 of the Brussels I Regulation provide for the following:

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

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[1] Swiss Rules of International Arbitration (Swiss Chamber's Arbitration Institution, 2012). *Web-site of the Swiss Chamber's Arbitration Institution.* <https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws> (2018, January, 15).

[2] Rules of Arbitration (Arbitration Center of Mexico, 2009). *Web-site of the Arbitration Center of Mexico*. <http://www.imarbitraje.org.mx/reglamentos/CAM%20Arbitration%20Rules.pdf> (2018, January, 15).

[3] North American Free Trade Agreement (signed 17 December 1992, entred into force 1 January 1994). Web-site of NAFTA Secretariat. <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement> (2018, January, 15).

[4] Yannaca-Small, C. (2006). Chapter 8: Consolidation of Claims: A Promising Avenue for Investment Arbitration? in *International Investment Perspectives.* Paris: OECD Publishing, 230.

[5] U.S. Model Bilateral Investment Treaty (2012). *Web-site of U.S. Department of State.* <https://www.state.gov/documents/organization/188371.pdf> (2018, January, 15).

[6] Canadian Model Bilateral Investment Treaty (2004). *ItaLaw Database.* <https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (2018, January, 15).

[7] Trans-Pacific Partnership Agreement (signed 4 February 2016). *Office of the United States Trade Representative.* <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf> (2018, January, 15).

[8] Comprehensive Economic and Trade Agreement (Canada – EU) (provisionally entered into force 21 September 2017). *Web-site of the European Commission.* <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> (2018, January, 15).

[9] Transatlantic Trade and Investment Partnership Agreement (EU–US) (European Commission draft text). *Web-site of the European Commission.* <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> (2018, January, 15).

[10] Kaufmann-Kohler, G. et al. (2006) 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: Foreign Investment Law Journal*, *21(1),* 81.

[11] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) 12 December 2012 (European Parliament, Council of the European Union). *Official Journal of the European Union, L 351, 20 December 2012,* 1-33.

[12] Kaufmann-Kohler, G. et al. (2006) 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: Foreign Investment Law Journal*, *21(1),* 70.

2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. [...]

The soft wording of Art. 30 highlights the fundamental distinction between the consolidation of interconnected claims and the principle of *lis pendens*, laid down in Article 29.1 of Brussels I Regulation. Thus, the latter case deals with parallel proceedings in identical disputes (proceedings involving the same cause of action and between the same parties), and the court which second takes jurisdiction must stay its proceeding. Instead, in the case of related proceedings under Art, 30, the court has discretion on whether to stay its proceeding, even if a case is considered in parallel by a court of another EU member state.

As stated in Article 30.3 of Brussels I Regulation, … *actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*

Thus, the main criterion for assessing the connection between the claims subject to Art. 30 of the Brussels I Regulation is the *risk of irreconcilable judgments*.

Kauffmann-Kohler points out that Art. 30.3 of the Brussels I Regulation does not require the parties to be identical[1]. Also, subject to the Brussels I Regulation the mere existence of the risk of substantially irreconcilable decisions is enough. Art. 30.3 does not require the simultaneous enforcement of decisions to be precluded or other conflicting legal consequences to result from separate proceedings. This follows from the ECJ judgment in the *The Ship Tatry* case and is in light of the main objective the consolidation of related claims serves for, i.e. *to improve coordination of the exercise of judicial functions within the Community*[2] (according to the wording of the case dated 1994).

On our view, the interpretation stemming from the case law on Brussels I Regulation also is in line with the approaches of BITs concerning consolidation in international investment disputes, bearing in mind that tribunals must make sure that consolidation is in the interests of the fair and effective settlement of the dispute.

Examples of Consolidation in International Investment Arbitration

*Example 1: "Corn syrop" against Mexico***.** For the first time, the consolidation under of Art. 1126 of NAFTA was considered at the request of the Government of Mexico applying for consolidation of the arbitration proceedings in *Corn Products International, Inc. v. United Mexican States* (Complainant – US corporation *Corn Products International, Inc.) and* in *Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc. v. United Mexican States* (Claimants – US corporations *Archer Daniels Midland Company* and *Tate and Lyle Ingredients Americas, Inc.)*

In its Order, the Consolidation Tribunal rejected the request of Mexico despite some common issues of fact and law existed. The Consolidation Tribunal took into account the competitive relations between the claimants and decided that the consolidation would require a complex procedures to be established in order to protect confidential and proprietary information at every point in the process[3].

Example 2: "*Softwood lumber*" disputes against US. On March 7, 2005, the United States submitted request on consolidation to ICSID Tribunal under Art. 1126 of the NAFTA. The request addressed three cases filed by the Canadian companies (*Canfor Corp., Terminal Forest Products Ltd. and Tembec Inc. et al.*) against the US in the "*softwood lumber"* disputes. These investment disputes were triggered by the US anti-dumping and countervailing measures imposed on imports of softwood lumber products originating from Canada. These disputes constitute a puzzle in a US-Canada long lasting *trade war on wood*.

US argued that the claims were almost identical in terms of facts and law. The Tribunal agreed to consolidate the claims after having ascertained they complied with the legal test under article 1126 (2)

[1] Kaufmann-Kohler, G. et al. (2006) 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: Foreign Investment Law Journal*, *21(1),*, 69.

[2] *The owners of the cargo lately laded on board the ship "Tatry" v the owners of the ship "Maciej Rataj"*, C-406/92, European Court 1994, paras. 54-57. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CJ0406> (15 January 2018).

[3] *Corn Products International, Inc. v. United Mexican States and Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc. v. United Mexican States* (Order of the Consolidation Tribunal) [May 20, 2005], para. 19. <https://www.italaw.com/sites/default/files/case-documents/ita0035.pdf>. (2018, January, 15).

of the NAFTA. The motives of voiding conflicting awards and promoting legal economy were also taken into account as important factors[1].

***De facto* consolidation or quasi-consolidation**

The above cases exemplify consolidation of consolidation *stricto sensu*, and they should be distinguished from *de facto* consolidation. *De facto* consolidation takes place when several related proceedings the same respondent State are considered by the same arbitrators and result in awards rendered separately in each dispute[2].

Examples of the factual consolidation can be depicted in the ICSID case law, for instance, *Salini v. Morocco and R.F.C.C. v. Morocco*, as well as *Camuzzi v. Argentina* and *Sempra v. Argentina.*

The disputes *Salini v. Morocco*[3] *and R.F.C.C. v. Morocco*[4] had identical factual circumstances and were based on the provisions of the Italy-Morocco BIT. Though both cases were considered within different arbitration proceeding, they were considered by the single Tribunal. Therefore, the final awards did not conflict each other.

The disputes *Sempra v. Argentina*[5] *and Camuzzi v. Argentina*[6] were filed in parallel by two related foreign investors: a majority shareholder (*Camuzzi International, S.A.*) and a minority shareholder (*Sempra Energy International*) of two Argentinean gas distribution companies *Sodigas Sur S.A.* and *Sodigas the* Argentinean company *Pampeana S.A*. The foreign investors initiated dispute settlement procedure independently, pursuant to different treaties: Argentina-US BIT (*Sempra*) and Argentina – BLEU (Belgium-Luxembourg Economic Union) BIT (*Camuzzi*), respectively. The complainants agreed to consider both disputes by the same tribunal. At the end of the day, due to such *de facto* consolidation the parties managed to avoid conflicting awards.

The same strategy was also chosen in other disputes against Argentina: *de facto* consolidation of two disputes brought *EDF International S.A. concerning the electric service concession contract (Electricidad Argentina, SA, and EDF International SA v. Argentina; EDF International SA, SAUR International SA and Léon Participations Argentinas SA v. Argentina)*[7].

De facto consolidation was applied to three disputes concerning the waste water concession contracts (*Aguas Provinciales de Santa Fe, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Interagua Servicios Integrales de Agua, SA v. Argentine Republic; Aguas Cordobesas, SA, Suez, and Sociedad General de Aguas de Barcelona, SA v. Argentine Republic; Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. Argentine Republic*)[8].

However, there are some less successful examples. For instance, in *CMS v. Argentina* and *Total v. Argentina* the parties did not agree on the consolidation of disputes. As a result, the cases were settled by different tribunals, which led to the adoption of the conflicting awards[9].

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[1] *Canfor Corporation v. United Sates of America, and Tembec et al v. United Sates of America, and Terminal Forest Products Ltd. v. United Sates of America,* (Order of the Consolidation Tribunal) [September 7, 2005]. <https://www.state.gov/documents/organization/53113.pdf> (2018, February, 01).

[2] Yannaca-Small, C. (2006). Chapter 8: Consolidation of Claims: A Promising Avenue for Investment Arbitration? in *International Investment Perspectives*. Paris: OECD Publishing, 226, 232; Born, G.B. (2012). *International Arbitration: Law and Practice*. London: Wolters Kluwer, 222.

[3] *SALINI COSTRUTTORI S.P.A. AND ITALSTRADE S.P.A. v. KINGDOM OF MOROCCO* (Decision on jurisdiction) [July 23, 2001] Case No. ARB/OO/4 <https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf> (2018, February, 01).

[4] *R.F.C.C. v. Morocco* (Decision on jurisdiction) [July 16, 2001] Case No. ARB/00/6 <https://www.italaw.com/sites/default/files/case-documents/ita0225.pdf> (2018, February, 01).

[5] *Sempra v. Argentina* (Decision on objections to jurisdiction) [May 11, 2005] Case No. ARB/02/16 <https://www.italaw.com/sites/default/files/case-documents/ita0768.pdf> (2018, February, 01).

[6] Camuzzi v. Argentina (Decision on objections to jurisdiction) [May 11, 2005] Case No. ARB/03/2 <https://www.italaw.com/sites/default/files/case-documents/ita0108.pdf> (2018, February, 01).

[7] Yannaca-Small, C. (2006). Chapter 8: Consolidation of Claims: A Promising Avenue for Investment Arbitration? in *International Investment Perspectives*, Paris: OECD Publishing, 232.

[8] Yannaca-Small, C. (2006). Chapter 8: Consolidation of Claims: A Promising Avenue for Investment Arbitration? in *International Investment Perspectives*, Paris: OECD Publishing, 232.

[9] Zarra, G. (2016). *Parallel Proceeding in Investment Arbitration*. Hague: Eleven International Publishing, 11.

Pros and Contras of Consolidation

De facto consolidation indeed reduces the risk of inconsistent decision, especially taking into account that the ICSID Convention does not provide for consolidation of claims *stricto sensu.* Back on 1982, Lord Denning called on the parties of a commercial dispute to agree on appointment of a single arbitrator for considering two similar disputes, seeing this as a way to avoid conflicting judgments[1]. However, despite its apparent positive effect, *de facto* consolidation does not guarantee reasonable distribution and economy of resources, since each individual proceeding implies its own exchange of arguments between parties and separate decision-making process. Such position prevails among scholars and practitioners, including Gabriel Kaufmann-Kohler[2].

As for consolidation *strictu sensu*, it also bears sufficient disadvantages. They may be summarized as follows:

(i) Confidentiality concerns

NAFTA Tribunal's order rejecting consolidation of the "corn syrup" disputes reflects the prevailing opinion among the foreign investors that consolidation of claims would lead to the reveal and undesirable disclosure of confidential information among other parties that directly compete with each other.

However, another NAFTA Tribunal reversed this approach when considering whether to consolidate the "softwood lumber" cases. The Tribunal notes that existence of competition between complainants and the need to ensure the confidentiality of the process should not prevent the consolidation of claims. The court added that for many arbitration proceedings, the practice of concluding non-disclosure agreements is quite well established[3].

Interestingly, *Tembec,* one of the claimants, unilaterally withdrew its claim and appealed to the US courts shortly after the Order on Consolidation of the "softwood disputes" was rendered by the NAFTA Tribunal[4].

(ii) Risk of the Tribunal's mistake

According to Dominique Hasher, consolidation of various disputes into a single arbitration proceeding increases the risk of error or omission made by Tribunal[5]. The scholar believes that due to consolidation of various disputes into one arbitration proceedings, the process and subject matter of analysis becomes more complicated. Each party must properly present its arguments to the tribunal and other parties to the dispute, as well as to evaluate their counterarguments. The volume of information to be processed by the Tribunal inevitably increases. It also may bring about procedural delays and extension of deadlines[6].

Thus, there is a probability that the complication of the process as a result of consolidation of claims may lead to incorrect application by the court of the relevant legal rules, incorrect assessment of the actual circumstances of the case or inconsistency of court findings with the actual circumstances of the case.

(iii) Procedural complexity

As a general principal, the consolidation provisions of the BITs provide for establishment of a new tribunal that will decide whether to consolidate, and then will consider a consolidated case. Instead, the first tribunal loses its powers in the event that the second tribunal decides in favor of consolidation.

Some scholars have concerns about impartiality in this respect, because the new consolidation tribunal is interested in consolidating the claims both for professional and financial reasons[7]. Neither option

[1] Kaufmann-Kohler, G. et al. (2006). 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: Foreign Investment Law Journal*, *21(1),* supra. 45.

[2] Kaufmann-Kohler, G. et al. (2006). 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: Foreign Investment Law Journal*, *21(1),* 75.

[3] *Canfor Corporation v. United Sates of America, and Tembec et al v. United Sates of America, and Terminal Forest Products Ltd. v. United Sates of America,* (Order of the Consolidation Tribunal) [September 7, 2005], para.147. <https://www.state.gov/documents/organization/53113.pdf>.

[4] Yannaca-Small, C. (2006). Chapter 8: Consolidation of Claims: A Promising Avenue for Investment Arbitration? in *International Investment Perspectives*. Paris: OECD Publishing, 232.

[5] Hascher, D.T. (1984). Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration? *Journal of International Arbitration, 1,* 135.

[6] Hascher, D.T. (1984). Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration? *Journal of International Arbitration, 1,* 135.

[7] Kaufmann-Kohler, G. et al. (2006). 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: Foreign Investment Law Journal*, *21(1),* 96.

is to create an independent tribunal deciding solely on appropriateness of consolidation, as it may enable the parties to abuse the process[1].

(iv) Extra costs borne by parties

The lack of a unified formula of arbitration costs allocation between the parties is also considered a negative feature of the consolidation. This issue normally is resolved upon the discretion of the tribunals in the light of the circumstances of the case[2].

v) Claimants' reluctance to consolidate the claims

Consolidation of claims is based on the principle of parties' autonomy. When foreign investors deliberately have started parallel proceedings and opted for forum shopping as an appropriate strategy, they will unlikely be interested in consideration of the proceedings[3].

Indeed, if foreign investors initiate parallel related disputes within different fora, they do it deliberately in order to diversify powers in several directions seeking for the most favorable result of the dispute. Such a tactics directly contradicts the main objective consolidation serves for.

Conclusions

Consolidation has been widely applied in international commercial arbitration in order to combine several related claims into the singe proceeding. In the international investment arbitration, consolidation was primarily prescribed in Art. 1126 of NAFTA and since then has been included into the texts of bilateral investment treaties and free trade agreements, predominantly involving US and Canada.

Consolidation tribunals have to assess whether the claims have factual and legal basis in common as well as whether the potential consolidation serve the interests of fair and efficient process.

Consolidation *stricto sensu* is to be distinguished from *de facto* consolidation. The latter implies that several related proceedings are considered independently by the same Tribunal and result in individual awards in each dispute. Despite procedural differences, both *stricto sensu* and *de facto* consolidation sufficiently reduce the risk of conflicting awards upon result of substantially related disputes.

However, consolidation implies some negative aspects that stem from the multiplicity of parties, factual circumstances and claims covered by a single consolidated proceeding. Doctrine and case law highlight the most important problems, including threat to confidentiality of the process; increasing risk of errors or omissions to be made by tribunal when assessing the consolidated case; extra costs borne by parties; and procedural complexity concerning appointment of consolidation tribunal and transfer of jurisdiction between original and consolidation tribunals.

Finally, the author shares a view of some scholars claiming that the main factor that renders consolidation inefficient is reluctance of the claimants to consolidate the parallel proceedings, they have deliberately initiated before different fora.

The factors outlined above call into question whether consolidation of claims is an appropriate and efficient procedural to handle parallel proceedings in the international investment arbitration.

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[2] Yannaca-Small, C. (2006). Chapter 8: Consolidation of Claims: A Promising Avenue for Investment Arbitration? in *International Investment Perspectives*, Paris: OECD Publishing, 238. *See also*: Born, G.B. (2012). *International Arbitration: Law and Practice*. London: Wolters Kluwer, 222.

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