LUISS

Department
of law

Ph.D. in Law and Business

XXXIV° Cycle

The right of individual access to international justice: between human rights and investment arbitration.

Prof. Pietro Pustorino

SUPERVISOR

Prof. Jorge Enrique Viñuales

SUPERVISOR

Manfredi Marciante

CANDIDATE

Academic year 2021/2022

TABLE OF CONTENTS

GENERAL INTRODUCTION.

CHAPTER I
ACCESS TO "INTERNATIONAL" JUSTICE: ANALYSIS OF DIFFERENT PERSPECTIVE.

CHAPTER II
ACCESS TO JUSTICE IN INTERNATIONAL HUMAN RIGHTS LITIGATION.

CHAPTER III

ACCESS TO JUSTICE IN INVESTOR-STATE DISPUTE SETTLEMENTS.

CHAPTER IV
FINAL REMARKS.

GENERAL INTRODUCTION

SUMMARY: 0.1. Background. - 0.2. The notion of "access to justice". - 0.3. Relevance of the matter. - 0.4. Research areas and methodology. - 0.5. Structure of the work.

0.1. BACKGROUND.

The ongoing development of law, in all its different forms and functions, has certainly facilitated an increasingly effective and comprehensive protection of rights, basically ensuring a concrete protection for previously merely factual situations.

Legal protection is thus a cornerstone of the expansion of the so-called 'rule of law': according to the "*World Justice Project*", an independent, multidisciplinary organization, the working definition of the rule of law consists in four universal principles: *i) accountability*, meaning the government as well as private actors are accountable under the law; *ii) just law*, implies that the law is clear, publicized, and stable and is applied evenly. It ensures human rights as well as contract and property rights; *iii) open government* implies the processes by which the law is adopted, administered, adjudicated, and enforced are accessible, fair, and efficient; *iv) Accessible and Impartial Justice*, that is justice delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.[1]

[1] For an overview, see https://worldjusticeproject.org/about-us/overview/what-rule-law. Similar provisions could also be found in the *Rule of Law Checklist*, adopted by the *Venice Commission at its 106th Plenary Session* (Venice, 11-12 March 2016), based on "core elements": *i) legal certainty*: legal certainty involves the accessibility of the law. The law must be certain, foreseeable and easy to understand. Basic principles such as *nullum crimen sine lege/nulla poena sine lege*, or the non-retroactivity of the criminal law are bulwarks of the legal certainty; *ii) Prevention of abuse/misuse of powers*: preventing the abuses of powers means having in the legal system safeguards against arbitrariness; providing that the discretionary power of the officials is not unlimited, and it is regulated by law; *iii) quality before the law and non-discrimination***:** equality before the law is probably the principle that most embodies the concept of Rule of Law. It is paramount that the law guarantees the absence of any discrimination on grounds such as race, colour, sex, language, religion, political opinion, national or social origin, birth etc. Similar situations must be

Therefore, the judicial function is one of the fundamental functions of the State.[2]

Clearly, each state is independent in organizing its judicial system in the appropriate manner[3], having regard to the principles that may indeed be acknowledged in different legal systems and traditions.[4]

A fundamental principle of the judicial system undoubtedly includes the provision of a "right of action" or "right to take legal action", which enables any person to bring a claim before the judicial authority against someone to protect his or her rights.

Depending on the applicable context, such right lends itself to different readings and interpretations, all of them falling within the scope of the "right of access to justice".

This dissertation focuses, however, on the perspective of the individual and,

---

treated equally and different situations differently. Positive measures could be allowed as long as they are proportionate and necessary; *iv) access to justice*: access to justice implicates the presence of an independent and impartial judiciary and the right to have a fair trial. The independence and the impartiality of the judiciary are central to the public perception of the justice and thus to the achievement of the classical formula: "*justice must not only be done, it must also be seen to be done*". As may be noted, access to justice is one of the main (and common) features of rule of law.

[2] On this topic, see R. B. CHAVEZ, *The Rule of Law and Courts in Democratizing Regimes*, in The Oxford Handbook of Law and Politics, Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (eds.), 2008.

[3] For example, in Italy the Italian Constitution recognizes among the "human inviolable rights" – acknowledged and protected by art. 2, in the light of the principle of equality in art. 3 – both art. 24, which provides that "*everyone may take legal action to protect his or her rights and legitimate interests*", and art. 111, which provides for a jurisdictional system of merit articulated in degrees, guaranteeing the right to a "fair trial". See A. TRAVI, *Gli artt. 24 e 111 della Costituzione come principi unitari di garanzia*, in Tutela dei diritti e sistema ordinamentale: atti del 6, Convegno Nazionale 31 marzo/1-2 aprile 2011, Capri, 2012, p. 15-28.

[4] For example, the European Court of Human Rights, in its analysis of the European Convention, states that Contracting Parties have an obligation to organize their judicial system in such a way that national courts can comply with all the requirements of the right to a fair trial as provided for in Article 6(1). In this sense, for an analysis of the case-law on the subject see: *Abdoella v. the Netherlands*, app. no. 12728/87, 25.11.1992, para. 24; *Dobbertin v. France*, app. no. 13089/87, 25.2.1993, para. 44.

more specifically, on the different context of access to justice by individuals on the international plane.

Its overall goal is to investigate whether the development of access to justice in international law is convergent enough to give rise to a common concept of individual access to international justice, with modalities which are transferable across different channels in the form of general principles, or rather remains a terminological aggregation of a variety of mechanisms with no or little conceptual and legal unity, *i.e.*, transferability from one channel to another.

The next sections clarify the meaning of the terms defining this research question and introduce the methodology selected to address it. Before undertaking this discussion, it is important to explain the relevance of the question and the implications of the different legal answers that may be given to it.

On the one hand, the individual who seeks justice through legal action, intended as both to the process of "access" to judicial mechanisms and to the final objective, *i.e.,* to have his or her reasons recognized by a third and impartial judge.

On the other hand, the state's obligations to respect the rule of law and access to justice arise, since it has the duty to set up appropriate judicial mechanisms and, finally, it must execute the decisions of the judge.

Regrettably, both the individual's prospect of access and the state's guarantee position often give rise to several problems jeopardizing the proper functioning of the system[5] and potentially make access to justice ineffective.[6]

Therefore, while every state should ensure that every individual has effective access to justice, the aim of this dissertation will be to understand whether and how access to justice in international forums and courts could be provided.

To address this issue, it will first be necessary to briefly comprehend in the

---

[5] On this specific issue, see: S. SCHEFFLER, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, Oxford University Press, 2001.

[6] On this subject, see: L. CAPLAN, *The Invisible Justice Problem*, in Daedalus, 148:1, 19-29, MIT Press Journal, 2019. In particular, the author considers that: "[..] *Access to justice has been separated in both rhetoric and reality from its fundamental purpose: ameliorating the economic insecurity and inequality at the core of the problem* […]".

following introduction what is meant by access to justice, balancing the domestic content of this right in an international perspective.

0. 2. THE NOTION OF "ACCESS TO JUSTICE".

Identifying and defining the concept of 'access to justice' is challenging, notably in the light of the different implications this important principle has in national legal systems.

In the legal sphere, there are several definitions of what can be entitled 'access to justice', each applicable in its own field of competence.

Particularly striking for the purpose of this dissertation is the definition of the United Nations Development Programme (UNDP)[7], which provides that "[...] *Access to Justice is the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards* [...]".[8]

Undoubtedly, the most relevant aspect is the reference made to human rights standards, which therefore should represent a guideline towards the protection of individuals.

Moreover, the focus seems to be on the ability of the subjects, who seem therefore the main recipients of the "right" of access to justice.

Lastly, this definition goes far beyond the main concepts often expressed at the domestic level, *i.e.,* improving an individual's access to the courts or ensuring adequate legal representation.

Consequently, this view seems to have achieved a strong international vocation, which – depending on the different fields of application – can be considered as a container of different rights, obligations and duties for both individuals and States.

---

[7] The UNDP is an international organisation created within the United Nations (General Assembly, 20th session: 1384th plenary meeting, Monday, 22 November 1965, New York) whose main objective is to support development.

[8] Cf. United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, Bangkok, UNDP, 2005.

0. 3. RELEVANCE OF THE MATTER.

The importance of this subject may be related to the various studies carried out on this topic, which tend to analyse the content of the right of access to justice.

However, with the passing of the years and thanks to an increasing diversification of judicial mechanisms in modern countries, the situation definitely changed and there has been an expansion of the concept of access to justice to include other forms of justice.[9]

In this sense, the above definition clashes with the different aspects of justice today, both in the national and international context. Among the first studies on the topic, great importance must be given to the six volumes published between 1978-79 of the "*Florence Access-to-Justice Project*", the legal-sociological research work of Prof. Mauro Cappelletti, which highlights – in a purely comparative dimension – the different aspects of the topic.[10]

According to this research, there are two fundamental aims of the legal system: firstly, the justice system must be equally accessible to all subjects and, secondly,

[9] Among these, the most important are those provided by public authorities – such as administrative or legislative agencies – carrying out activities of a technical and operational nature of national interest, see G. NAPOLETANO, *Autorità indipendenti e agenzie amministrative*, in *Diritto costituzionale. Dizionari sistematici*, 2008, p. 521-829. In addition, the so-called "*Alternative Dispute Resolution*" (ADR) has recently become of general importance as a response to the difficulties typically encountered in ordinary courts, ensuring through various alternative dispute resolution mechanisms a privatization of justice in certain areas.

[10] As acknowledged by the author himself: "*The intention of the research was therefore to carry out an analysis of the meaning and tasks of the modern 'social state' or welfare state: to carry out, in other words, an empirical-comparative analysis of modern democracy, 'a study on democracy'. On the one hand, the legal, economic, socio-political, cultural and psychological obstacles that make it difficult or impossible for many people to use the 'legal system' and, consequently, the effectiveness of their 'freedom' (this is the phenomenon of so-called 'legal poverty') have been examined; on the other hand, the efforts made in a number of countries to overcome or mitigate these obstacles have been subjected to informative and critical investigation*". See in this regard: Il Foro Italiano, Vol. 102, parte quinta: monografie e varietà (1979), pp. 53/54 - 59/60.

it must lead to results that are both individually and socially acceptable.[11]

Subsequently, studies have explored the compatibility of the right of access to justice from the point of view of consumers, a category exposed to possible violations of the fundamental principles of this right, both in domestic[12] and international law.[13]

In the last decade, the focus has been on the compatibility between the right of access to justice with different legal fields of application[14] beyond international law[15], but only the latter will only be functional as a basis for the development

---

[11] For an analysis of this topic, see the various volumes published by the author: M. CAPPELLETTI, G. BRYANT (editor/s), *Access to Justice Vol. I: A world survey (Book I & II)*, Milano, Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1978, [European University Institute]; M. CAPPELLETTI, G. BRYANT (editor/s), *Access to Justice Vol. III: Emerging issues*, Milano, Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1979, [European University Institute].

[12] See M. LOOS, *Access to justice in consumer law*. Recht der Werkelijkheid. 36, 2015.

[13] Cf. C. RICKETT, & T. TELFER (eds.), *International Perspectives on Consumers' Access to Justice*. Cambridge: Cambridge University Press, 2003.

[14] F. S. BLOCH, *Access to Justice and the Global Clinical Movement*, 28 Wash. U. J. L. & POL'y, 111, 2008; E. JOHNSON JR., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'l L.J. S83, 2000; M. BARENDRECHT, J. MULDER AND I. GIESEN, *How to Measure the Price and Quality of Access to Justice?*, November, 2006; G. K. HADFIELD, *The cost of law: Promoting access to justice through the (un)corporate practice of law*, International Review of Law and Economics, Volume 38, Supplement, 2014, Pages 43 63; R. A. MACDONALD, *Access to Justice and Law Reform*, 10 Windsor Y.B. Access Just. 287, 1990; M. GALANTER, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 2010; F. BHABHA, *Institutionalizing Access-to-Justice: Judicial Legislative and Grassroots Dimensions*, 33 QUEEN's L.J. 139, 2007; T. MULLEN, *Access to justice in administrative law and administrative justice.* In: Palmer, E., Cornford, T., Guinchard, A. and Marique, Y. (eds.) *Access to Justice: Beyond the Policies and Politics of Austerity*. Hart: Oxford, 2016, pp. 69-109; F. MANCINI, *Access to Justice: Individual Undertakings and EEC Antitrust Law - Problems and Pitfalls*, 22 J. Reprints Antitrust L. & ECON. 443, 1993.

[15] The studies mentioned in this footnote are not intended to be exclusive of the massive production of doctrine on the subject and may be subsequently referred to in the dissertation, but at the moment it provides an idea of the state of scientific research on the subject. F. FRANCIONI, *Access to Justice, Denial of Justice and International Investment Law*, European Journal of International Law, Volume 20, Issue 3, August 2009, Pages 729–747; F. FRANCIONI, *Access to*

of the present work.

Therefore, it is possible to argue that a real market for judicial services has developed, whereby individuals have several choices. For example, they can choose which law to apply, the judge or arbitrator to whom they refer the resolution of their disputes, etc.....[16]

Clearly, it will be necessary to identify the problematic issues surrounding the existence of these options for individuals to determine whether the human rights principles applicable to the right of access to justice can be extended to disputes relating to foreign investments.

0. 4. RESEARCH AREAS AND METHODOLOGY.

To carry out the aforementioned assessments, it seems appropriate to differentiate between the several areas of international law.

The analysis will therefore focus on the international human rights law and international investment law, as both have recently shown a trend towards recognizing the main features of the right of access to justice.

On the one hand, international human rights law has always been a cornerstone for the recognition of the synthesis of the values of the rule of law, which have been translated into universal and regional instruments.

On the other hand, international investment law is an important area of international economic law, which in turn is a branch of general international law and has been consistently implemented for individual's international investment protection in recent years.

Justice as a Human Right, Oxford University Press, 2007; S. RAMSHAW, *Rainbow Family: Machine Listening, Improvisation and Access to Justice in International Family Law*, The Routledge Handbook of International Law and the Humanities, eds., Shane Chalmers and Sundhya Pahuja (Routledge, Forthcoming), 2020; G. CUNIBERTI, *The recognition of foreign judgments lacking reasons in Europe: access to justice, foreign court avoidance, and efficiency*. International and Comparative Law Quarterly*, 57*(1), 2008, 25-52; A. MILLS, *Rethinking Jurisdiction in International Law*, British Yearbook of International Law, Volume 84, Issue 1, 2014, Pages 187–239.

[16] Cf. in this sense C. CAMPIGLIO, F. MOSCONI, *Diritto internazionale privato e processuale*, 2019, UTET Giuridica, 9th edn, p.11, footnotes 4, 5).

The methodology that will be used will concern the analysis of the doctrine and, above all, of the case law of both fields, highlighting the similarities and differences between them, through transversal criteria.

These criteria will be used to appreciate any similarities and differences between the two fields of application described above, in order to explore what motivates individuals to pursue protection in the different international forums.

0. 5. STRUCTURE OF THE WORK.

The structure of the dissertation will be divided into four chapters, with the aim of carrying out a logical-deductive analysis.

In the introductory chapter, an attempt will be made to reconstruct what is meant by access to international justice, highlighting the recent importance given to the individual, also in the light of recent trends expressed by the international community.

In this context, access to justice will be evaluate considering the opportunity and relevance of institutions such as diplomatic protection and Mixed-claims commissions. After analysing the current implications of the above-mentioned institutions, a short examination of the right to access to international justice will be carried out, both in the context of international human rights protection and international investment law.

In the second chapter, the content of the right of access to justice will be explored in relation to the international human rights law.

The analysis of the third chapter will be focused on international investment law, with regard to access to justice in investor-state disputes settlement.

Finally, the fourth chapter will focus on a comparative and conclusive analysis of the aspects concerning the right to justice highlighted in the first three chapters.

CHAPTER I

ACCESS TO "INTERNATIONAL" JUSTICE: ANALYSIS OF DIFFERENT PERSPECTIVES.

SUMMARY: 1. Overview: circumscribing the research question. - 2. The contribution of non-state actors in accessing to international adjudication. - 2. 1. Individuals: a central role in the acknowledgement of access to justice in international law. - 3. International community's: a commitment towards access to justice. - 3.1 Follow-up considerations. - 4. Setting the scene: significance of the legal frame. - 5. The "Mixed-claims commissions": ensuring direct access under an *ad hoc* mechanism. - 5.1 Actual significance of the "Mixed-claims commissions": first legal option to recourse to international adjudication. - 6. Diplomatic protection: an outdated State-centric conception of international law. - 7. The right to pursue an international claim: investment and international commercial arbitration. - 7.1 Distinction between investment treaty arbitration and international commercial arbitration: consequences for investor's right and choice to access to justice? - 8. The "human" right to access to justice and its relevance in international human rights law. - 8.1 Prior exhaustion of local remedies: a first evaluation of access to justice? - 8.2 Access to justice as a human right: consequences and perspectives. - 9. Concluding remarks.

1. OVERVIEW: CIRCUMSCRIBING THE RESEARCH QUESTION.

In order to examine the different aspects concerning the right of access to international justice, it should first be recalled that the purpose of this work is to explore the opportunities for individuals when they consider that their rights have been violated – by the State (of origin or a foreign State) or by other individuals – and the domestic legal systems are unable to provide them with adequate protection and/or compensation.

Therefore, the term "access to international justice" is intended to cover the set of substantive and procedural rules enabling an individual to have access to international mechanisms, providing appropriate relief for alleged violations of personal and property rights.

In the light of above, this introductory chapter will aim to capture the origins

and subsequent developments that have enabled the individual to have access – directly and indirectly – to international justice.

To do so, the first part will require an assessment of the current debate relating to the structure of the international law system, which led the international community to progressively evolve from an essentially state-sovereignty-centred system to one oriented towards the new necessities of individuals.[17]

Such evolution clearly refers to all those situations where international law did not recognise subjective legal situations for individuals[18], resulting in a total absence of rights or obligations, both material and procedural.[19]

Concisely, after a brief analysis on the role of non-state actors, there will be an overview of how access to justice has been consolidated by the international community through treaty instruments concerning the protection of vulnerable categories, which contribute to the creation of positive and negative obligations upon States.

Based on this assessment, the second section will analyse the different legal situations where an individual has been able to claim the violation of his or her rights through an international claim, from the first developments concerning diplomatic protection to the creation of the so-called Mixed-Claim Commissions.

Finally, it will conclude with an initial observation of the two fields of application that shall be addressed through this work, namely international investment law and international human rights law, which have contributed – with due differences – to the consolidation of the right of access to justice in international law.

2. THE CONTRIBUTION OF NON-STATE ACTORS IN ACCESSING TO

[17] To that effect, see C. TOMUSCHAT, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, in Recueil des Cours 281, 1999, pp. 11-438, who points out, however, that this transformation has not yet found a definitive balance.

[18] The reference here is to the individual as both an 'active' and a 'passive' subject of international norms.

[19] Cf. A. TANZI, *Introduzione al diritto internazionale contemporaneo*, 2016, CEDAM, 5th edition, p. 231.

INTERNATIONAL ADJUDICATION.

As well known, in the international legal order[20] states are the principal subjects of international law[21], since they represent the main recipient of rights and obligations.[22]

Nevertheless, the ongoing evolution of the area[23] has contributed to the emergence of different actors than states – the so-called 'non-state actors' – which have gradually taken[24] on a more prominent role in the international legal system in recent years.[25]

---

[20] In this sense, see P. ZICCARDI, *La costituzione dell'ordinamento internazionale*, Giuffrè, Milano, 1943.

[21] On this topic, see the analysis carried out by A. TANCREDI, *Lo Stato nel diritto internazionale tra effettività e legalità/legittimità*, in Ars Interpretandi, 16, 2011, 1, pp. 131-172.

[22] Among the most recent publications on this subject see D. GIOVANNI, *Fundamentals of public international law: a sketch of international legal orde*r, Leiden; Boston: Brill Nijhoff, 2019, in *Queen Mary studies in international law*, v. 38, specifically Chapter 2, concerning "*The Sovereign State as the Primary and Original Subject of pil*" pp. 74-234. Regarding rights and obligations, see S. M. CARBONE, L. SCHIANO DI PEPE, *States, Fundamental Rights and Duties*, in Max Planck Encyclopedias of International Law, 2009.

[23] On the evolution of international law, see M. STERIO, *The Evolution of International Law*, 31 B.C. Int'l & Comp. L. Rev. 213, 2008, according to which "[…] *the proliferation of actors, norms, and organizations, as well as the expansion of international jurisdiction that has underscored the development of international law over the last half century* […]". For a review of the most recent developments see B. CAMPBELL, *The Dynamic Evolution of International Law - The Case for the More Purposeful Development of Customary International Law*, 49 Victoria U. Wellington L. Rev. 561, 2018.

[24] In this regard, see P. PUSTORINO, *Movimenti Insurrezionali e diritto internazionale*, Cacucci, Bari, 2018, p. 18.

[25] A considerable body of literature exists on non-State actors. Significant recent contributions include M. NOORTMANN, A. REINISCH, C. RYNGAERT, *Non-State Actors in International Law*, Bloomsbury Publishing, 2015; A. PETERS AND OTHERS (eds) *Non-State Actors as Standard Setters*, CUP, Cambridge, 2009; A. BIANCHI (ed) *Non-State Actors and International Law*, Ashgate, Farnham, 2009. On the legal regime, which has been examined from the perspective of obligations under international human rights law and international humanitarian law, see, respectively: A. CLAPHAM, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, 2006; E. HEFFES, M. D. KOTLIK, M. J. VENTURA (eds), *International Humanitarian Law and Non-State Actors Debates, Law and Practice*, Springer, 2020.

The increasing autonomy also led to a reflection about the subjectivity by the International Court of Justice (ICJ), clarifying that the "subjects of law" of any legal system can have distinctive natures, mainly depending by the different needs of the community.[26]

Among non-state actors[27], individuals[28] – both as singular person and as companies[29] – assumed an undoubtedly important role in the recognition of the right of access to international justice.

Since the wide-ranging and debated topic of the legal personality of the individual in international law does not fall within the scope of this paper[30], it

---

[26] See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, pp. 174-178. This advisory opinion of the ICJ, as argued by leading scholar, has given way to a partial recognition of legal personality, with the consequence that the discussion has clearly shifted to what are the rights and obligations of non-State actors as subjects of international law, cf: J. WOUTERS, C. RYGAERT, T. RUYS AND G. DE BAERE, *International Law: A European Perspective*, Oxford, Hart, 2018, p. 387.

[27] For an analysis concerning subjects that fall into the category of non-state actors see: J. A. HESSBRUEGGE, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 Buff. Hum. Rts. L. Rev. 21, 2005, pp. 21 ss.

[28] The role of the individual in international law has always been the subject of different theoretical attention. For an examination of the doctrine that first debated the compatibility of the individual in international law see: J. SPIROPOULOS *'L'individu et le droit international'*, 1929, 30 RdC V 191–270. As regards early strong positions in scholarship, see G. SPERDUTI, *L'individuo nel diritto internazionale: Contributo all'interpretazione del diritto internazionale secondo il principio dell'effettività*, Giuffrè, Milano, 1950. A more recent view is expressed by G. GAJA *'The Position of Individuals in International Law: An ILC Perspective'*, 2010, 21, EJIL 11–14.

[29] The difference between a natural person and a legal person is well known. However, recent raising of multinational companies in the international community's panorama led to a protection extended to the individual within its social component, which can and must also extend to the right of access to a judge. The literature is wide-ranging on the legal nature of multinational corporations in international law: G. SPERDUTI, *Sulla soggettività internazionale*, in Rivista di diritto internazionale, 1972, p. 277 ss.; D. A. IJALAYE, *The Extension of Corporate Personality in International Law*, New York, Leiden, 1978; I. BANTEKAS, *Corporate Social Responsibility in International Law*, in Boston University International Law Journal, 2004, p. 309 ss.

[30] To explore this issue and considering the different points of view put forward by doctrine and case law, see: S. GORSKI, *Individuals in international law*, in Max Planck Encyclopedia of Public International Law, 2013, para 10-18.

seems appropriate to make some brief considerations on the current state of the discussion, to clarify whether – through the attribution of particular rights and obligations – an individual's access to international justice can currently be endorsed.

According to an overview of contemporary international law doctrine and jurisprudence, the individual has now developed a *sui generis* legal personality.[31]

This may be inferred from the importance the academic community attached to this topic over the years[32], since it has been pointed out the development of a real change in international law, leading to the so-called 'humanisation of international law'.[33]

However, at the moment there is no possibility to consider the individual as a subject of international law.[34]

Rather, the individual could be considered as a mere recipient of rules conferring substantive and procedural rights, even though the Permanent Court of International Justice (PCIJ) expressly clarified that no rights or obligations can flow from an international agreement for individuals.[35]

---

[31] See O. DÖRR, *Privatisierung des Völkerrechts, JuristenZeitung*, 60, 2005, 905–916 (905); see also P. K. MENON, *The Legal Personality of Individuals*, Sri Lanka Journal of International Law, 6, 1994, 127–156.

[32] Among many, see a recent contribution by C. GIORGETTI, *Rethinking the Individual in International Law*, 22 Lewis & Clark L. Rev. 1085, 2019.

[33] On this topic, see A. PETERS, *Beyond Human Rights: The Legal Status of the Individual in International Law*, Cambridge Studies in International and Comparative Law, J. Huston, Trans., Cambridge: Cambridge University Press, 2016, where the author underlines a development that has led to an accentuation of the importance of the individual in international law, highlighting how the doctrine has always emphasized this trend. More recently, see F. M. PALOMBINO, *Revisiting the 'humanization of international law' argument through the lens of international investment law*, in Diritto del Commercio Internazionale, fasc. 3, 2020, pp. 745-750.

[34] According to a recent approach, the individual should only be considered as an "object" of state protection. See in this sense the observation of a judgment of the German Constitutional Court, which rejected the claims of an individual for violation of international humanitarian law: K. F. GÄRDITZ, *Bridge of Varvarin*, American Journal of International Law 108, 2014, pp. 86–93.

[35] See the advisory opinion issued by the PCIJ in the case *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 3 March 1928, available in P.C.I.J. Publications, Series B, No 15, p. 17-18, which specified that the international agreements concluded by States or international customary

2. 1. INDIVIDUALS: A CENTRAL ROLE IN THE ACKNOWLEDGEMENT OF ACCESS TO JUSTICE IN INTERNATIONAL LAW.

As a matter of fact, for many years individuals were considered exclusively as citizens of the state (subjects) since international law should only regulate relations between states.[36]

Hence, according to the traditional conception, international law is a system regulating relations between states and only states have the legitimacy to bring actions before an International Courts or Tribunals.[37]

For these reasons, in the Westphalian model[38], individuals were clearly the beneficiaries of rights formally addressed to states, and the only way to activate them was through the request to exercise diplomatic protection.[39]

Therefore, individuals were considered objects and not subjects of international law: only if a state entertained relations with foreign citizens

law could create individual rights and obligations enforceable before local courts, but individuals could not do so at an international level.

[36] Cf. G. ARANGIO-RUIZ, "*La persona internazionale dello Stato*", in Digesto delle discipline pubblicistiche, UTET giuridica, 2014, pp. 39 e ss.

[37] This is reflected by the Statute of the International Court of Justice, which explicitly affirm in Article 34(1) that: "*Only states may be parties in cases before the Court*", see United Nations, *Statute of The International Court of Justice*, 18 April 1946. See also the theories of the 'founding fathers' of modern international law: D. ANZILOTTI, *Corso di Diritto Internazionale*, Rome, 1912 and R. QUADRI, *Diritto internazionale pubblico*, Naples, 1968.

[38] According to R. GROTE "[…] *Westphalia represented a fundamental shift in the organization of international society from a hierarchical order based on the recognition of authorities above the States to a horizontal system characterized by the coexistence of a multiplicity of territorially defined autonomous entities and sustained by a new type of law operating between rather than above the members of the system.* […]", see R. GROTE, *Westphalian System*, in Max Planck Encyclopedia of Public International Law [MPEPIL], 2006, para 1. See more about the topic in: S. BEAULAC, *The Westphalian Model in Defining International Law: Challenging the Myth*, Australian Journal of Legal History, 8, 2005.

[39] This is the opinion expressed by the judges of the Permanent Court of International Justice in the case *Appeal from a Judgement of the Hungaro/Czechoslovak Mixed Arbitral Tribunal* (the Peter Pázmány University), 15 December 1933, in P.C.I.J. Publications, Series A/B, no. 61, p. 231.

fundamental principles of human rights should have been applied.[40]

However, over the years this approach has been outdated[41] since – being recipients of various international rights and duties[42] – one would be witnessing to a process of incomplete emancipation, guaranteeing individuals a rather restricted *status* in international law.[43]

To corroborate the aforementioned system's evolution, the discussions is clearly linked to individual's access to international justice, since there have been several steps endorsed by jurisprudence and scholars.

Among scholars, particularly in the period after the First[44] and Second[45] World Wars, there has been a discussion of the international personality and capacity of the individual[46], with some scholars emphasising the existence of treaties directly granting rights and duties to this particular subjects.[47]

---

[40] See J. KLABBERS, *International Law*, Second Edition, Cambridge University Press, 2017, pp. 118 – 121; K. PARLETT, *The Individual in the International Legal System: Continuity and Change in International Law*, Cambridge University Press, 2011.

[41] In this sense see F. FRANCIONI; M. GESTRI; N. RONZITTI; T. SCOVAZZI, in "*Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*", Milano, Giuffrè, 2008, Collana di studi (Università di Siena, Dipartimento di diritto pubblico, Facoltà di giurisprudenza), page. 7, footnote 5.

[42] For an examination of the rights and obligations upon the individual, see F. M. PALOMBINO, *Introduzione al diritto internazionale*, Laterza, Bari, 2019, who correctly specifies that: "[...] *his (the individual's) subjectivity is expressed, in fact, only and exclusively in certain normative spheres (for the author, such normative spheres are international human rights law, international criminal law and international investment law) and, as such, has a sui generis nature* [...]", see pp. 138-143. [Translated by the author].

[43] See G. HAFNER, *The Emancipation of the Individual from the State under International Law*, Recueil des Cours 358, 2011, 263–453 (437).

[44] Cf. M. S. KOROWICZ, *La personalité de l'individu d'après la Convention relative à la Haute-Silésie*, in Revue internationale française du droit des gens, 1938, pp. 5-23; A. RAPISARDI-MIRABELLI, *La capacità giuridica internazionale degli individui*, in Studi in onore di S. Romano, III, 1940.

[45] See G. SPERDUTI, *L'individuo nel diritto internazionale*, Milano, 1950.

[46] See M. S. KOROWICZ, *The Problem of the International Personality of Individuals. American Journal of International Law*, 50(3), 1956, 533-562.

[47] On this topic, see G. BALLADORE PALLIERI, *Diritto Internazionale Pubblico*, Giuffrè, 8th edition, 1962, who pointed out the existence of treaties involving rights and duties for individuals. Among the rights, the author mentioned the possibility of bringing actions before international courts, and examples included the 1907 Hague Convention for the establishment of an

As far as case law is concerned, the Nuremberg Tribunal[48] had already ruled that an individual can be held responsible for an international crime even in cases where the act is not considered as such by domestic criminal law.[49]

This crucial legal position was subsequently reaffirmed by the International Criminal Tribunal for the former Yugoslavia (ICTY)[50] in the renowned *Tadic* case, clarifying that under international law both individuals and states have duties and responsibilities.[51]

Clearly, this assessment becomes more comprehensive in the light of the creation of the International Criminal Court (ICC), which represents the best solution to elucidate the *status* of the individual as a recipient of international criminal obligations.[52]

Even the International Court of Justice (ICJ) established[53] – in matters

---

international court of prey, the Washington Convention for the establishment of a Central American Court of Justice, and the possibility for individuals to petition international bodies under minority treaties. Of those treaties that impose duties on individuals, the author gives the example of the International Criminal Court, created under the Geneva Convention of 1937 and competent to judge certain crimes committed by individuals. For other examples given by the author, see pp. 173 - 176.

[48] Established by the London Agreement of 1945 – concluded between the occupying powers of Germany – at the end of World War II to punish major war criminals. This tribunal affirmed the centrality of the individual in international law, specifying that crimes against international law are committed by individuals and only by punishing them can the provisions of international law be implemented, see *Nurember Trial Proceedings*, vol. 22, p. 466, available at: http://avalon.law.yale.edu/imt/judlawch.asp.

[49] See *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 - 1 October 1946, Nuremberg, 1947, vol. I, 233 available at: https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

[50] *UN Security Council, Security Council resolution 827 (1993)* [International Criminal Tribunal for the former Yugoslavia (ICTY)], 25 May 1993, S/RES/827 (1993).

[51] Cf. *Prosecutor v. Dusko Tadic aka "Dule"* (Opinion and Judgment), IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997, par. 665.

[52] On this topic, see F. SALERNO, *Diritto Internazionale*, CEDAM, 2017, p. 391 – 398.

[53] Although the Court's jus *standi in iudicio* recognises only and exclusively the States as parties to a judgment, it is undeniable that there is an evolving tendency for the Court to guarantee the fundamental rights of the individual. See in this regard: A. KJELDGAARD-PEDERSEN, *The International Court of Justice and the Individual* (August 19, 2019). Forthcoming in Achilles Skordas

concerning consular relations – that a right is attributed to the individual in circumstance in which the authorities of the State of residence have the obligation to promptly warn the state of dispatch if the latter is arrested.[54] This position was subsequently reaffirmed by the case-law of the ICJ itself.[55]

Furthermore, it has been held that there must be a *legitimatio ad causam* of individuals in international law, recognizing both substantial and procedural rights.[56]

It has indeed been observed that the state, as a subject of international law, is responsible for all acts both of commission and omission, irrespective of whether they are *jure jestionis or jure imperi*.[57]

Therefore, this vision seems to endorse a consideration of the individual as a subject of international law in both domestic and international law, thus

---

(ed), Research Handbook on the International Court of Justice, Edward Elgar; F. ORREGO VICUNA, *Individuals and Non-State Entities before International Courts and Tribunals*, J.A. Frowein and R. Wolfrum (eds), Max Planck Yearbook of United Nations Law, Volume 5, 2001, 53-66.

[54] See *La Grand (Germany v. United States of America)*, Judgement, I.C.J. Reports 2001, p. 466, specifying that the right under Article 36(1) of the Convention on Consular Relations can only be guaranteed through States before the ICJ, para. 77.

[55] Cf. *Avena and Other Mexican Nationals (Mexico v. United States of America),* Judgement, I.C.J. Reports 2004 p. 12, par. 40.

[56] As will be made clear later, one supporter of this view is the ICJ Judge Antônio Augusto Cançado Trindade. Among his most relevant contributions on the subject see: A.A. CANÇADO TRINDADE, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 17–96; A.A. CANÇADO TRINDADE, '*The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments*', in K. Vasak Amicorum Liber – Les droits de l'homme à l'aube du XXIe siècle, Bruxelles, Bruylant, 1999, pp. 521–44; A.A. CANÇADO TRINDADE, '*Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne'*, 14 Revue québécoise de droit international, 2001, pp. 207–39; A.A. CANÇADO TRINDADE, '*El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000): La Emancipación del Ser Humano como Sujeto del Derecho Internacional de los Derechos Humanos'*, 30/31 Revista del Instituto Interamericano de Derechos Humanos, 2001, pp. 45–71.

[57] Cf. A.A. CANÇADO TRINDADE, '*International Law for Humankind: Towards a New Jus Gentium – General Course on Public International Law – Part I*', 316 Recueil des Cours de l'Académie de Droit International de la Haye, 2005, ch. IX, pp. 256 – 7.

recognising direct access – for the protection of human rights – to international courts even against his or her own State of origin, provided it is useful in claiming the violation of fundamental human rights.[58]

Several authors have supported this view of the individual over the years[59], some of whom considered that the classical conception of the sovereign state did not match the evolution and the different needs of the international community.[60]

Such a view was then strengthened by the entry into force of various regional instruments aimed at protecting and safeguarding human rights, being the most important example the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[61]: it was in fact argued that individuals had become holders of legitimate international interests, given that a process of emancipation had begun in international law that went beyond the exclusive protection of state agents.[62]

Finally, it seems plausible to share the doctrine's authoritative opinion according to which the relevance of the individual in international law is proportional to the possibility he has of directly using international coercive

---

[58] See S. GLASER, '*Les droits de l'homme à la lumière du droit international positif*', Mélanges offerts à H. Rolin – Problèmes de droit des gens, Paris, Pédone, 1964, pp. 117–18, and cf. pp. 105–6 and 114–16.

[59] See in this sense: H. ACCIOLY, *Tratado de Direito Internacional Público*, vol. I, 1st. ed., Rio de Janeiro, Imprensa Nacional, 1933, pp. 71–5; A. ALVAREZ, *La Reconstrucción del Derecho de Gentes – El Nuevo Orden y la Renovación Social*, Santiago de Chile, Ed. Nascimento, 1944, pp. 46–7 and 457–63, and cf. pp. 81, 91 and 499–500; H. LAUTERPACHT, *International Law and Human Rights*, London, Stevens, 1950, pp. 69, 61 and 51, and cf. p. 70; C. PARRY, '*Some Considerations upon the Protection of Individuals in International Law*', 90 RCADI, 1956, p. 722; B.V.A. RÖLING, *International Law in an Expanded World*, Amsterdam, Djambatan, 1960, pp. XXII and 1–2.

[60] Cf. P. C. JESSUP, *A modern Law of Nations – An Introduction*, New York, MacMillan Co., 1948, p. 41.

[61] On the ECHR, Article 34 and the relevant case law concerning access to justice, see Chapter 2.

[62] In this sense, see G. SPERDUTI, '*L'individu et le droit international*', 90 RCADI, 1956, pp. 824, 821 e 764 e G. SPERDUTI, *L'individuo nel Diritto Internazionale*, Milano, Giuffrè Ed., 1950, pp. 104 – 7.

means to force the state to respect and guarantee his rights.[63]

For these reasons, if the individual has attained a *sui generis* legal personality, given that there are various rules conferring rights and obligations, it is therefore natural that he/she should be able to bring an action before international mechanisms to protect his/her rights, which could guarantee appropriate satisfaction in the event of alleged violations.

3. INTERNATIONAL COMMUNITY'S: A COMMITMENT TOWARDS ACCESS TO JUSTICE.

The international community's focus on the individual, including access to justice in international litigation, has been recently returned to the centre of legal debate.[64]

Clearly, particular attention should be given to article 1 of the Universal Declaration of Human Rights[65] (UDHR), which acknowledged that: "*All human beings are born free and equal in dignity and rights*".[66]

Hence, considering this paramount concept of equality relating to the right of access to justice, it means that equal access to justice must be granted to all individuals.[67]

---

[63] Cf. B. CONFORTI, *Diritto internazionale*, Editoriale Scientifica, Napoli, 11th edition, 2018, p. 26.

[64] Among different, see the contribution of R. WOLFRUM, *Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia?*, in From Bilateralism to Community Interest: Essays in Honour of Bruno Simma, Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder (eds), Oxford University Press, 2011, pp. 1132-1145.

[65] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

[66] For a more recent assessment of the importance of Article 1 and, more generally, of the Universal Declaration, see C. FERSTMAN, A. GOLDBERG, T. GRAY, L. ISON, R. NATHAN, M.(eds), *Contemporary Human Rights Challenges The Universal Declaration of Human Rights and its Continuing Relevance*, Routledge, London, 2018, where Articles 1 and 2 are considered by B. G. Ramcharan as "The foundations".

[67] As the analyses carried out by the OECD show, there are mainly four reasons why it is important to recognise access to justice – national and international – for individuals: *i)* effective access to justice services is a crucial determinant of inclusive growth, citizen well-being and

This consideration is even more crucial when there is no domestic justice system that could ensure such equal treatment, thereby contributing to the marginalisation of vulnerable categories.[68]

In this respect, the commitment, notably within the United Nations (UN) system, to the recognition of the right of access to justice has directly and indirectly contributed to the creation of effective protection of individuals in a particularly vulnerable position.[69]

For example, the Convention against torture and other cruel, inhuman or degrading treatment or punishment (CAT)[70] provides both direct and indirect acknowledgement of the right to access to justice, imposing a positive obligation on states parties to guarantee an individual – who has been allegedly subjected to torture or inhuman and degrading treatment – the right to lodge a complaint and have his or her case impartially examined by the competent judicial

---

sound public administration; *ii)* the rule of law, security and justice influence economic performance, and business & investment climate; iii) countries with trusted justice systems report higher levels of GDP per capita, property protection rights and national competitiveness; iv) legal certainty, predictability and businesses' trust in justice systems help positive investment decisions and promote competition. For an overview of these parameters, see https://www.oecd.org/gov/access-to-justice.htm.

[68] Leaving aside the analyses of the doctrine, which will be the object of reflection later in this work, it seems appropriate to recall those reports which have analysed and described the compatibility of the rights of particularly vulnerable persons with access to justice. On all of them, see OECD (2020), *Gender Equality in Colombia: Access to Justice and Politics at the Local Level*, OECD Publishing, Paris, https://doi.org/10.1787/b956ef57-en.; OECD (2019), *Equal Access to Justice for Inclusive Growth: Putting People at the Centre*, OECD Publishing, Paris, https://doi.org/10.1787/597f5b7f-en.; OECD/Open Society Foundations (2019), *Legal Needs Surveys and Access to Justice, OECD Publishing*, Paris, https://doi.org/10.1787/g2g9a36c-en.

[69] Access to justice is indeed considered as one of the 'thematic areas' within the context of the *Access to justice and rule of law Institution.* For an analysis, please refer to the webpage https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/.

[70] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

authorities.[71]

Although the obligation falls directly upon the state, it cannot be denied that this obligation is also relevant for the individual, who has the right of access to justice to claim alleged acts of torture.

Moreover, the Convention against torture, although in a direct manner, conferred each state the possibility to recognise the jurisdiction of the Committee against Torture (CAT)[72], which means – as soon as the jurisdiction is accepted – the possibility for the individual to have access to international justice mechanisms for the recognition of his/her rights, allegedly violated by a state party to the Convention through acts or omissions.[73]

Furthermore, *General Comment No. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties*[74], arguing from the principle of non-discrimination, provides for an obligation upon States to ensure access to justice and to all mechanisms functional to seek and obtain redress equally accessible to all.[75]

Such considerations about the state's obligation are concretely addressed by the Committee against Torture[76]. The experts have also repeatedly stated that if

---

[71] See art. 13 of the CAT convention: "*Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given*".

[72] The Committee Against Torture (CAT) is the body of independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.

[73] See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 22, para 4.

[74] UN Committee Against Torture (CAT), *General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties*, 13 December 2012.

[75] Ibid. para 32.

[76] See *Estela Deolinda Yrusta and Alejandra del Valle Yrusta c. Argentina*, UN Doc. CAT/C/65/D/778/2016, 23.11.2018, para 7.9, where experts, on the issue of state responsibility, precisely recall the General Comment no. 3 of 13 December 2012.

the state fails to fulfil its obligations under article 12 of the Convention[77], it will incur in a responsibility under article 13, which consists in guaranteeing the right of the petitioner to lodge a complaint, according to which the Commission assumes that the state authorities will provide a satisfactory response by launching a prompt and impartial investigation.[78]

Similar consideration can also be found in the Convention on the rights of the child (CRC)[79], adopted by the UN General Assembly.

The CRC, in addition to the well-known obligation upon states parties to take all appropriate measures to guarantee the rights contained in the treaty[80], also imposes a duty to ensure that every child deprived of his or her liberty is able to challenge the legality of the measure applied to him or her before a competent, independent and impartial tribunal, which not only produces its effects within the jurisdiction of the state party, but also guarantees an effective right of access to justice for all children.[81]

Accordingly, the CRC Committee[82] has established that the right to an effective remedy is included among those recognised in article 4.[83]

An implicit reference, but nevertheless effective, to access to justice could also

---

[77] See CAT art. 12 "*Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction*".

[78] In this respect, the Committee's decisions are quite consistent. Among many others, see: *Jean Ndagijimana c. Burundi*, UN Doc. CAT/C/62/D/496/2012, 30.12.2017, para 8.6; *Damien Ndarisigaranye c. Burundi*, UN Doc. CAT/C/62/D/493/2012, 10.11.2017, para 8.6; *Danilo Dimitrijevic c. Serbia and Montenegro*, UN Doc. CAT/C/35/D/172/2000, 16.11.2005 para 7.3.

[79] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

[80] Art. 4 CRC expressly states that: "*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention*. […]".

[81] See art. 37 (d) of the CRC.

[82] The Committee on the Rights of the Child (CRC) is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties. It also monitors implementation of two optional protocols to the Convention, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography.

[83] See *A.S. c. Denmark*, UN Doc. CRC/C/82/D/36/2017, 26.09.2019, para 9.9.

found in the Convention against the elimination of all forms of racial discrimination (CERD).[84]

Indeed, an analysis of certain provisions reveals an obligation on States parties to ensure equality before the law without distinction as to race, colour, national or ethnic origin.[85]

As specified in article 5(a), such equality before the law must also be granted to the enjoyment of the right to fair treatment before the courts and, more generally, before all bodies administering justice.

Comparable obligations can be found in the Convention on the elimination of all forms of discrimination against women (CEDAW)[86], which is a fundamental treaty on women's rights.[87]

Finally, it is worth noting that the Convention on the Rights of persons with disabilities (CRPD)[88] is the only instrument that expressly (and literally) recognises the right of access to justice.

Unlike other agreements, article 13 is entitled "access to justice", which imposes a twofold obligation on the States parties to the Convention.

On the one hand, it places an obligation on effective access to justice, not only regarding the direct participation of persons with disabilities, but also concerning procedural guarantees if such persons are affected by characteristics during proceedings, such as for instance if they should become witnesses. On the other hand, States are required to provide training for all those working in the field of administration of justice, again to ensure effective access to justice for persons with disabilities.[89]

It seems therefore that such international instruments, although directly and

---

[84] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

[85] See in this sense a joint analysis of Articles 2 and 5 (a) of the CERD.

[86] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979*, United Nations, Treaty Series, vol. 1249, p. 13.

[87] Cf. art. 15 para 2.

[88] UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106.

[89] See art. 13 CPRD.

indirectly, have contributed to an acknowledgement of the individual right of access to international justice.

3.1. FOLLOW-UP CONSIDERATIONS.

Based on the analysis of these instruments, one can certainly deduce that the recognition of the right to access to justice is widely considered to be important by the international community. This consideration allows space for three successive and interrelated considerations.

Firstly, these are covenant instruments ratified by many states, which – through the conduct of their organs – have no choice but to respect these constraints, since otherwise they would incur in an international wrongful act.[90]

Secondly, such provisions have an interesting character because they reflect – directly and indirectly – the evolution the international community has undergone about the recognition of the rights of the individual. Guarantees and obligations, both substantive and procedural, always reflect upon states, whose task it is to practically commute these constraints on the individual's right of access to justice.

Finally, attention should be paid to the terminology used by states in the treaty instruments. Summarily, all the instruments enunciate the substantive and procedural requirements of the right of access to justice, but none of them – except, as analysed above, the Convention on disabilities – literally recognise such a right.

This latter observation, which at first sight may seem only important from a literal interpretative point of view, leads to a consideration that goes beyond the meaning of the terms used. As a matter of fact, the content of the right of access to justice raises several points of view – substantive and procedural – which

[90] This would be a responsibility in the exercise of typical functions, *i.e.*, legislative, executive and judicial, which is fully consistent with Article 4 of the Draft articles on Responsibility of States for Internationally Wrongful Acts.

together contribute to the effective implementation of this right.[91]

4. SETTING THE SCENE: SIGNIFICANCE OF THE LEGAL FRAME.

In the light of the above considerations, it would therefore seem possible to consider that standards concerning the right of access to justice in international law are binding – in the form of both positive and negative obligations – upon the states of the international community.[92]

Leaving aside the conventional obligations of states, it should be borne in mind that in the development of international law there has always been a minimum space for individuals to have recourse to international justice.

Tu support this view, four different contexts will therefore be analysed, which – with due differentiation – have allowed the individual to enforce his or her rights in an international perspective.

For this reason, a detailed examination of four framings will be subsequently carry out: the Mixed-claims commission, which guarantees direct access under an *ad hoc* redress mechanism for the individual; diplomatic protection, that has contributed to the consolidation but does not entail a direct representation of the individual, since States do not represent the interests of the latter; direct access in the form of a right – but not necessarily a human right – that takes shape through an international claim; finally, direct access of the individual as a human right, which seems to have reached a customary nature.

---

[91] For an overall analysis of the differences between access to justice and, for instance, effective remedy, see Chapter 2.

[92] Such a direct consequence, consisting in an obligation of means (or result) on the State, so that the individual can benefit from it, is today the only possible recognition of the right of access to justice for citizens. One will note, after all, that these norms are in any case addressed to the State as the principal subject of international law, in full accord with the international order established from Westphalia onwards. For an analysis of positive and negative obligations see D. SHELTON AND A. GOULD, *Positive and Negative Obligations*, in The Oxford Handbook of International Human Rights Law, Dinah Shelton (ed), Oxford Handbooks in Law, 2013, p. 562 ff.

5. THE "MIXED-CLAIMS COMMISSIONS": ENSURING DIRECT ACCESS UNDER AN *AD HOC* MECHANISM.

Mixed Commissions, although not widely used in international practice today, have historically represented a useful method of international dispute resolution over the years.

Despite the issue comprises specific methods of settling disputes with their own characteristics, the aim of this analysis at hand is not to identify the positive and negative aspects of such procedures, but rather to examine whether these mechanisms may have contributed to the achievement of direct access to international justice for the individual.

However, to corroborate the abovementioned purpose, it seems appropriate to briefly recall the evolution of these mechanisms, to understand how direct access for the individual – albeit at a first glance through *ad hoc* mechanisms – has contributed to the creation of a practice among states, which represents the broad framework of the present examination.

Currently, no univocal definition exists to describe mixed commissions established in response to mass claims[93], since their role and functions have always changed throughout the international community's legal history.[94]

Considering international law dispute resolutions[95], the specific character of Mixed-claims commissions consists, on the one hand, in partially replacing arbitration as a means of dispute resolution and, on the other hand, in anticipating the Mixed-arbitration tribunals set up from the 20th century onwards.

---

[93] In the opinion of leading scholar "[…] *The term 'mass claims' typically refers to compensation sought when a large number of parties have suffered damages arising from the same diplomatic, historic, or other event. The tribunals, commissions and other mechanisms created to resolve disputes in such circumstances have come to be called 'mass claims processes* […]". See H. M. HOLTZMANN, *Mass Claims*, in Max Planck Encyclopedia of Public International Law [MPEPIL], 2008, para. 1.

[94] While these institutions often have common objectives, the *nomen iuris* created is often different and can range from 'court', 'commission' and 'resolution'.

[95] See J. MERRILLS, *International Dispute Settlement* (6th ed.). Cambridge: Cambridge University Press, 2017.

Nevertheless, there seems to be no substantial difference between Mixed-commissions and Mixed-tribunals, at least if the impartiality of the members composing the mixed commissions is assumed.[96]

Yet, these commissions may be framed as *ad hoc* arbitration mechanisms established under international agreements to address several types of disputes arising from post-conflict matters between two or more states.

There have been several developments over the years in the historical evolution of these special proceedings, which have contributed to affirm the prominent role played by the individual in access to international justice.

Originally, it is well-known that the Jay Treaty[97] concluded between the United States and Great Britain could be identified as one of the first examples in international practice of the creation of an international mass claims process.[98]

Indeed, two of the three commissions set up under this treaty, which brought the revolutionary war between the United States and Great Britain to an end, had to deal with claims by citizens of both States.

Subsequently, the widespread adoption of these dispute resolution instruments led to a great diffusion both before[99] and after the First World War, where Mixed-arbitration commissions – in the context of peace treaties concluded after the Great War – were frequently deployed to settle private interests.

Despite their widespread use, at the end of the Second World War, the practice of Mixed claim was far less prevalent than in the previous two centuries, although certain issues arising out of the damages suffered in the Second World War were resolved by commissions having the same characteristics as those of

---

[96] One approach to differentiate mixed commissions is to set a time limit within which individual claimants have direct access to them. R. DOLZER, '*Mixed Claims Commissions*' in Max Planck Encyclopedia of Public International Law, 2011.

[97] *Treaty of Amity, Commerce and Navigation between Great Britain and the United States* (signed 19 November 1794) (1793–95).

[98] For an overview of national commissions see R. B. LILLICH, *International Claims: Their Adjudication by National Commissions*, Syracuse: University Press, 1962.

[99] In the opinion of leading scholars, "*the emphasis on this international form of dispute resolution was maintained between 1900 and 1918 (approximately 30 commissions)*", see R. DOLZER, *Mixed Claim Commissions*, in Max Planck Encyclopedia of Public International Law, 2011, para 6.

the 18th and 19th centuries, called arbitration commissions or tribunals.[100]

Indeed, throughout this historical period, states – rather than referring the merits of the dispute to third parties – opted to reach an agreement among themselves and, it was only afterwards that a mechanism (usually national commissions) was set up internally to guarantee fair redistribution because of the agreement reached with the state. These were the so-called 'Lump Sum Agreements'[101], which represented a turnaround from the arbitration commissions set up previously.

Specifically, through this specific type of agreement, the defendant state would have to pay the claimant state a certain amount – calculated on the basis of a number of requests for compensation – arising from the claims made by individual applicants.[102]

Therefore, contrary to Mixed commissions or the establishment of arbitral tribunals, the task of redistributing the assets transferred through Lump Sum Agreements would be deferred to the State, thus leaving a residual marginal value to the claims made by individuals.

In the aftermath of the Cold War, a revival of mass proceedings can be observed, which contributed to the creation of the 'modern' arbitration commissions.

Among these, one certainly includes the United States-Iran Agreement of 19 January 1981 (the so-called 'Algiers Accords')[103], which was set up following the crisis resulting from the hostage-taking of US diplomatic personnel in Tehran.

---

[100] See for example: *Arbitral Commission on Property, Rights and Interests in Germany* established by the *Convention on the Settlement of Matters Arising out of the War and the Occupation*, signed at Bonn on 26 May 1952; *The Anglo-Italian Conciliation Commission established under Article 83 of the treaty of Peace with Italy* (United Kingdom - Italy).

[101] For a discussion on this matter, see: R. B. LILLICH AND B. H. WESTON, *Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims*, The American Journal of International Law, Vol. 82, No. 1, 1988, pp. 69-80.

[102] Usually, a national claim authority or a national claims commission makes the allocation to individual claimants in the requesting state.

[103] See the *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*, Algiers, 19 January 1981.

One of the main treaty's provisions was the creation of the Iran-United States Claims Tribunal (IUSCT)[104], a tribunal based in The Hague composed of three Iranian judges, three US judges and three judges from other countries[105], applying the UNCITRAL arbitration rules[106] and tasked with adjudicating on several types of claims arising from the Islamic revolution in Iran.

Although formally configured with the typical characteristics of an international arbitral tribunal[107], it may be argued that its actual functions reflected both international and domestic arbitration.

As a matter of fact, both states and individuals had the possibility to bring their cases before the international *forum*. In particular, the tribunal would be able to adjudicate international disputes between the two States[108], settling disputes concerning the interpretation and application of the so-called "founding documents"[109] of the IUSCT[110] and – what is more interesting for the purposes of this investigation – deciding on the merits of claims submitted by

[104] The creation and rules of the Tribunal had been constituted because of the *Claims Settlement Declaration, General Principle B* (paras. 16-17) of the General Declaration of the Democratic and Popular Republic of Algeria and Para. 2(B) of the *Undertakings relating to the Algiers Agreements*.

[105] See G. H. ALDRICH, *The Jurisprudence of the Iran-United States Claims Tribunal*, Oxford University Press, 1996, for an analysis of the functioning and the relevant case-law.

[106] See Art. 3 par. 2 of the *Claim settlement declaration.*

[107] In this respect, within the Claim Settlement declaration the reference is to Article 2, which states that […] *An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States* […]".

[108] These are the so-called "*official claims*", *i.e.* disputes concerning commercial agreements for the sale of goods and services, see Art. 2 para. 2 of the *Claims Settlement Declaration*.

[109] See *Declaration of the government of the democratic and popular republic of Algeria* (general declaration), 19 January 1981 e the *Declaration of the government of the democratic and popular republic of Algeria concerning the settlement of claims by the government of the United States of America and the government of the Islamic republic of Iran* (Claims Settlement Declaration), 19 January 1981. Such terminology (founding documents) is the one used within the IUSCT website (available online at https://iusct.com/documents/).

[110] Such disputes are generally referred to as "interpretative disputes" and are covered by the claims settlement declaration in Articles 2(3) and 6(4).

individuals[111] concerning measures inherent to the right to property, *i.e.* expropriations, debts and contracts concerning US and Iranian citizens against Iran and the United States, respectively.

While there has been some criticism about the possibility of identifying this tribunal among the judicial bodies of international law[112], it must nevertheless be considered that the creation of such mechanism is essential in rebuilding an individual's access to justice in international law, both for substantive and procedural matters, also considering a provision in the agreement that allowed for a claim to be made to the tribunal for claims over $250,000.[113]

It seems quite clear that such a provision was created especially for companies that suffered several damages during the revolution, in order to give the possibility to make the claim without the intervention of the government of the company's nationality. This approach undoubtedly contributed to untie the possibility that a claim had to be made through the government and not individually by the injured party, especially as a legal entity.

Another recent example is the United Nations Compensation Commission (UNCC)[114], created following the war in the early 1990s caused by the invasion

---

111 See Art. 2 para. 1 of the Claims Settlement Declaration and Art. 3 para. 3.

112 In this respect, the criticisms made concerned the direct access of private individuals belonging to both States and the failure to stipulate the exhaustion of domestic remedies and the way judgments are enforced, see T. STEIN, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, American Journal of International Law, 78(1), 1984, 1-52, p. 2 ff.

113 These include the disputes provided for in Art. 3(3), which created a special mechanism of access for individuals based on their application.

114 The United Nations Compensation Commission (UNCC) is located at the Palais des Nations within the United Nations Office in Geneva, Switzerland. It was created in 1991 as a subsidiary organ of the United Nations Security Council under Security Council resolution 687 (1991) to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait in 1990-1991. For a review see: D. BEDERMAN '*The United Nations Compensation Commission and the Tradition of International Claims Settlement*', 27 NYUJIntlL&Pol, 1994, 1–42.

– and subsequent occupation – of Iraq in Kuwait.[115]

The purpose of this commission, as the title suggests, was to compensate individuals – from different states – who had carried out their activities in one of the two countries involved in the conflict and suffered commercial loss/disruption for various reasons, both personal and commercial.[116]

Whilst one of its tasks was to compensate the losses of the affected governments, including Kuwait, the commission allowed several private individuals to gain access to state compensation through UN mediation.

This consideration, in addition to the fact that the UNCC commissioners are appointed by the UN Secretary General and not by the states themselves, would make it possible to affirm that one cannot properly refer to the UNCC as a 'Mixed-claims commission', given that the latter would be based on treaties stipulated between States, which thus create reciprocal rights and obligations.

However, this differentiation does not affect the purpose of this dissertation, since both procedures encompasses the recognition of individual access to an international mechanism.

Another similar practice arose from the 1992-1995 war in former Yugoslavia, which led to the Dayton Peace Accords in 1995.[117]

These agreements established the Commission for Real Property Claims for Displaced Persons and Refugees (CRPC)[118] in Bosnia and Herzegovina, which

---

[115] UN Security Council, *Security Council resolution 692 (1991) [Iraq-Kuwait]*, 20 May 1991, S/RES/692 (1991).

[116] Indeed, one of the most significant differences between the UNCC and the IUSCT is the Iraq's responsibility, which allowed the UN Security Council to point out that […] *Reaffirms that Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage - including environmental damage and the depletion of natural resources - or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait* […]", Cf. *UN Security Council Resolution 687* (UN Doc. S/RES/687 (1991), 8 April 1991), para 16.

[117] *Dayton Peace Agreement*, General Framework Agreement for Peace in Bosnia and Herzegovinia, 21 November 1995, Signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia.

[118] See *Dayton Peace Agreement, Annex 7: Agreement on Refugees and Displaced Persons*, 14 December 1995.

differs in several aspects from the model of mixed arbitral commissions, since it was an institution designed to resolve disputes arising within a state.

However, the CRPC was essentially considered to be an international body, as it was composed of six national commissioners (two of them were appointed by the Bosnians, two by the Serbs and two by the Croats) and three international commissioners, with one of them acting as the chairperson.[119]

Moreover, although Yugoslav law was applied, it had to be reconciled with the principles of international law, especially those relating to international human rights law.

Indeed, the contribution of this commission to the development of the right of access to justice for the individual in international law is undoubted, as in eight years of work several decisions have been issued concerning the recognition and restoration of rights of an individual nature, most of them resulting from forced displacement.

The CRPC was followed by the creation in the framework of the United Nations (UNMIK)[120] – of the Housing and Property Claims Commission to settle claims concerning residential property in Kosovo.[121]

Since 1998, following an armed conflict which had led to several violations of international humanitarian law and various economic losses, the Eritrea-Ethiopia Claims Commission (EECC) was instituted – because of a peace agreement of 2000 between Eritrea and Ethiopia – with the purpose of resolving the legal actions filed by displaced subjects and to recover the commercial losses

---

[119] For further analysis see H. VAN HOUTTE *'Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina'*, 48 ICLQ 625–38, 1999; L. VON CARLOWITZ '*Settling Property Issues in Complex Peace Operations: The CRPC in Bosnia and Herzegovina and the HPD/CC in Kosovo'*, 17 LJIL, 2004, 599–614.

[120] The UNMIK was created on 10 June 1999 when the Security Council in resolution 1244 authorized the Secretary-General to establish in the war-ravaged province of Kosovo an interim civilian administration led by the United Nations under which its people could progressively enjoy substantial autonomy. See UN Security Council*, Security Council resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo]*, 10 June 1999, S/RES/1244 (1999).

[121] See *UNMIK regulation No. 1999/23 on the establishment of the Housing and Property Directorate and the Housing and Property Claims Commission*.

of those involved in the conflict.[122]

5.1. ACTUAL SIGNIFICANCE OF THE "MIXED-CLAIMS COMMISSIONS": FIRST LEGAL OPTION TO RECOURSE TO INTERNATIONAL ADJUDICATION.

Therefore, it seems clear that these progresses – each with their own differences in object, purpose and procedure – are an expression of the same development aimed at protecting the individual whose legal-patrimonial sphere has been affected during a conflict situation.[123]

Indeed, the entitlement to a right of access to justice has substantially changed through the various commissions/tribunals which have been set up over time, thus reflecting the role attributed to the individual by the international community.

As such, especially in the 19th century, only states had the power to bring a claim before such bodies, even though the disputes related to damages suffered by individuals.[124]

Although there was no consistent practice, after the First World War individuals were granted direct access to joint commissions[125], although in a very limited way.[126]

Leaving aside the period after the Second World War, when States preferred

---

[122] The Commission is an independent body established and operating pursuant to Article 5 of the *Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia.*

[123] See F. O. VICUÑA, *Claims, International*, in Max Planck Encyclopedia of Public International Law, 2010; H. M. HOLTZMANN (ed) *International Mass Claims Processes*, OUP Oxford, 2007.

[124] It was even rare that individuals were allowed to be represented by a lawyer, to present statements to the commission, to participate in oral proceedings, or to appear as witnesses. See R. DOLZER, '*Mixed Claims Commissions*' in Max Planck Encyclopedia of Public International Law, 2011, paras 17-18.

[125] See, for example, the *Convention between the United States and Mexico for reciprocal settlement of claims*, signed in Washington, September 8, 1923, art. 1.

[126] The limitation consists in a procedural perspective, since the proceedings were conducted by agents of the states concerned, cf. *Convention between the United States and Mexico for reciprocal settlement of claims*, 1923, art. 3.

to settle between themselves and then compensate – by means of their own internal administrative system of jurisdiction – injured parties, it is undeniable that in the 'modern' period there has been a shift from the past.[127]

For these reasons, from a purely substantive point of view, having an international remedy for violations of the rights of individuals is undoubtedly one of the reasons why the importance of Mixed-claim commissions has been reassessed in recent years.

Moreover, the development of Mixed-claim commissions could be seen as a gradual acceptance of the subjectivity of individuals as subjects of international law, as has already occurred in the areas of human rights and international criminal law.

Although the importance of Mixed-claim commissions is undeniable for the consolidation of the individual's right of access to international justice, the thesis that they represent a gradual recognition of subjectivity does not seem to be shared.

In this connection, despite various efforts made by the doctrine, the subjectivity of the individual would be only and exclusively limited or *sui generis*, even considering among the reasons supporting the identification of rights and obligations stemming from the disciplines of international criminal law or human rights.

Nevertheless, direct access – albeit within an *ad hoc* redress mechanism – by individuals has been an important breakthrough in the recognition of the general features of the individual's access to justice in international disputes.

6. DIPLOMATIC PROTECTION: AN OUTDATED STATE-CENTRIC CONCEPTION OF INTERNATIONAL LAW.

As well known, as far as standards regarding the protection of aliens are concerned, the state is obliged to adopt measures to prevent or repress any

[127] As outlined earlier, before the IUSCT, individuals may appear alone or, in the case of claims worth less than USD 250,000, they are represented by their respective governments.

interference with the individual or the alien's property.[128] Both measures impose obligations upon the state in different ways.

On one hand, preventive measures will have to be assessed on a case-by-case basis, determining whether the state's action complies with customary international obligations.

On the other hand, the state must provide the foreign national with an adequate judicial system through which he or she may bring claims and obtain justice. Thus, if the state does not have an adequate judicial organisation, this will lead to a denial of justice, resulting in a violation of international law.[129]

Over the years, the solutions for enforcing a foreigner's right to justice have diversified, introducing beneficial changes that have led the individuals closer to international courts.

Originally, people relied on the state of origin to "espouse" the reasons of its nationals abroad through diplomatic protection[130], defined by the International Law Commission (ILC) in its Draft Articles on Diplomatic Protection as: [...] *the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an international wrongful act of that State to a natural or a legal person that is a national of the former State with a view to the*

---

[128] See N. DI MACIO AND J. PAUWELYN, '*Non Discrimination in Trade and Investments Treaties: Worlds Apart or Two Sides of the Same Coin*?', 102 AJIL, 2008, pp. 48–89; J. KURTZ, '*National Treatment, Foreign Investment and Regulatory Autonomy: The Search of Protection or Something More*?' in P. Kahn (ed) *Les aspects nouveaux du droit des investissements internationaux*, Nijhoff, Leiden, 2007, pp. 311–51.

[129] On this point, see International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, November 2001, (A/56/10), which specifies that "[…] *Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. […]",* p. 41.

[130] In this context, see M. KOESSLER, (1946) "*Government Espousal of Private Claims before International Tribunals*," *University of Chicago Law Review*: Vol. 13: Iss. 2, 1946, Article 4, arguing on the nature of diplomatic protection, pointed out that […] *Its peculiarity is based on the fact that the claim of a private person, normally without judicial standing as against a foreign state, is espoused by a state and thus converted into a government claim which will be heard by the appropriate international tribunal* […], p. 180. For an analysis of the issues relating to diplomatic espousal and diplomatic settlement see C. L. LIM, J. HO, M. PAPARINSKIS, *International Investment Law and Arbitration: Commentary, Awards and other Materials*, Cambridge University Press, 2018, pp. 4-5.

implementation of such responsibility [...]".[131]

Therefore, diplomatic protection concerns a right reserved to the state, not to the individual.[132]

In this respect, to enable the state of the person's nationality to act under diplomatic protection, the individual must exhaust the available domestic remedies as provided for by the law of the territorial State in which the alleged violation took place.[133]

Such national remedies frequently have negative consequences, notably about the protection of a foreigner's property, due to both the length of the proceedings and socio-political problems.[134]

Moreover, even if the state – once the foreigner had exhausted the domestic remedies – had decided to exercise its right to exercise diplomatic protection[135],

---

[131] See United Nations, *Draft articles on Diplomatic Protection*, 2006, art. 1. As rightly pointed out by leading scholars, this precise formulation was also made in the light of the ILC's Draft Articles on States responsibility, cf. J. CRAWFORD, *State Responsibility: The General Part*, Cambridge University Press, 2014, p. 3, where the author specifically refers to the Draft articles on Responsibility of States for Internationally Wrongful Acts precisely Part one (2), pag. 33.

[132] This principle was codified in the *Draft Articles on Diplomatic Protection*, 2006, art. 2., specifying that: "A State has the right to exercise diplomatic protection in accordance with the present draft Articles".

[133] This topic will be discussed in detail below at page 42. However, for an overview see: A. A. CANÇADO TRINIDADE, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights*, Cambridge, 1983, p. 1; S. D'ASCOLI, K. M. SCHERR, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, in Working Paper, EUI LAW, 2007; F. D. MAZILU, "*The Rule of Exhausting Local Remedies within the Framework of Diplomatic Protection*," International Journal of Academic Research in Business and Social Sciences, Human Resource Management Academic Research Society, International Journal of Academic Research in Business and Social Sciences, vol. 5(9), 2015, pages 316-321.

[134] In this connection, see the contribution of M. S. ALBORNOZ, *Legal Nature and Legal Consequences of Diplomatic Protection. Contemporary Challenges.* Anuario Mexicano de Derecho Internacional, [S.l.], 2006.

[135] This decision left to the State's appreciation was not a duty, as can also be read in judgments of national courts analysing the subject. See, for example, *Anonymous v Netherlands* (Ministry for Foreign Affairs), 18 March 2003, Official Case No KG 03/137. For a comment on the judgment see *Anonymous v Netherlands (Ministry for Foreign Affairs), Interlocutory Judgment, No KG 03/137*, LJN:

then the foreigner would still have had a limited impact and therefore restricted decision-making power in the inter-state proceedings.

As is widely known, the state holder of the right does not act – from an international legal point of view – as the representative of the individual, being able to conclude the dispute at any time, even though this choice might not meet the individual's personal and legal interests.[136]

Such position was also endorsed by the International Court of Justice in the Diallo case[137], making direct reference to the instruments for the protection of human rights.[138]

AF5930, ILDC 149 (NL 2003), 18th March 2003, Netherlands; The Hague; District Court, in *Oxfords Reports on International Law*.

[136] The State of origin of a foreigner who claims that his rights have been infringed in a foreign State has several options: the most important of these are protests, recourse to countermeasures (or the threat of them), proposals for arbitration or recourse to judicial bodies.

[137] Specifically, the ICJ rendered a total of three judgments in the Diallo case, all dealing with quite different substantive and procedural issues. In the first judgment, the Court essentially clarified the issues concerning the diplomatic protection regime, specifically - given the nature of the case - those concerning companies and shareholders, see *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582. In the second judgment, reaching the merits of the dispute, the Court was able to interpret and give great emphasis to several regional human rights instruments, see *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010,* p. 639. In the third and final judgment, the Court acknowledged a damage to be paid by Congo to Guinea, see *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012,* p. 324. Each judgment, with its own procedural and substantive peculiarities, has contributed to the common mission of international courts and tribunals, consisting in the realization of international justice, see Separate *Opinion of judge Cançado Trinidade, in the Court judgement merits*, 2010, para. 240.

[138] In this connection, both Article 13 of the *International Covenant on Civil and Political Rights* and Article 12 (4) of the *African Charter on Human and Peoples' Rights* have been relied upon to rule on the legality of Mr Diallo's expulsion procedure from the Democratic Republic of the Congo, see *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639*, paras 64-65. In addition, there are interesting references to the decisions of the *Human Rights Committee* and the jurisprudence of the *African Commission*, *Ahmadou Sadio Diallo, Merits, Judgment,* paras 66-67. Finally, Judges referred to the caselaw of the European Court of Human Rights and the Inter-American Court to support their human rights arguments, thus

Other than international human rights law, one area that has been particularly affected by the problems arising from diplomatic protection is the protection of foreign investments.[139]

This has been adapted to the different treatment that investors received in foreign countries, with special reference to expropriation[140] and nationalisation of foreign assets[141] and the consequent obligation to pay compensation.[142]

Indeed, once the doctrine of exclusive jurisdiction of the local courts in the event of disputes concerning the treatment of the foreigner or his assets (Calvo Clause or Calvo doctrine)[143] has been superseded, over the years there has been

---

elevating the role of regional international human rights courts, *see Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639*, p. 68.

139 As pointed out by the doctrine, the exercise of diplomatic protection by the State for its own nationals mainly arises in the event of violation of the *international minimun standard* regarding the treatment of foreigners. On this point, see the arguments of C. ROUSSEAU, *Droit International Public*, Volume 1, Paris, Sirey, 1970, at p. 46.

140 On expropriation in international law, see: M. BUNGENBERG, J. GRIEBEL, S. HOBE, AND A. REINISCH, eds. *International Investment Law: A Handbook*. Oxford: Hart, 2015; R. DASGUPTA, *International Interplay: The Future of Expropriation across International Dispute Settlement*. Newcastle upon Tyne, UK: Cambridge Scholars, 2013; R. DOLZER, AND C. SCHREUER, *Principles of International Investment Law*. 2d ed. Oxford: Oxford University Press, 2012; A. P. NEWCOMBE, *The Boundaries of Regulatory Expropriation in International Law*. ICSID Review-Foreign Investment Law Journal, Vol. 20, No. 1, 2005.

141 Cf. J. YACKEE, *Investor-State Dispute Settlement at the Dawn of International Investment Law: France, Mauritania, and the Nationalization of the MIFERMA Iron Ore Operations*, American Journal of Legal History, Volume 59, Issue 1, 2019, Pages 71–110; F. FRANCIONI, *Compensation for Nationalisation of Foreign Property: The Borderline Between Law and Equity*, 24 INT'L & COMP. L.Q. 255, 1975.

142 Si veda in proposito: A. GIARDINA, *La legittimità internazionale dell'indennizzo in caso di nazionalizzazioni*, in *Dem. Dir.*, 1970, p. 181 e ss.; M. L. PADELLETTI, *Nazionalizzazioni nel diritto internazionale*, in Digesto delle discipline pubblicistiche, vol. 10, 1995, p. 111 ss.

143 On the Calvo Clause see: K. LIPSTEIN, *The place of the Calvo Clause in International Law*, in British Yearbook of Int. Law, vol. 22, 1945, p. 130 ss.; AMERICAN LAW INSTITUTE, '*Waiver by Prior Agreement: The Calvo Clause' in American Law Institute Restatement of the Law: Second Foreign Relations Law of the United States*, American Law Institute St Paul Minnesota, 1958–62, 599–605; D. MANNING-CABROL '*The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*', Law and Policy in International Business , 26, 1995, 1169–

a genuine regulation of the matter at the conventional level, disregarding the no longer useful remedy of diplomatic protection.

As far as diplomatic protection and access to justice are concerned, an interesting perspective could be the existence of an obligation upon the State of nationality to act under in the event of serious violations suffered by an individual in a foreign country.[144]

However, such a view would be a distortion of the guidance provided by the International Law Commission[145] and it has therefore been argued that individuals may could have a legitimate interest to the protection[146], but the latter option does not seem to be supported[147].

Therefore, because of these considerations, it seems that diplomatic protection cannot be considered as a right allowing the individual to have access to international justice[148], since the latter would only benefit from the effects of

---

200; C. K. DALRYMPLE '*Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*', CornellIntlLJ, 29, 1996, 161–89.

144 On this topic, see F. M. PALOMBINO, *Introduzione al diritto internazionale*, p. 139, who recalls the decision of the South African Supreme Court in the Kuanda case. For an analysis of the judgment, see M. COOMBS, *Kaunda v. President of the Republic of South Africa*. Case CCT 23/04. 2004 (10) BCLR 1009. American Journal of International Law, 99(3), 2005 pp. 681-686.

145 See *United Nations, Draft Articles on Diplomatic Protection with commentaries*, 2006, p. 54.

146 On this topic, see the conclusions reached by P. PUSTORINO, *Protezione diplomatica e interesse legittimo dell'individuo*, in Rivista di diritto internazionale, fasc. 1, 2012, pp. 156-159, arguing on the various points offered in the light of judgment no. 21581/2011 of the Italian Civil Cassation, which concerned [...] *the appeal of a private company carrying out maritime connection activities between Italy and Morocco on the basis of an international agreement concluded between the two countries on 15 April 1982 (implementing law no. 433 of 24 July 1985). 433 of 24 July 1985), considering that the company had a legitimate interest in challenging before the courts the legitimacy of the Italian Government's failure to act following the Moroccan authorities' refusal to authorise it to continue the commercial activity in question* [...]".

147 However, as PALOMBINO argued with reference to some national orientations of certain domestic courts, *Introduzione al diritto internazionale*, p. 140: "[...] *these are still sporadic manifestations, as such incapable of reflecting a communis opinio* [...]".

148 It has been emphasised that the State-centric conception does not mean that the legal interests of individuals should not be considered at all. In this sense, see *Amin v Brown*, Decision on preliminary question, [2005] EWHC 1670 (Ch), which concerned access to a British court by a woman with Iraqi citizenship during the war. For an analysis of this case see *Amin v Brown, [2005]*

such protection exclusively if there was a coincidence with state interests.[149]

The inter-state difficulties created a real need in the legal market to resolve the disputes that investors encountered in protecting their investments abroad.

This demand led to the emergence of a new sectoral discipline, which placed new actors other than states at the centre of the legal debate to guarantee access to international justice.

The reference is to the legal field of international investment law[150], which has evolved over the years from the previous protection analysed above, to the point where it now constitutes a field to be included in international economic relations.

7. THE RIGHT TO PURSUE AN INTERNATIONAL CLAIM: INVESTMENT AND INTERNATIONAL COMMERCIAL ARBITRATION.

A form of direct access to international justice for the individual, both as a natural and legal person, is certainly provided by dispute resolution mechanism arising from investments made in foreign countries.

Therefore, to grasp the requirements for a discussion on the existence of a right of access to justice in international arbitration and commercial disputes, it will first be necessary: *i)* to clarify whether there are differences between these two fields of application; *ii)* if such differences exist, which effect they have on the legal qualification of the right of access to justice for the individual.[151]

EWHC 1670 (Ch), ILDC 375 (UK 2005), 27th July 2005, United Kingdom; England and Wales; High Court [EWHC]; Chancery Division [ChD], in *Oxford Reports on International Law*.

149 R. QUADRI, Diritto Internazionale Pubblico, 1986, third edition, p. 402.

150 On this matter, see M. R. MAURO, *Diritto internazionale dell'economia. Teoria e prassi delle relazioni economiche internazionali*, Edizioni Scientifiche Italiane, Naples, 2019, who defines the system of international investment law as *"[...] a system consisting of a set of rules and principles aimed at regulating investments made in the territory of a State by private investors (or similar) – natural and legal persons – nationals of another State, which are defined as 'foreign investments' or 'foreigners'* [...]", p. 325.

151 These distinctions shall be considered as a preliminary analysis of the merits of the right of access for the individual in the field of international investment law, especially as a legal person. For a discussion see: P. MUCHLINSKI, "*Corporations and the Uses of Law: International Investment Arbitration as a "Multilateral Legal Order*"";, Oñati Socio-Legal Series, 2011, 1(4).

Therefore, a distinction between investment treaty arbitration (ITA) and international commercial arbitration (ICA) should be made.[152]

Generally, investment arbitration refers to disputes[153] arising out of an investment made by an individual in a foreign country (referred to as the host country of the investment), where the investment may often be protected by an *ad hoc* agreement between the State and the investor, by an existing law of the state concerning foreign investment and, as will be explained below, by a bilateral (or multilateral) investment treaty.[154]

Instead, with regard to ICA, the parties to the dispute are mainly two or more private parties (often one of which may also be a public entity), having as object of the dispute the violation of certain rights and obligations not always arising from or relating to the investment.[155]

Clearly, the ICA has an older legal tradition than the ITA, being embedded in state legislation both from a purely domestic and international perspective.[156]

---

[152] On this topic, see for example L. W. NEWMAN, D. ZASLOWSKY, "*The Difference Between Commercial and Investment Arbitration*" Part 5 Chapter 43, The Practice of International Litigation – 2nd Edition, 2010.

[153] See both ICJ jurisprudence in the *Case concerning East Timor [Portugal v Australia] [1995]* ICJ Rep 89, 99, defining the notion of dispute as a "[…] *a disagreement on a point of law or fact, a conflict of legal views or interests between parties* […]", and the the well-known arbitration case law in the "Texaco" case, *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libyan Arab Republic* [Preliminary Award] 53 ILR 389, 416, where it was specified that a dispute concerns "[…] *present divergence of interests and opposition of legal views* […]".

[154] Contributions on investment disputes are extensive. For a general analysis, see: R. DOLZER AND C. SCHREUER *Principles of International Investment Law*, 2nd edn, OUP Oxford, 2012; A.K HOFFMANN (ed) *Protection of Foreign Investments through Modern Treaty Arbitration*, ASA, Geneva, 2010; Z. DOUGLAS, *The International Law of Investment Claims*, CUP Cambridge, 2009; P. MUCHLINSKI F. ORTINO AND C. SCHREUER (eds) *The Oxford Handbook of International Investment Law*, OUP, Oxford, 2008.

[155] See T. E. CARBONNEAU (ed) *Handbook on Commercial Arbitration*, 2nd edn, Juris Net, Huntington, 2010; J. PAULSSON (ed) *International Handbook on Commercial Arbitration: National Reports and Basic Legal Texts*, Kluwer, The Hague, 2008; N. BLACKABY, *Redfern and Hunter on International Commercial Arbitration*, 5th edn, Oxford University Press, Oxford, 2009.

[156] In this respect, please refer to the considerations made by R. H. KREINDLER, T. KOPP, *Commercial Arbitration, International*, in Max Planck Encyclopedia of Public International Law,

Indeed, investor-state dispute settlement (ISDS) methods only became efficient in the early 1960s, *i.e.,* following the conclusion of the first bilateral investment treaty[157] and in particular through the efforts made by the World Bank, which led to the *ICSID* Convention.[158]

Although there are several points of contact between the two methods of dispute settlement[159], the differences seem to be quite undeniable.[160]

These distinctions have also been pointed out in arbitration practice[161], where the borderline between these two legal frameworks frequently appears to be drawn according to certain differentiations: *i)* as indirectly described above, the first distinction consists in the parties to the proceedings, investor vs. investor in commercial arbitration and investor vs. State in investment treaty arbitration;[162] *ii)* the second difference concerns the law applicable to the dispute,

---

2013, specifying that "[…] *The distinction between domestic and international arbitration is of vital importance when it comes to a petition for enforcement of an arbitral award. If the award is considered by that court to be a domestic award, it will be subject to the requirements of the relevant national law for domestic awards. If the award is considered non-domestic, it will be given a national status and, depending on that status, may be subject to a particular treaty, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention')—if the enforcing State is a party to that convention—or else the forum's procedural law* […]", cf. para 5.

157 *Treaty for the Promotion and Protection of Investments* (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 November 1962).

158 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159. On this topic, see Chapter III.

159 G. MOSS, *Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?*, international investment law for the 21st century. essays in honour of Christoph Schreuer. ed. by christina binder etc. - oxford: oxford university press, 2009, p. 791.

160 A. ROBERTS, *Divergence Between Investment and Commercial Arbitration*, Proceedings of the ASIL Annual Meeting, 2012, p. 298-299.

161 See *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", at 9, 17 (Jan. 15, 2001) (tribunal composed of V.V. Veeder, W. Rowley, W. Christopher). The case was brought under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

162 On this topic, see L. W. NEWMAN, D. ZASLOWSKY, *The difference between commercial and investment arbitration*, in "The Practice of International Litigation - 2nd Edition", part V, Chapter 43, 2010,

because in ITA the decision is also made according to international law, *i.e.* through treaties and customary international law;[163] and *iii)* the third, perhaps the most important and controversial one, which concerns the future effects that may arise as a result of the decision, which do not involve only and exclusively the two disputing parties.[164]

7.1. DISTINCTION BETWEEN INVESTMENT TREATY ARBITRATION AND INTERNATIONAL COMMERCIAL ARBITRATION: CONSEQUENCES FOR INVESTOR'S RIGHT AND CHOICE TO ACCESS TO JUSTICE?

Such perspectives, if examined from the investor's point of view, essentially concern the legal core from which disputes arise, which is indispensable when it comes to access to justice.

In ITAs, an agreement is made between two states for the mutual protection of investors abroad. Certainly, the object and purpose of the agreement is the protection of the investment (and thus indirectly of the investor), but since the agreement is in any case between states, the investor can only and exclusively be

clarifying that "[…] *Ordinarily, parties to a relationship of an international business nature that may give rise to disputes agree to have their disputes resolved in arbitration, usually pursuant to the rules of certain recognized arbitral institutions. Investment arbitrations, on the other hand, may not involve agreements regarding agreements made between a state and an investor. Instead, these disputes occur as a result of the operation of treaties between nations designed to encourage the flow of investments, usually from more developed nations to less developed ones* […]".

163 Regarding the scope of investment treaty arbitration see: Y. BANIFATEMI, "*The Law Applicable in Investment Treaty Arbitration* (Chapter 9)", in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Katia Yannaca-Small (ed.), Oxford University Press, 2010; T. CATHARINE, *Applicable Law in Investment Agreements*, ed. Tony Carty, New York, Oxford University Press, 2019. For an analysis of the applicable law in international commercial arbitration, see V.S. DESHPANDE, *The applicable law in international commercial arbitration*, Journal of the Indian Law Institute, Vol. 31, No. 2, 1989, pp. 127-135.

164 For an analysis of the economic, social and political implications of an international arbitration of foreign investments see: S. WILSKE, M. RAIBLE & L. MARKET, *International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a Status Thing*, Asia ARB. J. 213, 2008, pp. 220-223.

involved through consent.[165]

Those issues are inherently more controversial than in commercial arbitration, where the legal basis of the dispute lies in the international commercial agreement between two investors acting "*iure privatorum*", which are also freely to determine with the other party the methods of dispute resolution arising from the contract.[166]

Based on these considerations, it has been argued that these differences lead to a different role assumed by arbitrators in deciding their respective disputes, since in investment matters – which led to a broader, all-embracing reasoning, since they are not limited to a single decision on the merits as in commercial disputes – they have a certain role creating and generating norms, which would allow them to set precedents.[167]

These reflections could benefit the individual's choices in initiating arbitration proceedings, since – depending on the alleged violation – there may be useful

---

[165] For a discussion of the different methods and possibilities of consent see: CHRISTOPH SCHREUER, *Consent to Arbitration*, in *The Oxford Handbook of International Investment Law*, (eds) Peter Muchlinski, Federico Ortino, and Christoph Schreuer. The author examines possible scenarios in investment arbitration, specifically analysing: *i*) consent by Direct Agreement, p. 832; *ii)* consent through Host State Legislation, pp. 833-835; *iii)* consent through Bilateral Investment Treaties, pp. 835-848; *iv)* consent through Multilateral Treaties, p. 850; and, finally, *v)* consent through Most-Favoured-Nation Clauses, pp. 851-856. Although all these possibilities are of utmost relevance in the light of the subject matter dealt with, reference is made at this stage to the third chapter, where it will be analyzed in detail what consequences there are for the investor – concerning access to justice – because of consent given in the manner specified above.

[166] These clauses are standardised, for example see the clause of the International Chamber of Commerce, which provides that: "*All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules*". For an analysis of the other clauses, applicable in accordance with the parties' requirements, see: https://iccwbo.org/content/uploads/sites/3/2016/11/Standard-ICC-Arbitration-Clause-in-ENGLISH.pdf.

[167] See H. ALVAREZ, *The Status and Duty of an Arbitrator: Is a BIT Arbitrator Different?*, 10th IBA International Arbitration Day - The Role and Responsibilities of an Arbitrator, International Bar Association, Madrid, 2007; L. S. SCHANER, *Madrid Conference Report-Record Turnout Gathers in Madrid to Discuss the Role and Responsibilities of an Arbitrator*, arb. comm. newsl. 5-8, 2007.

precedents that would enhance the individual's right of action, whether its situation is similar to the case already decided.

However, it is currently not possible to argue that there is an obligation for arbitral tribunals to follow previous decisions, mainly for two reasons: first, there are no rules obliging arbitrators, appointed and/or chosen to settle a dispute, to follow a previous arbitral award; second, in investment disputes each case is different and awards will only have value for the parties involved.[168]

That being said, it is nevertheless worth noting that arbitrations often address similar issues – frequently stemming from related treaty violations – and, while not representing a 'body of law', are sometimes found to have a formally binding effect due to the persuasiveness of the legal argumentation.[169]

Thus, what really seems to distinguish ITAs and ICAs is precisely the subject matter of the dispute, *i.e.,* whether a dispute arises out of an investment, as can be inferred from the well-known article 25 of the *ICSID* Convention, since the arbitral tribunal cannot be constituted only upon the breach of an agreement contained in an international commercial contract.[170]

Therefore, whatever the differences between these two areas, it seems more

---

[168] On consistency in international arbitration, see: N. BÉGUIN, *The Rule of Precedent In International Arbitration*, in: Jusletter 5, 2009; G. KAUFMANN-KOHLER, *Arbitral Precedent: Dream, Necessity or Excuse*?: The 2006 Freshfields Lecture, Arbitration International, Volume 23, Issue 3, 2007, Pages 357–378. For a broader analysis of the use of precedent by international judges and arbitrators see: G. GUILLAUME, *The Use of Precedent by International Judges and Arbitrators*, Journal of International Dispute Settlement. 2, 2011, 5-23.

[169] For example, regarding the purpose of the MFN clause, there are several ICSID tribunal decisions which seem to have taken this approach. For analysis and case law below see: S. WILSKE, M. RAIBLE & L. MARKET, *International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a Status Thing*, 1(2) contemp. asia arb. j. 213, 2008, p. 217 and, for the relevant case-law mentioned in the paper, see footnote 13.

[170] On the notion of investment for the purposes of Article 25 of the ICSID Convention, there is a considerable amount of interesting doctrine. Among many, see: M. WAIBEL, *Subject Matter Jurisdiction: The Notion of Investment* 19 ICSID Rep, (eds. Jorge Vinuales and Michael Waibel), Cambridge, University Press, 2021, 25-84; Y. FAROUK, '*The Notion of Investment? in ICSID Case Law: A Drifting Jurisdictional Requirement?*', 22, Journal of International Arbitration, Issue 2, 2005, pp. 105-126.

consistent, as far as the subject matter of this research is concerned, to focus on investment arbitration, then analysing the particularities of the several centres for the settlement of international investment disputes, which may reveal differences and similarities between these mechanisms in gaining access to international justice.

In international commercial disputes, the "international" vocation is often given by the e commercial relationship having a transnational character, but the legal object concerns only and exclusively private law obligations.[171]

Admittedly, in commercial arbitration, the object of the dispute may also be found in general principles of law of an international perspective, such as force majeure clauses in international contracts[172], but the individual's right to access to justice is not affected.[173]

In this respect, there would not even be a difficulty for the individual to access international justice, if by international justice we consider the recourse to specialised centres such as the International Chambre of Commerce (ICC) – as a paradigmatic aspect of 'international' access – because this choice is only a direct consequence of the agreements (or arbitration clauses) that the parties have established in their international contract (of sale and/or exchange of goods).[174]

---

[171] See G. A. BERMANN, "*International Arbitration and Private International Law General Course on Private International Law (Volume 381)*", in: Collected Courses of the Hague Academy of International Law", 2017, pp. 17-72.

[172] The issue of the applicability of force majeure in international trade disputes has arisen especially in the wake of the Covid-19 pandemic. On this topic, see: C. HELLWEG, *COVID-19 and Force Majeure: How Will International Arbitral Tribunals Treat Force Majeure Clauses Entered into Prior to the Pandemic?*, in The American Review of International Arbitration, 2020; M. MCCLURE, D. KIM, *COVID-19 and Force Majeure: Dealing with the Ongoing Waves of COVID-19*, in Kluwer Arbitration Blog, 2020.

[173] Although it is never questioned, access to justice in different investment centres often differs from one location to another, creating significant divergences in terms of legal fees and procedural costs. For a more in-depth analysis, refer to Chapter 3.

[174] Cf. J. POHL, K. MASHIGO AND A. NOHEN (2012), "*Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*", OECD Working Papers on International Investment, 2012/02, OECD

As regards investment treaty disputes, the situation is quite different.

The essential difference lies in the essence of the characteristic of arbitration, *i.e.,* its close relation to public international law, where the principle of sovereignty of states is the cardinal rule.[175]

Thus, the (judicial-legislative) actions of the host state against the investor cannot result in the automatic violation of the investor's rights, because state always has the possibility to use its sovereign powers to perform its functions.[176]

The crucial theme arises when the state exercises these powers to violate rules and principles binding upon States, whether from the customary or conventional point of view. At this point, when there is a violation by the host state, the rights of the investor who made the investment come into play, thus creating an indirect and mitigated right of access to justice.

This is indeed the only protection afforded to foreign investor, because in the absence of principles of public international law, the State would have no "limits" and would therefore trample on the investor's rights – personal and patrimonial – entirely.

Therefore, investment arbitration is about a right to bring an international claim, stemming from its various aspects and contents, comes up against technical, commercial and economic difficulties, which mainly affect international investment disputes.

In any case, there is no doubt that investment disputes contributed to make access to international justice for the individual more effective, especially from a procedural and substantive point of view.

8. THE "HUMAN" RIGHT TO ACCESS TO JUSTICE AND ITS RELEVANCE IN INTERNATIONAL HUMAN RIGHTS LAW.

Publishing. http://dx.doi.org/10.1787/5k8xb71nf628-en.

[175] For an overview see L. BOISSON DE CHAZOURNES, C.L MCLACHLAN, *Preface: The Intersection of Investment Arbitration and Public International Law*, *ICSID Review - Foreign Investment Law Journal*, Volume 31, Issue 2, 2016, pages 255–256.

[176] On the notion of sovereignty in foreign investment law see, J. E. VIÑUALES, "*Sovereignty in Foreign Investment Law*" in Z. Douglas, J. E. Viñuales and J. Pauwelyn (ed(s)), *The Foundations of International Investment Law*, Oxford University Press, 2014, pp. 317-362.

International human rights law has become one of the most discussed and analysed branches of public international law, achieving a high level of importance, principally for the protection of the individual.[177]

Contrary to the aforementioned analysis on access to justice relating to investment disputes, in the field of international human rights law it seems possible to refer to access to justice as a human right and not simply a right upon the individual.[178]

Clearly, there are different procedural frameworks[179] guaranteeing access to justice for the individual for the protection of human rights. While it will be necessary to analyse specifically the existing rules on the different ways for individuals to access international justice for the safeguard of their rights[180], there are two aspects to be considered first.

First, and more generally, it is necessary to briefly address the importance of the rule of prior exhaustion of local remedies since it constitutes one of the most important and widespread prerequisites enabling the individual to address his grievances to international judicial bodies.

Secondly, and more specifically, it will be necessary to understand what kind of consequences the recognition of the right of access to justice as a human right entail for the individual, differentiating between recognition between domestic and international jurisdiction.

8.1. PRIOR EXHAUSTION OF LOCAL REMEDIES: A FIRST EVALUATION OF

[177] For a more recent analysis of international human rights law see: C. ZANGHÌ, L. PANELLA, *La protezione internazionale dei diritti dell'uomo*, quarta edizione, Giappichelli, 2019; R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani. Teoria e prassi*, Giappichelli, 2020.

[178] Among the latest contribution, see: V. LIMA, M. GOMEZ, *Access to Justice: Promoting the Legal System as a Human Right.* in: Peace, Justice and Strong Institutions. Springer International Publishing, Cham, 2020, pp. 1-10.

[179] An analysis of the content of so-called "procedural justice" can be found in: I. GIESEN, L. KLAMING, *Access to Justice: The Quality of the Procedure.* SSRN Electronic Journal, 2008, 10.2139/ssrn.1091105.

[180] For these analyses, see Chapter 2 of the present work.

As regards the first perspective of analysis, it should be noted that there are different ways to file an international claim, but the common admissibility requirements almost always include the prior exhaustion of domestic remedies, which therefore represents a rule that obliges individual to firstly refer to domestic remedies provided by the State jurisdiction for the protection of his own rights.[181]

Although it represents the first form of protection that states granted to citizens injured abroad, over the years the approach has changed, mainly due to what can be called the 'modern' approach of the institution of diplomatic protection.[182]

As the International Court of Justice has argued, the legal reason for the rule of prior exhaustion of domestic remedies may be found in the possibility that the State must correct its own errors – procedural and substantive – for which it is alleged to have been responsible.[183]

This view undoubtedly represents a concrete application of the principle of territorial sovereignty, being the territorial jurisdiction one of the main characteristics.[184]

Although the importance of this rule is undeniable, it must nevertheless be specified that it is not a mandatory rule[185], since it could be derogated if prior

---

[181] A general analysis of the exhaustion of internal remedies can be in C. AMERASINGHE, *Local Remedies in International Law*, 2nd ed., Cambridge Studies in International and Comparative Law, Cambridge: Cambridge University Press, 2004.

[182] On the origin of the rule of prior exhaustion of local remedies, see J. R. CRAWFORD, T. D. GRANT, *Local Remedies, Exhaustion of*, in Max Planck Encyclopedia of Public International Law, 2007, paras 1-2.

[183] Cf. *Interhandel Case*, Judgment of March 21st, 1959: I.C.J. Reports I959, p. 6., par. 27.

[184] See M. DIXON, *Textbook on International Law*. Oxford: Oxford University Press, 2005. Specifically, see Chapter 6 where the author examines the concepts of jurisdiction and sovereignty in international law, pp. 148 ss.

[185] This is particularly relevant in international human rights law, where the sudden intervention of an international court – e.g., through provisional measures – may be the only way to safeguard personal freedoms. On this point, which will however be deepened by an analysis of the practice

exhaustion of domestic remedies where recourse to them would be inadequate, ineffective, or unreasonably prolonged.[186]

These circumstances inevitably lead to two different and consequential considerations. Firstly, if a party wishes to resort to an international *forum*, it will have two different possibilities: on the one hand, it will have to demonstrate that it has exhausted all domestic remedies to protect its rights before the local jurisdictional authorities; on the other hand, if it has not exhausted domestic remedies, it will be obliged to justify its non-action at local level by invoking one or more of the reasons set out earlier.

Therefore, the burden of proof of the existence – or otherwise non-existence – of domestic remedies is on the individual (alleged victim of state's violation), which will automatically lead the international tribunal to an initial examination of whether the fundamental principles of access to justice at the domestic level have been respected, but in the light of international standards and their implementation practice.

Secondly, once the individual complaints have been received, the burden will be on the respondent state to make two different considerations: either to admit that there were no other domestic remedies available for the protection of the individual or to identify other remedies which it should have used.

If the state opts for the second solution, the burden of proof will again fall on the individual to show that the remedies indicated by the state – and therefore not pursued – can be considered inadequate or ineffective.

That said, it will always be the task of the international tribunal to assess the reliability of the reasons put forward by both parties, clarifying – in one way or another – the correctness of the means used, or which should have been used.

Therefore, the importance of the rule of prior exhaustion of domestic remedies is of clear value not only for the individual who wants to bring an action before

---

in chapter II, see R. PILLAY, *The Politics of Interim Measures in International Human Rights Law*. In: Rieter E., Zwaan K. (eds) *Urgency and Human Rights*. T.M.C. Asser Press, The Hague, 2021, p. 76-79.

[186] See for example the case law of the Inter-American Court of Human Rights, cf. *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988, par. 64.

an international mechanism, but also for the state, which must provide for effective access to jurisdiction.

Consequently, prior exhaustion of domestic remedies could essentially be considered as a precondition for the exercise of the individual's right of access to international justice.

8.2. ACCESS TO JUSTICE AS A HUMAN RIGHT: CONSEQUENCES AND PERSPECTIVES.

Besides the foregoing considerations, it is necessary to focus on the content of the human right of access to justice in international law.

In contrast to the preceding section, we will not discuss a 'right' to access a method of dispute resolution to protect one's rights, but rather the content of the individual's right to access international justice.

To avoid possible overlapping, it is necessary to clarify that the individual's right of access to international justice does not mean the right of access to a judge (or access to court), which turns out to be only one of the categories composing the more general "access to justice".

Indeed, access to domestic courts for violation of a right is acknowledged as one of the most important aspects governing the rules on the right to a fair trial[187], which – especially since the Universal Declaration of Human Rights – has been a cornerstone in international law for the protection of the individual from arbitrary treatment.[188]

The relevance of this principle derives directly from the principle of legality,

[187] On the compatibility of due process and international law, see: Q. WRIGHT, *Due Process and International Law. American Journal of International Law*, 40(2), 1946, 398-406; M. PAPARINSKIS, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, European Journal of International Law, Volume 30, Issue 2, 2019, Pages 689–694.

[188] For a definition of the concept of arbitrariness, it could be useful to refer to the notion contained in the *Fourth report on State Responsibility* by Mr. F.V. Garcia-Amador, Special Rapporteur: Yearbook of the International Law Commission, 1959, vol. II, p. 7, examining "*The notion of "arbitrariness" and the doctrine of abuse of rights*". A/CN.4/119.

which obliges states to respect the rule of law, even in emergency situations.[189]

Although the categorization of human rights is useful but not crystallized, it is possible to define the right of access to justice as a right having a civil and political content, but with economic and social repercussions.[190]

On this topic, it should be borne in mind that general international law seems to recognize a customary norm providing – for those who consider themselves victims of violations inherent in their legal sphere – an obligation on a state to guarantee access to a judicial system.

There is indeed a customary rule that compels states to offer victims who have suffered the violation of one or more human rights domestic remedies through judicial bodies.[191]

If, as is well known, there is an obligation on the individual to apply in advance to national courts before bringing an action before an international court, there is also an obligation on national authorities to ensure that the individual is entitled to adequate and effective domestic remedies.[192]

The recognition of this rule is even more evident if reference is made to conventional instruments protecting fundamental human rights, which identify

---

[189] See UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 16.

[190] While it is true that access to the courts may be considered a civil and political right, the reasons leading the individual to international protection are also aimed at protecting the patrimonial legal sphere.

[191] On this topic, see R. PISILLO MAZZESCHI, *Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme*, in *Recueil des Cours*, vol. 333, 2008, pp. 352 – 365; R. PISILLO MAZZESCHI, *Il rapporto fra norme di ius cogens e la regola sull'immunità degli Stati: alcune osservazioni critiche alla sentenza della Corte Internazionale di giustizia del 3 febbraio 2012*, in *Diritti Umani e Diritto Internazionale*, 2, 2012, pp. 6 – 7. As examined above, this view is further supported by the existence of the customary rule that an individual must first exhaust his domestic remedies if he decides to bring his claims before an international court, see, among others: R. PISILLO MAZZESCHI, *Esaurimento dei ricorsi interni e diritti umani*, Torino, G. Giappichelli Editore, 2004.

[192] Cf. F. FRANCIONI, "*Il diritto di accesso alla giustizia nel diritto internazionale generale*", in F. Francioni, M. Gestri, N. Ronzitti, T. Scovazzi (eds), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea*, Milano, 2008, p. 3 ss. e p. 20.

the human right of access to justice.[193]

Moreover, this appreciation has been identified over the years by the jurisprudence of the various human rights courts and tribunals – which have elaborated an essential core of the right of access to justice – highlighting both substantive and procedural protection.

However, in the light of conventional instruments and the jurisprudence of human rights courts, it is peculiar that no conventional provision refers literally to the "right of access to justice".[194] Rather, it is possible to find references to corollaries of access to justice, such as 'effective remedy' or 'prompt and effective redress'.[195]

In this regard, the ECHR system – which is the most modern and adequate human rights protection mechanism among the regional treaty-based control

---

[193] Several international instruments, which will be specifically analysed in the second chapter, have provided for the right of access to justice as a human right at the disposal of the individual. See *Universal Declaration of Human Rights*, 10 December 1948, Art. 8; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 6, 13; *American Convention on Human Rights*, 22 November 1969, Art. 8, 25; *International Covenant on Civil and Political Rights*, 16 December 1966, articles 2(3), 9(4), 14(1) and *Optional Protocol to the International Covenant on Civil and Political Rights* art. 2; *African Charter on Human and Peoples' Rights*, 28 June 1981, articles 3, 7(1); *Charter of Fundamental Rights of the European Union*, 7 December 2000, art. 47(2).

[194] As pointed out before, see *supra* note _, it should be noted that the term "access to justice" is included in the *United Nations Convention on the Rights of Persons with Disabilities* (adopted on 13 December 2006 at the sixty-first session of the United Nations General Assembly by resolution A/RES/61/106), in Article 13, to expand the degree of protection afforded to persons with disabilities.

[195] For example, see Article 8 of the Universal Declaration, which recognises a right to an "effective remedy" before the competent authorities against acts that may violate fundamental rights recognised by law, cf. *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Special Rapporteur on the situation of human rights defenders, 2011, pp. 88 – 94. Even more specific is the reference which can be made to Articles 6 and 13 ECHR, concerning respectively the right to a fair trial and the right to an effective remedy, which are included in the broader concept of "access to justice", cf. V. ZAGREBELSKY, P. DE SENA, S. BARTOLE, (eds.), *Commentario Breve alla Convenzione Europea per la salvaguardia dei Diritti Dell'uomo e delle libertà fondamentali*, CEDAM, Padova, 2012. For an analysis of Articles 6 and 13, see pp. 172 - 257 and pp. 474 - 519 respectively.

systems[196] – has largely contributed to make the Convention's protection of individual claimants effective.[197]

Indeed, taking the Convention into account as a living instrument that must be interpreted and applied in the light of the circumstances of contemporary society[198], Strasbourg courts have been able to extend guarantees for claimants that were implicitly contained within the ECHR.[199]

The case-law, especially regarding the violation of articles 6 and 13 of the Convention – concerning respectively the right to a fair trial and the right to an effective remedy – is quite extensive.

To summarize the main features, it is indeed necessary to point out that regarding the violation of the right to a fair trial, the ECHR implicitly derived the right of access to an independent and impartial tribunal, making the various substantive guarantees contained in the provision effectively applicable, going beyond the literal interpretation of the legal text.[200]

Furthermore, it has been established that the right of access to justice must be considered as an autonomous right, especially in cases where the measures do not affect the substantive rights but the procedural capacity of the applicant,

---

196 In this sense see: P. PUSTORINO, *Lezioni di tutela internazionale dei diritti umani*, Cacucci Editore, Bari, 2020, e edn, p. 45.

197 It should be noted that the protection accorded to the individual complainant as a natural person is extended in the case law of the European Court also to the individual complainant as a legal person, guaranteeing protection for the prejudice suffered directly by the company and not by the directors or members of the company, see *Comingersoll S.A. v. Portugal*, GC, Rec. no. 35382/97, 6.4.2000, para. 35.

198 See *Tyrer c. Regno Unito*, ric. n. 5856/72, 25 April 1978, par. 31.

199 On this point, as regards violations of Article 6 para. 1, see the partially dissenting opinion of the judges Nicolaou, Bratza, Lorenzen, Jočiené, Villiger And Sajó in the case *Scoppola c. Italia*, (No 2), ric. n. 10249/03, 17.9.2009.

200 Cf. *Golder v. United Kingdom*, ric. n. 4451/70, 21 February 1975, paras 28, 36; *Tinnelly & Sons Ltd and Others and McElduff and Others v. United Kingdom*, ric. n. 20390/92, 10 July 1998, par. 72. For a topic overview see P. LEANZA AND O. PRIDAL, *The Right to a Fair Trial. Article 6 of the European Convention on Human Rights*, Kluwer Law International, 2014.

depriving him of this fundamental right.[201]

Accordingly, international case-law has established that it is the duty of states to provide effective judicial remedies for those who have suffered human rights violations and that such remedies must be supported by the rules of due process.[202]

In this sense, the right to have alleged violations examined by a pre-established impartial judge is recognized to every subject, this right being made up of two elements: the first one, on a procedural stage, obliges the state to guarantee access to the competent judicial body to ascertain the right claimed; the second one of a substantive nature, obliges the State to ensure that the final decision is implemented.[203]

Therefore, in the light of the norms on access to justice contained in human rights treaties and the subsequent practice of judicial review bodies, it is possible to say that there is now a customary norm which – in the event of human rights violations – guarantees access to justice and subsequent redress for the individual victim, both at domestic and international level.

9. CONCLUDING REMARKS.

On the basis of the considerations made in this first chapter, it seems appropriate to firstly comment the different perspectives analysed concerning access to justice.

Certainly, one of the first considerations that can be made concerns the importance in international law of non-state actors.

Although States retain a central role in international relations, recent years have seen a gradual shift away from the 'State-centric' perspective. Undoubtedly, the role assumed by individuals seems crucial in international law, when referring to

---

[201] See *Canea Catholic Church v. Greece*, ric. n. 25528/94, 16 December 1997; *The Former King of Greece and Others v. Greece*, ric. n. 25701/94, 23 November 2000.

[202] Cf. *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, para. 91 (June 26, 1987).

[203] See *Barbani Duarte et al. v. Uruguay*, Merits, Reparations, and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 234, para. 122 (Oct. 13, 2011).

this important transition.

This view is not a demonstration of the individual's subjectivity, but rather a mere recognition of a fact: legitimacy stems directly from international treaties for recourse to the various international forums. This legitimation, both passive (as a defendant) and active (as an alleged victim), stimulates these considerations. Therefore, the impact of the right of access to international justice on this radical development is undoubtedly crucial.

The centrality of the above argument is reaffirmed by the efforts made by the international community.

From what is clear from the analysis, it appears that States have been paying close attention to the recognition of access to justice, essentially imposing positive and negative obligations upon each other to safeguard such important entitlement.

Furthermore, the protection of weaker persons within the domestic (and consequently international) legal system through certain treaties strengthens the centrality of the right of access to justice.

Consequently, although relevant provisions on access to justice fall under the responsibility of States and indirectly to their citizens, these set certain standards which might be useful both at domestic and international level: at domestic level, because they provide a valid argument in support of the several provisions designed to protect vulnerable persons within each legal system; at international level, since they often allow to bring actions to safeguard human rights, thus further concretising the content of the right of access to justice.

In this sense, it seems clear from the analyses just carried out that even states, especially with the creation of Mixed-claims commissions, have been co-protagonists of this change. Providing the possibility for individuals to bring an action before an international forum, albeit with all the limitations and procedural differences highlighted above, has certainly helped to create a significant legal space.

This space provided the possibility for individuals who considered themselves victims of an act of the state to directly – and therefore without the intermediation or interposition of the State of their nationality – resort to mechanisms to bring complaints.

The non-interposition of the State itself to represent the individuals' interests is undoubtedly the most important contribution that Mixed-claim commissions have made to make individuals' access to international justice more effective.

Another fundamental point is the law applicable to disputes relating to Mixed-claim commissions. Being international tribunals, they adjudicate either according to certain international arbitration rules (UNCITRAL, for example) or through domestic laws applied taking into account the most important international principles.

Clearly, with the current means of dispute resolution, these mechanisms no longer seem to correspond to the needs of the legal market. Nevertheless, the procedures and the volume of solved claims have undoubtedly contributed to a recognition of the right of individual access to international justice.

Finally, it can certainly be deduced from the above analysis that the two fields of application where the individual has room for access to international justice are international investment law and international human rights protection.

In this chapter, an analysis has simply been made to clarify why these two fields are so important in the light of the objective of the paper.

In the next two chapters, will then be important to analyse more specifically the content of the right of access to justice and its implications for the international human rights law and international investment law.

CHAPTER II

ACCESS TO JUSTICE IN INTERNATIONAL HUMAN RIGHTS LITIGATION.

SUMMARY: 0. 1. Introduction. - 1. The importance of international human rights law: a cornerstone granting access to international justice. - 1.2. An overview of history and evolution of human rights and its relevance for individual access to justice. - 1. 3. The UN Charter and the UN Declaration of human rights: significant steps towards an individual human rights justice. - 1. 3. 1. The UN Charter. - 1. 3. 2. The Universal Declaration of Human Rights. - 1. 4. The domestic implementation of human rights: a specific legal protection for the individual. - 2. Access to justice as a human right v. individual access to international justice: same purpose, different result. - 2. 1. Universal instruments: a widespread interpretation of the right of access to justice. - 2. 2. United Nations treaty bodies: the individual complaint procedure. - 2. 3. The Human Rights Committee: brief overview - 2. 3. 1. Access to international justice through individual communication to the U.N. Human Rights Committee. - 2. 3. 2. Practical and linguistic consideration. - 2. 3. 3. First and foremost: the *ratione temporis* requirement. - 2. 3. 4. Individual legitimacy to activate the HRC communication procedure. - 2. 3. 5. The "same matter" admissibility requirement to the HRC. - 2. 3. 6. Request for *interim* measure and/or measure of protection in the HRC Communication. - 2. 3. 7. Summarize the communications facts. - 2. 3. 7. 1. The exhaustion of local remedies. - 2. 3. 7. 2. Abuse of right: specification of the "time-limits" to initiate the individual communication procedure to the HRC. - 2. 3. 8. Demonstrating the alleged State's human rights violations towards the victim. - 2. 3. 9. Exposing the victim *status* in the individual communication. - 2. 3. 10. Extraterritorial application of the ICCPR. - 2. 3. 11. Last remarks submitting the Communication to the HRC. - 2. 3. 12. The length of HRC individual communication procedure. - 2. 3. 13. Costs to the HRC: between (not necessary) legal fees and documents translation. - 2. 3. 14. Could an HRC Decision make the difference? - 2. 4. Regional treaties protecting human rights: the consolidation of the right of access to international litigation justice. - 2. 5. The ECHR system: a brief evaluation. - 2. 5. 1. Individual application to the ECtHR: access to international justice through the admissibility criteria. - 2. 5. 2. The victim *status* of the applicant to the ECtHR: a progressing assessment. - 2. 5. 3. Legal standing to the ECtHR: an expanding representation. - 2. 5. 4. Application costs and legal assistance: between fixed and variable costs. - 2. 5. 5. Exhaustion of local remedies and the six (four)-months' time limit. - 2. 5. 6. Same matter and new facts: between procedural and factual criteria. - 2. 5. 7. Manifestly ill-founded or abuse of right: defining the need of protection. - 2. 5. 8. *De minimis* criterion: a subjective assessment of the Court. - 2. 5. 9. Grounds of inadmissibility: an indirect admissibility criterion. - 2. 5. 10. Provisional measures and ECtHR: the importance of Rule 39. - 3. Conclusion.

0. 1. INTRODUCTION.

After the preliminary considerations made in the first chapter, it seems now necessary to focus the attention of the research on one of the two main areas

under consideration, namely the international protection of human rights.

Therefore, the analysis of this chapter will begin with a brief introduction on the evolution and ongoing importance of the international human rights law, since the development of this topic could be considered as the "starting point" of the elaboration of the right of access to justice in international law.

Once the general arguments have been discussed, specific analysis of the right of access to justice in international law through regional and universal treaty instruments will proceed. Since there are several human rights conventions, it will not be possible to examine all the instruments that guarantee an effective protection of the right of access to justice. Therefore, the study will focus on two different, but often interrelated, modalities enabling the individual access to international human rights litigation: the "individual communication" to the UN Human Rights Committee (hereinafter, the Committee or HRC) and the individual "application form" to the European Court of Human Rights (hereinafter, the Court, the ECtHR, or the Strasbourg judges).

However, unlike the well-known contributions that focus on the analysis of the different stages (or phases) before these two judicial (or quasi-judicial) bodies, this research aims to explore the legal features characterising what could be defined a "pre-procedural moment", *i.e.*, the initiative taken by an individual to activate these mechanisms. In a nutshell, the study will focus on the different legal conditions, both procedural and substantive, that guarantee and consequently help to develop an individual right to access to international justice.

1. THE IMPORTANCE OF INTERNATIONAL HUMAN RIGHTS LAW: A CORNERSTONE GRANTING ACCESS TO INTERNATIONAL JUSTICE.

Currently, international protection of human rights has taken on a leading role in international relations between States[204], thus conferring strong protection to

[204] On this topic, see M. SHAW, *The international protection of human rights*, in *International Law* (pp. 265-344). Cambridge: Cambridge University Press, 2008; C. KRAUSE, M. SCHEININ (eds.), *International Protection of Human Rights: A Textbook*, in *Åbo Akademi University Institute for Human Rights*, 2009.

the individual both at domestic and international level.[205]

As is well-known, not only this prominent position has been achieved through a continuous legal evolution of the discipline[206], but also through a series of historical and social transitions that have characterised its development.[207]

Among the various turning points, which have given incisiveness to the international protection of human rights for the individual, two of them appear to be fundamental and therefore deserve a brief in-depth analysis, also considering the research topic: *i)* the development that the protection of human rights has acquired in the historical, social and legal context from the period before the First World War to its affirmation in the aftermath of the Second World War; *ii)* the importance that international protection has managed to acquire by going beyond the traditional reciprocity of rights and obligations between States, through a mechanism of implementations of domestic legislation that has directly guaranteed protections for individuals vis-à-vis States.

As will be shown, these steps have directly affected the protection of the individual's access to justice in the international context.

1. 2. AN OVERVIEW OF HISTORY AND EVOLUTION OF HUMAN RIGHTS AND ITS RELEVANCE FOR INDIVIDUAL ACCESS TO JUSTICE.

Originally, only certain legal systems provided for the protection of human

Retrieved from Cadmus, European University Institute Research Repository,

[205] See A. TRINDADE, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, in *Columbia Human Rights Law Review*, 30(1), 1-28, 1998.

[206] As will be further investigate, this evolution is mainly due to the spread of the various human rights conventions and the enforcement practice of international courts, as well as increasingly effective domestic implementation.

[207] For an analysis of the evolution of international human rights protection see: P. G. LAUREN, *The Evolution of International Human Rights*, in Pennsylvania Studies in Human Rights, 3rd ed., University of Pennsylvania Press, 2011.

rights, but clearly this was only and exclusively at the domestic level.[208]

Indeed, once the general limitation concerning the jurisdiction reserved to States[209] over their own territory and therefore over subjects settled within it was overcome, a strong production of treaties, jurisprudence (both national and international) and legal doctrine aimed to consolidate the international protection of human rights as one of the most discussed topics of international law.[210]

On this premises, which are known and well discussed in the international legal debate[211], it could be interesting to explore the reasons why the international protection of human rights represented a useful means of protection – also for most vulnerable people – to safeguard and support the individual beyond domestic protection.

As a matter of fact, there are significant historical experiences showing that the protection of individual rights must go hand in hand with judicial recognition, as otherwise it would be totally empty of content.[212] This safeguard, which is in any case not comparable to the judicial mechanisms known today, identified particular groups of individuals who – because of their legal, religious, or social

---

[208] For an in-depth analysis on this issue, see P. G. LAUREN, *The Foundations of Justice and Human Rights in Early Legal Texts and Thought*, in *The Oxford Handbook of International Human Rights Law*, D. Shelton (ed.), pp. 163-193, 2013.

[209] The bibliography on the "domain reserved" to States is very extensive. Among many authors, see: G. ARANGIO RUIZ, '*Le domaine réservé: L'organisation internationale et le rapport entre droit international et droit interne: Cours général de droit international public*', (225), in: *Collected Courses of the Hague Academy of International Law*, 1990; P. J, SPIRO, *A New International Law of Citizenship*, in *American Journal of International Law*, 694, 2011.

[210] Cf. D. WEISSBRODT, F. NI AOLAIN, & M. RUMSEY, *The development of international human rights law*, Taylor and Francis, 2017.

[211] The legal doctrine concerning international human rights law is extensive. More recently, see O. DE SCHUTTER, *International Human Rights Law Cases, Materials, Commentary*, Cambridge University Press, 3rd ed, 2019; D. MOECKLI, S. SANGEETA, AND S. SIVAKUMARAN, *International Human Rights Law*, Oxford University Press, 3rd ed, 2017; R. K. M. SMITH, *International Human Rights Law*, Oxford University Press, 9th ed, 2019.

[212] On this very specific topic, see C. WELLMAN, *Judicial Recognition of Human Rights*, in *The Moral Dimension of Human Rights*, Oxford University Press, Chapter 9, 2010.

status – were protected by international treaty law.

For example, among these older agreements, it is worth mentioning the Paris Peace Treaty[213] and the Berlin Congress[214], which represented two instruments of protection for Christian minorities in the territories ruled by the Ottoman Empire.

Furthermore, after World War I, the main Allied powers ensured that the newly formed States – Eastern and Central European States – became parties to treaties to protect the minorities living within them. One of these treaties was certainly the Treaty concerning the Recognition of the Independence of Poland and the Protection of Minorities.[215]

However, one important distinction stands out. These treaties, concluded after the First World War, had an important role played by the League of Nations, which not only acted as the guarantor of these treaties, but also guaranteed a mechanism through which minorities could complain about violations and enforce the rights contained in the conventions.[216]

Clearly, these mechanisms never provided direct access for the individual, as a singular person or as a group. Indeed, these were institutional mechanisms that – if raised issues of specific legal importance or difficult interpretation – could be triggered by the Council of the League of Nations, which then would invoke the jurisdiction of the Permanent Court of International Justice, providing an advisory opinion.[217] Contrary to what might be assumed, the Court's advisory opinions on this type of issue have been varied. Among them, the following should certainly be mentioned the Access to German Minority Schools in Upper

---

213 *General Treaty for the Re-establishment of Peace* [signed 30 March 1856, entered into force 27 April 1856] 114 CTS 409.

214 *Treaty for the Settlement of Affairs in the East* [signed 13 July 1878, entered into force 3 August 1878] (1908) 2 AJIL Supp 401.

215 *Treaty concerning the Recognition of the Independence of Poland and the Protection of Minorities* (signed 28 June 1919, entered into force 10 January 1920 (1919) 13 AJIL 423).

216 Cf. League of Nations, *Covenant of the League of Nations*, 28 April 1919.

217 On this topic, see L. GOODRICH, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, in *American Journal of International Law*, 32(4), 738-758, 1938.

Silesia and Minority Schools in Albania.[218]

It seems therefore reasonable to assume that already after the First World War there was a tendency to think in terms of protecting the individual – albeit in a collective manner – needs of persons against act or omission made by States. As known, the advisory opinions were not binding upon states, but as far as our investigation is concerned, these basically represent how the protection of human rights allowed access – albeit in an indirect and filtered way – to international justice. In this respect, these were not yet instruments that conferred rights on individuals, but collective protection of certain specific categories of subjects, which clearly represent an important antecedent to the instruments of international protection of human rights as we know at current times.

The situation definitely changed at the end of the Second World War, when states – first with the Charter of the United Nations and later with the Universal Declaration of Human Rights – created the modern international protection of human rights. Both these instruments, which are fundamental to the evolution of international law, have contributed in different ways to the international human rights law.

1. 3. THE UN CHARTER AND THE UN DECLARATION OF HUMAN RIGHTS: SIGNIFICANT STEPS TOWARDS AN INDIVIDUAL HUMAN RIGHTS JUSTICE.

1. 3. 1. THE UN CHARTER.

It seems appropriate to firstly focus on the Charter of the United Nations, because it marginally pays attention – despite reaffirming the importance of the

[218] Cf. *Access to German Minority Schools in Upper Silesia*, Germany v Poland, Advisory Opinion, (1931) PCIJ Series A/B no 40, ICGJ 286 (PCIJ 1931), 15th May 1931; *Minority Schools in Albania*, Advisory Opinion, PCIJ Series A/B no 64, ICGJ 314 (PCIJ 1935), 6th April 1935.

domain reserved to States[219] – to the protection of human rights, as its main purpose was to provide a founding treaty for the emerging United Nations Organisation, with the general target to maintain international peace and security.

Nevertheless, there are references aimed at recognising the importance of human rights as a matter of international concern, which will serve as a basis for subsequent codification in the Universal Declaration. For example, one of the first references is present in the preamble[220] where the desire "[...] *to reaffirm faith in fundamental human rights, in the dignity and worth of the human person* [...]"[221] immediately highlights one of the objectives of the Nations gathered in San Francisco.

Moreover, even in Chapter I concerning "purposes and principles", one of the purposes of the United Nations to achieve international cooperation – to solve economic, social, cultural, and humanitarian problems – is precisely that of "[...] *encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion* [...]".[222]

Subsequently, some references can be found in Chapter IX of the Charter dedicated to international economic and social cooperation, where articles 55[223] and 56[224] substantiate modalities through which States shall formulate their

---

[219] This is the well-known reference that is reiterated in Article 2(7) of the UN Charter, which excludes the application of the principle of dominion reserved to States only in relation to coercive measures taken by the Security Council in the light of Article 7 of the Charter. However, over time the doctrine has clarified that such a reference within the Charter does not mean that the United Nations should remain indifferent in situations where serious and widespread human rights violations occur, see J. SHEN, *'National Sovereignity and Human Rights in a Positive Law context'*, in *Brooklyn Journal of International Law*, 26, 417, 2000.

[220] The importance of the preamble in treaty interpretation is well known in international law, see M. H. HULME, *Preamble in Treat Interpretation*, in *University of Pennsylvania Law Review*, 164(5), 1281-1346, 2016.

[221] UN Charter, *Preamble.*

[222] UN Charter, art. 1, para 3.

[223] Specifically, art. 55 (c) of the UN Charter.

[224] It is clearly stated that […] *all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55* […].

human rights policy. Clearly, these articles have only provided inspiration for the adoption of several human rights treaties with monitoring mechanisms, created within the United Nations.[225]

Therefore, it seems apparent that in the aftermath of the atrocities committed after the Second World War, States of the international community identified a growing demand for legal safeguard beyond the protection of the individual as such within the domestic jurisdiction. The individual not only had a need for protection abroad, but also and above all within his own State, *i.e.*, a need protection from his own government. A protection was therefore taking place in which the interests of rulers and ruled subjects, rather than between private individuals, were in opposition.

Therefore, the necessity stemmed from the interest in the protection of the individual, who – in the event of the violation of rights concerning his legal sphere – would find himself in a situation of perpetual injustice. Clearly, the internal judicial organisation of the state represented – and still represents – the first possibility for the individual to assert his rights.

Hence, the problem is consequential: an individual would not have been able to protect himself against an alleged violation of his rights, that could have taken place against him in the domestic courts. This impasse would have led to a lack of possibility, namely the procedural protection of being able to address one's claims on the merits to a court that could have judged the responsibility of the state for having violated the individual's rights.

In this sense, it seems that this reasoning is nothing more than the legal basis for the establishment of international human rights courts and, therefore, the creation of a right of access to justice in international law.

1. 3. 2. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

[225] According to Judge Burghental's authoritative opinion, these mechanisms created within the UN, strengthened by regional human rights treaties, as well as the jurisprudence of international and regional tribunals, explain the substantial progress that has been made in the protection of human rights worldwide, see T. BUERGENTHAL, *The Contemporary Significance of International Human Rights Law*, in *Leiden Journal of International Law*, 22(2), 217-223, 2009.

As pointed out above, the Universal Declaration of Human Rights represents one of the most important steps in the evolution of the international protection of human rights.

From a purely legal point of view, it is the first declaration of principles drafted by the UN Commission on Human Rights and adopted by the General Assembly of the United Nations[226], which therefore does not constitute an autonomous source of general international norms.[227]

From a substantive point of view, the rights and freedoms contained in the Declaration can be subsumed under five categories: *i)* inherently personal freedoms; *ii)* rights and freedoms that guarantee personal security; *iii)* rights concerning the political life of the individual; *iv)* economic and social rights; *v)* rights concerning the social and legal life of the individual.[228]

It can therefore be observed that the legal thinking behind the Declaration is based on a twofold purpose: on the one hand, to draft a document with the aim of international protection of human rights and which could have been more easily accepted by all the States that contributed to its formation, since it is not a treaty; on the other hand, it represents a true synthesis of the different legal, political and ideological traditions that the United Nations member States had after World War II, contributing to giving a strong impulse – both at international and domestic level – to the international protection of human rights.

Clearly, the General Assembly can provide Recommendations, which have a typically exhortative value, but the Declaration falls into the category of

---

[226] See UNGA Res 3/217, 10 December 1948 and UN Doc A/RES/3/217A.

[227] Accordingly, since its formation the General Assembly has contributed to issuing a series of resolutions containing different types of provisions, concerning both the relations between states and the relations they have with their subjects or foreigners. On this point and for a rather exhaustive list of the different declarations made by the General Assembly see CONFORTI, *op. cit.*, p. 65-66.

[228] For a brief but concise analysis of the division and content of the articles, see J. WOUTERS ET AL., *International Law: a European perspective*, Oxford: Hart, 2019, p. 678.

resolutions, which, as such, are not binding upon the States.[229]

Once these technical considerations have been made, it seems quite difficult not recognising the fundamental role the Declarations of the General Assembly – and in particular the Universal Declaration – have played in the development of international law, to which the important contribution made to the international protection of human rights must certainly be acknowledged. Thus, although it cannot therefore be considered a binding legal act, there is no doubt that some of the rights contained in the Convention are part of customary international law[230] and, even more so, have acquired a *jus cogens* force.[231]

Apart from these brief and well-known considerations, there is no reference in the HR Declaration to the right of access to international justice. It seems reasonable to assume that the absence of a provision guaranteeing access to international *fora* was dictated by the need to include in the document civil, political, economic and social rights that responded more readily to the needs of society during that particular historical period.

Nevertheless, for the purposes of this research, the Universal Declaration certainly represents an important turning point, mainly from two points of view: firstly, it contributed to the diffusion of the international protection of human rights, representing a cornerstone not only for the subsequent international instruments but also for the different internal legislations of states; secondly, the Declaration, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols constitute the so-called "International Bill of Human Rights". Therefore, while previously there was a legal system that only considered the relations established or to be established between sovereign

---

[229] It seems appropriate to recall the preamble of the Charter, which states that "*to provide merely a common understanding of the human rights and fundamental freedoms mentioned in the UN Charter*", see UN Charter, Preamble.

[230] See in this sense what has been analysed by O. DE SCHUTTER, *International Human Rights Case Law: Cases, Materials*, Commentary, 2nd ed., Cambridge, CUP, 2015.

[231] On the *jus cogens* obligation, see the findings of the International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422, para 99.

states, over time there has been a growing desire to regulate relations between States and individuals.[232]

1. 4. THE DOMESTIC IMPLEMENTATION OF HUMAN RIGHTS: A SPECIFIC LEGAL PROTECTION FOR THE INDIVIDUAL.

For the purposes of the present chapter, attention should first be drawn to the difference[233] between the international protection of human rights at the international level and within the constitutions or laws of States. This difference is rooted in the development of human rights protection, which has, however, followed a very particular path.

Indeed, recognition of individual rights as natural rights first developed in various fundamental laws of the States of the international community.[234] Subsequently, these principles on human rights will be transposed by States at the conventional level, to create a minimum nucleus of rights – the so-called "*international minimun standars*" – that all the subjects of the international community should have guaranteed to their individuals.[235]

More recently, it seems interesting to observe how – after the consolidation of these values through conventional norms creating obligations for States party – there is a reverse return, *i.e.*, human rights principles developed because of the evolution of the jurisprudence of international courts now influencing domestic

---

[232] See P. MACKLEM, *What is International Human Rights Law? Three Applications of a distributive account,* 52, McGill L.J. 575, 2007, p. 579.

[233] Therefore, although this difference exists, there are spaces through which domestic law is often modified – or rather adapted – to the protection needs expressed by States at the international-conventional level. Indeed, it is necessary to consider the contribution that human rights have made to the international protection of individual and collective rights, as, for example, highlighted by the Universal Declaration of Human Rights.

[234] See, for example, the French and American Constitutions, which in this sense transformed into positive law (the constitutions, hence the fundamental law of the state) all the 'innate' human rights, in line with the natural law conception were to be granted to the human being.

[235] It was a reference to the different values in the Western versus Eastern hemisphere. For an analysis on this point see: P. GAETA, J. E. VIÑUALES, AND S. ZAPPALÁ, *Cassese's International Law*, 3rd ed., Oxford University Press, p. 406, 2020.

legal systems.

In this sense, the influence that States have undergone because of human rights developments has led to two, often interrelated, results: first, that it is now possible to invoke norms concerning the international protection of human rights before domestic courts; second, States party to international human rights conventions have had to amend their own legal systems in order not to fail to meet their conventional obligations. Both consequences identified above, have a decisive bearing on the right of individual's access to international justice.

Regarding the first result, it is necessary to specify that an individual can now complain before domestic tribunals not only about alleged violations of domestic legislation, but also about all those rights guaranteed to him/her through human rights treaties to which his/her own state is a party, and which therefore become binding at the domestic level. This topic is particularly relevant if one considers the judicial mechanism created within the European Union, which allows for the use of EU legislation directly within domestic courts.[236] This is clearly demonstrated by one of the cardinal principles in this field, namely the principle of direct effect. This principle, which was developed on a case-law basis[237], guarantees individuals the possibility of directly invoking European legislation which they consider to be harmful to their rights before the national courts, whether of their own country or of an EU Member State. Although this possibility does not extend to every European legal act[238], it represents a chance

---

[236] On this specific topic, see M. BOBEK, *The Effects of EU Law in the National Legal Systems*, C. Barnard and S. Peers (eds.), *European Union Law*, Oxford University Press, 2014, 140-173, December 23, 2013

[237] Following the notorious "van Gend & Loos", *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Judgment of the Court of 5 February 1963, stating for the very first time that EU law not only engenders obligations for EU Member States, but also rights for individuals. Therefore, individuals may take advantage of these rights and directly invoke EU law before national and European courts, independently of whether the national law test exists.

[238] About the topic in general, see P. CABRAL, R. NEVES, *General Principles of EU Law and Horizontal Direct Effect*, 17, in *European Public Law*, Issue 3, pp. 437-451, 2011; S. ROBIN-OLIVIER, *The evolution of direct effect in the EU: Stocktaking, problems, projections*, in *International Journal of Constitutional Law*, Volume 12, Issue 1, Pages 165–188, 2014.

for individuals to invoke European law before national courts, ensuring enforceability and effectiveness in EU MS countries.

On the second issue, it is sufficient to recall the various amendments regarding the legislation of the States Parties to the ECHR have made following decisions of the ECtHR.[239] This situation consists in the so-called "relationship between human rights treaties and domestic law"[240] since the main conditions for human rights norms to be effectively observed – by States that are parties to the Convention for the Protection of Human Rights – at the domestic level are twofold: first, these norms find direct application in the legal systems of States, which may differ according to the openness that such a system has at the international[241] or domestic[242] level; second, a great impact depends on the process to incorporate international law norms that each state adopts, which affects the rank given to the (international) norms at the domestic level.[243]

Such developments, which thus oblige the States parties to both positive and negative obligations, have clearly increased the protection of the fundamental rights of the individual, since States not only are obliged to adapt their legislation when implementing the Treaty[244], but are also obliged to intervene following decisions issued by the supervisory bodies that monitor compliance with the

[239] Specifically, see the work of the Venice Commission on this topic. Council of Europe, *Draft Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role the Courts*, study no. 690/2012, 2014.

[240] On this topic, see L. G. BARNETT, *International Human Rights Norms and their Domestic Application*, in Revista Instituto Interamericano de Derechos Humanos, n. 29, pp. 11-23, 1999.

[241] This is the well-known issue of the monistic or dualistic approach of domestic systems to international law. In literature see P. VERDIER, M. VERSTEEG, *International Law in National Legal Systems: An Empirical Investigation*, in *American Journal of International Law*, 109(3), 2015.

[242] Cf. E. DENZA, *The Relationship between International and National Law*, in *International Law*, 4th ed., edited by Malcolm Evans, 412–440, Oxford: Oxford University Press, 2006.

[243] On this matter, see P. PUSTORINO, *Lezioni di tutela internazionale dei diritti umani*, Cacucci Editore, Bari, 2020, 2 ed., p. 45.

[244] See V. GRÜNWALDOVÁ, *General and Particular Approaches to Implementation of the European Convention on Human Rights*, in *Canadian Yearbook of International Law/Annuaire Canadien De Droit International*, 55, 248-292, 2018.

Treaties.[245]

It is therefore a matter of constant monitoring, which obliges domestic legal systems to also comply with the normative interpretations made by international courts. In this sense, the most emblematic example is undoubtedly represented both by the supervision carried out by the European Court of Human Rights on the compliance of States parties to the ECHR and its protocols[246], and by the scrutiny performed by the Committee of Ministers of the Council of Europe on the execution of Strasbourg judgments.[247]

The kinds of decisions and judgments the Court can adopt are different and functional to a constant develop of international human rights law[248], due above all to the work carried out by the Court's on its evolving case-law, which now has the possibility of indicating general and specific measures to the state whose legal system does not comply with the ECHR or its protocols.[249]

As far as the subject matter of this research is concerned, a brief analysis of the general measures seems more appropriate, since the individual measures indicated by the Court tend to be based on specific non-compliance with the Convention and its protocols, therefore consisting in an *ad hoc* solutions.[250] Through the general measures – which are often identified with the term "pilot judgments" – the Court indicates to the state party measures that must be adopted following structural problems (or to be more precise, violations) within

---

[245] For an in-depth analysis, see J. H. GERARDS, J. FLEUREN, *Implementation of the European convention on human rights and of the judgments of the ECtHR in national case law*, 1st ed., Intersentia, 2014.

[246] See ECHR, art. 19.

[247] See in this sense the amendments introduced to Article 46 ECHR in the light of Protocol 14, which specifically amended paragraphs 3 and 4.

[248] On this matter, see J. VILJANEN, *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, 2008.

[249] Since the early 2000s, specifically since the *Scozzari and Giunta v. Italy*, app. nn. 39221/98 and 41963/98, 13.07.2000 [GC], the Court has widened the types of judgments that can be adopted. For an analysis see PUSTORINO, *op. cit.*, p. 55.

[250] See ECHR, art. 46.

the legal system.[251] Once the Court has adopted these measures, the state will be able to carry out several actions or remedies, including changes in legislation or administrative apparatus. Indeed, if the state does not comply with the decision of the ECHR, it will face repeated violations of the norm(s) laid down in the ECHR or the protocols.

All these considerations even further reaffirm the importance that the evolution and constant development of human rights has had for the protection of the individual.

These evaluations will now have to be compared with the progress that the international protection of human rights has made with respect to the right of access to justice, which is the most effective way of protecting the individual before international courts.

2. ACCESS TO JUSTICE AS A HUMAN RIGHT V. INDIVIDUAL ACCESS TO INTERNATIONAL JUSTICE: SAME PURPOSE, DIFFERENT RESULT.

Thus, if it is quite clear that the development of international protection of human rights represented a turning point for the individual's access to international justice, it is now appropriate to comprehend how this right has been implemented at the conventional level.

For this reason, it seems appropriate to first differentiate between the of the access to justice considered as a "human right" and the individual right of access to international justice litigation. Clearly, the difference relates to the scope and the object of protection, since the main argument is still access to justice, but it is nevertheless important because it circumscribes even more clearly the scope of protection to which this work seeks to address.

Indeed, the protection of the human right to access to justice – understood as

[251] On the pilot judgments of the European Court and their consequences see: D. HAIDER, *The Pilot-Judgment Procedure of the European Court of Human Rights*, Martinus Nijhoff Publishers, 2013; A. BUYSE, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, in *Nomiko Vima (The Greek Law Journal)*, Vol. 57, pp. 1890-1902, 2009; L. R. GLAS, *The European Court of Human Rights Supervising the Execution of Its Judgments*, in *Netherlands Quarterly of Human Rights*, 37, no. 3, 2019.

the right to an independent and impartial tribunal, or the right to an effective remedy – is easy to find in most universal and regional human rights instruments.

Temporarily, it should be noted that already the Universal Declaration of Human Rights – adopted by the General Assembly of the United Nations on 10 December 1948 – recognises in article 8 the right to an effective remedy before the competent authorities against acts that may violate the fundamental rights recognised by law[252] and in article 10 the right of everyone to a fair and public hearing before a third and impartial tribunal.

In the wake of the Universal Declaration, the European Convention for the Protection of Human Rights and Fundamental Freedoms[253] (ECHR) – adopted on 4 November 1950 – is the cornerstone for the recognition of the individual's access to justice in international law. In this regard, both articles 6 and 13 – respectively concerning the right to a fair trial and the right to an effective remedy – are included in the broader concept of access to justice, which refers to the various elements that guarantee an effective remedy against the alleged violation of a right, such as information on rights and proceedings, legal assistance, legal representation, legal standing, or general access to the courts.[254]

Similarly, on the American continent, the American Convention on Human Rights[255] (San José Covenant) – adopted on 22 November 1969 – provides in article 8 that everyone has the right to a trial by a competent, independent and impartial tribunal, thus guaranteeing him or her a prompt and effective remedy and, in article 25 – further extending the protection granted to the individual – not only the protection of the rights guaranteed by the Convention but also the

---

[252] See in this connection: *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Special Rapporteur on the situation of human rights defenders, pp. 88 – 94, 2011.

[253] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950.

[254] See V. ZAGREBELSKY, P. DE SENA, S. BARTOLE, (eds.), *Commentario breve alla convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, CEDAM, Padova, 2012. For an analysis of Articles 6 and 13, see pp. 172 - 257 and pp. 474 - 519 respectively.

[255] Organisation of American States (OAS), *American Convention on Human Rights 'San José Pact'*, Costa Rica, 22 November 1969.

fundamental human rights recognised in the law of the State.[256]

Moreover, it seems appropriate to recall Article 2(3) of the International Covenant on Civil and Political Rights[257] – adopted in New York in 1966 and entered into force in March 1976 – which obliges each state party to the Convention to guarantee the individual effective remedies, to ensure a remedy provided by judicial, administrative or legislative authorities and to guarantee the enforcement of remedies. Similarly, articles 9(4) and 14(1) ensure the recognition of access to justice as a right of the individual, guaranteeing respectively the right of the individual to a procedure before a court and the right to a fair and public hearing.[258]

This recognition can also be found in the African Charter on Human and Peoples' Rights[259] – adopted in Nairobi in 1981 and in force since 1986 – which, in article 7(1), guarantees the individual that his or her case will be heard and, in article 3, ensures the right to equality and full protection before the law.[260]

Recently, in the European regional context, the Charter of Fundamental Rights of the European Union[261] – officially proclaimed in Nice in December 2000, re-proclaimed in December 2007, and legally binding in the European Union in 2009 with the entry into force of the Lisbon Treaty – is of quite relevance, since provides in article 47(2) for the protection of the individual in the event that fundamental rights and freedoms are violated by the EU institutions.[262]

---

256 For a more in-depth analysis, see: M. ANTKOWIAK AND A. GONZA, *The American Convention on Human Rights*, First Edition, New York, Oxford University Press, 2017.

257 *International Covenant on Civil and Political Rights*, adopted by General Assembly Resolution N.U. 2200° (XXI) of 16 December 1966.

258 See *The International Covenant on Civil and Political Rights - Cases, Materials, and Commentary*, 3rd Edition by Joseph, Sarah; Castan, Melissa, 2013.

259 Adopted in Nairobi on 28 June 1981 by the Conference of Heads of State and Government of the Organisation of African Unity. Entered into force on 21 October 1986.

260 For a comprehensive analysis of the Charter see: G. PASCALE, *La tutela internazionale dei diritti dell'uomo nel continente africano*, Jovene editore, Napoli, 2017.

261 Charter of Fundamental Rights of the European Union, [2012/C 326/02].

262 See for an in-depth comment: A. RIZZO, *Commento alla Carta dei diritti fondamentali dell'Unione europea*, Giuffré Editore, 2014, in *Trattati dell'Unione Europea*, Antonio Tizzano, II Edizione. It also notes the case law of the Court of Justice of the European Union. In particular, see on

Undoubtedly, these instruments – through the jurisprudence of their respective judicial control mechanisms – have contributed to the creation of a nucleus protecting substantive and procedural rights. It is therefore one of the main rights complementing the more general right to a fair trial, which concerns not only the modalities of access to the national court, but also places positive obligations on States parties to the Convention, including the organisation of the national judicial system, which must be ensured in such a way that all proceedings are conducted in a fair, efficient, and independent manner from other powers of the State.[263]

However, while considering the aforementioned legal instruments, the purpose of the protection does not entail the evaluation of the individuals' access to international justice, but to safeguard them against possible violations by the state through the international courts, which – through their established jurisprudence – will judge whether a person has not been fully guaranteed access to justice in domestic courts.

Without prejudice to the above considerations, it is now appropriate to consider how a person may access international human right justice for the protection of his or her rights, by attempting to understand the peculiarities of the different systems that allow individual access to international mechanism for the protection of human rights.

Considering these issues, it is now necessary to explore the focus of the research, analysing access through universal and regional human rights instruments. Indeed, the instruments allowing individual access are numerous, therefore the analysis will focus on two very specific perspectives: with regard to universal instruments, the UN Human Rights Committee will be considered, as it is undoubtedly one of the most used mechanisms within the United Nations; with regard to regional instruments, the analysis will focus on the European

---

access to a court CJEU, Joined Cases from C-128/09 to C-131/09, C-134/09 and C-135/09, *Antoine Boxus, Willy Roua, Guido Durlet e a., Paul Fastrez, Henriette Fastrez, Philippe Daras, Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh), Bernard Page, Léon L'Hoir, Nadine Dartois c. Région wallonne*, 18 October 2011, §§ 49-57.

[263] Above all, from the interference that could come from the executive power.

Court of Human Rights, which is unquestionably the most developed and effective regional mechanism for the protection of fundamental human rights.

2. 1. UNIVERSAL INSTRUMENTS: A WIDESPREAD INTERPRETATION OF THE RIGHT OF ACCESS TO JUSTICE.

Universal instruments for the protection of human rights are characterised by the fact that they are spread among all the States of the international community, without distinction between regions of origin.

For this analysis, the study will focus on treaties within the United Nations, which have provided mechanisms for monitoring and protecting the rights contained therein, thus facilitating the development of the right of access to international justice mechanism.

2. 2. UNITED NATIONS TREATY BODIES: THE INDIVIDUAL COMPLAINT PROCEDURE.

Human rights bodies are all those bodies of a semi-jurisdictional nature dealing with human rights issues[264], therefore it seems appropriate to scrutinize the "monitoring mechanisms" or "follow up procedures" set up to safeguard compliance with treaties, since there are various ways, this follow-up could take place.[265]

However, for the purposes of this research the focus will be on the so-called

[264] On this topic see M. O'FLAHERTY, *Human Rights and the UN: Practice before the Treaty Bodies*, Kluwer Law International, 2002.

[265] In addition to the individual complaints procedures, which will be analysed specifically below, these are: *i)* the reporting procedures, where States parties to human rights treaties are obliged to periodically report the implementation of the treaty at a domestic level to a supervisory body, see for example art. 40 ICCPR; *ii)* the inter-State complaint procedure, although rarely used, which allow a State party to a treaty to initiate a procedure against another State party, as for example enshrined in art. 21 CAT; *iii)* the inquires procedures, where independent group of experts could deal with issues of non-compliance with human rights obligations in a State party to a treaty, see for example art. 41 ACHR.

'individual complaint procedures', which have therefore allowed direct access to international justice for the individual.

There are currently nine human rights treaties that have established a treaty body – made up of human rights experts – to monitor the implementation of treaty provisions by member States, but only eight of these can assess individual complaints submitted by individuals.[266]

In addition to the UN Human Rights Committee, which will be analysed more specifically below, there are other treaty bodies. As in the case of the HRC, some of these may be addressed by an individual only if the state – against the individual wish to claim its alleged treaty violation – ratified the Optional Protocol to the Convention, such as the CEDAW[267], the CRPD[268], the CESCR[269] and the CRC[270]; others, on the other hand, may only be seized if the state party

[266] In this connection, it seems appropriate to specify that as for the Committee on Migrant Workers (CMW), the individual complaint mechanism has not yet entered into force. Indeed, article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families gives the Committee on Migrant Workers (CMW) competence to receive and consider individual communications alleging violations of the Convention by States parties who made the necessary declaration under article 77. This individual complaint mechanism will become operative when 10 states parties have made the necessary declaration under article 77.

[267] See the Committee on Elimination of Discrimination against Women (CEDAW). This Committee may consider individual communications alleging violations of the Convention on the Elimination of All Forms of Discrimination against Women by States parties to the Optional Protocol to the Convention on the Elimination of Discrimination against Women.

[268] The Committee on the Rights of Persons with Disabilities (CRPD) may deal with individual communications alleging violations of the Convention on the Rights of Persons with Disabilities by States parties to the Optional Protocol to the Convention.

[269] As well known, the Committee on Economic, Social and Cultural Rights (CESCR) may evaluate individual communications alleging violations of the International Covenant on Economic, Social and Cultural Rights by States parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

[270] The Committee on the Rights of the Child (CRC) may consider individual communications alleging violations of the Convention on the Rights of the Child or its two first Optional Protocols on the sale of children, child prostitution and child pornography (OPSC), and on the involvement of children in armed conflict (OPAC) by State Parties to the Third Optional Protocol on a communications procedure (OPIC).

to the Convention has made the necessary declaration to institute individual proceedings under an article of the Convention, such as the CAT[271], the CERD[272] and the CED.[273]

For the purposes of the present discussion, a specific analysis will be made of the adoption of individual communications by the UN Committee on Human Rights. This choice has been made for two reasons: first, it represents a procedure which in some respects is similar to all the others listed before, therefore prescribing – with the necessary differences – a line of "common procedure"[274]; second, it is undoubtedly the most successful procedure among those listed for individual communications, since in nine years, the amount of registered cases has quadrupled, and the number of pending cases has risen from 352 in 2011 to 1178 by December 2019. Among these, "closed" cases – which include both adoptions of views and decisions of inadmissibility and discontinuity – never fall below an average of almost 120 cases per year.[275]

2. 3. THE HUMAN RIGHTS COMMITTEE: BRIEF OVERVIEW.

[271] The Committee against Torture (CAT) may consider individual complaints alleging violations of the rights set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States parties who have made the necessary declaration under article 22 of the Convention.

[272] The Committee on the Elimination of Racial Discrimination (CERD) could consider individual petitions alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination only by States parties who have made the necessary declaration under article 14 of the Convention.

[273] The Committee on Enforced Disappearances (CED) may consider individual communications alleging violations of the International Convention for the Protection of All Persons from Enforced Disappearance by States parties who have made the necessary declaration under article 31 of the Convention.

[274] This seems to be the approach outlined in the "*Submission form of individual communications to treaty bodies*", where the first choice required to an individual, even before specifying his or her personal details, is to immediately indicate against which body the communication is to be made.

[275] This is an analysis carried out considering official data provided by the Report of the Human Rights Committee. Specifically, see UN Human Rights Committee (HRC), *Report of the UN Human Rights Committee*, 2020, A/75/40, pag. 4, para. 27.

The Human Rights Committee was established by article 28 of the International Covenant on Civil and Political Rights (ICCPR) to monitor and ensure respect for the rights contained in the treaty by States parties. The members of the Committee are elected from a list, nominated by the Government of each state party, between individuals of high moral standing and expertise in the field of international human rights protection.

However, the Committee does not have automatic competence to settle individual communication for all States parties to the ICCPR. Instead, the Committee can only consider individual communications if it comes from a national under the jurisdiction of a state that has ratified the First Optional Protocol to the Covenant, which entered into force in 1976. More precisely, the work of the Committee began only in 1977, during its second session.

Therefore, without prejudice to the discretion of the state party to the Covenant to ratify or not to ratify the First Optional Protocol, if the state party decides to accept the competence of the Committee to examine individual complaints, the individual would automatically be guaranteed the right to access the HRC to protect himself from possible violations by the State. There are currently 116 States parties[276] to the First Optional Protocol, 3 are signatories[277] and 78 have not taken a position on the Protocol and have therefore not expressed their consent to be bound by the Protocol.[278]

On one hand, these numbers are certainly encouraging, since represents a strong commitment of the international community. On the other hand, it should be observed that many States prefer to be parties only and exclusively to

[276] Specifically, this mean that a State has expressed its consent, through an act of ratification, accession, or succession. Moreover, this implies that the treaty has entered into force, or a State is close to become a party after formal reception by the UN Secretariat of the State's decision to be a party.

[277] Signatory to a treaty implies that a State provided a preliminary endorsement of the instrument and its intent to examine the treaty domestically and consider ratifying it.

[278] For a full analysis of the different situations of States in relation to the First Optional Protocol to the ICCPR, see https://indicators.ohchr.org/.

the ICCPR – which currently has 173 States Parties[279] – not guaranteeing, on the one hand, the Committee to carry out its task (*i.e.*, to ensure compliance with the ICCPR) and, on the other hand, not allowing individuals access to international justice to protect their rights.

Taking into account these issues, which go beyond a purely legal analysis but result in political and governmental issues of States, it is now necessary to understand the individual procedure in the HRC. In order for the individual to address his or her individual petition to the Committee, it is necessary – both for the individual and for the Committee – to comply with substantive and procedural requirements, identified in a general way in the First Optional Protocol[280] (hereinafter the Protocol, OP1 or the First Protocol) and more specifically in the Rules of Procedure of the Human Rights Committee[281] (hereinafter the Rules, HRC Rules or Rules of Procedure).

2. 3. 1. ACCESS TO INTERNATIONAL JUSTICE THROUGH INDIVIDUAL COMMUNICATION TO THE U.N. HUMAN RIGHTS COMMITTEE.

Accessing international justice through an individual communication to the UN Human Rights Committee could present some difficulties, involving both substantive and procedural assessments.

From a practical point of view, those who wish to submit their individual complaints to the Committee may do so individually or with the assistance of a lawyer. In order to "activate" one's right of access to international justice, it will

[279] See UN Human Rights Committee (HRC), *Report of the UN Human Rights Committee*, 2020, A/75/40, p. 1, para 1.

[280] See arts. 2, 3 and 5 of the First Optional Protocol.

[281] As for individual communication procedure, see Part II, "*Rules relating to the functions of the Committee*", section XVIII "*Procedure for the consideration of communications received under the Optional Protocol*", from art. 88 to art. 113. In accordance with art. 39 (2) ICCPR, the HRC drew up its Provisional Rules of Procedure during its first session in New York. Several years later, in July 1989, the HRC made the Rules of Procedure definitive by eliminating the word 'Provisional' from their title. After many revisions, the version that is current at the time of writing can be found in a document dated 9 January 2019.

be necessary[282] to fill in a "Submission Form" available online on the Committee's website[283], which is accompanied by a "Guidance Note" that may be useful in compiling the submission.[284]

2. 3. 2. PRACTICAL AND LINGUISTIC CONSIDERATION.

In the light of both the documents available for completing (and then proposing) an individual communication to the Committee, it seems immediately necessary to make some considerations.

From a formal point of view, it is not compulsory to submit communications solely and exclusively through the online submission form, but they can also be made freely, provided that all 14 points listed in the document are indicated and considered. Therefore, if one opts for a free-form communication, it will be necessary to specify the seat[285] of the Committee and the planned procedure, which will be a communication "*submitted for consideration under Article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights*".

From a linguistic point of view, it should be noted that the model submission forms[286] are available online in four languages, English, French, Spanish and Russian. However, as specified in Rule 88(4) of the HRC Rules of Procedure, communications may be submitted in any of the languages used to conduct the Committee's work under Rule 29, which also include Arabic and Chinese.

Therefore, although the Committee specifies that Communications must be submitted "[...] *preferably the official language of the United Nations most commonly used*

---

[282] Sending the communication in writing is a fundamental prerequisite, since the Committee may not receive communications that are not in writing, see Rule 88(3)(b).

[283] In this sense, see https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx, where under "Complaints Procedure" the "model complaint form" is available in word format in four of the official languages of the United Nations.

[284] See https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx, where under "Complaints Procedure" the "Guidance note to the complaint form" is available in word format, in four of the official languages of the United Nations.

[285] Which is in Geneva, Switzerland.

[286] In this connection, the same consideration should also be made for the guidance note.

in the State party against which the communication is addressed", not providing a submission form in Arabic or Chinese could hinder the right of access to justice for those persons who do not have adequate financial means to be represented by a lawyer to make the individual communication and/or have a translation service provided.

This assessment seems particularly important also considering that, although the working languages of the Committee can be decided in the light of the members participating in it, the right of any author of an individual communication to provide information to the Committee in one of the six languages of the United Nations is not affected.[287]

Clearly, this is not a major violation of the HRC's right to access justice, but it is nevertheless a deficit that should be considered by the secretariat, because it is hard to see why an effort cannot be made to secure a basic document to activate the procedure.

2. 3. 3. FIRST AND FOREMOST: THE *RATIONE TEMPORIS* REQUIREMENT.

The first assessment of whether an individual communication can be made to the Committee does not depend on the individual's willingness to make use of this international mechanism.

Indeed, it may be inferred from the combined provisions of article 1 of Optional Protocol n. 1 and article 88, (3)(a), one can conclude that the Committee cannot receive any communication if it is addressed to a state which is not party to the First Optional Protocol. The importance of what might be considered the "first" and most important condition of admissibility is also reiterated in paragraph 2 of the "guidance", where the person intending to make an individual communication is reminded that it is not only necessary to be sure that the state party against which the complaint is to be made has ratified the OP1[288] recognizing the competence of the Committee, but also that the alleged violation has taken place after ratification of the Protocol or is a "continuous

[287] See art. 29 of the Rules of Procedure.

[288] Or made a statement of acceptance of individual procedures.

violation".

This is the so-called "*ratione temporis*" admissibility requirement, which under article 1 of the Optional Protocol provides that "*No communication shall be received by the Committee if it concerns a State party to the Covenant which is not a party to the present Protocol.*".[289]

This requirement, which is known to be of paramount importance, must always be examined by the HRC to assess the admissibility of a communication, even if a state Party does not object to it.[290] However, there may be possible violations that occur prior to the entry into force of the Protocol but continue after its entry into force, *i.e., 'continuing violations'*. The case-law of the Committee, in this sense, has clarified that alleged violations of the Covenant occurred before the entry into force of the Optional Protocol for a state Party may be examined by the Committee only and exclusively if such violations "continue" after that date or "continue" to have effects that constitute a violation of the Covenant.[291]

In particular, the Committee may consider an alleged violation "of a continuing nature" when it is found that – after the entry into force of the Optional Protocol – there are previous violations of the Covenant by the state Party.[292]

2. 3. 4. INDIVIDUAL LEGITIMACY TO ACTIVATE THE HRC COMMUNICATION PROCEDURE.

Once it is established that the communication can be made to a state Party to the Optional Protocol, it will be necessary to specify who is legally enabled in making the communication and, if it is a different individual, to specify the details of the victim of the alleged violation.

---

[289] See art. 1 of the OP1 and art. 88 (3) (a) of the Rules.

[290] See *Mukunto v. Zambia*, UN Doc. CCPR/C/66/D/768/1997, 23 July 1999, para. 6.3; *Lovelace v. Canada*, UN Doc. CCPR/C/13/D/24/1977, 30 July 1981, para. 10.

[291] See communications *Kouidis v. Greece*, UN Doc. CCPR/C/86/D/1070/2002, 28 March 2006, para. 6.3; *Zhurin v. Russian Federation*, UN Doc. CCPR/C/82/D/851/1999, 2 November 2004, para. 6.4.

[292] See communications *Kouidis v. Greece*, above, para. 6.6; No. 1033/2001, *Singarasa v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001, 21 July 2004, para. 6.3.

Firstly, it seems appropriate to specify from the outset that only individuals – consequently considered as "natural persons" – may submit an individual communication to the HRC. This possibility is therefore not extended to juridical persons, such as NGO's members. This impossibility, which in view of the possible violation seems of minor importance, could certainly have been accepted in the past, but in the light of the increasingly evident need to protect the legal market, it seems to be a limitation that should be reassessed or at least taken into consideration.

That being said, specifying the individual personal information entails one of the admissibility requirement[293], since the Committee will not be able to consider anonymous communications[294], for two reasons: first, the identity of the claimant and/or of the victim must be provided to the Committee, which must assess the reliability of the information provided; second, the details provided in the submission are necessary for the respondent State party to the proceedings to adequately defend itself against the alleged violations claimed by the claimant.[295]

However, the claimant/victim has the possibility to request, since the introduction of the communication, that his or her personal details not be provided in the event of a decision on admissibility or merit[296], and this choice, if not made in the submission form, must be made as soon as possible, precisely because – once the views have been published and circulated – it would be difficult for the UN to satisfy requests for anonymity.[297]

As mentioned above, the subjects identified as claimant and qualified as victim in the communication do not always coincide. Usually, the complainant and the victim coincide, being at the same time the person submitting the communication and claiming a violation of his rights under the ICCPR, who is usually referred to as the "author" in the final decisions.

---

[293] See art. 99 (a) of the Rules.

[294] See art. 88 (3) (c) read in conjunction with art. 2 OP1.

[295] Specifically, see the Guidance note, p. 10.

[296] In this respect, see p. 7 of the submission form.

[297] Guidance note, p. 10.

However, there is nothing to prevent the complainant from being represented by a lawyer[298] or acting on behalf of another person, who – for serious reasons such as death, disappearance, or detention – cannot actually submit a communication. This solution is certainly feasible for all those people who have a family link with the alleged victim or who in any case demonstrate to the Committee a '*legitimate interest*' with him/her[299].

In this sense, rather than a legitimate interest, the Committee's jurisprudence has established that when there are circumstances where it is impossible for the victim to personally authorize the communication, two requirements must be met in order for the communication to occur: *i)* a '*sufficient link*' between the author of the communication and the alleged victim and *ii)* the likelihood that the victim would have consented to the individual communication made by the representative persons.[300]

After the necessary differences between the author of the communication and the alleged victim have been made, the analysis should now focus to clarify who can make a communication to the Committee and in what capacity they could act.

Considering only the literal wording of the Optional Protocol, the persons qualified to propose a communication to the Committee would generally be "individuals".[301]

This reference, which is certainly very broad, must necessarily be explored since it represents one of the essential steps of the research in question, *i.e.,* understanding who is entitled to access international justice through the HRC.

---

[298] See p. 6 of the submission form to be read in conjunction with p. 8.9 of the Guidance, which clarify that the complainant can also be non-legally represented by a human rights organisation.

[299] Such terminology (legitimate interest) is referred to in point 3.7 of the Guidance.

[300] See *Mbenge v. Zaire*, UN Doc. CCPR/C/OP/2(1990), 25 March 1983; *Umsinai Isaeva v. Uzbekistan*, UN Doc. CCPR/C/95/D/1163/2003, 20 March 2009; *Annakkarage Suranjini Sadamali Pathmini Peiris v. Sri Lanka*, UN Doc. CCPR/C/103/D/1862/2009, 26 October 2011; *Abubakar Amirov and Aïzan Amirova v. Russian Federation*, UN Doc. CCPR/C/95/D/1447/2006, 2 April 2009; *Sergio Euben Lopez Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981.

[301] See art. 2 OP1.

Considering the above, it seems worth recalling the clarification made in the Rules of Procedure, where it is specified that individual communications may be submitted "*by or on behalf of one or several individuals*", if there is consent of the persons represented or that the author of the communication can justify the action even in the absence of explicit consent.[302]

Thus, the Committee has recognized that an individual communication should normally be submitted personally by the individual or by his representative, but that in any case a communication submitted on behalf of an alleged victim can only be accepted when it appears that the individual in question is unable to submit the communication personally.[303]

However, HRC jurisprudence has clarified, for example, that the power of attorney duly granted by the alleged victim to her lawyer to represent her before the Committee fully meets the requirements of Rule 99(b) of the Rules of Procedure.[304]

In this sense, the HRC's practice has also specified that if the alleged victim was in prison when the communication was submitted, a letter of authorisation issued to his wife authorising her to appoint a lawyer to represent the alleged victim before the Committee would not preclude her admissibility before the Committee.[305]

Lastly, it seems appropriate to specify that only individuals – consequently considered as "natural persons" – may submit an individual communication to the HRC. This possibility is therefore not extended to juridical persons, such as NGO's members. This impossibility, which in view of the possible violation seems of minor importance, could certainly have been accepted in the past, but in the light of the increasingly evident need to protect the legal market, it seems

---

302 See Rule 91 and Rule 99 (b) of the Rules of Procedure.

303 See also *Humanitarian Law Center v. Serbia*, UN Doc. CCPR/C/89/D/1355/2005, 26 March 2007, para. 6.3; *Kovaleva and Kozyar v. Belarus*, UN Doc. CCPR/C/106/D/2120/2011, 29 October 2012, para. 10.2.

304 See, *Murat Telibekov v. Kazakhstan*, UN Doc. CCPR/C/128/D/2687/2015, 13 March 2020, para 8.4.

305 Cf. *Natalya Pinchuk v. Belarus*, UN Doc. CCPR/C/112/D/2165/2012, 24 October 2014, para 7.6.

to be a limitation that should be reassessed or at least taken into consideration.

2. 3. 5. THE "SAME MATTER" ADMISSIBILITY REQUIREMENT TO THE HRC.

After having specifically determined who the author of the communication or his representative is, the author must make it clear whether the '*same matter*'[306] – the legal issue raised in the communication – has not already been submitted to another treaty body or other regional mechanism[307], which is therefore another important requirement assessed by the Committee for the admissibility[308] of the communication.[309]

According to the Committee's constant Views, in order for an issue to be considered identical with respect to another issue which is the subject of a different international proceeding, three elements must be present: *i)* a first "subjective" element, consisting in the fact that the author of the communication is the same as the one who filed the complaint or petition with another international body[310]; *ii)* a second "objective" element, since the complaint filed

306 Such admissibility condition is included in the issues concerning the overlapping of individual claims and the consequent effectiveness of final determinations issued by human rights monitoring bodies. For an analysis see F. SALERNO, *Rapporti fra procedimenti concernenti le medesime istanze individuali presso diversi organismi internazionali di tutela dei diritti umani,* in *Rivista di diritto internazionale, 1999, p. 363 ss.;* L. SANDRINI*, La concorrenza tra il Comitato dei diritti umani e la Corte europea dei diritti dell'uomo nell'esame di istanze individuali: brevi note sulle clausole di coordinamento,* in *Diritti individuali e giustizia internazionale. Liber Fausto Pocar (a cura di Venturini e Bariatti), Milano, 2009, p. 837.*

307 An interesting observation is that the guidelines provide a list of other regional bodies with jurisdiction to adjudicate human rights disputes, such as the European Court of Human Rights, the Inter-American Commission on Human Rights, or the African Commission or Court of Human and Peoples' Rights, see p. 11 of the guidelines.

308 The Committee must first decide whether a communication can be declared admissible and, only after this assessment, may the Committee proceed to examine the merit of the communication, see art. 97 (2) of the Rules of Procedure.

309 On this issue, see both the Rules of Procedure and the OP1, respectively 99 (e) and 5 (2) (a).

310 See *Fanali v. Italy*, UN Doc. CCPR/C/OP/2, p. 99 (1990), 31 March 1983, par. 7.2.

must have the same "legal" content as the complaint already filed[311]; *iii)* a third "factual" element, since the alleged facts must be the same as those used in both proceedings.[312]

If the same matter has not been brought before any other international body, there are no problems for the author of the communication, subject to the possibility for the respondent State Party and the Committee to verify the truth of the statement made.

If, on the other hand, the author of the communication has already submitted the same question to another international body, he/she must specify in his/her submission to the Committee the procedure carried out or the judicial body already accessed, also indicating the date and the authors of the submission, the violations sustained, and any decision already adopted.[313]

Generally, if the same submission matter has been made to other international bodies, the Committee by majority vote will not be able to examine the individual communication. This assessment, however, is not absolute, as the submission guidelines already specify that the Human Rights Committee may consider communications already submitted to other international *fora* provided that: *a)* they are not pending before another international mechanism and *b)* the respondent State Party did not object when ratifying or acceding to the treaty.[314]

Indeed, several States[315], when ratifying the Optional Protocol, have made a reservation[316] which limits – but, as will be made clear, does not exclude – the Committee's competence to consider submissions that have been examined in

---

311 Cf. *Mahabir v. Austria*, UN Doc. CCPR/C/82/D/944/2000, 11 November 2004, par. 8.4.

312 On the joint existence of the three elements see, among others, *Wallmann c. Austria*, UN Doc. CCPR/C/80/D/1002/2001, 1 April 2004, par. 8.4; *Althammer c. Australia*, UN Doc. CCPR/C/78/D/998/2001, 8 August 2003, par. 8.4.

313 See p. 8 of the Submission form.

314 See p. 11 of the Guidance.

315 Several European and non-European States party to the Optional Protocol have made such a reservation. Currently, those States that have made a reservation or interpretative declaration to Article 5(2)(a) of the Protocol are: Austria, Croatia, Denmark, El Salvador, France, Germany, Iceland, Italy, Ireland, Luxembourg, Malta, Norway, Poland, Moldova, Romania, Russia, Slovenia, Spain, Sri Lanka, Sweden, Turkey, and Uganda.

316 The text of the reservation is available online at https://treaties.un.org.

the context of another international proceeding concerning the same issues.

Thus, in the case of communications proposed against one of the States that have made such a reservation, the Committee will have to make two types of assessment in order to consider the individual communication admissible: on the one hand, in the light of article 5(2)(a), it will not be able to examine applications concerning the same facts that are being examined in other international mechanisms ("[. ...] *being examined* [...]"); on the other hand, in view of the reservation, it will not be able to examine all applications concerning the same facts that have already been examined in another international procedure (the reservation in fact specifies "[...] *being and has not been examined* [...]").

In this regard, it seems useful to consider the Committee's case-law on the possible overlap between the above-mentioned applications in the presence of reservations concerning proceedings already decided by other international bodies, pursuant to article 5(2)(a) of the Optional Protocol.

As an example, the Committee has made it clear that, where the Strasbourg courts' declaration of inadmissibility goes beyond a mere procedural examination, analysing the issue on its merits, the question of inadmissibility must be assessed in the light of article 5(2)(a) of the Optional Protocol.[317]

More specifically, if an application is declared "manifestly ill-founded" by the European Court and subsequently referred to the Committee against a State which has made a reservation to article 5(2)(a), the application will be considered inadmissible based on the criteria set out above and established in the Committee's practice.[318]

The Committee also reached the same conclusion in the case of a declaration of interpretation made by the State at the time of ratification of the Covenant, rather than a reservation.[319]

Furthermore, the Committee declined the arguments of States Parties which, although they had not made reservations under article 5(2)(a), proposed to limit

[317] See *Rivera Fernández v. Spain*, UN Doc. CCPR/C/85/D/1396/2005, 22 November 2005, par. 6.2.

[318] See *A.M.vc. Denmark*, UN Doc. CCPR/C/OP/1, p. 32 (1984), 23 July 1982, §§ 4-6.

[319] *Linderholm v. Croatia*, UN Doc. CCPR/C/66/D/744/1997, 27 July 1999, par. 4.2.

the competence of the Committee to consider individual communications on the basis of a broad interpretation of the notion of a request "being examined", in order – according to the respondent States – to avoid communications to the Committee constituting forms of "appeal" against the decisions of other international tribunals or bodies which would constitute forum shopping in the field of human rights.[320]

At the same time, the Committee has specified that if the matter is not 'pending' before another review procedure and there is no 'preclusion' based on the reservation in Article 5(2)(a), the communication may be considered admissible.[321]

The Committee has therefore repeatedly reiterated the central role of the reservation for the admissibility of an individual communication already examined by another international body, including the ECtHR, noting that, if the State party has not made a reservation under Article 5(2)(a), it is legitimate to re-examine the same issue decided by other international bodies.[322]

2. 3. 6. REQUEST FOR *INTERIM* MEASURE AND/OR MEASURE OF PROTECTION IN THE HRC COMMUNICATION.

In order to protect the rights under the Covenant in the immediate period, individuals are given the possibility to apply to the Committee for "*interim* measures" or "measures of protection", which respectively aim to prevent "irreparable harm" to the author/victim of the communication and to avoid harm or retaliation against the alleged victim, his family or his representatives.[323]

Although both are *interim* measures, *i.e.*, decided before the merits of the whole

[320] *Anver Prince v. South Africa*, UN Doc. CCPR/C/91/D/1474/2006, 14 November 2007, par. 4.3.

[321] *Anver Prince v. Sud Africa*, par. 6.2; *Kohoutek v. Repubblica ceca*, UN Doc. CCPR/C/93/D/1448/2006, 2 September 2008, par. 6.2; *Persan v. Czech Republic*, UN Doc. CCPR/C/95/D/1479/2006, 28 April 2009, par. 6.2.

[322] *S.Y. c. the Netherlands*, UN Doc. CCPR/C/123/D/2392/2014, 28 August 2018, par. 8.2, footnote 10.

[323] On this matter, see Rule 94 for *interim* measures and Rule 95 for measures of protection.

procedure are assessed, the differences between these two requests are quite apparent.

Indeed, *interim* or provisional measures are those measures that the Committee requests to the State party to take in order to prevent irreparable harm to the alleged victim while the examination of the case is still pending. The term "irreparable harm" means harm that, because of its nature, cannot be redressed. However, the burden of proof on the author requesting the application of provisional measures has a rather high standard, as he/she must not only request what kind of measures he/she intends to request from the Committee, but also show that the risk is real and that, should it be realized, the harm would be irreparable.

Moreover, this risk cannot be limited to general assessments, but must be shown to be a personal risk, which is why typical measures often include the execution of a death sentence or deportation to a country where the alleged victim would be subjected to mistreatment and/or torture. Due to the great importance attached, a request for *interim* measures can be received by the Committee at any time prior to the adoption of the final decision, with the aim of reaching the Secretariat before the irreparable harmful event can materialise.

On the other hand, measures of protection are designed to protect people (lawyers, witnesses, and family members) involved in the communication from possible retaliation. However, unlike *interim* measures, this risk must relate to the submission of the communication and can also be submitted in the context of the follow-up procedure, *i.e.*, after the adoption of a decision finding an infringement.

However, it must be considered that the procedure for applying *interim* measures has unfortunately not always achieved the aims of "complementary protection" for which it was activated. For example, in the Views adopted in *Yakovitsky et al. v. Belarus*, the author requested in the initial communication the adoption of *interim* measures on behalf of the father, who was in real danger of being subjected to death penalty. Nevertheless, despite the Committee granted the request made in the communication, still the execution of the subject took

place.[324] In the decision, it was found that the State had not complied with the Committee's request for provisional measures by executing the death penalty on the father of the author of the communication before the members had taken a decision to do so.[325]

In this regard, the Committee not only stressed that it has the power to freely establish its own rules of procedure – which the states Parties have agreed to recognize[326] – but also stated that by becoming a party to the Optional Protocol n. 1 automatically means an acceptance of the HRC's competence to hear individual complaints for the protection of one of the rights set forth in the Covenant[327], and that it is implicit in ratifying the Covenant that a State cooperates with the Committee in respecting the obligations assumed in good faith, and it is therefore incompatible with those obligations that one may take any action that might undermine or impede the Committee in carrying out its functions.[328]

For this reason, the Committee made clear that the State had committed a serious breach of its obligations under the Protocol by executing the sentence before the experts could conclude their final considerations[329] and that by failing to comply with the request for provisional measures the State party had breached its covenant obligations under article 1 of the Optional Protocol.[330] Regardless of the lack of cooperation that States sometimes have with regard to rulings on interim measures, this procedure has been quite successful, considering that during the last three sessions of the Committee, the Special Rapporteurs have issued 86 decisions on *interim* measures under Rule 94 of the Rules.[331]

---

[324] See *Gennady Yakovitsky and Aleksandra Yakovitskaya*, UN Doc. CCPR/C/128/D/2789/2016, 12 March, para. 2.6.

[325] See *Gennady Yakovitsky and Aleksandra Yakovitskaya*, para. 6.1.

[326] See art. 39 (2) of the Covenant.

[327] See OP1, Preamble and art. 1.

[328] *Gennady Yakovitsky and Aleksandra Yakovitskaya*, 6.2.

[329] *Gennady Yakovitsky and Aleksandra Yakovitskaya*, 6.4.

[330] *Gennady Yakovitsky and Aleksandra Yakovitskaya*, para 9.

[331] See *Report of the Human Rights Committee*, p. 1, para 9.

2. 3. 7. SUMMARIZE THE COMMUNICATIONS FACTS.

Further on in the introduction of the communication, the author will be required to provide a summary of the main facts of the case, which should be outlined in chronological order indicating any possible dates and/or information, which clearly should focus on the alleged victim and not on a general context.

However, while the narration of the facts is certainly useful for the Committee to understand the "factual" situation, this step of the communication is crucial to demonstrate that: *i)* the author of the communication has exhausted all the domestic remedies available in national jurisdiction; *ii)* the communication does not constitute an abuse of rights.

Generally, these two assessments must be evaluated by the Committee to decide on the admissibility of the communication, as set out respectively in Rule 99(c) and (f), and it appears from a combined reading of the submission form and the guidance note that information must be provided by the author in the statement of facts.[332]

2. 3. 7. 1. THE EXHAUSTION OF LOCAL REMEDIES.

As regards the well-known requirement of exhaustion of domestic remedies, provided for in articles 2 and 5(2)(b) of the Optional Protocol, it is necessary for the author to describe, in chronological order, all the legal steps[333] taken by the alleged victim at the domestic level[334], also having the possibility of explaining

[332] On this issue, see Submission form p. 2, 10 and Guidance p. 13, which, after giving indications about the exercise of domestic remedies, immediately specify that "[…] *It is important to submit the communication as soon as possible after domestic remedies have been exhausted* […]".

[333] As pointed out in the Guidance, this is usually an assessment that goes all the way to the last stage of domestic judgement.

[334] It is specified at page 10 of the Submission form that it is necessary to indicate the date of the remedies, the violations complained of, the authority against which the complaint was made, the reasons for the judgments and the dates.

the reasons[335] that prevented the exhaustion of domestic remedies.[336]

Indeed, it seems interesting to note that, while article 5(2)(b) of the Protocol refers only to domestic remedies that are "available", the Committee has clarified that such remedies must also be effective[337], as the author would not need to exhaust domestic remedies when these are known to be "ineffective".[338]

In this respect, the Committee's practice is to consider that the rule of exhaustion of domestic remedies does not apply when the legal claim has no prospect of success[339] or when – according to domestic law – the rejection of the claim would be highly probable, and the jurisprudence of the highest courts excludes any possibility of winning the case.[340]

Clearly, if the burden of proof concerning the exhaustion of domestic remedies lies *prima facie* on the author of the communication, it is still clear that this represents one of the most important challenges to admissibility in the defendant state's arguments. However, if the State asserts that the author of the communication had not exhausted all available domestic remedies, it is obliged to specify what types of remedies should have been exhausted and whether they could be effective in the concrete case, as clarified both by General Comment No. 32[341] and the Committee's case law.[342]

---

335 A maximum limit of 2,500 words is allowed to analyse this passage in the communication.

336 The author of the notice must show that such remedies would be unduly prolonged, ineffective, or unavailable by providing detailed information as to why the general rule of prior exhaustion of domestic remedies should not apply.

337 See UN Human Rights Committee (HRC), *General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, UN Doc. CCPR/C/GC/33, § 5.

338 Cf. *Oldřiška (Olga) Jünglingová v. The Czech Republic*, UN Doc. CCPR/C/103/D/1563/2007, 24 October 2011, § 6.3.

339 See *Pratt and Morgan v. Jamaïque*, UN Doc. CCPR/C/35/D/225/1987, 6 April 1989, § 12.3.

340 Cf. *Länsman and consorts v. Finland*, UN Doc. CCPR/C/52/D/511/1992, 26 October 1994, § 6.2.

341 See UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, UN Doc. CCPR/C/GC/32, para. 48.

342 Cf. *Mikhail Timoshenko et al. v. Belarus*, UN Doc. CCPR/C/129/D/2461/2014, 23 July 2020, para 6.3.

It should also be pointed out that several challenges to the admissibility of the communication made by the Governments of the respondent States are based on the failure to request a review of the trial following the judgment of last resort, but the Committee has repeatedly made clear that this procedure does not constitute a remedy that must be exhausted for the purposes of article 5 (2) (b) of the Protocol.[343]

2. 3. 7. 2. ABUSE OF RIGHT: SPECIFICATION OF THE "TIME-LIMITS" TO INITIATE THE INDIVIDUAL COMMUNICATION PROCEDURE TO THE HRC.

As for the assessment concerning the abuse of rights, it seems necessary to specify that, although this requirement is mentioned among the inadmissibility requirements under article 3 of the Optional Protocol to the Covenant[344], there is no mention of it in the Submission form, but an explanation is merely mentioned in the Guidance, which, however, does not describe the essential requirements.

In this context, it is recommended that it is crucial to submit the communication as soon as domestic remedies have been exhausted – so that the State can adequately defend itself and the Committee can fully assess the facts – and that sometimes a communication submitted after a "prolonged period" may be considered an abuse of the right to petition, and therefore could be considered inadmissible.

Although the time limits for submitting an individual communication are also indicated according to the Rules[345], the Committee should clarify this point more

[343] See, for example: *Alekseev v. Russian Federation*, UN Doc. CCPR/C/109/D/1873/2009, 25 October 2013, para. 8.4; *Lozenko v. Belarus*, UN Doc. CCPR/C/112/D/1929/2010, 24 October 2014, para. 6.3; *Sudalenko v. Belarus*, UN Doc. CCPR/C/115/D/2016/2010, 5 November 2015, para. 7.3; *Koreshkov v. Belarus*, UN Doc. CCPR/C/121/D/2168/2012, 9 November 2017, para. 7.3; and *Abromchik v. Belarus*, UN Doc. CCPR/C/122/D/2228/2012, 20 March 2018, para. 9.3.

[344] See art. 3 OP1.

[345] These are 5 years for the CCPR, 1 year for the CESCR and the CRC and 6 months for the CERD, as there are no other fixed deadlines for submitting a communication to the remaining four committees.

carefully in both the Submission form and the Guidance. Indeed, to understand the time limits – both substantive and temporal – of this requirement, it is necessary to assess Rule 99(c), which in its current version applies only to communications received by the Committee since 1 January 2012.[346]

This Rule on admissibility is essentially designed on two levels: first, it clarifies that the Committee – assessing the admissibility of the communication – must make clear that it is not a communication that constitutes an abuse of the right of submission, while specifying that it is not a basis for a decision of inadmissibility *ratione temporis* dictated by reasons of delay in submission; secondly, it is specified that an individual communication may be considered an abuse of the right of submission when it is filed five years after the exhaustion of domestic remedies by the author of the communication or three years after the conclusion of another international procedure, unless there are reasons which could justify the delay.[347]

In this respect, while it is true that five or three years consist in a very long time for the submission of the communication, this rule should be clearer in order to allow the author of the communication a more effective procedural strategy, since on the one hand it is specified that abuse of the right of petition is one of the conditions of admissibility and that delay in communication is not "*a basis of a decision of inadmissibility ratione temporis on grounds of delay in submission*".

There are those who argue that very late submissions to the HRC can be dismissed by the Committee as an abuse of process and that the five-year time limit can be considered as a presumption that would give rise to inadmissibility on the ground of abuse of process.[348]

The Committee also clarified that, although there are no fixed time limits for the submission of individual communications and that the mere delay in submission does not *ipso facto* amount to an abuse of process[349], in certain

---

346 See Rule 99 (c), p. 19 note 2.

347 See Rule 99 (c).

348 On this issue, see S. JOSEPH, *Committees: Human Rights Bodies*, in Max Planck Encyclopedia of International Procedural Law [MPEiPro], 2019, para 65.

349 Cf. *Ramil Kaliyev v. Russian Federation*, UN Doc. CCPR/C/127/D/2977/2017, 8 November 2019, para 8.5.

circumstances it is necessary for the author to provide reasonable explanations justifying the delay in submitting the communication.[350]

That being said, the "presumption" that a communication filed five years after the exhaustion of domestic remedies or three years after the conclusion of another international investigation procedure constitutes an abuse of the right to file, subject to the considerations invoked to justify the delay, was also reaffirmed.[351]

2. 3. 8. DEMONSTRATING THE ALLEGED STATE'S HUMAN RIGHTS VIOLATIONS TOWARDS THE VICTIM.

After briefly explaining the facts of the case, paying attention to demonstrate the exhaustion of all available internal remedies, the author of the communication must proceed with a succinct analysis of the alleged violations, specifying how and why the above facts and circumstances violate his/her rights (if author and victim coincide) or the rights of the victim (if they are different subjects).

As can be deduced from a brief analysis of the Guidance, the author must be very diligent and scrupulous if he/she wants his communication not to be rejected[352], correctly highlight the object of the communication and the provisions of the Covenant that would be violated.[353]

Therefore, the author must essentially demonstrate his/her status as a victim within the meaning of the Covenant, in the light of the combined provisions of articles 1 and 2 of the Optional Protocol, which on the one hand specify "[...]

---

350 See *Gobin v. Mauritius*, UN Doc. CCPR/C/72/D/787/1997, 25 November 1996, para. 6.3.

351 See *Ramil Kaliyev v. Russian Federation*, para 8.5.; *Isabel López Martínez et al. v. Colombia*, UN Doc. CCPR/C/128/D/3076/2017, 11 March 2020, para. 8.7.

352 In this sense, it is specified that it is appropriate to mention the specific articles relating to the violations of a treaty that they intend to invoke, stating how the State Party has – through the facts described above – violated them. It is also suggested to indicate the specific remedies that the author would like to obtain from the State party in case the Committee to which the matter has been referred reveals the existence of a violation, see Guidance p. 14.

353 See on this aspect Rule 90 (c), (d) of the Rules of Procedure.

individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant [...]"[354] and on the other hand clarify "[...] *individuals who claim that any of their rights enumerated in the Covenant have been violated* [...]"[355], which therefore require the authors' communication to be rejected, which thus require that the authors' allegations must be sufficiently substantiated.

Clearly, from this point of view, there are no requirements for making an individual communication to the Committee and thus accessing international justice, as everyone is free to claim any of the alleged violations that the State would have carried out, unless they fall within the rights enumerated in the ICCPR and within the jurisdiction of the State.

This prospect deserves a closer examination on two issues, which the individual – in situations of difficulties related to the submission of the communication – often must face: *i)* proving his or her status as a victim; *ii)* the extraterritorial applicability of the ICCPR to demonstrate the existence of the Committee's jurisdiction according to article 2.

2. 3. 9. EXPOSING THE VICTIM *STATUS* IN THE INDIVIDUAL COMMUNICATION.

With regard to the *statu*s of victim, it can be noted from the Committee's practice that communications based on hypothetical violations of Covenant rights that may occur in the future are considered inadmissible[356], as it is necessary for the author to demonstrate that an act or omission of a State Party has already affected the enjoyment of the right sought to be protected, or that the effect of such alleged violation is imminent.[357]

For example, on a particularly sensitive issue such as the request for *non-refoulement*, the Committee found that the submission of an author who made

[354] See art. 1 OP1.

[355] See art. 2 OP1.

[356] Cf. *V.M.R.B. v. Canada*, UN Doc. CCPR/C/33/D/236/1987, 25 June 1987, para. 6.3.

[357] See *Beydon et al. v. France*, UN Doc. CCPR/C/85/D/1400/2005, 16 July 2004, para 4.3.

general allegations of a risk of arbitrary arrest and detention that could result in torture and death was unsubstantiated, even though he acknowledged that he had not suffered any direct threat to his life.[358] It therefore seems clear, according to the Committee's case-law, that a person may only claim to be a victim within the meaning of article 1 protocol 1 if he/she is actually affected by the act or by the omission of the State[359], basing the arguments on the legislation in force in the State party or on a judicial and/or administrative decision.[360]

In this connection, the experts specify that if the relevant law or practice of domestic law has not yet been applied to the detriment of the individual, there must nevertheless be a possibility that it may apply in such a way that the risk to the alleged victim of being harmed is more than a mere theoretical possibility.[361]

2. 3. 10. EXTRATERRITORIAL APPLICATION OF THE ICCPR.

On the other issue, concerning the extraterritorial applicability of the ICCPR (*rationae locii*), since it consists in a peculiar argument close to need of the individual's access to justice, some clarifications should be made.

Pursuant to articles 2(1) and 1 of the Optional Protocol, the Contracting State assumes an obligation which is limited to respecting and guaranteeing the rights and freedoms enumerated for individuals subject to its jurisdiction, being the exercise of jurisdiction that is a necessary condition for a Contracting State to be held internationally responsible for acts or omissions attributable to it, which could arguably give rise to a violation of the ICCPR.

In this sense, it is precisely article 2(1) of the ICCPR that sets the territorial

---

358 Cf. *Z.H. v. Australia*, UN Doc. CCPR/C/107/D/1957/2010, 21 March 2013, para. 8.4. On the contrary, see *Young-kwan Kim et al. v. Republic of Korea*, UN Doc. CCPR/C/112/D/2179/2012, 15 October 2014, where the Committee considered the authors' claims to be sufficiently substantiated and therefore admissible.

359 Cf. *Rabbae et al. v. Netherlands*, UN Doc. CCPR/C/117/D/2124/2011, 14 July 2016, para. 9.5.

360 See *Picq v. France*, UN Doc. CCPR/C/94/D/1632/2007, 28 May 2007, para. 6.3; *E.W. et al. v. Netherlands*, UN Doc. CCPR/C/47/D/429/1990, 19 November 1990, para. 6.4.

361 See *Aumeeruddy-Cziffra et al. v. Mauritius*, UN Doc. CCPR/C/12/D/35/1978, 9 April 1981, para. 9.2.

limits to the scope of the Covenant, having the Committee recognised that the notions of territory and jurisdiction are autonomous and that precisely in the light of article 2(1) ICCPR the latter is not limited to the national territory of a State Party.

Indeed, the term jurisdiction is commonly interpreted as not necessarily requiring that the alleged violations of the Covenant have taken place in the territory of the respondent States, thus adopting a liberal approach to the jurisdictional scope of a State's ICCPR obligations and confirming that the State bears an extraterritorial level of responsibility.[362]

In its practice, the Committee has therefore clarified that States can be held liable for acts that are carried out outside their national borders[363] that produce effects outside their territory and within the territory over which they have effective control or with respect to individuals over whom they exercise authority[364], or if States use their coercive powers through State agents operating in the territory of third countries.[365]

2. 3. 11. LAST REMARKS SUBMITTING THE COMMUNICATION TO THE HRC.

Once the author has correctly indicated all the points analysed above, the communication is completed. However, there are last steps to be taken for the individual author of the communication to be taken, which if not addressed could lead to inadmissibility of the communication.

---

362 On this topic see L. RAIBLE, *Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship*, in *Leiden Journal of International Law*, 31(2), 315-334, 2018; T. ALTWICKER, *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, in *European Journal of International Law*, Volume 29, Issue 2, May 2018, Pages 581–606.

363 Consequently, these States are technically not "parties" to the ICCPR.

364 On this issue, see for example the Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, *Concluding observations of the Human Rights Committee on Israel*, CCPR/C/ISR/CO/3, 3 September 2010.

365 See *Lopez Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981, §§ 12.1, 12.2, 12.13.

For example, and although this information is provided in the previous parts, it is again specified that communications must be in writing, preferably typewritten and signed. The communication, once signed and complete with attachments, must be sent by email, but if this is not possible, it can be sent in paper format.

However, sending paper documents seems to be strongly discouraged, as suggested in the submission form, where it is specified that "[...] *No paper complaints will be processed unless a justification is provided* [...]".[366] Unlike what happens, for example, in the drafting of the application form of the ECtHR, it almost seems that the author has the possibility to interact with the OHCHR Petitions and Urgent Actions Section (PUAS)[367], considering that the Guidance specifies that if the description of the facts or violations complained of is unclear or lacks information essential to be processed under the procedure providing for individual communication, the PUAS may contact the applicant with a request to supplement the information previously provided.

Without prejudice to this possibility, authors are reminded that they should be diligent in their correspondence with the PUAS and that the requested supplementary information should be sent as soon as possible, since if it is not received by the office within two years of the request the file will be closed.

Once the technical issues related to the introduction of the individual communication to the Committee have been addressed, it is necessary to finally focus on other aspects that may determine the individual's willingness to access this type of international justice, namely: *i)* the procedural timing leading to a final decision; *ii)* the costs of the procedure; *iii)* the bindingness or effectiveness of this procedure.

2. 3. 12. THE LENGTH OF HRC INDIVIDUAL COMMUNICATION PROCEDURE.

366 See submission form pg. 4, p. 14 and Guidance p. 15-17.

367 As specified in the submission form, this is the Office to which individual communications should be sent.

The decision-making process, once the individual communication has been received and until the adoption of the "Views", is indicated in the Rules of Procedure, precisely from Rule 92 onwards, which specifies how the contradictory process between the author/victim of the communication and the respondent State will take place.[368]

In short, and disregarding *interim* orders – since these are incidental and ancillary requests – the procedure for the adoption of the final views proceeds as follows: once the communication is submitted, the case is registered and forwarded to the State Party concerned, to give it the opportunity to make comments[369] within a set period of time[370]; once these comments have been made, the author will have the opportunity to contest the comments made by the State, which in turn may again insist on a submission to substantiate its position.

Once this submission is completed, which as is well known takes place in writing and does not provide for an oral hearing, the Committee will divide the case into two main phases, concerning the "admissibility" and the "merits", respectively: *i)* the formal requirements that the submission must meet before the Committee can consider the merits; *ii)* the substantive requirements, on the basis of which the Committee decides whether or not there has been a violation of the rights contained in the ICCPR.

There is no possibility of appeal against the adoption of a final decision and therefore its final decision is final. If the Committee finds violations, it may invite the State party to provide information within a certain time limit – which according to the Committee's established practice is a total of 180 days – on the measures it intends to take to give effect to the conclusions reached[371], which may be followed by the obligation to publish and disseminate in the official language of the State party.

---

368 See Rule 92 of the Rules of Procedure.

369 Such comments may concern both the admissibility and the merits of the communication, although it is sometimes not necessary for the Committee to request admissibility evaluations.

370 Currently, under Rule 92(2), the State has six months to provide its written observations.

371 See Rule 102.

In addition, in order to monitor the adoption of such measures, the Committee may designate a Special Rapporteur for follow-up on Views, in order to ascertain that the measures taken by States to give effect to the Views of the Committee have been carried out.[372]

Except for certain deadlines indicated in the Rules[373], it is not possible to establish with certainty the average duration of proceedings – from the date of the introduction of the communication until the adoption of the views – before the HRC.[374]

Although there are no fixed time limits, it is possible to identify the average duration of a proceeding in the light of the Committee's practice. However, at this stage, some considerations can be made by taking the most recent working session of the Committee[375] as a reference and only considering "adoption of views" as a type of decision.

There are a total of 14 cases decided by the Committee[376], all introduced by

---

[372] See Rule 106.

[373] Among those deadlines, see for example: Rule 92, para 2, 5; Rule 93, para. 1; Rule 99, lett. c); Rule 101, para. 2.

[374] Such impossibility must be assessed in the light of several variables including, for example, the number of communications introduced in the specific period of time.

[375] See Working session n. 129 HRC.

[376] More specifically, this concerns the following individual complaint procedures: *Alberto Velásquez Echeverri v. Colombia*, UN Doc. CCPR/C/129/D/2931/2017, 21 July 2021; *Sergei Sotnik v. Russian Federation*, UN Doc. CCPR/C/129/D/2478/2014, 23 July 2020; *Oleg Volchek v. Belarus*, UN Doc. CCPR/C/129/D/2337/2014, 23 July 2020; *Vladimir Malei v. Belarus*, UN Doc. CCPR/C/129/D/2404/2014, 23 July 2020; *Tatsiana Reviako v. Belarus*, UN Doc. CCPR/C/129/D/2455/2014, 23 July 2020; *Mikhail Timoshenko et al. v. Belarus*, UN Doc. CCPR/C/129/D/2461/2014, 23 July 2020; *Dmitry Koreshkov v. Belarus*, UN Doc. CCPR/C/129/D/2482/2014, 23 July 2020; *Siarhei Malashenak v. Belarus*, UN Doc. CCPR/C/129/D/2486/2014, 23 July 2020; *Bakhytzhan Toregozhina v. Kazakhstan*, UN Doc. CCPR/C/129/D/2503/2014, 23 July 2020; *Erzhan Sadykov v. Kazakhstan*, UN Doc. CCPR/C/129/D/2456/2014, 23 July 2020; *Lukpan Akhmedyarov v. Kazakhstan*, UN Doc. CCPR/C/129/D/2535/2015, 23 July 2020; *Zhanna Baytelova*, UN Doc. CCPR/C/129/D/2520/2015, 23 July 2020; *A.G. et al. v. Angola*, UN Doc. CCPR/C/129/D/3106/2018-3122/2018, 21 July 2020; *Sabas Eduardo Pretelt de la Vega v. Colombia*, UN Doc. CCPR/C/129/D/2930/2017, 21 July 2020.

communication between 23/12/2012[377] and 19/01/2018.[378]

In the light of these timeframes, the average time needed to arrive at an adoption of views can be calculated as five and a half years, to which must be added, subsequently, the actions that the State should take to give effect to the views.

Clearly, these are always estimates based only on a very limited percentage of the decisions taken by the Committee, which therefore need to be ad hoc evaluated so that the individual who intends to initiate an individual procedure knows the average duration of the procedure.

2. 3. 13. COSTS TO THE HRC: BETWEEN (NOT NECESSARY) LEGAL FEES AND DOCUMENTS TRANSLATION.

As regards the topic of costs, which concerns a fundamental aspect of the right of access to justice, it is difficult to find information about it in the submission form or in the guidance.

The procedure before the Committee for individual communications is, as is well known, totally free of charge, and there are no costs of justice for the person intending to make the communication, as there is no mention either in the Optional Protocol or in the Rules of Procedure.

The only costs that a party may incur, therefore, are legal fees, which in this case include both the fees of a law firm and, for example, the translation of the documents if they are in a language other than English, French, Russian and Spanish.

As regards the costs relating to legal fees, it has already been mentioned that it is not necessary to be assisted by a lawyer, although – as specified in the Guidance – "[...] *It is not necessary to have a lawyer prepare the case, though legal advice may improve the quality of the submissions* [...]".[379]

As can be observed, more than an aid to complete the submission, it is some

[377] See *Vladimir Malei v. Belarus*, CCPR/C/129/D/2404/2014.

[378] Cf. *A.G. et al. v. Angola*, CCPR/C/129/D/3106/2018-3122/2018.

[379] See Guidance p. 8-9. Furthermore, there is no economic or legal aid from the United Nations.

advice for the victim/author of a submission, which is also often used in other regional human rights protection systems.[380]

On the topic of legal fees, which therefore represent a possible barrier for the individual who wants to access the Committee mechanism, some considerations should be made. As it was observed, submitting an individual communication to the Committee, and managing the process of the communication is not easy.

There are several legal technicalities which it would be difficult for someone unfamiliar with the legal field to resolve. Indeed, these issues often concern the sphere of an individual's personal human rights, so possible errors could be serious and have detrimental consequences for one's life.

Therefore, while it is true that the help of a lawyer could be decisive in the evaluations carried out by the Committee, it is also true that the costs involved are often not insignificant, especially for proceedings that could last several years.

For these reasons, several human rights law firms undertake this type of litigation on a *pro bono* basis, *i.e.,* by taking on the task and not charging their clients. This could undoubtedly be an excellent possibility for all those who do not have the financial means to afford their own legal expenses.

From this point of view, due to the technical difficulties involved in the procedure, it would be very useful, for example, to create a list of lawyers to be made available on the HRC's platforms, so that it would be easier for an entity to identify a lawyer who has the specific expertise to initiate and then deal with the procedure before the Committee.

Such a solution could help all the actors who could possibly be involved in the procedure: on the one hand, the individual would have the possibility of having his/her case studied and then presented by a lawyer who is familiar with the subject matter and the procedure, thus guaranteeing him/her effective access to justice and not at the risk of any errors in the presentation of the communication; on the other hand, the Committee would only receive communications relevant to the examination of the case, thus avoiding possible errors that a person with no knowledge of the law or the procedure might make.

[380] See the documents supplied by the CoE for the compilation of the application form to the European Court.

2. 3. 14. COULD AN HRC DECISION MAKE THE DIFFERENCE?

Having mentioned the issue of costs, it is necessary to briefly dwell on the consequences of the individual procedure, assessing the legal 'weight' of the views. As repeatedly stressed, decisions adopted by the Committee are recommendations and do not oblige the State to comply with them.

However, it must be borne in mind that this legal aspect – although technically correct from a purely jurisdictional point of view – must contend with the evolution that Views have undergone in recent years.

In this sense, the Human Rights Committee itself has established that between States parties to the First Optional Protocol there is a duty of mutual cooperation[381], which derives from the customary duty incumbent on the States of the international community to conduct themselves in good faith in light of their treaty obligations.[382]

Furthermore, the Committee has often reiterated that a State Party commits a serious breach of its obligations under the Protocol if it acts to prevent or frustrate the Committee's consideration of a communication alleging a violation of the Covenant, or by rendering the implementation of the decisions expressed unnecessary and futile.[383]

But it is often in the non-implementation of *interim* measures that the Committee acts forcefully in asserting the powers that States have freely decided to entrust to it, especially when it considers that interim measures are essential because the Committee may prevent irreparable harm to the victim of an alleged

---

381 See UN Human Rights Committee (HRC), *General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, UN Doc. CCPR/C/GC/33, para 15.

382 This obligation is well known in the panorama of international law and is directly referred to in article 26 of the VCLT, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

383 See, *inter alia*, *Idieva v. Tajikistan*, UN Doc. CCPR/C/95/D/1276/2004, 31 March 2009, para. 7.3; *Kovaleva and Kozyar v. Belarus*, UN Doc. CCPR/C/106/D/2120/2011, 29 October 2012, para. 9.4.

violation and that failure to comply with the rule provided for under Rule 94 of the Rules undermines the protection of the rights included in the ICCPR.[384]

Moreover, even the International Court of Justice has acknowledged that the interpretations of the ICCPR provided by the HRC must be given great weight in order to provide individuals with legal certainty.[385]

Therefore, while it is true that these cannot in themselves be considered binding, it is clear that they have now attained an important legal status which certainly gives them a value that could in some ways be decisive in certain disputes.

It is therefore of marginal legal value but certainly of great social and public importance, because a "judgement" by the HRC on a State Party to the First Protocol (even if technically it is not a judgement) is always a matter of news that has a certain domestic and international impact.

2. 4. REGIONAL TREATIES PROTECTING HUMAN RIGHTS: THE CONSOLIDATION OF THE RIGHT OF ACCESS TO INTERNATIONAL LITIGATION JUSTICE.

Although the efforts of the United Nations have been different and very useful, it must nevertheless be acknowledged that the consolidation of the right of access to international justice owes much to regional human rights instruments and their enforcement mechanism.

These are, as is well known, international organisations with a regional character, which –through human rights treaties – have established monitoring systems to judge violations committed by states. These mechanisms are concerned with complaints between an individual and a state party or between two States parties to the Convention.

---

384 See, *inter alia*, *Saidova v. Tajikistan*, UN Doc. CCPR/C/81/D/964/2001, 8 July 2004, para. 4.4; *Tolipkhuzhaev v. Uzbekistan*, UN Doc. CCPR/C/96/D/1280/2004, 22 July 2009, para. 6.4; *Kovaleva and Kozyar v. Belarus*, para. 9.5.

385 See *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, para 664.

Therefore, in the light of the subject matter of this work, it will be necessary to focus on the so-called 'individual complaints', which have ensured the possibility for the individual to refer to international resolution mechanisms, consolidating his or her individual right of access to international justice.

As far as regional systems for the protection of human rights are concerned, it is undeniable that they have had a strong diffusion and development especially in recent years. It is worth noting that there are several mechanisms that guarantee individual access to justice.

Among these, the ones that have contributed to creating a more relevant practice are the mechanisms set up within the Council of Europe, the Organisation of American States, and the African Union.

These international organisations have adopted conventions to protect human rights, respectively the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

Therefore, thanks to the efforts of international organisations and human rights conventions, monitoring mechanisms have been established with the aim of ensuring respect for the rights guaranteed therein, namely the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights.

Each of the above-mentioned treaties guarantees the possibility for the individual to have access to these courts, thus guaranteeing an individual right of access to international justice. In light of these considerations, particular analysis of the individual's access to justice at the ECHR will follow, as it is certainly the most successful regional protection mechanism over the years.

2. 5. THE ECHR SYSTEM: A BRIEF EVALUATION.

At the outset, it is now possible to consider the ECHR system as the most advanced and effective mechanism for the protection of human rights. This importance has also helped to influence other mechanisms of a regional nature, which have thus ensured more effective protection of human rights.

Since its formation, the ECHR system has undergone several amendments,

which have helped to bring the needs of States and their citizens closer together. Clearly, it is beyond the scope of this paragraph to specifically analyse all the modifications that have characterised the ECHR's legal framework.

Currently, following the entry into force of Protocol No. 11, the system is based on a single supervisory body, the European Court of Human Rights, which operates in the composition of a single judge, committees, chambers, and Grand Chamber.[386]

The ECHR, as is well known, was basically structured in two parts, guaranteeing within itself a "substantive" part and a "procedural" part: the former consists in a list of the rights guaranteed by the Convention; the latter entails the organs and the functional mechanisms of the ECtHR.[387]

The Court has a contentious and an advisory jurisdiction: the contentious jurisdiction includes both inter-State and individual applications; the advisory opinion jurisdiction allows both an opinion under article 47 by the Committee of Ministers and, most recently, with the entry into force of Protocol 16[388], a request for an advisory opinion from the domestic Courts of last instance to the European Court.[389]

Clearly, the following analysis will focus on the so-called "individual application", since it guarantees the direct access of the individual to the ECtHR for the protection of the rights enshrined in the ECHR and its protocols.

Indeed, the application under article 34 ECHR provides individuals a right to take legal action at the international level, being one of the fundamental guarantees of the effectiveness of the ECHR system as well as one of the key

386 See Council of Europe, *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, 11 May 1994, ETS 155.

387 Clearly, both first and second parts should be comprehended considering the several Protocols progressively amended and complemented the ECHR.

388 Cf. Council of Europe, *Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms*, 2 October 2013, CETS 214.

389 For an analysis, see K. LEMMENS, *Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?*, in *European Constitutional Law Review*, 15(4), 691-713, 2019.

components of the human rights protection mechanism.[390]

Moreover, being a "living" instrument, the Convention must be interpreted in the light of the current needs and conditions of society, and this interpretation must also be extended to procedural provisions such as article 34 ECHR.[391]

As a matter of fact, and as also acknowledged by scholars[392], the possibility to have individual recourse to a court of law constitutes the very core on which the ECHR system is founded, since it grants the individual what could be considered as a right of access to an international tribunal to protect the rights enshrined in the Convention.

More generally, to access the ECHR system and obtain a decision on the merits would be to recognise only a fraction of its fundamental importance, given that the role of the Strasbourg courts is to clarify, safeguard and develop the standards laid down in the Convention, thus contributing to States' compliance with their commitments as 'contracting parties'.[393]

In this respect, the ECHR system aims to determine questions of public policy of general interest, raising standards of human rights protection and extending human rights jurisprudence throughout the community of Convention States.[394] As has been acknowledged by the Court, the role of the ECHR is as a "*constitutional instrument of European public policy*" in the field of human rights".[395]

The litigation procedure can be divided into three "stages": *i)* the first stage concerns the admissibility of the application (or, more technically, the "admissibility stage"); *ii)* the second stage deals with the analysis carried out by the Court on the facts and the merits of the dispute (except for the attempt to friendly settle the case); and, *iii)* finally, the third stage regards the Court's

---

390 See *Mamatkulov and Askarov v. Turkey* [GC], app. nos. 46827/99 and 46951/99, 4 February 2005, §§ 100 and § 122; *Loizidou v. Turkey*, (preliminary objection), app. no. 15318/89, § 70.

391 Cf. *Loizidou v. Turkey*, (preliminary objection), § 71.

392 On this issue, see V. ZAGREBELSKY, *Manuale dei diritti fondamentali in Europa*, 2 ed., 2019, p. 30.

393 See *Ireland v. United Kingdom*, app. no. 5310/71, 18 January 1978, § 154, and, more recently, see *Jeronovičs v. Latvia* [GC], app. no. 44898/10, 5 July 2016, § 109.

394 Cf. *Konstantin Markin v. Russia* [GC], app. no. 30078/06, 22 March 2012, § 89.

395 See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], app. no. 45036/98, 30 June 2005, § 156.

decision on the merits.

Clearly, the analysis that will follow is preliminary to the beginning of the procedure, *i.e.,* the admissibility phase/stage, since this is the phase in which a person must "set up" his or her application and thus ensure access to international justice. This is therefore a further step, which is however a prerequisite for starting the procedure before the Strasbourg Court.

This "pre-procedural" phase will be necessary and fundamental to explore, since it represents an analysis of access to justice for the individual who wants to protect his/her rights before the Strasbourg Court: it will therefore be a study based on the Court's case law on the applicability of an individual application, since the Court's legal precedents play an important role in Strasbourg judgements.[396]

2. 5. 1. INDIVIDUAL APPLICATION TO THE ECTHR: ACCESS TO INTERNATIONAL JUSTICE THROUGH THE ADMISSIBILITY CRITERIA.

In order to explore how the individual is guaranteed the right to bring an action and thus to "have recourse to Strasbourg", it seems necessary to carry out an analysis of the admissibility criteria laid down by the ECHR, which have been amended over the years both by the action of member States of the Council of Europe and by the evolving jurisprudence of the ECtHR.

Therefore, these criteria represent the conditions of eligibility to access the regional system provided for by the ECHR.

However, scholars have always focused the attention on the legal aspects of these requirements, but the real possibility to access the Court consists in filling in the "application form", which is the first step to try to file a case before the Strasbourg judges. Consequently, not only will an analysis of these criteria be addressed, but it will be carried out considering how they are to be subsumed within the application form.

Indeed, the application form is an official legal document that may affect the

[396] See Y. LUPU AND E. VOETEN, *The Role of Precedent at the European Court of Human Rights: A Network Analysis of Case Citations*, Paper 12, 2010.

rights and obligations of the applicant, which must be filled out in its entirety, providing all the documents necessary for the assessment of the case.[397]

In this sense, if the application form is incomplete, it will be considered insufficient and will therefore be rejected by the Court[398], since it must contain a concise statement of the facts, the complaints and the information relating to compliance with the admissibility criteria.[399]

These strict indications are specified because the first admissibility filter carried out by the Court must make it possible to determine the nature and subject-matter of the application without consulting other documents than the other provided by the claimant.

Indeed, filling in the application form basically mean meet the conditions of admissibility laid down by the ECHR, which are contained by direct and sometimes indirect reference. For these reasons, just as previously tried to analyse the submission form to the HRC, a pragmatic analysis of the application form – which has strict formal and substantive requirements – will be attempted.

To examine the completion of the form and thus understand how the individual can access the ECHR mechanism, it is necessary to consider the following instruments: *i)* the Convention and its protocols, which are useful from a substantive as well as a formal point of view; *ii)* the Rules of the Court, which contain valuable indications that are also useful for the completion of the application form.[400]

In addition, the Secretariat of the Court provides potential applicants with information on how to fill in the form – one of the most useful of which is the "*Notes for filling in the application form*"[401] – which can be used as a guide both by individuals who wish to submit a form without the assistance of a lawyer and, more generally, by lawyers who are unfamiliar with proceedings before the Strasbourg judges.

---

397 See Application Form, p. 1.

398 See, generally, art. 47 of the Rules of Court.

399 See, specifically, art. 47 (2) (a) of the Rules of Court.

400 Council of Europe, *Rules of the Court*, Registry of the Court, new edition entered into force on 18 October 2021.

401 See "*Notes for filling the application form*", 2021/1.

2. 5. 2. THE VICTIM *STATUS* OF THE APPLICANT TO THE ECTHR: A PROGRESSING ASSESSMENT.

Among the different conditions of admissibility laid down by the ECHR for bringing an individual complaint, a prominent position – both for substantive and procedural issues – is certainly represented by the demonstrability of possessing the quality of "victim" of one of the rights laid down in the ECHR or in the additional protocols.

Therefore, it seems necessary to understand what is meant by "victim" within the meaning of the ECHR or its protocols.

In general, the Court – to ascertain whether there is victimhood – must determine if the way the applicant's rights may have been violated is contrary to the ECHR and its protocols, as it cannot examine violations *in abstracto*.[402]

Indeed, the Court examines of its own motion the question of victimhood, since it concerns an inherent jurisdictional competence of the Court[403], as the burden of proof fall on the specificity of the facts – it may also be related to the merits of the case[404] – and on the alleged violations of the Convention.[405]

In this regard, it seems appropriate to make a distinction between the word "victim" within the meaning of article 34 ECHR and the Court's interpretation of the "notion of victim": in the first case, article 34 not only concerns the direct victim(s) of the violation, but also all those indirect victims to whom the violation would cause harm, or who would otherwise have an interest in ensuring that the alleged violation ceases[406]; in the second case, the Court may interpret the notion of victim in a completely autonomous manner, leaving aside the rules

---

402 See *Roman Zakharov v. Russia* [GC], app. no. 47143/06, 4 December 2015, § 164.

403 Cf. *Buzadji v. The Republic of Moldova* [GC], app. no. 23755/07, 5 July 2016, § 70; *Satakunnan Markkinapörssi Oy e Satamedia Oy v. Finland* [GC], app. no. 931/13, 27 June 2017, § 93.

404 See *Siliadin v. France*, app. no. 73316/01, 26 October 2005, § 63; *Hirsi Jamaa and others v. Italy* [GC], app. no. 27765/09, 23 February 2012, § 111.

405 *N.D. and N.T. v. Spain* [GC], app. nos. 8675/15 and 8697/15, 13 February 2020, §§ 83- 88.

406 See *Vallianatos and others v. Greece* [GC], app. nos. 29381/09 and 32684/09, 7 November 2013, § 47.

of domestic law concerning the interest or capacity to act[407], since this interpretation must be assessed by the Court in an evolutionary manner and applied without excessive formalism.[408]

This constantly evolving interpretation of the notion of victim has made it possible to create a case law of the Court that covers three different situations concerning the *status* of victim of according to the ECHR or its protocols: *i)* the notion of direct victim; *ii)* the notion of indirect victim; *iii)* the notion of potential victim.

As far as the "direct victim" is concerned, it is essential[409] that a claimant is able to show that he or she was 'directly affected' by the measure complained of[410], although the position of the person in domestic proceedings is not decisive since the notion of victim is interpreted autonomously in the system of the Convention.[411] In addition, it is of utmost importance that the applicant claims to be a victim of the alleged infringement at all stages of the proceedings before the Court[412], always justifying the victim *status*.[413]

On this matter, the evolving jurisprudence of the Court on actions brought on behalf of an individual is indeed of particular interest. Currently, Strasbourg

---

[407]Cf. *Gorraiz Lizarraga and others v. Spain*, app. no. 62543/00, 10 November 2004, § 35.

[408] See both *Stukus and others v. Poland*, app. no. 12543/03, 1 July 2008, § 35 and *Zietal v. Poland*, app. no. 64972/01, 12 August 2009, §§ 54-59.

[409] *Hristozov and other v. Bulgaria*, app. nos. 47039/11 and 358/12, 29 April 2013, § 73.

[410] *Tănase v. Moldova* [GC], app. no. 7/08, 27 April 2010, § 104; *Burden v. The United Kingdom* [GC], app. no. 13378/05, 29 April 2008, § 33; *Lambert and others v. France* [GC], app. no. 46043/14, 5 June 2015, § 89.

[411] Cf. *Kalfagiannis and Pospert v. Greece* (dec.), app. no. 74435/14, 9 June 2020, §§ 44-48. Moreover, see also the consideration adopted by the Court respectively in *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], app. no. 38433/09, 7 June 2012, § 92, where the Court made it clear that a party may not complain of a violation of his or her rights in proceedings to which he or she was not a party. However, in some specific circumstances, direct victims who had not participated in the domestic proceedings were accepted as applicants before the Court, for example in *Beizaras and Levickas v. Lithuania*, app. no. 41288/15, 14 May 2020, §§ 78-81.

[412] *Scordino v. Italy* (n. 1) [GC], app. no. 36813/97, 29 March 2006, § 179; *Rooman v. Belgium* [GC], app. no. 18052/11, 31 January 2019, §§ 128-133.

[413] *Burdov v. Russia*, app. no. 33509/04, 4 May 2009, § 30; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], § 80.

judges have clarified that the application form can only be filed by or on behalf of living persons, except for alleged violations of core rights[414] by national authorities: in such cases, applications filed by individuals or associations on behalf of victims – even if not provided with a valid power of attorney – can be declared admissible.[415]

The notion of "indirect victim" entails a case law development which has allowed applications to be made for all those persons with a "close link" to the alleged victims who have a legal interest in clarifying the reasons behind the death or disappearance of a relative.[416]

If it is possible to assume that the death or disappearance may lead to State responsibility, the Court has accepted that close relatives may be considered indirect victims of the ECHR.[417] Clearly, such reasoning may also extend to siblings[418], children[419], married[420] and unmarried partners[421] and, finally, grandchildren.[422] However, the Court takes a more restrictive approach to all those persons who activate article 34 procedure in cases where the alleged ECHR violation was not closely related to the death or disappearance of the direct victim[423], refusing to grant standing to any other person who cannot demonstrate a connection and interest in relation to the alleged victim.[424]

Although not directly relevant to indirect victim issues, this interest/connection to the victim is also highlighted when a person makes an

---

414 This would include the following articles 2, 3 and 8 ECHR.

415 *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], §§ 103-114.

416 See *Varnava and others v. Turkey* [GC], app. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, § 112.

417 Cf. *Tsalikidis and others v. Greece*, app. no. 73974/14, 16 February 2018, § 64; *Kotilainen and others v. Finland*, app. no. 62439/12, 17 December 2020, §§ 51-52.

418 *Andronicou and Constantinou v. Cyprus*, app. no. 86/1996/705/89, 9 October 1997.

419 See *McKerr v. The United Kingdom*, app. no. 28883/95, 4 August 2001.

420 *McCann and others v. The United Kingdom*, app. no. 18984/91, 27 September 1995.

421 Cf. *Velikova v. Bulgaria* (dec.), app. no. 41488/98, 4 October 2000.

422 *Yaşa v. Turkey*, app. no. 22281/93, 27 June 2002.

423 *Karpylenko v. Ukraine*, app. no. 15509/12, 11 May 2016, § 104.

424 *Nassau Verzekering Maatschappij N.V. v. the Netherlands* (dec.), app. no. 57602/09, 4 October 2011, § 20.

application to the ECHR and passes away during the proceedings. In such cases, three hypotheses could be envisaged: *i)* an application already lodged could be "taken forward" by the heirs or close relatives of the alleged victim who express their intention to continue the proceedings, provided that they have a specific interest/connection with the victim and in relation to the case[425]; *ii)* if no one offers to take the case forward, or if this intention comes from persons who are not the heirs or sufficiently close relatives of the applicant – and therefore cannot demonstrate a connection and thus a legitimate interest in continuing the proceedings – the Court will strike the application from the register[426]; *iii)* the third hypothesis, which is very peculiar, could lead the Court to continue to deal with the application even in the absence of persons having a link with the victim and a concrete interest in the case, in exceptional situations where the Strasbourg judges consider that compliance with the ECHR and its protocols requires a continuation of the examination of the case.[427]

That being said, and as mentioned above, even though the ECHR does not allow for the possibility of *in abstracto* applications, the Court has nevertheless recognised the *status* of "potential victims" only and exclusively when they produce reasonable and convincing evidence of the likelihood of a violation affecting them personally, since mere suspicion or conjecture is not sufficient.[428]

There are several cases where the Court has recognised the qualification of potential victim[429], but it is extremely difficult to demonstrate the actual likelihood of a violation, since the Court has stressed that: *i)* one cannot be a

---

[425] *López Ribalda and Others v. Spain* [GC], app. nos. 1874/13 and 8567/13, 17 October 2019, §§ 71-73; *Malhous v. the Czech Republic* (dec.) [GC], app. no. 33071/96, 13 December 2000; *Tagiyev and Huseynov v. Azerbaijan*, app. no. 13274/08, 5 March 2020, §§ 23-24.

[426] *Léger v. France* (striking out) [GC], app. no. 19324/02, 30 March 2009, § 50; *Hirsi Jamaa and Others v. Italy* [GC] § 57.

[427] *Paposhvili v. Belgium* [GC], app. no. 41738/10, 13 December 2016, §§ 129-133; *Delecolle v. France* [GC], app. no. 37646/13, 25 January 2019, § 39.

[428] *Senator Lines GmbH v. fifteen Member States of the European Union* (dec.) [GC], app. no. 56672/00, 10 March 2004.

[429] See *Klass and Others v. Germany*, app. no. 5029/71, 6 September 1978; *Soering v. the United Kingdom*, app. no. 14038/88, 7 July 1989; and *Dudgeon v. the United Kingdom*, app. no. 7525/76, 24 February 1983.

potential victim if he/she is partly responsible for the violation[430]; *ii)* it is not possible for claimants to complain about a provision of a domestic law simply because they believe – without having been directly affected – that it may contravene the Convention.[431]

It is therefore clear that the evolution of the ECHR's interpretation of the notion of "victim" within the meaning of the ECHR or its protocols has expanded considerably in recent years. However, to demonstrate one's *status* as a potential victim – and thus to complain about possible violations by the State in the domestic proceedings – in the application form is complicated, especially for those who do not wish to avail themselves of the services of a lawyer at this stage.

As to substantiate the victim *status* to the ECtHR, there is a gap between what is affirmed in the Convention and what is included in the application form, as there is no clear stating, for example, "*demonstrate the status of a victim under the Convention*".

For this reason, victimhood must be demonstrated *prima facie* from three different perspectives: firstly, the person[432] who is to be regarded as a "victim" within the meaning of the ECHR or its protocols must be correctly specified by appropriately completing all the sections provided for that purpose[433]; secondly, brief references could also be made in the statement of facts, as the Court could draw useful indications as to whether the applicant is a victim[434]; lastly, it will be necessary to specify in section F – the section devoted to the presentation of one or more violations of the ECHR and its protocols – what are the complaints presented to the Court and thus make it clear to the Strasbourg judges in what

---

430 *Paşa and Erkan Erol v. Turkey*, app. no. 51358/99, 23 May 2007.

431 This is the so-called "*actio popularis*", see *Cordella and Others v. Italy*, app. no. 54414/13 and 54264/15, 24 June 2019, § 100; *Kalfagiannis and Pospert v. Greece* (dec.), app. no. 74435/14, 9 June 2020, § 46).

432 Clearly, the person is understood to be either a natural person or a legal entity, as analysed above.

433 These are the indications contained on pages 1, 3 and 4, to be filled in depending on whether or not the subject is represented (by an attorney or a third party) or is an organisation.

434 See p. 5/13, section E.

way the State has not respected the rights provided for by the Convention, underlining their impact on the applicant and, therefore, supporting them with arguments suggesting that he is a victim.[435]

Therefore, to demonstrate the condition of victim within the meaning of the Convention and its protocols, it is not only necessary to carry out a detailed legal analysis of the events that the applicant wishes to represent, but also to succeed in highlighting – within the limited space made available in the application form – the possible violations committed by the State.

For this purpose, a knowledge of the Court's previous case law on this specific requirement seems necessary, which may certainly make a difference as regards the admissibility of the application form and thus as regards access to justice.

As a final consideration related to this topic, it should be borne in mind that the application must contain all the necessary indications so that the alleged applicant can be "known" by the Court; consequently, another condition of admissibility – linked with the victim condition – is the rejection of anonymous applications.

In this respect, it should be made clear that an "anonymous" application under article 35 § 2(a) ECHR must be distinguished from disclosure to the public of the identity of an applicant, since the latter would be an exception to the rule on public access to information in proceedings before the Court.[436]

Indeed, the applicant must be duly identified (and therefore identifiable by the Court) in the application form, since only the Court could determine that the identity of that person is not disclosed to the public.[437] It is clear from the Court's case-law that an action brought before the Court is considered anonymous when no information[438] is given in the form that would allow the judges to identify the

---

[435] See p. 8/13, section F.

[436] Cf. Arts. 33 and 47 § 4 of the Rules of Court and the Practice Directions annexed thereto.

[437] In such a case, according to Rule 47 § 4 of the Rules, the applicant will be identified by his initials or by a letter.

[438] In this sense, Article 35 § 2 (a) of the ECHR does not apply where the applicants have submitted sufficient elements of fact and law to enable the courts to identify them and establish their links to the facts in question and the violations raised, see *Sindicatul "Păstorul cel Bun" v. Romania* [GC], app. no. 2330/09, 9 July 2013, § 71.

applicant[439], since only the Court has jurisdiction if an action is anonymous within the meaning of article 35 § 2 (a).[440]

2. 5. 3. LEGAL STANDING TO THE ECTHR: AN EXPANDING REPRESENTATION.

Compared to the original approach, the number of legal entities enjoying the right of access to international justice before the ECtHR is now numerous.

As provided for by the ECHR and the subsequent evolving jurisprudence of the ECtHR, natural persons (both individually and collectively) and organisations, an expression which includes both companies (legal persons), non-governmental organisations, associations, or another type of legal person, can qualify as "victims" and thus bring an individual application.

Although the determination of the quality of victim is clearly unique, *i.e.,* the individual must suffer an impairment of one of the rights included in the ECHR and/or in the Protocols, it may vary depending on the violations alleged and/or the subjects who intend to claim the violation.

As previously explored, to invoke article 34 ECHR an individual must demonstrate: *i)* that he or she falls within one of the categories provided for in article 34; *ii)* that he or she is a victim of a violation of the Convention.[441]

As far as natural persons are concerned, any person may invoke the protection of rights under the ECHR against a State Party when the alleged violation has taken place within the jurisdiction of the State concerned, within the meaning of

---

[439] See *"Blondje" v. the Netherlands* (dec.) app. no. 7245/09, 15 September 2009, where no space or documents submitted contained a mention of the applicant's name, but only a reference and pseudonyms, and the power of attorney was signed "X"; thus, the applicant's identity was not identified.

[440] Clearly, if the respondent Government have doubts as to the authenticity of the application, they had an obligation to inform the Court in sufficient time to reach a decision, see *Sindicatul Păstorul cel Bun v. Romania* [GC], § 69.

[441] See *Vallianatos and others v. Greece* [GC], app. nos. 29381/09 and 32684/09, 7 November 2013, § 47.

article 1 ECHR.[442] These claims can only be filed by living persons or persons claiming on their behalf, as a deceased person cannot file a claim form.[443] As long as the analysis is limited to the individual subject, *i.e.*, to an individual claimant, the matter seems quite clear.

However, as regards "legal persons" or "organisations" (as referred to in the application form), it seems necessary to make some clarifications.

For example, the term "governmental organisations" applies both to central bodies of the State but also to decentralised bodies exercising 'public functions', irrespective of their degree of autonomy towards central bodies.[444]

In order to determine whether a legal person (other than a territorial authority) falls into this category, several aspects must be taken into account, including: *i)* its legal *status* or the rights that that status confers on it; *ii)* the nature of the activity it carries out and the context in which it is carried out; *iii)* the degree of independence from the political authorities.[445]

On the other hand, the Court has considered a company to be "non-governmental", for the purposes of article 34, when it is essentially governed by "company law", when it does not enjoy any governmental or other powers, except those conferred by private law, and when it is subject to the jurisdiction

---

[442] Cf. *Van der Tang v. Spain*, app. n. 19382/92, 13 July 1995, § 53.

[443] See *Aizpurua Ortiz and others v. Spain*, app. no. 42430/05, 28 June 2010, § 30; *Dvořáček and Dvořáčková v. Slovakia*, app. no. 30754/04, 28 October 2009, § 41.

[444] In this respect, see the Court's case-law, which has applied this criterion, for example, to local and regional authorities (*Radio France and Others v. France*, (dec.), app. no. 53984/00, 23 September 2003, § 26), a municipality (*Ayuntamiento de Mula v. Spain* (dec.), app. no. 55346/00, 1 February 2001), or a part of a municipality participating in the exercise of public powers (*Municipal Chamber of Antilly v. France* (dec.), app. no. 45129/98, 23 November 1999), none of which is entitled to submit an application on the basis of article 34, see for example *Döşemealtı Belediyesi v. Turkey* (dec.), app. no. 50108/06, 23 March 2010, where in the inadmissibility decision it is stated that the municipality had exercised its powers as a public body in bringing the action in question because it was precisely because it was a "municipality" that it had the status of applicant in the proceedings under domestic law. Furthermore, the three stakeholders in the proceedings, the applicant (municipality), the Ministry of the Interior and the judicial authorities conducting the domestic proceedings represented public authority and therefore the respondent State.

[445] See *Kotov v. Russia* [GC], app. no. 54522/00, 3 April 2012, § 93.

of the ordinary courts rather than the administrative tribunals. In short, when it carries on commercial activities and does not have a "public service" role or a monopoly in a specific sector.[446]

Moreover, as anticipated, subjects may also bring a claim as a "group of individuals", as long as they do not come from local authorities or governmental bodies that make up or represent them.[447]

Furthermore, it seems noteworthy to underline how, over the years, the protection relating to the right of access to justice has also been extended to commercial companies – whether represented as such or as capital shareholders – in relation to different measures aimed at preventing the protection of the "right to property"[448], especially after the evolving case law on "corporate veil".[449]

Such an expansion certainly suggests a higher degree of protection – and thus access to international justice – that goes well beyond the known human rights standards, ensuring the protection of subjective legal situations adapted to the requirements of the market.

2. 5. 4. APPLICATION COSTS AND LEGAL ASSISTANCE: BETWEEN FIXED AND VARIABLE COSTS.

Once it has been clarified which subjects have an effective legitimacy within

[446] Cf. *Slovenia v. Croatia* [GC], (dec.), app. no. 54155/16, 18 November 2020, §§ 62-63.

[447] On this point, see *Demirbaş and Others v. Turkey* (dec.), app. no. 1093/08. On the contrary, a group of members of a regional parliament may be regarded as a "group of individuals" different to a governmental organisation, since the rights and freedoms invoked by the applicants concern them individually and are not attributable to the Parliament as an institution, see *Forcadell i Lluis and Others v. Spain* (dec.), app. no. 75147/17, 7 May 2019, where the Court accepted that the applicant MPs were acting as a "group of individuals" in order to defend their specific individual rights, which were not attributable to the Parliament of Catalonia as an institution.

[448] See. Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, art. 1.

[449] Cf. *Agrotexim and Others v. Greece*, app. no. 14807/89, 24 October 1995, the situations in which individual shareholders may be entitled to bring actions against measures taken against their companies, as well as the circumstances that allow them to bring claims on their own behalf.

the application form, it is necessary to elaborate two issues closely linked to this topic and deeply affecting the access to justice at the ECHR: *i)* the legal costs to access the Strasbourg procedure; and *ii)* legal assistance.

Regarding costs, there are no fees or charges for lodging an application form to the European Court, since the paper documentation on the case must be send by international registered mail at the Registry of the European Court in Strasbourg. It should also be noted that if the application is rejected (on the merits or because it is inadmissible), there is never any possibility of the applicant being ordered to pay the costs, nor are any penalties or court fees due.

Such assessments clearly allow access to justice to be economically beneficial for any subject, since the high costs of starting litigation proceedings can often be a factor in favour of initiating proceedings.

In addition, the impossibility of an order to pay costs after losing the case guarantees the person unconditional access to justice, which will enable him to pursue his reasons until the end.

These are clearly considerations which, as often happens in these cases, have both positive and negative developments: on the one hand, having so few costs, both in the start-up and in the final phase of the proceedings, facilitates and broadens the right of access to international justice; on the other hand, not having concerns of this kind could lead either to actions being brought before the Court only because one has lost in the domestic proceedings or to actions being brought even if one is not entirely convinced of one's reasons.

Thus, the applicant's costs for bringing a case before the ECHR will be both "fixed" and "variable" in nature. The fixed costs will relate to the costs of correspondence with the Court, *i.e.*, sending the international registered letter[450] to the Registry in Strasbourg and the subsequent procedural documents, if a decision of inadmissibility is not reached *prima facie*.

The variable costs will mainly depend on the legal costs, which in addition to including the lawyer's fee – necessary from the stage of correspondence with the defendant government onwards – could relate to technical expertise and/or translations of documents in domestic proceedings.

[450] Which has a different cost, depending on the sending State.

As regards questions relating to legal assistance, it must be stressed that, for this stage of the procedure – preparing and sending the application form – the assistance of a lawyer is not necessary.

This is inferred both implicitly from article 34 ECHR, where no reference is made to the need for legal representation[451], and explicitly in rule 36 of the Rules of Court, where it is specified that [...] *Persons, non-governmental organisations or groups of individuals may initially submit applications under Article 34 of the Convention themselves or through a representative* [...], except in subsequent paragraphs dictating the operation of legal representation during the proceedings[452] and, finally, in the "practice directions" contained within the Rules of Court, where it is stressed that "[...] *An applicant does not have to have legal representation at the introductory stage of proceedings.* [...]".[453]

Nevertheless, the assistance of a lawyer will be necessary once the Court notifies the defendant government to submit its observations on the merits[454], so from that stage onwards the applicant will have "fixed" legal assistance costs. However, at this specific stage of the proceedings the applicant may apply for legal aid[455], which – under certain circumstances[456] – may be granted by the President of the Chamber until the case is concluded.[457]

If, on the other hand, the applicant prefers to appoint a lawyer as soon as his/her appeal under article 34 ECHR is lodged, it must be specified that there is no list of lawyers authorised to practise before the ECHR, as long as it is one or more lawyers qualified to practice law in one of the Member States of the ECHR and resident in one of those States, or in any case authorised by the President of the Chamber.[458]

---

451 To be specific, there is not even a reference to an obligation of legal aid that will become mandatory after the complaint has been dealt with by the respondent government.

452 See Rule 36 of the Rules of the Court.

453 See page 60, § 9 of the Rules of the Court.

454 See Rule 36 p. 2.

455 See Rule 105.

456 See Rule 106.

457 See Rule 105 p. 2.

458 See Rule 36, (4) (a).

Clearly, in the event that one or more applicants decide to be represented as referred to above, it is necessary that they authorise[459] by means of the duly signed power of attorney the lawyer, who must therefore be able to demonstrate that he or she has received a specific and explicit mandate from the alleged victim who wishes to bring a claim under Article 34 ECHR, on whose behalf they are acting before the Court.[460]

However, in cases of particularly serious violations allegedly carried out by national authorities – and therefore in view of the difficulties of having physical access to the Strasbourg Court's justice – the ECtHR's case-law has been less formalistic and has exceptionally declared applications admissible even where there is a duly signed power of attorney.[461]

2. 5. 5. EXHAUSTION OF LOCAL REMEDIES AND THE SIX (FOUR)-MONTHS' TIME LIMIT.

Another fundamental condition for the admissibility of individual action is the requirement of exhaustion of domestic remedies[462], which must be read in conjunction with the other condition of exceeding the time limit of four months[463] from the adoption of the final domestic decision.[464]

As regards the rule of exhaustion of domestic remedies, as analysed in the first chapter and as also indicated in the text of the Convention, this is a rule of

---

459 See *Aliev v. Georgia*, app. no. 522/04, 13 April 2009, §§ 44-49.

460 Cf. *Oliyevskyy v. Ukraine*, (dec.), app. no. 65117/11, 14 January 2020, §§ 16-22.

461 See *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], app. no. 47848/08, 17 July 2014, where the Court ruled that in exceptional circumstances an association may act as a representative of a victim, in the absence of a power of attorney and even though the victim may have died before the application was made under the Convention, § 122.

462 These remedies are limited to those that are accessible and effective according to a particularly well-established practice.

463 This time-limit, originally provided for six months, was reduced with the entry into force of Protocol No. 15. See Council of Europe, *Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms*, 24 June 2004, CETS 213, art. 4.

464 See Article 35 ECHR.

customary international law[465] which identifies the Court as an international tribunal subsidiary to the national systems of human rights protection[466], given that the initial possibility of determining the compatibility of the rules of domestic law with those of the ECHR or the Protocols[467] is reserved to national courts.[468]

There are also parameters elaborated by the Court's jurisprudence for determining whether a domestic jurisdictional procedure can be considered an "effective remedy".[469]

These include the complaints raised by the applicant, the scope of the State's obligations under that particular provision of the ECHR, the remedies available in the respondent State and the specific circumstances of the case.[470]

These parameters should also be applied with a certain degree of flexibility and without excessive formalism as it fits within the context of human rights protection[471], although applicants are nevertheless bound by the applicable rules and procedures of domestic law.[472]

Indeed, it remains up to the individual claimant to choose the most congenial remedy to his/her case[473] and, in case of several remedies that could potentially

---

[465] In this respect, see what has been discussed above in Chapter 1.

[466] Indeed, it is a rule that is an indispensable part of the functioning of the system of protection provided for by the Convention, see *Vučković and Others v. Serbia* (preliminary objection) [GC], app. nos. 17153/11, 17157/11, 17160/11, 17163/11, 17168/11, 17173/11, 17178/11, 17181/11, 17182/11, 17186/11, 17343/11, 17344/11, 17362/11, 17364/11, 17367/11, 17370/11, 17372/11, 17377/11, 17380/11, 17382/11, 17386/11, 17421/11, 17424/11, 17428/11, 17431/11, 17435/11, 17438/11, 17439/11, 17440/11 and 17443/11, 25 March 2014, §§ 69-77.

[467] *A, B and C v. Ireland* [GC], app. no. 25579/05, 16 December 2010, § 142.

[468] *Gherghina v. Romania* (dec.) [GC], app. no. 42219/07, 9 July 2015, §§ 84-89; *Mocanu and Others v. Romania* [GC], app. nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, §§ 221.

[469] In the light of Article 35 §1 ECHR.

[470] *Kozacioğlu v. Turkey* [GC], app. no. 2334/03, 19 February 2009, § 40*; D.H. and Others v. the Czech Republic* [GC], app. no. 57325/00, 13 November 2007, § 116.

[471] *Gherghina v. Romania* (dec.) [GC], app. no. 42219/07, 9 July 2015, § 87.

[472] *Agbovi v. Germany* (dec.), app. no. 71759/01, 25 September 2006; *Vučković and Others v. Serbia* (preliminary objection) [GC], §§ 72 and 80.

[473] *Fabris and Parziale v. Italy*, app. no. 41603/13, 19 March 2020, §§ 49-59.

be effective, the alleged victim will still be required to use only one of them[474], since if one jurisdictional way has been tried resorting to a remedy that has essentially the same purpose been not required by the Court.[475]

Another issue of fundamental importance for the access to justice of the applicant, which relates jointly to the obligation to exhaust domestic remedies and to the *ratione materiae* application of the ECHR, concerns the possibility of grounding a violation of rights under the Convention on domestic proceedings.

In order to meet the claimants' demand for justice and thus ensure the proper functioning of the ECHR mechanism, the Court has clarified that the claimant does not necessarily have to raise the violation of the ECHR or its protocols during the domestic proceedings, provided that the grievance is raised at least in substance[476], *i.e.* he/she must have raised arguments that have a similar effect from the point of view of domestic law, since the rationale is to grant – in the first instance – the national courts the possibility to remedy the alleged violation.[477]

This is what is known as "horizontal" exhaustion, which must not be confused with the "vertical" exhaustion mentioned above, which obliges the claimant to pursue the remedy up to the highest authority in the hierarchy to obtain a decision against which no further ordinary appeal is possible, *i.e.*, up to the last instance of the proceedings.[478]

As mentioned above, it is necessary to " establish " in the application form that all domestic remedies have been exhausted, which means that the burden of proof falls *prima facie* on the applicant, who must implement it in the form,

---

474 *Karakó v. Hungary*, app. no. 39311/05, 28 July 2009, § 14; *Aquilina v. Malta* [GC], app. no. 25642, 29 April 1999, § 39.

475 *Nicolae Virgiliu Tănase v. Romania* [GC], app. no. 41720, 25 June 2019, § 177.

476 *Fressoz and Roire v. France* [GC], app. no. 29183/95, 21 January 1999, § 38; *Azinas v. Cyprus* [GC], app. no. 56679/00, 28 April 2004, §§ 40-41.

477 *Marić v. Croatia*, app. no. 50132/12, 12 September 2014, § 53; *Portu Juanenea and Sarasola Yarzabal v. Spain*, app. no 1653, 13 May 2018, §§ 62-63.

478 *A., B. and C. v. Ireland* [GC], 16 December 2010, § 142.

both generally in the statement of facts[479] and more specifically in section G, under the heading "*Compliance with the criteria for admissibility laid down in Article 35 § 1 of the Convention*", where for each grievance complained of, it will be necessary to show and confirm that he has exhausted all the effective remedies available[480] in the State against which the action is directed[481] and, if necessary, to specify whether there was a remedy that he did not pursue and to justify his failure to do so.[482]

Clearly, if the respondent Government – by means of its pleadings/observations – asserts the non-exhaustion of domestic remedies, it has the burden of proving that the applicant did not use all available and effective remedies.[483]

As regards the "time" limit, it is well known that the ECHR currently provides that the application must be lodged within six months from the "final domestic decision", *i.e.*, the decision against which no further ordinary remedy is available, since the revocation of the judgment is considered an extraordinary remedy and therefore is not relevant.

As mentioned above, Protocol No 15 to the ECHR[484] amended article 35 § 1 to reduce the time-limit from six months to four months.[485]

This modification will be effective only from 1 February 2022 onwards and will not have retroactive effect, therefore it will not apply to all applications

---

[479] See application form pp. 5/13, where it is stated that this section is devoted to containing all the information relating "[...] *to compliance with the rule of prior exhaustion of domestic remedies* [...]".

[480] These are, as clarified by the Court's case-law, remedies which are accessible, capable of providing redress in respect of the grievances presented and which offer reasonable prospects of success, see *Sejdovic v. Italy* [GC], app. no. 56581/00, 1 March 2006, § 46; *Paksas v. Lithuania* [GC], app. no. 34932/04, 6 January 2011, § 75.

[481] See application form p. 10/13.

[482] See p. 11/13 of the application form.

[483] *Molla Sali v. Greece* [GC], app. no. 20452/14 19 December 2018, § 89; *Mocanu and Others v. Romania* [GC], § 225.

[484] The Protocol entered into force on 1 August 2021. For an interesting comment, see N. VOGIATZIS, *When Reform Meets Judicial Restraint Protocol 15 Amending the European Convention on Human Rights*, in *Northern Ireland Legal Quarterly*, 66(2), 127-150, 2015.

[485] In this regard, see article 4 of Protocol No. 15.

where the final domestic decision was taken before the Protocol entered into force.[486]

Notwithstanding this amendment clearly made to reduce delays, the rationale of such a condition of admissibility is to ensure "legal certainty" by guaranteeing that possible violations of the ECHR or the Protocols are examined within a reasonable period, avoiding State authorities and/or other actors involved in the matter would be kept in a state of uncertainty for a long period of time.[487]

In addition, the importance of this admissibility criteria – which is of fundamental public policy significance – is also demonstrated by the fact that it is automatically reviewable by the Court, even if the respondent Government does not raise such an objection.[488]

What is most relevant to this condition of admissibility in the matter of access to justice is certainly the date by which the time-limit is to run, which, according to the settled case-law of the Court, is identified with the date of the 'final decision' of the last domestic instance.[489]

More specifically as regards the *dies a quo*, the six-month (soon becoming four-months) time-limit runs from the date on which the applicant or his representative has sufficient knowledge of the reasons underlying the final domestic decision.[490]

This deadline ensures the potential applicant the time to consider whether to bring a claim, and to decide on the complaints and arguments to be raised before the Strasbourg courts, since the running of time would make the handling of the complaint problematic and therefore unfair.[491]

Lastly, it must be borne in mind that the time-limit laid down in article 35 § 1

---

[486] See *Explanatory Report to Protocol No.15*, § 22.

[487] *Lopes de Sousa Fernandes v. Portugal* [GC], app. no. 56080/13, 19 December 2017, § 129.

[488] *Merabishvili v. Georgia* [GC], app. no. 72508, 28 November 2017, § 247; *Radomilja and Others v. Croatia* [GC], app. nos. 37685/10 and 22768/12, 20 March 2018, § 138.

[489] *Lekić v. Slovenia* [GC], app. no. 36480/07, 11 December 2018, § 65.

[490] *Koç and Tosun v. Turkey* (dec.), app. no. 23852/04, 13 November 2008; *Papachelas v. Greece* [GC], app. no. 31423/96, 25 March 1999, § 30.

[491] *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], app. nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, §§ 99-101; *Sabri Güneş v. Turkey* [GC], app. no. 27396/06, 29 June 2012, § 39.

begins to run on the day following the date on which the final decision is delivered, or the applicant or his/her representative is informed of it, consisting of the period in six calendar months, irrespective of the actual duration of those months.[492]

In this sense, the Court applies this time limit considering the specific criteria of the ECHR and not those of the State's internal legislation[493], since this ensures legal certainty, the proper administration of justice and thus the practical and effective functioning of the Convention mechanism.[494]

To enable the Court to verify compliance with the six-month time-limit, it is necessary for the applicant to clearly specify the date of the final domestic decision for each grievance he or she wishes to raise[495], taking particular care to include the decision in an attachment.

2. 5. 6. SAME MATTER AND NEW FACTS: BETWEEN PROCEDURAL AND FACTUAL CRITERIA.

There are other conditions of admissibility directly specified in the application form[496], the one laid down in article 35 § 2 (b): *i*) an application may not be examined by the Court if it contains no new facts and *ii)* is essentially identical to one already examined by the Court or already submitted to another international mechanism procedure.[497]

Indeed, these are two different conditions of admissibility combined in one, as this "difference" can also be seen in the form: firstly, the applicant is asked whether he/she has already submitted one of the issues raised to another international court of enquiry or resolution and, if so, he/she must give

---

[492] *Otto v. Germany* (dec.), app. no. 27574/02, 24 November 2005; *Ataykaya v. Turkey*, app. no. 50275/08, 22 July 2014, § 40.

[493] *Poslu and Others v. Turkey*, app. nos. 6162/04, 6297/04, 6304/04, 6305/04, 6149/04, 9724/04 and 9733/04, 8 September 2010, § 10.

[494] *Sabri Güneş v. Turkey* [GC], app. no. 27396/06, 29 June 2012, § 56.

[495] See application form sections E and G.

[496] See application form sect. H, p. 11/13.

[497] See ECHR, art. 35, § 2 (b).

information about the issues raised, the international institution addressed, the date of the application and finally what kind of decisions have been taken[498]; secondly, the applicant is asked to specify whether he/she has lodged any complaints before the Court, indicating – if so – the corresponding application number already given by the Registry.[499]

Although described in the application form in an inverse way to how it is indicated in the ECHR, it is necessary to analyse this double – indeed as one – condition of admissibility.

The foundation of the first requirement indicated in the form is to avoid several international dispute resolution bodies dealing simultaneously with essentially identical complaints and cases, as this would be incompatible with the purpose of the ECHR.[500]

That being said, an examination of the Court's case-law – which must verify this type of admissibility condition *ex officio*[501] – reveals reasoning based on two levels.

First, the judges will have to check whether the parallel proceedings can be considered to have been conducted in "*another international investigation or settlement procedure*" within the meaning of article 35 § 2(b) of the Convention.[502]

From an examination of the caselaw, it does not appear that the Court will "restrict itself" to a formal verification, extending the analysis to the nature of the body, the procedure followed and the effectiveness of the decisions, which will have to be such as to exclude the jurisdiction of the Court under article 35 § 2 (b).[503]

More specifically, for a mechanism resembling that envisaged by the ECHR to

---

498 See Application Form, section H, paras 66-67.

499 See Application Form, sect. H, paras 68-69.

500 *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, app. no. 20641/05, 25 December 2012, § 37; *Selahattin Demirtaş v. Turkey* (no. 2) [GC], app. no. 14305/17, 22 December 2020, § 180.

501 *POA and Others v. the United Kingdom* (dec.), app. no. 59253/11, 21 May 2013, § 27.

502 *Gürdeniz v. Turkey* (dec.), app. no. 59715/10, 18 March 2014, §§ 39-40; *Doğan and Çakmak v. Turkey* (dec.), app. nos. 28484/10 and 58223/10, 14 May 2019, § 20.

503 *OAO Neftyanaya Kompaniya Yukos v. Russia*, app. no. 14902/04, 8 March 2012, § 522; *De Pace v. Italy*, app. no. 22728/03, 1 December 2008, §§ 25-28.

emerge, it is necessary for the examination of the merits to be determined based on rights included in a legal instrument, upon which the relevant international legal body is authorised to judge on the responsibility of the State and to provide a legal remedy capable of putting an end to the alleged violation. Moreover, the "other" international legal body should also have offer guarantees – both institutional and procedural – such as independence, impartiality and adversarial.[504]

Secondly, to complete the analysis in the first step, it will be necessary for the Court to make a comparison of the claimants in the respective proceedings, the relevant legal provisions invoked by them, the scope of their grievances and the types of redress sought.[505]

Therefore, as is the practice of the UN Human Rights Committee[506], this is a "test" that the Court carries out to assess the admissibility of applications submitted or already submitted to other instances: *i)* identity of the applicants[507]; *ii)* same facts; and *iii)* same violations.[508]

As regards the purpose of the second requirement set out in the form, it must be borne in mind that it is a condition of admissibility aimed at ensuring the finality of the Court's decisions and at preventing applicants from attempting – by submitting a new application – to "challenge" earlier judgments or decisions of the Court.[509]

---

[504] *Selahattin Demirtaş v. Turkey* (no. 2) [GC], app. no. 14305/17, 22 December 2020, §§ 182-186.

[505] *Greek Federation of Bank Employees' Unions v. Greece* (dec.), app. no. 24581/94, 6 April 1995, § 39.

[506] Qui fai nota ad analisi precedente, magari citando la pagina e non la nota.

[507] The "personal" requirement is of particular importance in the Court's view, since if the applicants before the two institutions are not identical, the "application" to the Court cannot be regarded as "*substantially the same as a question which has been ... submitted to another international investigation or resolution procedure*", see *Folgerø and Others v. Norway* (dec.), app. no. 15472/02, 29 June 2007.

[508] *Karoussiotis v. Portugal*, app. no. 23205/08, 1 May 2011, § 63; *Gürdeniz v. Turkey* (dec.), app. no. 59715/10, 18 March 2014, §§ 41-45; *Pauger v. Austria*, Commisison decision, app. no. 24872/94, 9 January 1995.

[509] *Kafkaris v. Cyprus* (dec.), app. no. 21906/04, 11 April 2006, § 67; *Lowe v. United Kingdom* (dec.), app. no. 12486/07, 8 September 2009.

In addition to prevent subsequent applications from acting as a "remedy" for decisions already taken by the Court, this requirement pursues the interests of legal certainty and is therefore strictly applied by the Court, unlike other conditions of admissibility which are applied flexibly and without excessive formalism.[510] *Mutatis mutandis*, the Court has also built its inadmissibility jurisprudence on the three requirements outlined above: same persons, same facts[511] and same violations.[512]

However, it should be noted that if a previous application has never been the subject of a formal decision, the Court is not precluded from examining the new application by means of a form.[513]

Therefore, in order for the Court to consider an application that relates to the same facts as those set out in an earlier application or complaints, the applicant must actually raise a new complaint or submit new information that has not previously been considered by the Court[514], considering that this must be new information concerning "new facts" on the case and not developments in the Court's case law, which do not constitute "relevant new information" for the purposes of article 35 § 2 (b).[515]

2. 5. 7. MANIFESTLY ILL-FOUNDED OR ABUSE OF RIGHT: DEFINING THE REQUISITE OF PROTECTION.

A further inadmissibility condition is that the application must not be frivolous (*i.e.,* "abusive" within the meaning of the Convention) or manifestly ill-

[510] *Harkins v. the United Kingdom* (dec.) [GC], app. no. 71537/14, 15 June 2017, §§ 52-54.

[511] As the Court has emphasised, to determine whether a complaint or a grievance is substantially the same within the meaning of Article 35 § 2 (b) of the Convention, the assessment is based on the facts alleged therein, see *Radomilja and Others v. Croatia* [GC], app. nos. 37685/10 and 22768/12, 20 March 2018, § 120.

[512] *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], app. no. 32772/02, 30 June 2009, § 63; *Amarandei and Others v. Romania*, app. no. 1443/10, 26 July 2016, §§ 106-111.

[513] *Sürmeli v. Germany* (dec.), app. no. 75529/01, 29 April 2004.

[514] *Kafkaris v. Cyprus* (dec.), app. no. 21906/04, 11 April 2006, § 68.

[515] *Harkins v. the United Kingdom* (dec.) [GC], §§ 50 and 55-56.

founded.[516]

Again, this is a condition which essentially encompasses two different ones: on the one hand, the abuse of the right to complain (or, specifically, abuse of the right to petition) under article 34 ECHR[517]; on the other, that of the "manifest ill-founded" of the merits of the application to the Court.[518]

With regard to the first of the two aspects mentioned above, this is a well-known characteristic in various legal systems, the abuse of rights, which under article 35 § 3 (a) ECHR must be understood as the harmful exercise of a right for purposes other than those for which it was intended – thus covering any conduct by an applicant that is manifestly contrary to the purpose of the right of access to justice provided for by the ECHR – and which impedes the proper functioning of the Court or the proper conduct of proceedings before it.[519]

Although inadmissibility on this ground is an exceptional measure[520], an analysis of the Court's case-law reveals five typical categories of situations leading to abuse of the right to petition before the Strasbourg judges.[521]

The first category concerns misleading the Court[522], which means basing the complaint on incorrect facts, such as submitting an application under a false identity[523], falsifying documents sent to the Court[524], not correctly declaring one's nationality[525], or using vague and undefined terms in a complaint to make the circumstances of the case appear similar to another case in which the Court

[516] See Article 35 § 3 (a).

[517] See Article 35 § 3 (a), when it states that [...] *the application is ... an abuse of the right of individual application* [...].

[518] See Article 35 § 3 (a), when it is stated that [...] *the application is ... manifestly ill-founded* [...].

[519] *Bivolaru v. Romania*, app. no. 28796/04, 28 May 2017, §§ 78-82.

[520] *Miroļubovs and Others v. Latvia*, app. no. 798/05, 15 December 2009, § 62.

[521] Moreover, there are also cases not directly falling into these categories which cannot therefore be listed exhaustively, see *S.A.S. v. France* [GC], app. no. 43835/11, 1 July 2014, § 67.

[522] *Gogitidze and Others v. Georgia*, app. no. 36862/05, 12 August 2015, § 76.

[523] *Drijfhout v. Netherlands* (dec.), app. no. 51721/09, 22 February 2011, §§ 27-29

[524] *Bagheri and Maliki v. the Netherlands* (dec.), app. no. 30164/06, 15 May 2007.

[525] *Bencheref v. Sweden* (dec.), app. no. 9602/15, 5 December 2017, § 39.

found an infringement.[526]

The second category regards the use of particularly vexatious, aggressive language or offensive expressions[527] in the applicant's correspondence with the Court, whether against the respondent government, its agent, the authorities of the respondent state, the Court itself, its judges, its registry, or its members.[528]

The third category deals with the violation of the obligation[529] to keep the friendly settlement proceedings confidential – which can therefore be considered an abuse of rights[530] – especially when this kind of confidential information is revealed through the mass media[531] and is of an "international" nature.[532]

The fourth category includes all those applications manifestly vexatious or lacking any real purpose, which is displayed, for example, when the applicant abuses his/her right to petition by submitting applications like those he has already submitted in the past and which have already been declared inadmissible[533], or when he brings an application that is manifestly lacking any

---

526 *Kongresna Narodna Stranka and Others v. Bosnia and Herzegovina* (dec.), app. no. 414/11, 26 April 2016, §§ 13 and 15-19.

527 As the Court's practice has made clear, it is not sufficient that the applicant's language is merely cutting, polemical or sarcastic, since it must exceed "*the limits of normal, civilised and legitimate criticism*" to be considered abusive, see *Di Salvo v. Italy* (dec.), app. no. 16098/05, 11 January 2007; *Apinis v. Latvia* (dec.), app. no. 46549/06, 20 September 2011.

528 *Řehák v. Czech Republic* (dec.), app. no. 67208/01, 18 May 2004; *Duringer and Others v. France* (dec.), app. nos. 61164/00 and 18589/02, 4 February 2003.

529 This is an obligation under Article 39 § 2 of the ECHR and Rule 62 § 2 of the Rules of Court.

530 *Popov v. Moldova* (no. 1), app. no. 74153/01, 17 April 2006, § 48; *Miroļubovs and Others v. Latvia*, app. no. 798/05, 15 December 2009, § 66.

531 For instance, see to that effect *Mătăsaru v. Republic of Moldova* (dec.), app. no. 44743/08, 21 January 2020, where the applicant's wife revealed to the media the Court's proposed friendly settlement, §§ 36-39.

532 See, *Hadrabová and Others v. Czech Republic* (dec.), app. nos. 42165/02 and 466/03, 25 September 2007, where the Court dismissed an application where the applicants had expressly referred to the amicable settlement proposals made by the Court's Registry in their correspondence with their country's Ministry of Justice.

533 Cf. *M. v. United Kingdom* (dec.), app. no. 13284/87, 15 October 1987; *Philis v. Greece* (dec.), app, no. 28970/95, 17 October 1996.

real purpose.[534]

The fifth and last category comprises all those situations which do not fall within the aforementioned categories, for example when an application – or a decision or judgment of the Court – is misused for a desire of publicity or political propaganda.[535]

At last, as regards the requirement of manifest inadmissibility, it is first necessary to clarify what is meant by a "manifestly ill-founded" application.

This is indeed a rather discretionary requirement used by the Court, since according to the interpretation given by the case-law, an application will be manifestly ill-founded if a preliminary examination of its content does not reveal any apparent violation of the rights guaranteed by the ECHR and, consequently, the application may be declared inadmissible without proceeding to a formal examination of the merits, which would normally end in a judgment.

In the Court's practice, it is possible for applications to be considered as manifestly ill-founded because they are considered as "fourth instance" applications[536], appeals in which there is no clear violation of the ECHR, unsubstantiated applications and, finally, confused or implausible appeals.

Ultimately, both these conditions are not directly spelled out in the application form, but they represent a *post facto* assessment made by the Court, so the applicant will have to evaluate the relevance of his/her applications in the light of the ECtHR's previous practice.

2. 5. 8. *DE MINIMIS* CRITERION: A SUBJECTIVE ASSESSMENT OF THE COURT.

[534] The Court has made it clear, for example, that "significal disadvantage" entails an application concerning a small sum of money or, in general, that has no bearing on the objective legitimate interests of the applicant, see *Bock v. Germany* (dec.), app. no. 22051/07, 19 January 2010.

[535] *Khadzhialiyev and Others v. Russia*, app. no. 3013/04, 6 April 2009, §§ 66-67.

[536] *Kemmache v. France* (no. 3), app. no. 17621/91, 24 November 1994, § 44.

The last requirement, introduced by Protocol No. 14[537], is the so-called "*de minimis* criterion"[538], with the aim to facilitate the work of the Court and the Secretariat, since they are overburdened by a caseload that often lasts several years.

Recently, Protocol No. 15 to the Convention, which entered into force on 1 August 2021, amended article 35 § 3 (b) of the Convention to remove the condition that the case had not been properly examined at national level.[539]

Again, this is a condition of admissibility consisting of two elements: the first, which concerns the admissibility criterion, considering that the Court may declare inadmissible any individual application when the applicant has not suffered any "significant disadvantage"; the second, on the other hand, is the so-called "safeguard clause", which does not allow the Court to declare an application inadmissible when respect for human rights requires a substantive examination.

Not only is the Court the only authority empowered to interpret this admissibility requirement and to decide on its applicability[540], but it can also raise this admissibility criterion of its own motion.[541]

---

537 See, Council of Europe, *Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention*, 13 May 2004, CETS 194, art. 20.

538 Although this expression was not formally part of the European Convention on Human Rights until 1 June 2010, it was nevertheless evoked in several Dissenting Opinions, see for example the Dissenting Opinion of Judge Matscher in *Dudgeon v. United Kingdom*, 22 October 1981 and the Dissenting Opinion of Judge Myjer in *O'Halloran and Francis v. United Kingdom* [GC], app. nos. 15809/02 and 25624/02, 29 June 2007, § 8.

539 See Article 5 of Protocol No. 15: "*In Article 35, paragraph 3, sub-paragraph b, of the Convention, the words 'and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal' shall be deleted.*"

540 In that sense, during the first two years following its entry into force, the application of the criterion was reserved for the Chambers and the Grand Chamber, under Article 20 § 2 of Protocol No. 14. Since 1 June 2012 the criterion has been used by all judicial formations of the Court.

541 *Ionescu v. Romania* (dec.), app. no. 36659/04, 1 June 2010; *Magomedov and Others v. Russia*, app. nos. 33636/09 and 9 others, 28 June 2017, § 49.

Although it is not easy to delineate what is meant by "*significant disadvantage*"[542], the Court has considered that this disadvantage is based on the idea that the violation of a right – however real from a purely legal point of view – should reach a minimum level of seriousness to be assessed by an international court; therefore, purely technical and insignificant violations do not fall within the control framework outlined by the ECHR system[543], since even a subjective perception of the applicant is not sufficient.[544]

Precisely with regard to the assessment of the subjective relevance of the matter for the applicant, the Court has introduced some new elements to be taken into account in order to determine the minimum threshold of gravity to justify the examination by an international court, namely: *i)* the nature of the right allegedly violated; *ii)* the seriousness of the alleged violation and/or the potential consequences of the violation on the personal situation of the applicant; *iii)* finally, when assessing these consequences, the Court will consider, in particular, the stakes or the outcome of the domestic proceedings.[545]

In conclusion, it is a prejudice assessed also and most importantly in economic terms, meaning an important financial impact, which is not assessed only in the light of the non-pecuniary damages claimed by the applicant.[546]

2. 5. 9. GROUNDS OF INADMISSIBILITY: AN INDIRECT ADMISSIBILITY CRITERION.

The requirements previously analysed are those which, directly and indirectly

---

[542] See, for example, N. VOGIATZIS, *The admissibility criterion under article 35(3)(b) echr: a 'significant disadvantage' to human rights protection?*, in *International and Comparative Law Quarterly*, 65(1), 185-211, 2016.

[543] *Shefer v. Russia* (dec.), app. no. 45175/04, 13 March 2012.

[544] *Ladygin v. Russia* (dec.), app. no. 35365/05, 30 August 2011.

[545] *Giusti v. Italy*, app. no. 13175/03, 18 October 2011, §§ 22-36.

[546] See, *Kiousi v. Greece* (dec.), app. no. 52036/09, 20 September 2011. The Court has so far not considered cases with an amount of EUR 500 or less as a "significant disadvantage", see *Şimşek, Andiç and Boğatekin v. Turkey* (dec.), app. nos. 75845/12, 79989/12 and 75856/12, 17 March 2020, §§ 26-29.

referred to in the application form, play a fundamental role because they concretise the individual's right of access to justice of the ECHR.

However, in addition to the requirements and conditions of admissibility just mentioned – which are therefore of a substantive and procedural nature – there are several grounds of inadmissibility which are not explicitly mentioned in the application form, which are particularly relevant because they are an integral part of the ECHR system.

These are requirements of compatibility *ratione personae*, *loci*, *temporis* and *materiae* of the individual application to the ECHR, often analysed in the light of articles 1[547], 32[548] and 35.[549]

As to jurisdiction *ratione personae*, this is a matter to be analysed by the Court of its own motion even when the respondent State has not raised an objection[550], also assuming that the latter objects solely and exclusively on the ground of lack of jurisdiction *ratione loci*.[551] Clearly, an objection of jurisdiction *ratione personae* is much more likely to be raised in the light of the applicability of article 1 ECHR concerning jurisdiction, since this is a necessary condition for a Contracting State to be held responsible for acts or omissions attributable to it which give rise to possible violations of the rights and freedoms set out in the Convention.[552]

As is well known, these are fundamental rights protected by human rights which must be guaranteed to individuals even in the event of dissolution or succession[553], as a State's jurisdiction under article 1 is primarily territorial[554], presuming that it is exercised throughout the territory[555], even in particular cases

---

547 Which includes jurisdiction and the obligation to protect rights guaranteed by the ECHR to contractors.

548 Where the Court's contentious jurisdiction is analysed.

549 Specifically, article 35 § 3 (a), where it is specified that [...] (a) *the application is incompatible with the provisions of the Convention or the Protocols thereto* [...].

550 *Mutu and Pechstein v. Switzerland*, app. nos. 40575/10 and 67474/10, 4 February 2019, § 63.

551 *Drozd and Janousek v. France and Spain*, app. no. 12747/87, 26 June 1992, § 90.

552 *Al-Skeini v. United Kingdom* [GC], app. no. 55721/07, 7 July 2011, § 130.

553 *Bijelić v. Montenegro and Serbia*, app. no. 11890/05, 6 November 2009, § 69.

554 *Banković and Others v. Belgium and Others* (dec.) [GC], app. no. 52207/99, 12 December 2001, §§ 61.

555 *Assanidze v. Georgia* [GC], app. no. 71503/01, 8 April 2004, § 139.

where the States forming the external border of the "Schengen area" have encountered considerable difficulties in handling the growing influx of migrants and asylum seekers.[556]

As regards jurisdiction *ratione materiae*, this is an analysis that the Court carries out at the admissibility stage of the application, unless there are reasons that can link it to the merits.[557] Clearly, in order for an application to be compatible *ratione materiae* with the Convention, the right claimed by the applicant must be protected by the Convention and its protocols which have entered into force[558], unless the respondent State has made a reservation[559], provided that the issue falls within the scope of the reservation[560] and that the Court considers it valid under article 57 ECHR.[561]

Compatibility *ratione temporis* applies in accordance with the general rules of international law concerning the well-known principle of non-retroactivity of treaties; thus, the provisions of the ECHR do not bind a State Party in respect of any act or fact occurring prior to the date of entry into force of the Convention with respect to it[562], except in cases of continuing violation which

---

[556] See in this connection the case of *N.D. and N.T. Spain* [GC], where the Court, while acknowledging the difficulties of border States, did not draw any conclusions as to their jurisdiction, see §§ 104-111, despite the fact that the Spanish State respondent in the proceedings had invoked an exception to territorial jurisdiction in a context of illegal immigration, see §§ 107-108. Thus, this concept of "jurisdiction" is essentially interpreted according to public international law, according to which the existence of a fence located at a certain distance from the border does not entitle a State to unilaterally exclude, alter or limit its territorial jurisdiction, which begins at the line forming the border.

[557] *Denisov v. Ukraine* [GC], app. no. 76639/11, 25 September 2018, § 93.

[558] See, on the contrary, *Ahunbay and Others v. Turkey* (dec.), app. no. 6080/06, 29 January 2019, §§ 21-26 concerning an allegedly universal individual right to the protection of a specific cultural heritage.

[559] *Benavent Díaz v. Spain* (dec.), app. no. 46479/10, 31 January 2017, § 53.

[560] *Göktan v. France*, app. no. 33402/96, 2 October 2002, § 51.

[561] *Grande Stevens and Others v. Italy*, app. no. 18640/10, 4 March 2014, §§ 206 et seq.

[562] *Blečić v. Croatia* [GC], app. no. 59532/00, 8 March 2006, § 70; *Šilih v. Slovenia* [GC], app. no. 71463/01, 9 April 2009, § 140; *Varnava and Others v. Turkey* [GC], § 130.

began before the entry into force of the treaty but which persist after that date.[563] In this sense, the Court is required to examine of its own motion and at any stage of the proceedings its own jurisdiction *ratione temporis*, since this is a question concerning its own 'jurisdiction' rather than a question on admissibility as such.[564]

Finally, with regard to jurisdiction *ratione loci*, the Court requires that the alleged violation of the Convention took place within the jurisdiction of the respondent State or in a territory effectively controlled[565] by it, given that a State will be responsible for the acts of its diplomatic and consular representatives abroad and that no question of incompatibility *ratione loci* can arise in relation to diplomatic missions[566] or acts carried out on board aircraft and ships registered in that State or flying its flag.[567]

2. 5. 10. PROVISIONAL MEASURES AND ECTHR: THE IMPORTANCE OF RULE 39.

Likewise in the ECHR system there is the possibility for a subject to access the international justice of the Court through a request for provisional measures, requested under Rule 39 of the Rules of the Court.[568]

These are urgent measures which, according to the Court's established case-law, are only applied when there is an imminent risk of irreparable harm, so it is up to the Court to verify compliance with the provisional measure, but a State

563 *De Becker v. Belgium*, Commission decision, app. no. 214/5, 27 March 1962, where already the Commission recognised that "*in regard to its competence ratione temporis that the Applicant had found himself placed in a continuing situation which had no doubt originated before the entry into force of the Convention in respect of Belgium (14th June 1955), but which had continued after that date, since the forfeitures in question had been imposed "for life*", see § 8.

564 *Petrović v. Serbia*, app. no. 40485/08, 15 July 2014, § 66.

565 *Drozd and Janousek v. France and Spain*, app. no. 12747/87, 26 June 1992, §§ 84-90.

566 *Al-Skeini v. United Kingdom* [GC], § 134; *M. v. Denmark*, Commission decision, app. no. 17392/90, 14 October 1992, § 1.

567 *Hirsi Jamaa and others v. Italy* [GC], §§ 77 and § 81; *Bakanova v. Lithuania*, app. no. 11167/12, 31 August 2016, § 63.

568 *Mamatkulov and Askarov v. Turkey* [GC], §§ 99-129.

considering that it holds information capable of convincing the Court to have the provisional measure set aside should inform the Strasbourg judges.[569]

In most cases, these are applications for the suspension of deportation or extradition proceedings – *i.e.,* where the applicant could face a serious and irreparable breach – where the Court can indicate measures to both the respondent Government and the applicants.[570] Clearly, a request for provisional measures does not oblige the State to automatically suspend an individual measure, notwithstanding the obligation to cooperate in good faith with the Court.[571]

Such decisions are not open to appeal and are made by written procedure only and could lead to a violation of article 34 ECHR if the authorities of a Contracting State do not take all the measures that could reasonably have been taken to comply with the measure indicated by the Court.[572]

However, while it is not necessary for the applicant to exhaust domestic remedies and the Court is in any event tasked with establishing the facts, there is always an obligation on the parties to provide active assistance by specifying the relevant information, also considering that the applicant's attitude is considered when seeking evidence.[573]

Indeed, there is an obligation on the respondent State to provide all the evidence requested by the courts when a request for a provisional measure is made, whether at the time of the initial communication of an application to the Government or at a later stage in the proceedings.[574]

In conclusion, as far as the scope of the current research is concerned, there is a *lex generalis* and *lex specialis* relationship between the individual remedy under

---

[569] *Paladi v. Moldova* [GC], app. no. 39806/05, 10 March 2009, §§ 90-92; *Olaechea Cahuas v. Spain*, app. no. 24668/03, 10 August 2006, § 70.

[570] See *Ilaşcu and Others v. the Republic of Moldova and Russia*, app. no. 48787/99, 8 July 2004, where the Court asked one of the applicants to stop a hunger-strike §11. See, also, *Rodić and Others v. Bosnia and Herzegovina*, app. no. 22893/05, 1 December 2008.

[571] *Al-Moayad v. Germany* (dec.), app. no. 35865/03, 20 February 2007, §§ 122.

[572] *Paladi c. Moldova* [GC], §§ 87-92.

[573] *Ireland v. the United Kingdom*, § 161.

[574] *Enukidze and Girgvliani v. Georgia*, app. no. 25091/07, 26 July 2011, § 295.

article 34 and the measures requested of the Court under article 39, given that the former is designed to ensure the effective operation of the individual right of access and the latter requires the States Parties to have a specific obligation to cooperate with the Court.[575]

3. CONCLUSION.

In the light of the above considerations, some conclusions can be drawn.

There can be no doubt that the abundance of human rights conventions has facilitated the individual's access to international justice. Thus, these legal instruments have had a twofold objective during their evolution: from instruments that had the objective of recognizing certain fundamental rights, so that the individual was protected from State interference; subsequently, it seems that these instruments have evolved not only by recognizing these fundamental rights, but also by guaranteeing their incisiveness and judicial protection.

It is precisely in this discourse that the importance of individual access to international justice is included, which has therefore played a fundamental role in the effective protection of the individual's human rights.

In this respect, this effectiveness is also highlighted in the study of the two individual access modalities highlighted above. While it is true that the underlying rationale of the two procedures is identical, *i.e.,* the international protection of human rights through jurisdictional mechanisms, there are several differences that place the protection of the European Court of Human Rights in a hierarchically superior position to the UN Committee on Human Rights.

This can be deduced from the binding effect that the Court's judgments have on the member states of the ECHR, which therefore provide greater protection than the decisions taken by the HRC.

But not only that, also in terms of actual practicality the application form seems to be prepared with more order and clarity than the Committee's submission form. This conclusion can be drawn from the greater information and caselaw of the ECtHR with respect to each individual condition of admissibility, which

[575] *Bazorkina v. Russia*, app. no. 69481/01, 11 December 2006, §§ 170 e ss.

already makes the pre-procedural phase more adapted to the needs of the appellant.

Moreover, the discrepancies with the languages made available to the individual also point to a rather important difference in terms of use: the application form to the ECtHR is available in all the languages of the States parties to the Council of Europe, whereas only four languages are available for the submission form as opposed to the six official ones acknowledged by the United Nations. While at first sight this might seem to be a minor difference, it actually appears to be a limitation that affects both the substantive and the procedural part: on the merits, the subject will not have the same opportunity to express him/herself in the best possible way in order to represent his/her complaints; from the procedural point of view, it is an infringement of the right to access the court in a fair manner, thus implicitly violating the right of access to international justice.

Last but not least, it is necessary to put individual protection extended to several subjects in the context of appeals to the ECHR: from this point of view, a company could not in any way address its grievances before the Committee but could only do so before the Strasbourg courts.

CHAPTER III

ACCESS TO JUSTICE IN INVESTOR-STATE DISPUTE SETTLEMENTS.

SUMMARY: 0.1. Introduction. - 1. General framework: international economic law. - 1.2. The development of international investment law and its relevance towards access to justice. - 2. Exploring the contributing factors to the creation of a right of access to justice in ISDS. - 2.1. Access to justice in ISDS through International Investment Agreements, with a special focus on Bilateral Investment Treaties. - 2.1.1. Consent and its relevance in ISDS right to access to justice. - 2.2. The establishment of international investment dispute resolution centres: a "litigation space" in ISDS. - 2.2.1. The importance of ICSID and its impact on access to justice in ISDS. - 2. 2. 2. ICSID main jurisdictional requirements and the connection to access to justice. - 3. Request for arbitration in ICSID proceedings: concretisation of access to justice. - 3.1. Introduction in the RoA: presenting the legal issue. - 3.2. The identification of parties in the RoA: a significant step to access ICSID arbitration. - 3.3. Summary of the dispute: a first factual assessment of the claim. - 3.4. Assessing ICSID jurisdiction in the RoA: the burden of consent. - 3.5. Beyond consent: the necessity to first address other ICSID jurisdictional requirements. - 3.6. Request's optional information: procedural matters. - 3.7. The costs of access to justice in the RoA. - 4. Setting the scene: addressing the "cost problematic". - 4.1. Costs in international investment arbitration. - 4.2. Complications of high costs associated to SMEs: a barrier towards access to justice? - 5. Third-Party Funding and its relevance in ISDS. - 5.1. Defining Third-Party Funding in ISDS: a strategy for clarity. - 5.2. Third-Party Funding legal implications: between disclosure and security for costs. - 5.3. Third-Party Funding enhance access to justice: at what cost? - 6. Conclusion.

0.1. INTRODUCTION.

Following the considerations made in chapter two, it is now possible to address the other "legal dimensions" of access to justice under analysis, namely international investment law.

However, although these are two modalities through which the individual may have recourse to 'international litigation', the distinctions concerning the right of access to justice are considerable.

In any case, such a distinction does not prevent the identification of analytical profiles that may be useful to corroborate one of the objectives of this work, *i.e.*, the existence of an international *forum* to which the individual has access to complain about violations of law committed by States.

In a nutshell, given the main distinction will be dealt more deeply in the concluding chapter, when discussing investment arbitration, the focus relies in

ADR mechanisms from an international perspective[576], which are substantially different from the international human rights protection system mechanisms, such as the one previously discussed about the ECtHR.

Such an obvious and basic consideration, which however also affects the other "phases" of a dispute[577], does not affect the possibility to bring a claim against an act or omission made by a state, therefore guaranteeing the individual direct access to international justice.

Bearing in mind the existence of these peculiarities, which precisely concerns two different ways of understanding litigation strategy, in this chapter it will first be necessary to make a brief analysis of the development of international investment law, examining the main features which have led to its maximum expansion in the current legal market.

Secondly, and in the light of the analysis carried out above, consideration will be given to two major influencing factors which – in the light of their importance and of the present research – have positively characterised the development of the right of access to justice in international investment law: the spread of IIAs, with particular regard to bilateral investment treaties, and the progressive expansion of dispute resolution centres, with particular attention to the ICSID arbitration procedure.

As will be shown, these two factors represent the framework through which it is possible to recognise a substantive and procedural protection of the right of access to justice in investor-state dispute settlement (hereinafter, also "ISDS").

Following the examination of these factors, an attempt will be made to understand whether the existence of a right of access to justice is compatible with the different specificities of investment arbitration.

---

576 See, J. MICHEL, *Alternative Dispute Resolution and the Rule of Law in International Development Cooperation*, Justice and development working paper series no. 12. World Bank, Washington, DC, World Bank, 2010.

577 It is sufficient to consider, for instance, the difference concerning the phase of enforcement of judgments: on the one hand, the one concerning the human rights system, there will be a phase which is generally part of the procedure in general; on the other hand, as regards the system of enforcement of judgments following favourable awards, a subsequent procedure will have to be activated which will therefore require further action on the part of the individual.

In this sense, having laid the groundwork with the above discussions, it will be necessary to point out the main limitation conditioning the right of access in investment disputes, *i.e.,* the costs inherent to the procedure, specifying which international main "players" may be affected by this system.

Through an analysis of the costs, it will be possible to identify possible solutions to circumvent this problem, including the possibility of third-party financing of the dispute, which nevertheless has practical and substantial drawbacks.

Finally, considering the analyses carried out, it would be possible to draw final considerations which – as carried out in the second chapter – could outline the main characteristics of the access to justice concerning investment litigation.

1. GENERAL FRAMEWORK: INTERNATIONAL ECONOMIC LAW.

From a purely methodological point of view, it seems necessary to immediately clarify that the specific subject of international investment law falls conceptually within the more general framework of international economic law (hereinafter also "IEL").[578]

Over the years, various definitions have been attributed by scholars to this branch of international law.[579]

Bearing in mind the different definitions and evolutions, IEL could be described in the light of two closely interlinked elements: on the one hand, the first element is certainly represented by cross-border economic relations in a globalized world[580]; on the other hand, the second element is represented by the connection

[578] Cf. A. VAN AAKEN, *Fragmentation of International Law: The Case of International Investment Protection*, published in: Finnish Yearbook of International Law (2008) Vol. XVII, pp. 91-130., U. of St. Gallen Law & Economics Working Paper No. 2008-01.

[579] On this topic see A. F. LOWENFELD, *International Economic Law*, Second Edition, Oxford University Press, 2002; I. SEIDL-HOHENVELDERN, *International Economic Law*, 3rd revised edition, Kluwer Law International, 1999; M. HERDEGEN, *Principles of International Economic Law*, (2nd Edition), 2016, Oxford University Press; AM. SLAUGHTER, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'l L. & POL'y 717, 1995.

[580] See more recently E. BRUNET-JAILLY, *Cross-border cooperation: a global overview. Alternatives.* 2022;47(1):3-17; J. BASEDOW, *International economic law and commercial contracts: promoting cross-border*

that this economic conduct creates with the key players in this system[581], *i.e.* States, international organisations and individuals, whether natural or legal persons.[582]

In the light of this perception, it is quite clear that the centrality of this field lies in the "economic context" and therefore rights and obligations of the parties are a necessary consequence, which in the end entails the general right of access to justice.

Among the various areas that derive from international economic law, an important weight is represented by international investment law, which especially following the effects of market globalisation[583] represented a milestone protection of the right of access to justice[584], especially for international investors.

1.2. THE DEVELOPMENT OF INTERNATIONAL INVESTMENT LAW AND ITS RELEVANCE TOWARDS ACCESS TO JUSTICE.

In international law, the traditional area of foreign investment protection[585] relates to laws of state responsibility[586] for violations of rules concerning the

trade by uniform law conventions, Uniform Law Review, Volume 23, Issue 1, March 2018, Pages 1–14.

581 See M. HERDEGEN, Principles of International Economic Law, *supra* note 4, pp. 27 ss.

582 See also the consideration made by S. CHARNOVITZ, *What is International Economic Law?*, Journal of International Economic Law, Volume 14, Issue 1, March 2011, Pages 3–22.

583 Cf. M.F. DIALLO, S. DJELASSI, V. KUMAR, *Marketing and globalization: Relevance, trends and future research. Recherche et Applications en Marketing* (English Edition), 36(3):2-7, 2021. See also, S. W. SCHILL, *The Multilateralization of International Investment Law, Chapter I "Introduction: globalization and international investment law"*, pp. 1-22, Cambridge University Press, 2010.

584 Generally, see J-M. MARCOUX, *International Investment Law and Globalization, Foreign Investment, Responsibilities and Intergovernmental Organizations*, 1st edition, Routledge, 2020.

585 These are considerations that, although made several years ago, are still of fundamental importance today: E. SNYDER, *Foreign Investment Protection: A Reasoned Approach*, 61 MICH. L. REV. 1087, 1963.

586 See one the first contribution specifically addressing the issue, L. F. E. GOLDIE, *State Responsibility and the Expropriation of Property*, 12 INT'l L. 63, 1978. More recently, also under different circumstances, see J. HO, *State Responsibility and Expropriation. In State Responsibility for*

protection of foreigners' property[587], which is part of the *macro*-topic of the treatment of aliens.[588]

Therefore, the legal framework concerns disputes involving investments made by foreigners, more precisely by nationals of a nationality other than that of the host State, often referred to investor-state dispute settlements, hereinafter also "ISDS".

As widely known, state-investor dispute system has evolved rather rapidly since the 1960s[589], gaining a prominent place in the "litigation market" especially in the 1990s[590] and contributing to influence international law as well.[591]

In spite of the various criticisms that have been made[592], this evolution allows the investor to have "access" to international dispute resolution mechanism, thus bypassing the mandatory requirement of the investor's home state to intervene under diplomatic protection, which practically entails that the home state no

---

Breaches of Investment Contracts (Cambridge Studies in International and Comparative Law, pp. 139-179). Cambridge: Cambridge University Press, 2018.

587 Cf. W. VERWEY & N. SCHRIJVER, *The taking of foreign property under international law: A new legal perspective?*, Netherlands Yearbook of International Law, 15, 3-96, 1984. For a more "general" context, see S. SUCHARITKUL, *State Responsibility And International Liability Under International Law*, 18 Loyola of Los Angeles Int'l. & Comp. L.J., p. 821, 1996.

588 On this issue see I. BROWNLIE, *Principles of Public International Law*, 7th ed., Oxford and New York: Oxford University Press, 2008. Work in which the subject of aliens in international law is approached in Part 9, pp. 521–555.

589 Usually, the date of the first Bilateral Investment Treaty between Germany and Pakistan is taken as the start of this development. In this sense, see *Germany–Pakistan BIT, signed 25 November 1959*, Bundesgesetzblatt, Pt II, No. 33 (6 July 1961), 793.

590 In this sense, this system saw a rapid development especially in 1987, when the first international claim between a Hong Kong investor and Sri Lanka was made, with the latter being obliged to pay compensation. In this sense, see *Asian Agricultural Products Ltd v. Sri Lanka*, (1997) 4 ICSID Rep. 246.

591 Cf. S. PUIG, A. STREZHNEV, *The David Effect and ISDS*, European Journal of International Law, Volume 28, Issue 3, August 2017, Pages 731–761.

592 On this topic, see P. EBERHARDT AND C. OLIVET (T. AMOS AND N. BUXTON CONTRIBUTORS), *Profiting from injustice: how law firms, arbitrators and financiers are fuelling an investment arbitration boom*, in Corporate Europe Observatory: Transnational Institute, Brussels, 2012.

longer had a specific role in the dispute.[593]

Indeed, such a legal framework is of fundamental importance in terms of right of access to justice: on the one hand, the legal position of an investor plays an important role throughout the course of litigation, being the only subject deciding the "litigation strategy"; on the other hand, it contributes to a favourable "investment climate" in the host state, since these procedures are hardly affected by the influences of the political and social context.

However, while now representing a benchmark for various subjects in the field (both investors and legal practitioners), there are several steps that have contributed to the creation of the ISDS system as we know it today, and all these developments have positively affected the investor's right of access to justice.

Indeed, the investment arbitration regime inherited a procedural and substantive protocol stemming from international commercial arbitration, especially following the Geneva Protocol of 1923, where essentially States – and, more generally, the legal practitioners of the time – perceived that arbitration would become the most beneficial tool for the resolution of disputes of a commercial nature.[594]

Indeed, the purpose of this instrument was twofold, which has significantly influenced the evolution of the right of access to justice in the field of future ISDS: first, to ensure that the parties were obliged to settle the dispute through arbitration (not through domestic courts), to ensure that arbitration clauses were internationally enforceable; second, to ensure that arbitral awards were enforceable as the dispute developed, in the State where they were issued.[595]

These two targets, although hardly achievable in the medium term due to the various historical-legal difficulties of those years, still represent two reasons facilitating – and why not, enabling – access to justice in arbitration disputes for the investor.

In this sense, both the compulsory submission of litigation to arbitration and

---

[593] See the consideration on this specific point made in Chapter I.

[594] See on *Arbitration Clauses*, Sept. 24, 1923, 27 L.N.T.S. 157.

[595] On this topic, see A. REDFERN & M. HUNTER, *Law and Practice of International Commercial Arbitration*, p. 455, 2d ed., 1991.

the enforcement of a potential judgment in favour of the investor would have facilitated the investor's choice of remedies under the '23 Protocol.

While this step is fundamental to the subject matter under analysis, it is nevertheless appropriate to consider that the main objective of these instruments – in line with the requirements of the time – was simply to facilitate international trade.

Indeed, after the end of colonialism, investments made abroad were governed by so-called "concessions", *i.e.*, agreements between investor and host state aimed at granting wide economic freedoms to foreign investors, although the state still retained control over such activities.[596]

These disputes did not raise any particular issues of "public interest", which is the main difference between international commercial arbitration and international arbitration for the protection of foreign investments.

In view of these differences, it cannot be denied, however, that this *scenario* essentially laid the groundwork for the recognition of a right of access to justice, understood here as a procedure for the liberalisation of trade and commerce, even though it was not yet possible to argue for a well-defined structure that could protect the investor from the exercise of public authority.

Therefore, although it seems proper to give credit to the approach provided by the Geneva Protocol (which was later expanded by the Geneva Convention of 1927[597]), it is nevertheless appropriate to recognize that among the various treaties or instruments concluded by States in this "early period", the one which represents the milestone and which facilitated the right of access to justice in investments is certainly the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, the so-called "New York Convention".[598]

---

[596] See J. BALORO, "*The Legal Status of Concession Agreements in International Law.*", The Comparative and International Law Journal of Southern Africa, vol. 19, no. 3, 1986, pp. 410–49; K. CARLSTON, *Concession Agreements and Nationalization*, American Journal of International Law, 52(2), 260-279, 1958.

[597] Cf. *Geneva Convention on the Execution of Foreign Arbitral Awards, 1927.*

[598] See *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958.

This instrument, which is still a point of reference for those involved in international trade, is of particular importance in the development of ISDS, because it has contributed decisively to the use of arbitration as the main method for resolving disputes of an international commercial nature.[599]

However, even that instrument did not guarantee direct access in the event of a violation of one's investment abroad but was rather useful at a "subsequent" stage, *i.e.*, when the judgment had been formed and the judgment had to take effect in a jurisdiction other than the one where it had been celebrated.

Such an approach clearly led to a very distinct consequence, hindering the investor's access to justice, because it was not remotely conceivable that international arbitration could have the same legal authority as a national court for the resolution of disputes between state and individual arising from alleged violations by public authorities with respect to the investment made.

Over the years, several attempts have been made to address violations of foreign investor rights, the most important of which are certainly the Abs-Shawcross Draft Convention on Investments Abroad[600], the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens[601] and the Draft Convention on the Protection of Foreign Property.[602]

Despite the previous different approaches, the international community began to perceive the need to clarify which principles could accompany the violation of the rights of the investor in a foreign State, a need that was also perceived by the General Assembly of the United Nations, first through Resolution 1803[603]

---

[599] On this issue see A. HAMMASH, & K. ALSHAKHANBEH, *The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Advances in Social Sciences Research Journal, 4(16), 2017. See also P. SANDERS, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Nederlands Tijdschrift Voor Internationaal Recht, 6(1), 43-59, 1959.

[600] See G. SCHWARZENBERGER, *The ABs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary*, 9 J. PUB. L. 147, 1960.

[601] Cf. L. SOHN & B. BAXTER, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, American Journal of International Law, 55(3), 548-584, 1961.

[602] On this topic see A. NEWCOMBE AND L. PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment*, Leiden, Kluwer, pp. 30-31, 2009.

[603] See UN General Assembly, *Permanent sovereignty over natural resources*, 17 December 1973, A/RES/3171.

and later through Resolution 3281[604], the so-called Charter of Economic Rights and Duties of the United Nations, which aimed to differently achieve two objectives: first, to ensure both that investors' contracts with host States had themselves some international law basis; second, represented the commitment made by the international community of the construction of a "New International Economic Order".[605]

Therefore, it was precisely the necessity to create a system that would facilitate the investor's access to justice that gave impetus to the creation of ISDS, *i.e.*, the creation of a system that would allow an enterprise that invested abroad to be protected against possible violations carried out because of regulation by the public authorities of the State hosting the investment.

The rationale for this development is based on a precise choice by the states of the international community, which have contributed to the creation of an international regime granting the individual – understood in this sense in its collective dimension, therefore through the so-called multinational companies[606] – the ability to complain about possible violations of their assets in the event of activities carried out by the host State of the investment.[607]

Indeed, through the express provision of international resolution mechanisms for state-investor disputes in most investment treaties, investors have consolidated their right to seek redress – which, as we shall specify later, can be dealt in different modalities – for alleged damage caused by public authorities in relation to obligations arising from the investment.

In this sense, the procedural and substantive difficulties within the states where

---

[604] UN General Assembly, *Charter of Economic Rights and Duties of States: resolution / adopted by the General Assembly*, 17 December 1984, A/RES/39/163.

[605] Cf. UN General Assembly, *3201 (S-VI). Declaration on the Establishment of a New International Economic Order*, 1 May 1994, A/RES/3201(S-VI). Among scholars, see H. O'NEILL, *What New International Economic Order?*, Irish Studies in International Affairs, vol. 1, no. 2, 1980, pp. 32–44.

[606] On this topic see P. MUCHLINSKI, *Multinational Enterprises and the Law*, 2d ed. Oxford: Oxford University Press, 2007.

[607] See V. KORZUN, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance* (November 26, 2018), University of Pennsylvania Journal of International Law, Vol. 40, No. 1, 2018, pp. 189-254.

the foreign investor made the investment have allowed a rapid development of the State-investor arbitration, which in terms of access to justice is linked to three reasons: firstly, a diriment factor concerns the so-called "depoliticization" of the dispute as ISDS is completely independent of the domestic judicial system of the State hosting the investment, thus creating a more transparent expectation of justice on the part of the investor[608]; secondly, the decision as to whether or not to initiate the arbitration procedure lies solely and exclusively with the investor, who will therefore not be forced to go along with the political decisions of the State of nationality[609]; last, but not least, the investor - but more generally the parties - have a freedom of choice as to who will decide the dispute, the arbitrators, since it is assumed that if highly qualified profiles are among the persons in charge of deciding the dispute, this should create a benefit in terms of efficiency and thus costs.[610]

Thus, ISDS has essentially become the most efficient means for foreign investors to withstand interference by state regulation, providing a method to claim compensation for the costs – and especially losses – arising from the exercise of public authority.

Such analysis, as correctly pointed out by scholars, is based on four different

[608] The legal doctrine on this topic is quite extensive. For example, see U. KRIEBAUM, *Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes*, ICSID Review - Foreign Investment Law Journal, Volume 33, Issue 1, Winter 2018, Pages 14–28; D. SCHNEIDERMAN, *Revisiting the Depoliticization of Investment Disputes,* Yearbook on International Investment Law and Policy, 2010-11 (Oxford University Press), pp. 693-714, 2011; S. DIAS, C. FERNANDO, *Investment Dispute Settlement Ever Be Depoliticized*?, 4(2) Cardozo International and Comparative Law Review 507-537 (2021), The Chinese University of Hong Kong Faculty of Law Research Paper No. 2021-20.

[609] Clearly, this perspective further accentuates the importance of the individual in ISDS litigation.

[610] Above all, in contrast to the well-known difficulties that can arise within a domestic legal system.

principles: (i) the principle of individualisation[611]; (ii) the principle of damages[612]; (iii) the principle of direct applicability[613]; and (iv) the principle of forum-shopping.[614]

These principles, however, merely subsume and explicate the content of the investor's right of access to justice in the ISDS, giving the possibility to bring to the attention of highly qualified persons the (possible) liability of states for breach of investment rights.

This progressive development of ISDS and thus of a recognition of an investor's right to access an arbitral tribunal to complain about possible violations concerning the investment lies in bilateral investment treaties, free trade agreements and other regional and multilateral investment treaties, also referred as International Investment Agreements, hereinafter also as IIA's.

The impact of these different investment treaties has important – and thus consequential – significances in terms of access to justice: firstly, from a purely statistical point of view, the spread of these instruments has led to an increase in the number of cases before the various institutions created for dispute resolution; secondly, as the number of cases increases, the more complex the issues addressed become, involving more possible violations and thus more parties represented in the procedure.

2. EXPLORING THE CONTRIBUTING FACTORS TO THE CREATION OF A RIGHT OF ACCESS TO JUSTICE IN ISDS.

Without prejudice to the above considerations, it will now be necessary to

611 Such claims are commonly not subject to the usual limitations that apply to individual claims under other types of treaties, including an individual's duty to exhaust local remedies.

612 Under investment treaties, investors may directly bring claims for damages, assigned as a public law remedy.

613 Since investment treaties incorporate the procedural framework and enforcement structure of international commercial arbitration, investors can directly seek enforcement of arbitral tribunal awards before the domestic courts of a large number of countries, with limited judicial oversight by domestic courts.

614 Investment treaties facilitate forum-shopping by investors through the selective creation of holding companies, thus expanding the scope of investment arbitration as an international mechanism of judicial review.

focus on the two factors that have affected the realisation and implementation of the right of access to justice in the ISDS.

These are two elements which, for reasons of analysis, should be hand in hand examined and consequentially represent what could be defined as the "cornerstone" of access to justice: the international investment agreements and the international dispute resolution centres, which together represent a strong substantive and procedural protection for the investor.

2.1. ACCESS TO JUSTICE IN ISDS THROUGH INTERNATIONAL INVESTMENT AGREEMENTS, WITH A SPECIAL FOCUS ON BILATERAL INVESTMENT TREATIES.

In recent years, a proliferation of international, bilateral and regional agreements concerning investor protection has been witnessed.

In the light of the continuous and constant evolution of international practice, proliferation is a topic that has often been addressed by legal scholars from different points of view.[615]

However, this system, which undoubtedly represents an established method of dispute resolution today, is the consequence of an unsuccessful attempt by states of the international community to regulate the matter in a uniform manner.[616]

However, the historical economic context – ready to deal with the trade boom following the Second World War – required action[617], *i.e.*, it required a system that guaranteed the investor a chance to invest abroad and that, in case of investment difficulties, ensured that his issue was decided by an impartial court (and not that of the foreign state where he had made the investment).[618]

Therefore, states had no option but to protect their interests, and thus the

---

[615] See, for example, G. SACERDOTI, *The Proliferation of Bits: Conflicts of Treaties, Proceedings and Awards*, Bocconi Legal Studies Research Paper No. 07-02, 2007.

[616] See for example the Havana Charter, United Nations Conference on Trade and Employment. *Havana Charter for an International Trade Organization*, March 24, 1948, Including a Guide to the Study of the Charter, Washington, 1948.

[617] In this sense, see the considerations made by the ICJ in the Barcelona Traction case, Barcelona Traction, Light and Power Co., *Ltd., Belgium v. Spain*, 1970 I.C.J. 3, paras 46-47.

[618] See C.D. GRAY, *Judicial Remedies in International Law*, Oxford: Clarendon, 11, 1987.

interests of investors, through treaties. From 1960 onwards, agreements to promote and protect foreign investment were concluded, which, depending on requirements – commercial, legal and social – had a bilateral, regional and multilateral character.[619]

These are known as International Investment Agreements (IIAs)[620], *i.e.*, agreements that aim to promote investment flows between two or more countries by establishing applicable protection standards for investments made in one country by investors from the other country.[621]

These agreements, which have been one of the most important progresses in international law[622], can develop in practice in different ways: through bilateral investment treaties, through regional free trade agreements[623] or through sectorial treaties.[624]

These instruments, in a more or less similar way, guarantee these standards and, consequently, recognise as a main condition the fact that in case of violation there must be a right for the allegedly injured party to seek judicial protection.[625]

De facto, all these instruments only consolidate the right of access to justice, encompassing its substantive and procedural components.

Among these instruments, bilateral investment treaties (hereinafter, also "BITs") have taken on a particular importance and impact[626], as they have

---

[619] See Z. ELKINS, A. GUZMAN & B. SIMMONS, *Competing for Capital: The Diffusion of Bilateral Investment Treaties*, 1960–2000. International Organization, 60(4), 811-846, 2006.

[620] See A. F. LOWENFELD, *Investment Agreements and International Law*, 42 COLUM. J., Transnat'l L. 123, 2003.

[621] See H. HORN, T. TANGERÅS, *Economics of international investment agreements*, Journal of International Economics, Volume 131, 103433, 2021.

[622] For a historical analysis of IIAs see K. VANDEVELDE, *A Brief History of International Investment Agreements*, University of California at Davis Journal of International Law and Policy, 12, 2009.

[623] Which clearly include foreign investment obligations, such as the North American Free Trade Agreement (NAFTA), Central American-Dominican Republic Free Trade Agreement (CAFTA-DR), the European Union (EU) and Asia-Pacific Economic Cooperation (APEC).

[624] For example, the ECT, Energy Charter Treaty 2080 UNTS 100, ECT, 1994.

[625] Cf. K. VANDEVELDE, *A Brief History of International Investment Agreements*, *supra* note 47.

[626] See on this topic P. EGGER, M. PFAFFERMAYR, *The impact of bilateral investment treaties on foreign direct investment*, Journal of Comparative Economics, Volume 32, Issue 4, Pages 788-804, 2004.

certainly facilitated the recognition of a right of access to justice by creating appropriate substantive and procedural conditions for the protection of the individual and multinational companies[627], thus representing the most widespread type of IIAs.[628]

Although it is difficult to provide a complete definition, BITs are international legal instruments through which two countries establish and regulate a series of rights, duties and obligations – both substantive and procedural[629] – governing the flow of capitals of their respective citizens into the territory of the other country.[630]

Clearly, BITs have generally contributed to the development of international law, thus creating a specific space interconnected between treaty obligation and development of customary international law. [631]

Indeed, the current importance of BITs can undoubtedly be attributed to the high number of such instruments in the bilateral practice of states, which thus led – especially during the mid-1990s[632] – to the well-known considerations concerning the "proliferation of BITs".[633]

Such proliferation triggered a substantial increase in attracting capital

---

627 On this specific topic, see P. EGGER, AND V. MERLO, "*BITs Bite: An Anatomy of the Impact of Bilateral Investment Treaties on Multinational Firms.*" The Scandinavian Journal of Economics, vol. 114, no. 4, 2012, pp. 1240–66.

628 See P. MUCHLINSKI, *The Framework of Investment Protection: The Content of BITs*, 2009.

629 See S. SCHILL, *The Multilateralization of International Investment Law*, Cambridge University Press, 70-88, 2009.

630 Cf. J. W. SALACUSE & N. P. SULLIVAN, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'l L.J., p. 67, 2005.

631 See S. M. SCHWEBEL, "*The Influence of Bilateral Investment Treaties on Customary International Law.*" Proceedings of the Annual Meeting (American Society of International Law), vol. 98, pp. 27–30, 2004.

632 Over 2000 BITs were signed from the early 1960s to the early 2000s, making it the preferred option for protecting foreign investment. See, UNCTAD, *World Investment Report 2003: FDI policies for development: national and international perspectives* 89, u.n. doc. unctad/wir/2003, 2003.

633 On the reasons driving the proliferation of BITs, see M. JACOBS, *Transnational corporations and the proliferation of bilateral investment treaties: more than a bit influential*, Transnational Corporations Review, 8:2, 93-111, 2016.

investments abroad and, consequently, an increase in disputes with investors and states as the main actors.[634]

In modern bilateral treaties, unlike those of the "first generation of BITs", there are two mechanisms for resolving disputes and thus providing effective protection for substantive guarantees[635]: one concerns the mechanism for resolving disputes between the states party to the treaty and the other for resolving disputes between the investor and the host state of the investment.

Considering the topic under investigation, the focus will be on the second category of dispute resolution mechanism, which has essentially granted the foreign investor a right to initiate an international arbitration procedure, that will have a final and binding character.

In doing so, the importance of BITs in the current topic[636] is obvious: through these instruments, a general right of access to justice in ISDS disputes is recognised, which can then be gradually declined in the light of the specificities regarding the treaty itself, the nature of the investment and the notion of investor.

In bilateral investment treaties practice, there are basically a number of modalities to activate the investor's jurisdictional guarantees in case of alleged violation of rights related to the foreign investment.

However, as will be examined below, all these "modalities" do not always provide the possibility to access judicial protection in an effective manner.

As discussed earlier, one possible method of access to justice for the investor is through domestic court proceedings, a solution which is often present in all

---

634 Differently, see M. HALLWARD-DRIEMEIER, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit And They Could Bite*, 2003.

635 This is a real set of legal standards of a practical nature, such as, for example: Most-Favoured Nation Treatment (MFN), Fair and Equitable Treatment (FET), Full Protection and Security (FPS), or National Treatment (NT). On these topics, see A. REINISCH, & C. SCHREUER, *International Protection of Investments: The Substantive Standards*, Cambridge: Cambridge University Press, 2020.

636 More generally, on the importance of BITs on this matter, see P. DUMBERRY, *Are BITs Representing the New Customary International Law in International Investment Law*, 28 PENN St. INT'l L. REV. 675, 2010.

bilateral investment treaties. This solution is, however, not often undertaken by the investor for the various reasons outlined above, and generally departs from the subject matter of this chapter, *i.e.*, access to international investment justice.[637]

Another modality often present in BITs is the so-called "fork in the road" clause, which basically offers the investor – who presumes that his rights have been violated – the possibility to initiate an investment dispute either within the domestic courts or through international arbitration. This choice, which is often discussed in the doctrine, represents a real watershed for the investor's defensive strategies, because once made, there is no often turning back.[638]

Finally, it may also happen that there are "temporally conditional" BITs, which essentially require the investor – before taking the ISDS way – to seek judicial protection through the domestic courts for a period of time[639], but this solution has been deemed incompatible (and therefore almost never used) even by the *ad hoc* tribunals.[640]

These difficulties have therefore led to investor-state arbitration as the most widely used means of dispute resolution in practice.[641]

Indeed, attention should also be drawn to the reasons behind the rapid expansion of BITs and thus of ISDS disputes, considering that judicial

---

[637] See G. KAUFMANN-KOHLER, M. POTESTÀ, *Investor-State Dispute Settlement and National Courts Current Framework and Reform Options*, European Yearbook of International Economic Law, Springer, 2020. See also, R. EFTEKHAR, *The Relevance of the Host State Domestic Law in Investment Treaty Arbitrations: Revival of the Localisation Theory?*, in The Role of the Domestic Law of the Host State in Determining the Jurisdiction ratione materiae of Investment Treaty Tribunals, pp. 1–36, 2019.

[638] Cf. M. A. PETSCHE, *The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches*, 18 WASH. U. GLOBAL STUD. L. REV. 391, 2019.

[639] This is usually a time frame of 9 to 18 months.

[640] See C. SCHREUER, *Investment Disputes*, in Max Planck Encyclopedias of International Law, Oxford Public International Law, Oxford University Press, para 18, 2022, thus referring to the well-known "*Maffezini v. Spain*" case.

[641] On this issue see S. E. BLYTHE, "*The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties*." The International Lawyer, vol. 47, no. 2, 2013, pp. 273–90.

protection – and thus the right of access to justice – has assumed an almost predominant role.

Bearing in mind the extensive literature on this topic, the reasons behind the expansion of BITs are both economic and legal in nature, thus resulting in different perspectives.[642]

Clearly, from an economic point of view, the major issue concerns national companies from industrialised states, that had found excellent investment opportunities in developing countries.[643] However, such economic reason goes hand in hand with a legal reason, since it was necessary to invest in these countries in a secure manner.

These premises lead to subsequent considerations: *i)* creating conditions conducive to investment abroad by pushing for legal protections that would guarantee the investor from possible government interference by the host-state; *ii)* as a consequence of the previous point, it was necessary to effectively implement the protection of these rights, thus ensuring procedural protection; *iii)* the guarantee of procedural protection could not have been enforced in the domestic courts of the host state of the investment, since – due to state interests of an economic-political nature – the influence of domestic court systems would not have assured the investor[644]; *iv)* therefore, as a necessary consequence, the investor needed to be able to rely on alternatives to the jurisdiction of domestic courts, which is why a system was gradually set up to facilitate alternative means of access to domestic courts.[645]

---

642 See also the results addressed by A. KERNER, "*Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties.*", in International Studies Quarterly, vol. 53, no. 1, 2009, pp. 73–102.

643 Cf. L. DELANY, L., SIGNAL, & G. THOMSON, *International trade and investment law: a new framework for public health and the common good*, BMC Public Health 18, 602, 2018.

644 See J. W. SALACUSE & N. P. SULLIVAN, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, *supra* note 55, p. 75.

645 The domestic courts of the host state are very often seen as unattractive to the investor, mainly for two reasons: first, they are often perceived as biased in favour of the state; second, assuming that ultra-specialised issues such as those relating to international investment law are involved, a lack of experience in this field may compromise the handling of the dispute.

The creation of this system has increased the international judicial protection of the investor, thus creating a perfect "access to justice environment", since: *i)* in the event of a dispute arising abroad, it will no longer be necessary to always[646] use the domestic courts of the host state of the investment, but one will be able to directly resort to an *ad hoc* tribunal set up to settle the dispute; *ii)* it will be a method of dispute resolution of a purely private nature, therefore the parties will be free – while following the general indications contained in the BITs – to decide who will be in charge of settling the dispute and under which applicable law; *iii)* disputes will certainly take into account domestic laws, but they will be decided using international standards, also in the light of international rules which – also developed according to principles of public international law – may limit the (sometimes discretionary) choices made by governments; *iv)* last but not least, the New York Convention will be of particular importance, thus ensuring the potential winner of an arbitral award a prompt and effective enforcement of the decisions adopted by the arbitral tribunals.

In conclusion, it could be assumed that bilateral investment treaties provide a "multifunctional protection", facilitating both the right of access to the dispute and the "enforceable" right, aimed at the effective recognition – legal and, above all, economic – of the party that has breached its contractual obligations.

Indeed, if one refers to the practice of states in the creation of a BIT, among the various topics[647] that can be found there is always that relating to the "Investment Dispute Settlement", which as rightly pointed out represents a question of a practical nature, having two objectives: on the one hand, it serves the purpose of understanding whether the BIT signatory states are effectively complying with the substantive protections that can be found; on the other hand, in the event that states do not comply with the rules within the BIT, it represents a way of enforcing alleged violations of the investor's rights[648], thus creating a

---

[646] One can sometimes identify in some BITs an obligation to remedy in domestic courts, but clearly this trend is disappearing over the years.

[647] J. W. SALACUSE & N. P. SULLIVAN, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, *supra* note 55, p. 79.

[648] On this issue, see the consideration made by the AMERICAN BAR ASSOCIATION, *The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets*, 2014, available online at:

right of access to binding arbitration for the investor.[649]

For all these reasons, the investor's rights are protected within a legal scheme in which the BITs are one of the main sources in the ISDS scheme.[650]

However, in consideration of the purpose of this work, it is necessary to analyse these instruments in relation to the main objective they were created for, *i.e.*, the protection of the investment and, consequently, the protection of a right of the investor.

Depending on the situations which may arise, such a right can be protected in two main ways: on the one hand, if there are no negative consequences linked to the investment, there will always be protection since the state will have certain types of obligations to respect; on the other hand, if – as is often the case – there may be violations of the treaty (and consequently violations of the rights contained therein for the protection of the investor), then there will be a right for the investor to defend himself against the possible violations dreaded, thereby implicitly recognising a right of access to justice.

2.1.1. CONSENT AND ITS RELEVANCE IN ISDS RIGHT TO ACCESS TO JUSTICE.

In order to understand the importance of consent in relation to the compatibility of the right of access to justice in ISDS, it seems appropriate to male some brief introductory and general considerations.

ISDS is one of the fields of application where the so-called alternative dispute resolution (ADR) means are fully implemented, which as is well known may

https://www.americanbar.org/groups/business_law/publications/blt/2014/03/01_sprenger/

.

649 In general, see A. T. GUZMAN, *Explaining the Popularity of Bilateral Investment Treaties*, in The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows, Karl P. Sauvant and Lisa E. Sachs, Oxford Scholarship Online, 2009, p. 74.

650 See P. JUILLARD, *L'Evolution des Sources du Droit des Investissements*, 250 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 74, 1994.

include among others conciliation, mediation[651] and arbitration.[652]

Although there has recently been an increase in the first two methods[653], the analysis now must focus on arbitration, since it seems necessary to discuss "investment arbitration" in order to analyse the right of access to justice.

As is well known, arbitration procedures are based on a choice, or rather an agreement, created between the parties.[654] This agreement in ISDS is recognised as a consent[655], which therefore represents a fundamental and indispensable subject matter in the right of access to justice in investment arbitration.[656]

As is well known and recognised by both practice and scholars, such consent may be acknowledged in different ways (usually, three ways are identified)[657] and it is an agreement between different parties along with different legal prerequisites, but all leading to the same result, *i.e.* the concretisation of the investor's right to make a claim against the host state of the investment.

For example, a possible form of consent could be in an international agreement between the investor and the host state of the investment.

This is a familiar arrangement in practice, thus involving a private party and a

---

651 See F. ALI, SHAHLA AND G. REPOUSIS, *Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat*?, Denver Journal of International Law and Policy, Vol. 45, No. 2, 2018; J. J. COE, JR, *Should Mediation Of Investment Disputes Be Encouraged, And, If So, By Whom And How*? In: Contemporary Issues in International Arbitration and Mediation: The Fordham Papers, pp. 339–357, 2009.

652 Cf. J. K. SCHÄFER, *Alternatives to Investment Arbitration in: International Investment Law*, pp. 1186 – 1211, 2005.

653 On this topic, see L. C. REIF, *The Use of Conciliation or Mediation for the Resolution of International Commercial Disputes*, 45 CAN. Bus. L.J. 20, 2007.

654 Cf. D. C. G. SIAN, "*Agreements to Refer Disputes to Arbitration.*", Singapore Journal of Legal Studies, 1993, pp. 261–73.

655 For an interesting perspective, see W. GUIGUO, *Consent in Investor–State Arbitration: A Critical Analysis*, Chinese Journal of International Law, Volume 13, Issue 2, Pages 335–361, 2014.

656 See, S. SCHWEBEL, L. SOBOTA, & R. MANTON, *The Severability of the Arbitration Agreement*, In International Arbitration: Three Salient Problems (Hersch Lauterpacht Memorial Lectures, pp. 1-64). Cambridge: Cambridge University Press, 2020.

657 Cf. A. M. STEINGRUBER, *The Mutable and Evolving Concept of 'Consent' in International Arbitration – Comparing rules, laws, treaties and types of arbitration for a better understanding of the concept of 'Consent'*, Oxford U Comparative L Forum 2 at ouclf.law.ox.ac.uk, 2012.

state, and it certainly broadens the boundaries of the investor's right of access to justice, since it can be used for both existing and future disputes.

In the first case, reference is made to the so-called "*compromis*", which is nothing more than an agreement to which both parties agree to submit the legal issue to the attention of an arbitral tribunal (or a centre)[658]; in the second case, reference is made to the so-called "compromissory clause", *i.e.* clauses in investment agreements which allow – usually to the party who considers its rights have been violated – to activate the jurisdiction of a court to settle a dispute.

Regardless of the different wording between the two modalities[659], it is important to emphasise that this type of agreement on consent between the two parties does not necessarily have to be provided in a separate document[660], it is sufficient only that the written agreement shows the clear willingness of the parties to submit the matter to international arbitration, so that the jurisdiction of an *ad hoc* tribunal can be activated.[661]

In the second case, it may also be the case that sometimes consent occurs directly through a specific provision in the legislation of the host state of the investment.[662]

On this situation, rather than discussing parties, one should discuss a possibility offered by the legislation of the state, leaving it to the discretion of the investor. Indeed, including in a law the consent to methods of settling

---

658 See C. TITI, *Applicable Law in Investment Agreements*, in Oxford Bibliographies, 2019; see also J. D. MORTENSON, "*International Investment Law*.", in Conceptual and Contextual Perspectives on the Modern Law of Treaties, edited by Michael J. Bowman and Dino Kritsiotis, 653-676. Cambridge: Cambridge University Press, 2018, 655.

659 See ICSID Model Clauses, available online at: https://icsid.worldbank.org/resources/content/model-clauses.

660 Although the reference to other instruments of a legal nature for the purpose of consent is entirely legitimate, see *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para 55.

661 Cf. *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, p. 400, para 23.

662 See C. SCHREUER, *Consent to Arbitration through Legislation*, available online at: https://www.nomos-elibrary.de/10.5771/9783845299051-447.pdf, 2019.

international disputes is a precise choice – and thus a legislative prerogative – of the state, through direct and indirect references.[663]

There is, however, a difference, in this method of consent, between the efforts made by the state and the investor, since while it is true that the state must "simply" express its consent through one of its prerogatives (the legislative power), the investor is required to take a number of steps to perfect its consent through a domestic investment law.

Indeed, there are some limits and conditions which must be respected by the investor, who may, depending on the case, express his consent in basically two ways, *i.e.*, through the institution of proceedings or before the institution of proceedings[664], reserving in the latter case the possibility of litigating against the host state of the investment in the future.

This modality further emphasises the role of the individual-investor in evaluations of access to justice because it is not only a choice, but a necessary legal action at the initiative of the investor, which is therefore nothing but a clear expression of the recognition of his right of access.[665]

Last but certainly not least, there is a modality of consent provided through treaties, which can be either bilateral or multilateral.

In this case, although the parties are still state and investor, the methodology of consent is not as immediate as in the first two described above, and this certainly represents an important pre-procedural condition for the identification of the investor's right of access to justice.

Such a consent procedure is established through what is often called an "offer"

---

663 See the case *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, where the tribunal established ICSID's jurisdiction because there were no agreements between the parties or bilateral treaties, declaring the centre's jurisdiction through a provision of Egyptian law, see Decision on Jurisdiction I, 27 November 1985, p. 161.

664 See, for example, *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, para 77.

665 See also on this topic, M. POTESTÀ, *The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws*, Arbitration International, Volume 27, Issue 2, Pages 149–170, 2011.

made by the state[666], where the beneficiaries are the citizens of the other contracting state.

However, this is a simple offer of consent – which is sometimes made explicitly in bilateral treaties or only indirectly mentioned – which is of no value *per* se to trigger the jurisdiction of an investment arbitration centre and/or tribunal.

Indeed, it is always necessary for the investor to accept the offer of consent made by the state in the treaty and only international arbitral jurisdiction be established.

For these reasons, in ISDS, the notion of consent is of fundamental importance, as for the first time it is not only and exclusively a matter of choices made by the investor, but also and above all by states.[667]

In this sense, in BIT's consent, the treaty does not represent the agreement to arbitrate, but a possibility left to the state' s citizens – who may resort to arbitration to resolve the dispute – perfecting the consensus through the investor's acceptance.[668]

Indeed, once perfected, the consent cannot be revoked unilaterally and will become binding on the parties, being either general or, *i.e.*, limited to certain categories of potential disputes.[669]

Moreover, because it is a fundamental and often decisive requirement for triggering the jurisdiction of arbitral tribunals, such consent must be given in writing and be as explicit as possible, as it cannot be limited to factual assessments.[670]

---

666 On this topic, see G. LABORDE, *The Case for Host State Claims in Investment Arbitration*, Journal of International Dispute Settlement, Volume 1, Issue 1, page 105, 2010.

667 Cf. Y. ANDREEVA, *Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions*, Arbitration International, Volume 27, Issue 2, 2011.

668 More recently, see R. RADOVIĆ, *Beyond Consent Revisiting Jurisdiction in Investment Treaty Arbitration*, Nijhoff International Investment Law Series, Volume: 18, 2021.

669 These considerations have often led scholars to question the so-called 'informed consent', see D. N. CINOTTI, *How Informed Is Sovereign Consent to Investor-State Arbitration*, 30 MD. J. INT'l L. 105, 2015.

670 Cf. *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, award 13 January 1997, p. 361 para 4.17.

In addition, consent may sometimes lend itself to certain procedural conditions, such as the exhaustion of domestic remedies and the attempt to settle the dispute amicably through consultations or negotiations.[671] The first condition, unlike the second, rarely occurs in practice.

Thus, although it is not the only way to access investment arbitration disputes, it is exclusively the state that – from the outset – chooses to be bound by a treaty. Through this choice, which again is at the discretion of state authorities and in line with the concept of sovereignty, the state gives its consent to submit to an arbitration procedure in the event of a dispute with a foreign investor, who will then have to make the same choice explicit.[672]

Clearly, the consent is linked to the topic of the right of access to justice, since within the BITs there is a tendency to include – within the topic of dispute resolution – an international arbitration procedure for the resolution of potential disputes between an allegedly damaged foreign investor and the government of the host state of the investment. It is, therefore, a consensus that is necessary, as it "allows" an arbitral jurisdiction to be invoked for the creation of an *ad hoc* tribunal.

In this respect, while it is true that there is an individual right of the investor to have access to judicial protection, it is necessary to specify that such a right could not exist without the consent of the state to resolve investors' claims exclusively through arbitration.

Moreover, once consent is given, there may potentially be no limit to the disputes and/or parties that may resort to arbitration, subject to compliance with general rules on the notion of investment, nationality of the investor, etc.[673]

For these reasons, the importance of consent – in terms of jurisdictional choice for access to justice in ISDS – is of a fundamental nature, as consent essentially triggers the substantive and procedural protection that may result from an IIA,

---

[671] Often within a certain period of time, usually six months.

[672] Occasionally, these choices may also affect internal state matters, see S. BIJLMAKERS, *Effects of Foreign Direct Investment Arbitration on a State's Regulatory Autonomy Involving the Public Interest*, The American Review of International Arbitration (ARIA), v23/no2, 245-266, 2012.

[673] See on this topic, J. PAULSSON, "*Arbitration without Privity*", 10 ICSID Rev. 232, 232-3, 1995.

thus granting the to bring an international action against a sovereign state.[674]

Bearing in mind the above-mentioned consideration on the importance of consent in ISDS, it should also be noted that there are also other conditions for an investment arbitration to take place, which are crucial both in form and in substance, which are connected to the notion of access to justice indirectly.

Among the best known, which will be briefly further addressed[675], issues relating to the nationality of the investor[676], the existence of an investment[677] and the law applicable to the dispute.

These are fundamental conditions and are connected to the notion of consent, and more generally to the notion of arbitral jurisdiction, for several reasons, one need only consider that on the issue of investor nationality, the investor must be a national of a state party to the treaty to benefit from the host state's offer of consent to arbitration.

Moreover, as regards the existence of an investment, consent to arbitral jurisdiction is limited to disputes over "investments", which within especially the BITs contain very broad definitions thereof.

For these reasons, it seems more appropriate to analyse all these other conditions from a procedural point of view, in order to understand what kind of "practical" impact they may have on access to justice.

2.2. THE ESTABLISHMENT OF INTERNATIONAL INVESTMENT DISPUTE

674 As correctly noted, "[...] *Granting a private party the right to bring an action in an international tribunal against a sovereign state with respect to an investment dispute is a revolutionary innovation that now seems to be taken for granted.* [...], J. W. SALACUSE & N. P. SULLIVAN, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, *supra* note 55, p 88.

675 As these issues are also often resolved by the caselaw of arbitral tribunals, they will be addressed in the section on investment centres, especially with regard to ICSID.

676 See R. WISNER, & N. GALLUS, *Nationality Requirements in Investor-State Arbitration*, The Journal of World Investment & Trade, 5(6), 927-945, 2004; see also B. LEGUM, *Defining Investment and Investor: Who is Entitled to Claim*?, Arbitration International, Volume 22, Issue 4, Pages 521–526, 2006.

677 Cf. J. D. MORTENSON, *The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'l L.J. 257, 2010, p. 259, which examines this very issue of 'access' to ICSID.

All the above considerations represent a set of substantive and procedural conditions in favour of the creation of an investor's right of access to arbitral tribunals to settle disputes on foreign investments.

However, such discussions must necessarily be complemented by strictly procedural assessments, *i.e.*, valuations that make the protections referred to – e.g., in the BITs – truly effective and practically feasible to "complete" the investor's access to justice.

Clearly, the investment dispute settlement system does not have – unlike the human rights system, for example – an international (regional and/or universal) court where individuals could refer alleged violation of their rights.

However, there are several international investment centres that sometimes create or adopt a set of procedural rules allowing for the activation of arbitral jurisdiction, thus creating a "litigation space" for the involved actors.

Nevertheless, investment arbitration between state and investor does not always have to take place within a dispute resolution centre, thus giving rise to what is called *ad hoc* arbitration.[678] Clearly, an *ad hoc* arbitration will require an arbitration agreement, which will be necessary because through it the parties will have to agree on several procedural issues, including the choice of arbitrators and the law applicable to the dispute.[679]

These are very important choices, which – although made in agreement with the other party – characterise and influence the right of access to justice in investment disputes.

For these reasons, some institutions have created templates that the contracting parties can use as a reference when drafting treaties.[680]

Clearly, these templates do not directly address access to justice but facilitate it

[678] Among many others, see the first considerations on this topic, H. L. ARKIN, *International Ad Hoc Arbitration: A Practical Alternative*, 15 INT'l Bus. LAW. 5, 1987.

[679] On this topic, see G. BLANKE, *Institutional versus Ad Hoc Arbitration: A European Perspective*, ERA Forum 9, 275–282, 2008.

[680] See for example the UNCITRAL "Model arbitration clause for contracts", in UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), p. 31.

in the event of a dispute between the parties, thus highlighting the focus on these issues also at the arbitration agreement stage.

However, the investor is not always free to choose which arbitration centre and arbitration rules to apply to the dispute, and this lack of freedom translates into what could be called a conditional choice of access to justice.

Several elements influence the selection of the court and the arbitration rules, but certainly – also in light of the above analysis – the greatest "conditioning" is the result of the provisions contained in the BITs, which specify which arbitration forums are open to the investor.[681]

Irrespective of the choices made by the investor, while bilateral investment treaties have in the past been a phenomenon which increased investor protection abroad, it should be noted that these protections are now also applied in practice by centres which have in turn created arbitration rules, thus allowing further development of the right of access to justice in ISDS.

In bilateral investment treaties, if an "arbitral framework" is specified and offered, it is certainly the ICSID, which – as will be seen shortly – for historical and opportunity reasons has represented and represents one of the main solutions for the investor to access investment justice.

2.2.1. THE IMPORTANCE OF ICSID AND ITS IMPACT ON ACCESS TO JUSTICE IN ISDS.

Undoubtedly, an important weight must be given to ICSID in the discussion on the right of access to justice in ISDS.

This is one of the organizations[682] set up within the World Bank with the task of creating conditions for the settlement of international investment disputes.

The "Convention on the Settlement of Investment Disputes between States and Nationals of Other States"[683], often referred to as the "Washington

[681] Clearly, international arbitral forums are not the only alternatives offered in BITs to the investor, as these may also include the domestic courts of the host state of the investment.

[682] Other organisations include: IBRD, IDA, IFC e MIGA, see https://icsid.worldbank.org/about.

[683] *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159.

Convention" or the "ICSID Convention", created the "International Centre for Settlement of Investment Disputes", which is an intergovernmental institution specialized in the settlement of investment disputes.[684]

The analyses concerning the establishment, functioning and benefits of ICSID are well known.[685]

It is a convention with a large number of state parties[686], which aims to promote economic growth through the creation of a favourable investment climate.[687]

However, the approach to be taken on this work is different, since it will be crucial to understand how the establishment of a centre such as ICSID has enhanced – and then made practically effective – the development of the individual right of access in investment disputes, by analysing from a practical and factual point of view how it is possible to 'access' this method of dispute resolution.

In this sense, through a study of the preparatory documents that led to the creation of the ICSID Convention, it is possible to observe that – both directly and indirectly – it is precisely the possibility of access to international justice in matters of investment disputes that has had a significant weight in the creation of this mechanism.[688]

Among the various ideas that the documents offer, certainly some are significant in terms of access to international justice for dispute resolution.

On the one hand, there is a need to settle disputes between investor and host

---

[684] See, ICSID Convention, art. 1 para 2.

[685] Among many, see A. F. LOWENFELD, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'l & COMP. L. 47, 2009.

[686] See the Database of ICSID Member States, available online at: https://icsid.worldbank.org/about/member-states/database-of-member-states. At the moment, there are 164 of Signatory and Contracting States.

[687] See ICSID' Preamble.

[688] As is well known, the analysis concerning the preparatory work for a treaty is very important in international law. Among the most important works in this respect, see H. LAUTERPACHT, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 HARV. L. REV., 549, 1935. Specifically, on VCLT 1969, see J. MORTENSON, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History? American Journal of International Law*, 107(4), 780-822, 2013.

state in a spirit of 'mutual confidence', specifying that in certain cases it would be more appropriate to use international methods to resolve disputes.[689]

This passage, although it may seem trivial at first glance, was by no means taken for granted, especially at a time when access to international methods of legal disputes was the sole responsibility of states.

These steps only highlight a clear necessity, which also thanks to the work of ICSID has been realised, namely the creation of a framework with an international character within which to complain about the violation of individual rights against sovereign states.

However, it is also possible to find considerations which have the main objective of recognising a right for the investor to access international justice for the settlement of investment disputes.

In this sense, it is sufficient here to recall the considerations made by Aaron Broches[690], who through a note addressed to the Executive Directors of the IBRD, was the first to analyse and question the various problems between foreign investors and host states, recognising among his points the remedies, including "*a recognition by States of the possibility of direct access by private individuals and corporations to an international tribunal in the field of financial and economic disputes with Governments*"[691] which as later analysed in the "Working Paper in the form of a Draft Convention"[692] was nothing more than "*recognition of the private party's right*

[689] Rather than making the "claim espousal" by the state of nationality of the investor, see *History of the ICSID Convention*, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume I, Doc. 24, p. 18.

[690] Other than General Counsel of the International Bank for Reconstruction and Development ("IBRD"), Aron Broches, who was general counsel of the World Bank for two decades until his retirement in 1979.

[691] *History of the ICSID Convention*, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II-1, Doc No. 1, para. 3(a).

[692] These have also been prepared by the General Counsel and transmitted to the Executive Directors on June 5, 1962.

of direct access to an international jurisdiction".[693]

Clearly, there are other and always coherent references to the subject matter of this work within the different documents, but the two mentioned above best represent the synthesis of the arguments on access to justice: on one hand, a creation of an "international legal space" where one can effectively claim possible violations committed by individuals; on the other hand, give the possibility of direct access of individuals into this legal space, in full standard with the requirements represented by the right of access to justice in general.

These goals have undoubtedly been fully achieved, because today ICSID represents the best framework for the resolution of state-investor disputes. Precisely for these reasons, with the various modifications and improvements made over the years[694], ICSID has certainly contributed to the creation of a legal space within which it is possible to recreate a right of access to justice in ISDS.

These issues are procedural and purely jurisdictional in nature and have helped to create conditions for the admissibility of the investor's claim.

There are basically two instruments to be taken into account for the analysis of these access perspectives: on the one hand, of course, the aforementioned ICSID convention, which represents the most relevant foresight instrument in this context; on the other hand, the ICSID Additional Facility Rules[695], which

---

693 *History of the ICSID Convention*, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II-1, comment to Section 5.

694 In the past, see K. M. SUPNIK, "*Making amends: amending the ICSID Convention to reconcile competing interests in international investment law*." Duke Law Journal, vol. 59, no. 2, 2009, pp. 343–76. More recently, see S. SEELMANN-EGGEBERT, *Amendment of the ICSID Arbitration Rules: Comment from Counsel's Perspective in: Evolution, Evaluation and Future Developments in International Investment Law*, page 137 – 144, Proceedings of the 10 Year Anniversary Conference of the International Investment Law Centre Cologne, 2021.

695 Cf. *Arbitration (Additional Facility) Rules* (International Centre for Settlement of Investment Disputes [ICSID]), created on September 27, 1978. As explained in https://icsid.worldbank.org/resources/rules-and-regulations/additional-facility-rules/overview, "[…] *The original Additional Facility Rules were published with non-binding explanatory comments: ICSID Additional Facility (1978). The Additional Facility Rules have subsequently been amended twice. The first amendment was approved on September 29, 2002, and was effective on January 1, 2003: ICSID*

have had an extraordinary impact on the subject of access to justice, since they have made it possible to refer to the ICSID jurisdiction also in certain disputes which did not fall within the jurisdiction of the centre.[696]

2. 2. 2. ICSID MAIN JURISDICTIONAL REQUIREMENTS AND THE CONNECTION TO ACCESS TO JUSTICE.

Among the substantive admissibility requirements conditioning access to justice, and thus representing a jurisdictional requirement for ICSID investment arbitration, besides the well-known notion concerning the existence of an investment[697], two are of fundamental importance: the notion of dispute and the characteristics of the parties involved.

These considerations are well known both in practice and in the literature but must nevertheless be mentioned in the context of access to justice, as they constitute necessary jurisdictional conditions.

As regards the existence of a dispute, in the light of practice there are several elements that must be taken into account by a party intending to access ICSID jurisdiction: *i)* there must be conflicting interests with opposing legal points of view[698]; *ii)* the issue subject of the potential dispute must have been minimally discussed by the parties, thus highlighting the different positions[699]; *iii)* the

Additional Facility Rules (2003). The current rules were approved by written vote of the Administrative Council in early 2006 and came into effect on April 10, 2006: ICSID Additional Facility Rules (2006). They were adopted after a two-year period of public consultation. This included a discussion paper released on October 22, 2004 on Possible Improvements of the Framework for ICSID Arbitration and a working paper released on May 12, 2005 on Suggested Changes to the ICSID Rules and Regulations. […]".

696 On a different scale, see the first considerations made by P. TORIELLO, *The additional facility of the international centre for settlement of investment disputes*, The Italian Yearbook of International Law Online, 4(1), 59-83, 1978. More recently, see A. R. PARRA, *The New Amendments to the ICSID Regulations and Rules and Additional Facility Rules*, 3 LAW & PRAC. INT'l Cts. & Tribunals 181, 2004.

697 On this relevant topic, see L. J.E. TIMMER, *The Meaning of 'Investment' as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre*, 29, Journal of International Arbitration, Issue 4, pp. 363-373, 2012.

698 Cf. *Texaco c. Libya*, Preliminary Award, 27 November 1975, 53 ILR 389, para 416.

699 See *Valores Mundiales c. Venezuela*, Award, 25 July 2017, para 231.

dispute must be concrete and not purely theoretical[700]; *iv)* the dispute must exist when legal proceedings are initiated.[701]

These factors, which determine whether or not to initiate investment arbitration and are therefore fundamental to the issue of access to justice, must be balanced against an evolution which has affected the notion of dispute, since: *i)* the dispute must be of a "legal" nature[702] and political issues – which, as anticipated, are physiological in ISDS – must not contribute to conditioning it in any way[703]; *ii)* in the light of Art. 25(1) ICSID, the dispute must arise directly from a direct[704] or indirect[705] foreign investment, *i.e.* through a "close connection" to the investment.[706]

As regards the parties involved in investment arbitration, it is necessary to focus on certain characteristics of the two "main actors", *i.e.*, the foreign investor and the state. Given the subject matter of this chapter, there is no doubt that among the two parties involved, emphasis should be placed on the foreign investor.[707]

Indeed, if it is true that in practice the investor is often the claimant in investment arbitration, then it is necessary to investigate who has "legal standing", *i.e.*, which parties – thus considered as investors – may trigger ISDS

---

[700] On this topic, more recently, see *AES c. Argentina*, Decision on Jurisdiction, 26 April 2005, para 43. Such a topic was also addressed in an inter-state arbitration, see *Ecuador c. United States*, Award, 29 September 2012, paras 198-207.

[701] See for example the legal reasoning in *Siemens c. Argentina*, Decision on jurisdiction, 3 August 2004, where the Tribunal asserted that "[…] *for purposes of the Treaty the dispute must exist at the time of the notice of arbitration. It has to exist also at the time the dispute is filed with the ICSID Secretariat and at the time of registration.* […]", para 161.

[702] Cf. *Suez and Inter Agua c. Argentina*, Decision on Jurisdiction, 16 May 2006, paras 34-37.

[703] As long as the "legal character" or the "legal nature" is clearly maintained, see *CSOB c. Slovakia*, Decision on Jurisdiction, 24 May 1999, para 61.

[704] Cf. *Fedax c. Venezuela*, Decision on Jurisdiction, 11 July 1997, para 24.

[705] See for example *CMS c. Argentina*, Decision on Jurisdiction, 17 July 2003, para 24.

[706] Recently, on this topic, see *Bridgestone c. Panama*, Decision on Expedited Objections, 13 December 2017, para 238.

[707] See K. A. KONRAD, *Large investors, regulatory taking and investor-state dispute settlement*, European Economic Review, Volume 98, Pages 341-353, 2017.

procedures and thus have access to investment arbitration justice.

In this sense, it is clear that the role of the investor assumes a particular relevance in the ISDS arbitration, it is sufficient to consider the importance attributed to it also by the ICSID Convention itself.[708]

Such a recognition, which is clearly important also from an interpretative[709] point of view of the Convention[710] itself, seems however to give greater prominence to the investor as a natural or legal person.

This is also assessed by the arbitral practice, which clearly grasps a greater involvement of corporations as claimant-investors[711], although there are situations where the investor may also be an individual[712] or a group of individuals, provided that each of them has given individual consent to the arbitration.[713]

However, what affects the definition of investor in ISDS is not only the legal qualification of the enterprise or, more generally, the "private" nature of the individual, but how and in what capacity the investment is made, *i.e.*, it is necessary to understand whether the investor is acting in a private commercial capacity.[714]

---

[708] It is specifically addressed "[…] *the role of private international investment* […]", cf. Convention on the settlement of investment disputes between states and nationals of other states, Preamble.

[709] See N. MORAN, *Preambles and the Right to Regulate*, in Engagement Between Trade and Investment. European Yearbook of International Economic Law, vol 18. Springer, Cham, 2021. More generally, see M. H. HULME, *Preamble in Treaty Interpretation*, 164 U. PA. L. REV. 1281, 2016.

[710] See J. FOURET, L. S. PENA COSTA, "*The Preamble of the ICSID Convention*", ELECD 3017, 2019; in Fouret, Julien; Gerbay, Remy; Alvarez, M. Gloria (eds), "The ICSID Convention, Regulations and Rules", Edward Elgar Publishing, 2019.

[711] See M. VALASEK, AND P. DUMBERRY, *Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Dispute*, 26(1) ICSID Review-Foreign Investment Law Journal, 2011, p. 34-75; see also P. MUCHLINSKI, *Corporations and the Uses of Law: International Investment Arbitration as a 'Multilateral Legal Order'*, Oñati Socio-Legal Series, Vol. 1, No. 4, 2011.

[712] There are several cases where the Claimant was a single individual, cf. *Maffezzini c. Spain*, *Soufraki c. UAE* and *Goetz c. Burundi*.

[713] On this topic see the well-known *Abaclat c. Argentina* case, Decision on Jurisdiction, 4 August 2011, para 518.

[714] Cf. G. VAN HARTEN, *Private authority and transnational governance: the contours of the international system of investor protection*, Review of International Political Economy, 12:4, 600-623, 2005.

In this respect, it is interesting to note that these observations are the result of decisions of arbitral tribunals which precisely concerned the investor's right of access to ISDS.

In a well-known case involving a bank, the respondent state argued that the arbitral tribunal did not have jurisdiction because it was a state agency and not an enterprise with commercial activity.[715]

However, the tribunal – rejecting the respondent state's arguments – upheld its jurisdiction precisely by arguing based on the right of access to justice.

Specifically, the arbitral Tribunal adopted a 'test', aimed at clarifying that the bank's activities had to be analysed in the light of their nature and not their more general purpose, thus ruling that access to arbitration should not depend on whether the company was partly or wholly controlled by the government of the respondent state.[716]

In addition to considerations of what kind of business activity the investor must engage in, another fundamental requirement for an investor's access to justice is the question of nationality.

In this sense, nationality is one of the most important requirements regarding access to the dispute resolution methods established under the ICSID Convention, since not only will the investor have to substantiate the nationality of a state which is party to the convention, but will also have to demonstrate that he/she does not have the nationality of the host state of the investment.[717]

Clearly, the foregoing is the general rule, as in the particulars it will subsequently be necessary to prove both the investor's nationality as a natural person and as a legal person.[718]

---

[715] Reference is made to the *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4. For an overview see the Case Summary available online https://www.biicl.org/files/3916_2004_csob_v_czech_republic.pdf.

[716] See *CSOB c. Slovakia*, Decision on Jurisdiction, 24 May 1999, paras 15-27.

[717] On this very specific topic, see V. NERETS, *Nationality of investors in ICSID arbitration*, in RGSL Research Papers no. 2, 2011.

[718] On both issues, see respectively: R. WISNER AND N. GALLUS, *Nationality Requirements in Investor-State Arbitration*, in the journal of world investment and trade, 5, pp. 927-945, 2004; R. L. ASTORGA, *The Nationality of Juridical Persons in the ICSID Convention in Light of Its Jurisprudence*, Max

Without prejudice to these conditions, which are therefore prerequisites for access to investment arbitration, it should now be specifically analysed what are and under which circumstances it is possible to exercise the right of access to justice in ICSID arbitration.

It should be noted at the outset that the steps of an arbitration are different and not all of them necessary. The focus of the present analysis is on the "activation" phase of the procedure, *i.e.*, how access to arbitral justice under the ICSID Convention is practically possible.

In this sense, before having access to the ICSID arbitral justice, it would be appropriate to assess three different conditions: *i)* the possibility to refer to the domestic courts of the host state of the investment; *ii)* to take into account possible "fork in the road clauses"; *iii)* to allow a certain period of time to try to reach an amicable solution to the dispute. These are not necessarily procedural conditions, unless they are expressly referred to in the BITs.

Proceeding in order, the first condition, that of exhaustion of domestic remedies, seems to find little place in practice, also because it is the ICSID Convention itself which specifically excludes it, unless it is expressly provided for.[719]

Forks in the road provisions are still provided for in some BITs and, as mentioned above, impose a choice on the investor, who, however, forfeits his right of access to international arbitration only if the so-called triple identity test, which has been repeatedly considered by arbitral tribunals, is satisfied.[720]

To allow a certain period of time to elapse basically means having an attempt to avoid litigation, which is often what is specified in notices of disputes.

In any event, irrespective of the possible solutions to avoid the commencement of litigation, at some point the investor – or better the legal team – will find himself at a crossroads: choosing either to commence litigation or to

---

Planck Institute for Comparative Public Law and International Law and the University of Chile, University of Heidelberg, pp. 420-472, 2007.

[719] See art. 26 of the ICSID Convention.

[720] Cf. *Pey Casado c. Chile*, Award, 8 May 2008, paras 467-498; *Yukos Universal c. Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras 587-600.

avoid and try other possible out-of-court solutions. Under ICSID, if an investor wants to initiate a dispute of an arbitral nature, he must access justice through a Request for Arbitration.

For this reason, a brief analysis of the essential contents of a Request will be made, focusing on the obligations of the investor in this specific act, which thus typifies its right of access to justice.

3. REQUEST FOR ARBITRATION IN ICSID PROCEEDINGS: CONCRETISATION OF ACCESS TO JUSTICE.

Bearing in mind the abovementioned considerations, it is now necessary to focus the attention on the main act through which it is possible to initiate the ICSID procedure and "access" to the justice offered by the Centre, *i.e.,* the "Request for arbitration", hereinafter also "RoA" or "Request".

This is a necessary act to access ICSID investment arbitration, but more generally it is a necessary act to access all disputes relating to foreign investments.[721]

Requests are also possible for conciliation procedures, however in light of the purpose of this work, the focus will obviously be on the Request for Arbitration.

For a complete analysis of the Request, it is necessary to analyse and take into account three different documents: the ICSID Convention, the Administrative and Financial Regulations and the Rules of Procedure for the institution of conciliation and arbitration proceedings (institution rules).[722]

In addition to these documents, which are fundamental for the formulation of the Request, there is also the information made directly available to the parties, which the centre makes available online "*How to file a Request for Arbitration* -

[721] See for example article 4 "Request for Arbitration" of the ICC Rules of Arbitration, entered into force on 1 January 2021.

[722] Those three documents are available online at https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf. In the footnotes, when reference is made to the Convention, it will be referred to as "Art.", when reference is made to the Rules of Procedure for the institution of conciliation and arbitration proceedings, it will be referred to as "Institution" or "Institution Rule" and when referring to the Administrative and Financial Regulations, it will be referred to as the "AFR Regulation".

ICSID Convention".[723]

Before the specific examination of the RoA, it is interesting to analyse in a general way how these three documents – from the general to the particular – offer to the party wishing to access the Centre's justice fundamental information on the right of access to justice.

Basically, the main obligations to "initiate" the procedure are all outlined within the Convention, so that the "Institution Rules"[724] serve as a specific document for the party intending to make a Request. This information is then reiterated and crystallised online to ensure that the party seeking access to justice is fully informed.

In order to make a Request and attempt to access the jurisdiction of the Centre, one must specify in concrete terms all the conditions for access provided for – and mentioned above – in Article 25 ICSID.

Clearly, there is no format already prepared by the Centre and no set order on how to formulate a Request for Arbitration. However, in light of the above documents, it is now possible to analyse what the characteristics of a Request might be, thus representing a concrete implementation of the right of access to ISDS disputes.

Indeed, unlike the other documents investigated in the previous chapter, there is no pre-established "scheme" for setting up the Request, *i.e.* there is no form or series of points to be addressed in order to request access to the Centre.

This certainly leaves ample freedom to the parties, who will be able to "set up" the first act of the litigation without having to comply with certain – and above all mandatory – formal characteristics.

However, this freedom will always have to be within the very wide margin provided by Articles 25 and 36 of the ICSID Convention, since it is these two articles that "create" the conditions of admissibility for the Request for Arbitration, contributing significantly to the right of access in the ICSID investment arbitration.

In this sense, the considerations that will now be made are the result of analyses

[723] See https://icsid.worldbank.org/services/arbitration/convention/process/request.

[724] Quoted in this manner according to Institution Rule, according to Rule 9 para 2.

entirely based on the documents referred to above, as the various Requests for Arbitration available in the ICSID case search platform are not public.

However, as will be highlighted and as can be deduced from a joint analysis of the instruments useful to formulate a Request, it is possible to identify the necessary and optional sections, which, from time to time, can also affect the very content of the act.

From a technical point of view, even if they do not have to be specified in the introduction, it should be noted that the Request must be made in writing[725] and must be in one of the languages made available by the Centre.[726]

The "linguistic" considerations are not insignificant, especially when dealing with issues relating to the right of access to justice.

The fact that the Request can only be conducted in English, French or Spanish shows that anyone wishing to access the Centre will not be able, at least in the introductory part, to submit questions in their mother tongue.

Clearly, this cannot be considered as a "limitation" of access to justice, because since these are very complex matters, it is clear that the parties will rely on international lawyers, thus circumventing this difficulty.

However, in order to facilitate the relationship between the Centre and its 'potential' clients (who may be states parties or individuals with the nationality of a state party), it might be interesting to make translations of the main instruments in the hands of the Centre available online. This would facilitate both access to the Centre by potential beneficiaries and easily accessible comprehensive information for everyone.

Finally, although it seems rare that it may occur in practice, the possibility of introducing the Request is guaranteed also by both parties[727], who shall clearly specify it and possibly share the costs of access from the initial stage.[728]

The analysis to follow, therefore, will be the result of a study of the "ICSID" documents which legitimise effective access to jurisdiction through the Request

[725] It seems quite obvious according to art. 36 (1) and Rule 1.

[726] See AFR Regulation 34 (1) and Rule I (1).

[727] Cf. Rule (1) (2).

[728] Cf. AFR Regulation 16.

and, where possible, also of the various Requests for Arbitration which the parties have decided to make public.

Clearly, these documents are not excessively numerous, but they are nevertheless useful because they serve to reconstruct a certain tendency on the part of investors – or, rather, their lawyers – in the exercise of effective access to justice. In this sense, among the public documents made available by the parties online, it is possible to find some Requests for Arbitration prepared by Claimants for access to ICSID, some by Convention and some by Additional Facility Rules.

The following sub-sections do not represent indications that must be followed in the order in which they are set forth but may represent a proposal for the approach to the Request, carried out in the light of the main rules and practice.

3.1. INTRODUCTION IN THE ROA: PRESENTING THE LEGAL ISSUE.

Like any legal act, the Request for Arbitration would seem to require some introduction, which is not necessary but could be strategically decisive in many respects.

From a formal and substantive point of view, it will be necessary from the outset for the party instituting the proceedings to specify that it is a Request for Arbitration[729], making this clear both in the title of the document, which is usually found on the first page. This is an important indication that characterises the means of access to justice at the Centre, since it immediately highlights the choice made by the Claimant to support its reasons in court.

This information, which is preliminary in nature, is intended to inform the Secretary General of the macro-considerations, specifying from the outset who the claimants and respondents are in the dispute to be instituted and the legal reasons underlying the request, which for example could be - without going into too much detail at this time - the alleged violation by the respondent of a bilateral investment treaty.

In addition to these considerations, it might be useful to carry out a sort of

[729] Cf. Institution Rule 1 (1), where it is specified that "[…] *The request shall indicate whether it relates to a conciliation or an arbitration proceeding.* […]".

summary of the facts that led to the establishment of the dispute, thus contributing to bring out - right from the start - the factual reasons that led to the Request.

Moreover, right from the introductory considerations, the party intending to institute the proceedings could anticipate to the Secretariat – and thus, indirectly, to the Tribunal that will be constituted – to reserve the possibility to request provisional measures.

This consideration could be very useful especially if the alleged violations are in place at the time the Request is introduced, thus leaving room for immediate action to stop the possible violations put in place by the other party.

3.2. THE IDENTIFICATION OF PARTIES IN THE ROA: A SIGNIFICANT STEP TO ACCESS ICSID ARBITRATION.

Investor-state disputes concerning foreign investments have necessary parties, who – depending on the alleged violations – will become Claimant and Respondent.

Most likely, the role of Claimant is often played by the investor(s) and that of Respondent by the state hosting the investment.

Indeed, providing information about parties in the Request for Arbitration could be considered one of the most significant steps, as the actual "legal standing" before the Centre is achieved.

In this sense, the Request for Arbitration must contain the identity of the parties[730] in a precise manner, also specifying their addresses.[731]

As a matter of fact, specifying the data of the parties seems to be a real burden placed on the Claimant, a burden that will have different consequences depending on whether the party is a natural person or a legal entity.

In this sense, it should be immediately reiterated that there is nothing to prevent – within the same Request – claimants from being both natural persons and companies. Clearly, depending on whether the claimant is a natural person or a legal entity, this will affect both consent and nationality issues, both investor

[730] Cf. art. 36 (2).

[731] Cf. Rule 2 (1) (b).

and of the state.

Particular attention must be paid if one of the parties to the proceedings is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State.[732] These are important considerations of a necessary character, affecting the consent and thus the entire jurisdiction of the Centre.

Clearly, the objectives of thoroughly identifying the party or parties who intend to make the Request are different.

On this issue, it will first be necessary to precisely specify the nationality of the investor, depending on whether the investor is a natural person or a legal person. No doubt, if the investor is an individual, the nationality could easily be obtained from the passport, which is the necessary and most useful international document.

If, on the other hand, the investor is a legal entity (e.g., a company), it will be necessary to specify the place (state) of incorporation and the applicable laws, which could, for example, be obtained from the commercial register number within the state.

However, it is also specified that in the case of a Request for Arbitration made by a juridical person, it will be necessary to demonstrate – by means of relevant documentation[733] – that all the necessary steps have been taken at the internal decision-making level of the company to authorise the Request.[734]

Thus, it appears that taking care to make a full identification of one's own party is a main requirement for access to justice in investment arbitration, both for substantive and procedural issues.

Moreover, if the parties are represented in court by one or more lawyers, it would be advisable to mention this immediately in the Request, both for matters relating to representation in court and for matters of mere procedural correspondence with the Centre and (possibly) the other party.

---

[732] Cf. art. 25 (1).

[733] Cf. Rule 2 (2).

[734] Rule 2 (1) (f). As suggested in How to file a Request Arbitration, this could, for example, be a resolution of the board of directors.

As regards the identification of the Respondent put in place in the Request by the Claimant[735], it is clearly often states parties to the ICSID Convention, often addressing politically[736] relevant figures and their offices.[737]

Lastly, through a specific and clear description of the parties, it will be possible to highlight from the outset the activities they carry out and how these activities have developed within the foreign investment. By doing so, it will be made immediately clear that the activities carried out by the investor fall within the notion of "investment", thus preparing the ground for the subsequent substantive arguments.

Thus, in addition to information that must necessarily be included in the Request, considerations of the parties to the dispute are also jurisdictional, making them a key step for the individual to take regarding possible access to ISDS.

3.3. SUMMARY OF THE DISPUTE: A FIRST FACTUAL ASSESSMENT OF THE CLAIM.

In order to have "access" to ICSID arbitration, it is necessary to provide in the Request for Arbitration substantial and factual considerations indicating the origin of the dispute, *i.e.*, a summary of the disputes (or summary of the relevant facts).

These are, as anticipated, compulsory[738] considerations that should indicate whether a legal dispute has arisen between the parties as a result of an investment.[739]

Although it is not specified, in this section considerable weight must also be given to purely factual considerations. To justify one's "action" and thus fall within one's right of access, the Claimant will have to be able to provide initial considerations making the Secretariat and the other party aware of the matter in

[735] Clearly, it will be necessary to specify that the particulars known at the time of the introduction of the request will be given, in order to avoid possible exceptions on the part of the other party.

[736] This is usually the head of the current government or the President of the country.

[737] Hypothetically, this information should be available online in national's website.

[738] Cf. art. 36 (2),

[739] Cf. Rule 2 (1) (e).

dispute.

Admittedly, in terms of defence strategy, not everything should always be accurately represented. As long as the considerations necessary to initiate the proceedings are provided, the initiating party may, for example, reserve the right to elaborate further at later stages of the proceedings.

Allegations of fact may conceivably be based on documented evidence, which if referred to should be promptly produced in court. However, there may be additional evidence which could later be provided by the party after the arbitral tribunal has been constituted, as it may be deemed decisive to 'shift' or 'steer' the arbitrators' reasoning towards a positive decision.

In the event of political instability in the host country of the investment, it may be useful, for example, to provide an overview of the situation and how this situation has affected and negatively influenced the investment. Also, it might be useful to describe from a factual perspective how the legislation of the host state was favourable to the entry of foreign investment, only to change it later and thus provide the basis for the request to initiate proceedings.

Even from this type of narrative, which in any event is not created in a contradictory way between the parties, the Secretary could derive useful aspects that, for example, might make it clear that the factual issues between the parties involve a dispute of a legal nature, which is necessary for ICSID jurisdiction.

Although not necessary at this stage of the proceedings, the factual analysis in the Request should be able to point to an international responsibility of the state, which will have to be clearly demonstrated in the course of the proceedings.

Therefore, although it will be necessary to start from purely "factual" considerations, it may be useful in the summary of disputes to proceed to outline – very briefly – what actions were taken by the state that allegedly violated the investor's rights, thus "preparing the ground" for subsequent and necessary legal evaluation.

3.4. ASSESSING ICSID JURISDICTION IN THE ROA: THE BURDEN OF CONSENT.

When both parties to the dispute have been introduced and a statement of the facts explored, the Claimant must demonstrate that ICSID has jurisdiction to

arbitrate the dispute.

This is clearly one of the most important legal issues in the RoA, essentially entitling a party to access arbitral justice against a state, in accordance with the considerations set out in Articles 25 and 36 of the Convention.

The burden of proving the existence of the Centre's jurisdiction clearly falls on the party seeking to institute proceedings. Of course, the Request is not the only act by which the Claimant can demonstrate the existence of jurisdiction, since there will always be the possibility to specify and elaborate on its reasons subsequently, but it is certainly the first act by which the investor takes a legal "position" vis-à-vis the host state.

These considerations are the consequence of the provisions laid down in ICSID.

Indeed, not only is it expressly stated that all useful information regarding the consent of both parties must be provided in the Request[740], but it is also reiterated – further increasing the burden of proof on the Claimant – that the Secretary General may find from the very first information provided in the Request that the action does not fall within the jurisdiction of the Centre.[741]

It seems clear that the request must conform as closely as possible to the requirements of the Convention, while leaving a margin of appreciation for the Secretary-General's initial review.

Indeed, interpreting the adverb "manifestly" teleologically, there seems to be a sort of preliminary check, which will have to be analysed on its merits - in cross-examination with the Respondent - by the court that is to be set up later.

The importance of such considerations about consent is also reiterated in the so-called "Institution Rules", whether in the case of a state or one of its subdivisions or agencies[742], or whether it is a natural[743] or legal person.[744]

These considerations are of substantive, procedural and temporal relevance,

[740] Cf. Art. 36 (2).

[741] Cf. Art. 36 (3).

[742] See Institution Rule 2 (1) (c)

[743] See both Institution Rule 2 (1) (d) (i) and 2 (1) (ii) (B).

[744] Cf. Institution Rule 2 (1) (d) (iii).

since the date of consent runs from the moment when both parties have formalised in written form a willingness to submit to the jurisdiction of the centre.[745]

This analysis leads to two considerations, closely linked to the right of access to justice in the ISDS on the subject of consent to ICSID.

On the one hand, the Claimant will have the double task of claiming that consent is given by both parties, arguing not only his own reasons but also those that point to a consent given by the other party.

On the other hand, reasons provided in this first act may be sufficient to overcome what could be defined as the "first admissibility test" exercised by the Secretary General, but these will have to be sustained – perhaps even more decisively – also in the subsequent stages of the dispute, trying to convince the court that will have been constituted.

These considerations only emphasize the role the Claimant assumes in the RoA, thus guaranteeing him the possibility to pursue judicial remedies and thus to better regulate his right to access justice in ICSID disputes.

3.5. BEYOND CONSENT: THE NECESSITY TO FIRST ADDRESS OTHER ICSID JURISDICTIONAL REQUIREMENTS.

In addition to consent, in the Request the Claimant must demonstrate the compliance with all the other requirements listed in art. 25 ICSID and mentioned above, *i.e.*, that it must be a dispute: *i)* between a contracting state and the national of another contracting state; *ii)* concerning an investment; *iii)* having legal character.

Proceeding in the order outlined above, it will first be necessary[746] to specify in the Request the date on which the respondent state ratified the ICSID Convention, *inter alia* by using the list made available online.[747]

The same type of operation will have to be carried out to substantiate the

[745] See Institution Rule 2 (3), which also specifies that in the case of consent given on different dates, the consent given by the party who gave it as the second will be taken as the reference.

[746] Cf. art. 36 (1) and Rule 1.

[747] See https://icsid.worldbank.org/sites/default/files/documents/2021_Sep.ICSID.ENG.pdf.

nationality of the citizen of the other state[748], in addition to having specified beforehand – in the introduction of the parties – all the representative details of citizenship.

In the Request it will be quite easy to highlight them from the outset, unless one of the two states involved has decided to withdraw from ICSID, since in that case in addition to questions of substance, temporal analyses will be required, *i.e.* understanding whether the Request or the consent was provided by the state when it was still party to the Convention.

As regards the investment condition, which thus refers to the requirement of Art. 25(1) ICSID, all the considerations made by scholars and arbitral practice are of the utmost relevance.[749]

However, what is most needed to be summarised within the Request on the "notion of investment" is clearly the existence of the factual requirements that may lead to a definition of investment within the claim.

In this sense, through factual considerations, the Claimant must be able to demonstrate that its dispute arises directly[750] from the investment made in the host state.

In addition to factual considerations, which can then be briefly referred to in order to argue that the dispute concerns an investment on its merits, the Claimant could also make considerations about the IIAs between the two states.

In this way, as well as purely factual considerations, a legal reference could be made to the instruments in force, which clearly often describe what is meant by "investment".

Finally, it will be the Claimant's task to specify in the Request that the dispute to be established is of a "legal" nature.[751]

In this respect, there are several possibilities to demonstrate the legal nature of

---

748. See, precisely, art. 25 (2) (b) of the ICSID Convention.

749 On this topic, see A. GRABOWSKI, "*The Definition of Investment under the ICSID Convention: A Defense of Salini*," Chicago Journal of International Law: Vol. 15: No. 1, 2014; J. HO, *The meaning of 'investment' in ICSID arbitrations.* Arbitration International. 26. 633-648, 2010; M. WAIBEL, *Subject matter jurisdiction: The notion of investment*. ICSID Reports, 19, 25-82, 2021.

750 Cf. Rule 2 (1) (e)

751 See Rule (2) (1) (e).

the dispute, *i.e.*, the disagreement in law between the investor and the state, including specifying the applicability of the bilateral treaty in the dispute.

Once the applicability of the IIA is clear, it will be necessary to specify how the host state has violated the investor's rights, hence applying factual infringements to breaches of substantive law.

3.6. REQUEST'S OPTIONAL INFORMATION: PROCEDURAL MATTERS.

The Request for Arbitration is often made only by one party and almost never jointly, notwithstanding the opportunity to do so.

Clearly, in the case of a request made by agreement between the parties, the parties have the possibility to submit from the outset jointly – as a result of an agreement or following a proposal – specific procedural details relating to the resolution of the dispute[752], such as the number of arbitrators to be appointed.

However, as mentioned above, it is very difficult in practice for the two parties to agree at the outset of the Request on issues that could potentially be decisive for the outcome of the dispute.

For this reason, even the single party proposing the Request could propose, to the Secretary directly – but also indirectly to the other party receiving the document – even the constitution of the Arbitral Tribunal, specifying the indications on the appointment of the same in light of the relevant ICSDI rules.[753]

Clearly, neither the Secretariat nor the counterparts are obliged or in any way bound by the proposals made by the Claimant, but it could in any case be a strategic starting point for a discussion to maximize and optimise the different interests of the two parties.

3.7. THE COSTS OF ACCESS TO JUSTICE IN THE ROA.

In general, the costs of ICSID proceedings are outlined within Chapter 4 of the Convention.[754]

---

[752] Cf. Rule 3.

[753] Cf. Art. 37 ICSID and Rule 2 ICSID Arbitration Rules.

[754] Cf. artt. 59, 60 and 61.

However, considering the subject matter of this work, the focus should be limited to an analysis of the costs of access to the Centre, which therefore have a correlation with the right of access to justice.

Following an initial analysis, it is not possible to find any reference in the Convention to the costs of access to the Centre.

This lack is not remedied even in the subsequent instruments, *i.e.*, the Institution Rules or the AFR. In these instruments, it is simply made clear that the parties will have to pay costs to use the Centre[755] and that if the party – individually or jointly with the other party – wishes to initiate arbitration proceedings, it will have to pay a "non-refundable fee" to be determined by the Secretary-General.[756]

It seems necessary to reflect on this fact from the point of view of the protection of the right of access to justice, since if it is true that the above rules aim at outlining the entire framework of the system, not having any consideration of the actual costs could represent a contradiction, considering the social and legal objectives for which the entire mechanism was created.

Indeed, to have actual knowledge of the cost of justice required to activate the Centre, *i.e.*, the cost to be paid when submitting the Request for Arbitration, the potential Claimant's analysis will only be answered online at the ICSID website.

A reference to Regulation 16 of the AFR clarifies that the mandatory fee to be paid to the Centre before submitting the Request for Arbitration is US$ 25,000.

As also clarified online, this is a "lodging fee" created also in light of the Schedule of Fees[757], which is payable by the party wishing to request the institution of an ICSID proceeding.[758]

It is therefore an expense that the Claimant must always bear at the time the ICSID is accessed, without prejudice to the possibility that it may be divided in the event of a joint request by the parties.

---

[755] Cf. art. 59.

[756] Cf. Regulation 16 AFR.

[757] See "Schedule of Fees", available online at https://icsid.worldbank.org/services/content/schedule-fees.

[758] Cf. Schedule of Fees, para 1 (specifically letter a).

However, this fixed cost must clearly be added to the parties' other fixed costs, including the cost of legal advice. Clearly, the cost of legal assistance in proceedings before ICSID is not fixed, as there are different types of activities that need to be carried out.

In addition, there may be expenses that have no fixed character but in international proceedings may be physiological, such as certified translations of all documents to accompany the Request.[759]

To underline the importance of these costs, ICSID even advises to enclose a copy of the wire transfer with the Request, so that the Secretariat can immediately be aware of the payment of the costs of access to justice.[760]

In this sense, as long as the payment has not been received, the Secretariat will not be able to carry out any action after the Request[761] reception, as it will be obliged to forward the documents to the other party only when the lodging fee is received.[762]

In the light of these brief considerations, it is quite evident that access costs represent a real *condicio sine qua non* to access the justice offered by the Centre, leaving aside for the moment the argument of high costs and their compatibility with the right of access to justice, which will be the subject of subsequent analysis.

4. SETTING THE SCENE: ADDRESSING THE "COST PROBLEMATIC".

As noted above, access to ICSID justice – and ISDS justice in general -– not only requires certain legal requirements, but above all it is important to bear in mind that these procedures are highly expensive.

Generally, in investments disputes one of the main obstacles for the investor's access to ISDS is above all represented by the high costs of international

[759] See Regulation 30 (3) Certified AFR.

[760] See online "How to file a Request for Arbitration - ICSID Convention", at https://icsid.worldbank.org/services/arbitration/convention/process/request.

[761] Cf. Rule 5 (1) (b).

[762] Cf. Rule 5 (2).

arbitration procedures.[763]

High cost of access to justice leads to two consequential situations: access would no longer be completely free but substantially "restricted" because of the economic situation of the investor; this restriction could affect the legal market, creating economic, social, and legal inequalities. For these reasons, it will first be necessary to identify the "costs" referred to in the ISDS on access to justice and the economic and legal actors most affected.

Subsequently, consideration will be provided as to whether a possible remedy to overcome the cost problem could be the TPF, which therefore – through the financing of one party's costs – might render access to justice effective.

However, although TPF may facilitates access to litigation, it is also true that – since it is a commercial transaction with the purpose of making a profit – several social, economic, and legal consequences may arise from the financing agreement, which will therefore necessarily have to be assessed in the overall context.

Finally, final remarks on the convenience of TPF in the ISDS will be made, to understand – in the light of the current legal and economic practice – whether this instrument could really be considered as a facilitation of access to justice.

4.1. COSTS IN INTERNATIONAL INVESTMENT ARBITRATION.

Costs represent one of the main obstacles the investor faces to initiate proceedings[764], since it is well known that access to every legal procedure comes at a cost.[765]

---

763 Cf. S. D. FRANCK, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*, Oxford University Press, pp. 113-120, 2019.

764 It is sometimes argued that the question of costs is the most critical aspect of whether an arbitration case should be initiated, see M. BRADFIELD AND G. VERDIRAME, *Litigating International Investment Disputes*, pp. 411, 2014.

765 Scholars, about the cost relating specifically to access to justice, contributed in a different way. See M. BARENDRECHT, J. MULDER AND I. GIESEN, *How to Measure the Price and Quality of Access to Justice?*, SSRN Electronic Journal, 2006, who argue that cost of access to justice includes "[…] (all) *the barriers that people experience when they seek access to justice* […]", including time spent on the case, costs resulting from delay, etc, p. 3. See also M. GRAMATIKOV, *A Framework for Measuring*

In international investment law, specifically in the field of ISDS, a type of 'private' justice financed by the parties is quite often involved[766], which means that litigating parties should decide the choice of the arbitral institution[767], the applicable law[768] and the persons who will decide the dispute[769], identified as arbitrators.[770]

Traditionally, costs in arbitral proceedings are classified in two macro-categories: on the one hand, costs that party incurs in the administration of the arbitral tribunal and the proceedings[771], and, on the other hand, those generally related to the parties' legal defence.[772]

For the purpose of the present work, the focus will be on the first category, which mainly comprises the costs related to the fees of the arbitrators and those of the arbitral institution where the proceedings take place.

---

the Costs of Paths to Justice, 2 J. Juris 111, who define it as "[…] *all costs incurred on the quest to solve a legal problem, including out-of-pocket costs, opportunity costs, and intangible costs* […].", p. 10, 2009.

766 Cf. J. KUDRNA, *Arbitration and Right of Access to Justice: Tips for a Successful Marriage*, New York University Journal of International Law and Politics (JILP) Online Forum, 2013, p. 2.

767 Clearly, parties are not always free to choose the arbitral institution to refer to. However, there is still a legal market that would allow the parties a choice as to which centre to choose, since – besides ICSID – there are several institutions that regularly administer state-investor disputes. Among the best known see International Court of Arbitration of the International Chamber of Commerce (ICC), Permanent Court of Arbitration (PCA) and Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

768 On this topic see A. BJORKLUND AND L. VANHONNAEKER, *Applicable Law in International Investment Arbitration*, pp. 225-243, 2021.

769 See C. GIORGETTI, *The Selection and Removal of Arbitrators in Investor-State Dispute Settlement*, in Brill Research Perspectives in International Investment Law and Arbitration, 1-93, 2019.

770 Clearly, all of these decisions are not exclusively up to the discretion of the parties. On the issue of both party and judicial autonomy in ISDS see A. TANZI, *On judicial autonomy and the autonomy of the parties in international adjudication, with special regard to investment arbitration and ICSID annulment proceedings*, Leiden Journal of International Law, 33(1), 57-75, 2020.

771 These costs range from the first official act, which could often be the so-called 'notice of intent', to the enforcement of the arbitral award in the domestic court.

772 See M. V. BENEDETTELLI, L. G. RADICATI DI BROZOLO AND C. CONSOLO, *Commentario breve al diritto dell'arbitrato nazionale ed internazionale*, Milano, Wolters Kluwer, CEDAM, 2017, p. 1160.

In essence, these are "reliable costs"[773] that any person seeking access to ISDS justice will have to bear, as the costs of the defence team may vary.[774]

Costs related to the fees of individual arbitrators and those of the arbitral institution do not have fixed determination criteria.

An attempt to calculate "*an estimate of the likely costs*" is provided by the International Chamber of Commerce, which only relies on Secretariat and arbitrators' expenses[775] and by the European Court of Arbitration, specifying that it is still "[…] *a general idea of the costs and fees of arbitral proceedings administered by the European Court of Arbitration under the International Rules* […]" and that the Secretariat of the Court will always be responsible for setting a precise amount..[776]

As set forth in several arbitration rules, the parameter used to determine such costs is based on the dispute value and, where such value is indeterminate or cannot be determined, the responsibility for fixing such costs resides within the arbitrators' discretion.[777]

In line with a relevant classification that has been discussed in literature[778], it seems possible to identify three approaches to calculate the cost of instituting international legal proceedings: the payment of a fixed sum, regardless of the

---

[773] Clearly, such costs are not certain *per se*, but these expenses need to be addressed.

[774] Obviously, legal costs also must be met, but these expenses might depend on several factors, for example: how many people are included in the defence team; the quality of the lawyers chosen to represent the case; the level of complexity of the dispute.

[775] International Chamber of Commerce (2022), Cost calculator. https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/. Regardless of the information provided, it is nevertheless a valuable indicator for access to justice: having a minimum idea of the costs involved, notably for companies operating on a balance sheet basis, could be decisive in deciding whether to engage in ISDS arbitration.

[776] European Court of Arbitration (2022), Cost Calculator. https://cour-europe-arbitrage.org/the-costs-of-arbitration/.

[777] Cf. M. W. BÜHLER, *Costs of Arbitration: Some Further Considerations*, in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner, ICC Publishing (2005), pp. 179-182.

[778] Cf., A. ASSAREH, *Forum shopping and the cost of access to justice: cost and certainty in international commercial litigation and arbitration*, Journal of Law and Commerce, 31, 1–44, p. 12, 2013.

total amount of the dispute[779]; the determination of a variable fee, to be fixed on the basis of the dispute value[780]; and, finally, the subscription of a so-called hybrid fee, composed of a fixed part and a variable part.[781]

Whilst this classification could be considered as useful tool, estimating how much ISDS cost is complicated, although several studies that have tried to do so[782], sometimes managing to provide an indicative value that could be considered as an important step in decision-making.[783]

In any case, these costs are truly excessive[784] and only underline the need for a structural reform of the system, such as the one carried out within ICSID[785], which has – among its various objectives – that of reducing the costs of the procedure. [786]

Another problematic profile concerning the costs of access to justice in ISDS

---

779 See the ICSID Schedule of Fees (2021), https://icsid.worldbank.org/services/content/schedule-fees.

780 In pure variable fee forums, the cost of initiating legal proceedings varies directly according to the amount of the dispute.

781 An interesting dynamic is that of hybrid forums, where the costs of initiating proceedings are calculated using a combination of variable and fixed fee formulas.

782 According to research conducted in 2012, the average total costs of ISDS proceedings have averaged $8 million and, in very exceptional cases, over $30 million, see D. GAUKRODGER AND K. GORDON, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", in OECD Working Papers on International Investment, https://www.oecd.org/investment/investment-policy/WP-2012_3.pdf, 2012, p. 19.

783 For a more recent overview, see M. HODGSON, Y. KRYVOI AND D. HRCKA, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, 2021.

784 Cf. G. BOTTINI, C. TITI, F. P. AZNAR, J. CHAISSE, M. JOVANOVIC AND O. PUDGEMONT SOLA, '*Excessive Costs and Recoverability of Cost Awards in Investment Arbitration'*, in Journal of World Investment & Trade 21 (2020) 251–299, 2019.

785 As well known, the amendment process began in 2016 and – after different suggestions with the aim of amending the rules – in 2021 the ICSID Secretariat published 6 working papers, see ICSID (2021), About the ICSID Rule Amendments, https://icsid.worldbank.org/resources/rules-and-regulations/amendments/about.

786 Cf. M. J. ALARCON, *ICSID Reform: Balancing the Scales?*, in Kluwer Arbitration Blog, available online at http://arbitrationblog.kluwerarbitration.com/2022/01/28/icsid-reform-balancing-the-scales/.

is related to the advance payment of costs.[787]

Although it is true, on one hand, that the costs advanced will be assessed in the award by the losing party in the proceedings[788], on the other hand, such advance payment could often consist in a request – and then an order made by the Tribunal – of Security for Costs.[789]

In the light of these considerations and, in general, of the problems that costs represent, it is possible to deduce that this is an issue that involves three fundamental aspects.

Firstly, a strictly legal aspect, since these are basically justice costs which represent the *condicio sine qua non* for access to investment dispute resolution mechanisms.

Secondly, the social impact of high costs should also not be underestimated: the more costs continue to rise, the more difficult it will be to create a legal market that even small and medium-sized enterprises can rely on.

Finally, there is a problematic issue that represents a synthesis of the two issues addressed above, namely the economic problem, which affects small and medium-sized enterprises (hereinafter also referred as "SME").

4.2. COMPLICATIONS OF HIGH COSTS ASSOCIATED TO SMES: A BARRIER TOWARDS ACCESS TO JUSTICE?

Traditionally, international arbitration – in contrast to domestic arbitration, where small claims may be involved – has covered larger transnational corporations and, consequently, larger litigated amounts.

It should be borne in mind that these SMEs are small compared to large multinationals and therefore the costs of initiating proceedings and the

[787] See the ICC Arbitration Rules (2021), article 37.

[788] In ISDS often recalled as "costs follow the event" or "loser pays" approach, also developed due to an extensive arbitral jurisprudence, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No ARB(AF)/07/2, Award (13 August 2009), paras. 185-186.

[789] Cf. S. P. CAMILLERI, *Between rags and riches: rethinking security for costs in international commercial arbitration*, Arbitration International, Volume 37, Issue 4, pp. 851-862, 2021.

associated "cost risk" are a daunting – practically prohibitive – burden.[790]

Indeed, research commissioned in the past by the European Commission (2011)[791] and, more recently, by the World Bank (2019)[792] are oriented accordingly, confirming that – especially for small and medium enterprises (SMEs) – international litigation is an inadequate means of pursuing justice.

Because of this situation, several companies do not operate in the legal market and their commercial growth remains limited[793], so different and consequential examinations appear to be worthwhile, in close connection with issues related to access to justice in international arbitration, which will provide a preliminary discussion concerning the funding of a dispute.

On one hand, facilitating access to arbitration for these small entities would be advantageous, so that the international arbitration procedure would not be seen as the exclusive monopoly of the richest and largest companies.[794]

It seems sufficient to consider, in this connection, that companies with an annual turnover of more than 1 billion dollars and private individuals with a value of more than 100 million dollars received approximately 94.5% of the total compensation following ISDS (if interest before the award of the sums is included, the figure is still very high, at 93.5%).[795]

On the other hand, SMEs as investors can also face difficulties in planning,

---

790 Cf. D. WILLIAMS AND J. WALTON, "*Costs and Access to International Arbitration*", 80 (4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, p. 304, 2014.

791 European Commission, European contract law in business-to-business transactions: Summary (2011), https://europa.eu/eurobarometer/surveys/detail/965.

792 World Bank and the International Finance Corporation Doing Business 2019 (2019), https://www.worldbank.org/content/dam/doingBusiness/media/AnnualReports/English/DB2019report_web-version.pdf.

793 See P. BUTLER AND C. HERBERT, *Access to justice vs access to justice for small and medium-sized enterprises: the case for a bilateral arbitration treaty*, 26 N.Z.U. L. REV. 186, 189, 2014, pp. 186-221.

794 Cf., D. WILLIAMS AND J. WALTON, *supra* note 214, p. 433.

795 See G. VAN HARTEN AND P. MALYSHEUSKI, *Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants*, Osgoode Legal Studies Research Paper No. 14/2016, p. 1, 2016.

implementing, and managing an investment abroad.[796] The settlement of disputes with the host state is not only – as extensively argued above – extremely burdensome, but requires particular legal expertise.[797]

Supporting the clear difficulties outlined above, according to a study conducted over an expected time frame from 2008 to 2013, the number of SMEs that had recourse to international dispute resolution mechanisms accounted for only 15% of total disputes.[798]

Therefore, it seems quite clear that the high costs of arbitration procedures are not only a barrier to access to justice, but sometimes – in particular situation such as the one described above – a real disincentive to use ISDS mechanism.

Such situation becomes even clearer if one considers that, in the classic hypothesis, the company complains of having suffered a loss – which clearly also has an economic character – and would then find itself having to face the costs of an arbitration procedure from a loss-making balance sheet.

These circumstances have therefore created a demand in the economic-legal market, leading to the intervention of various subjects who – in the event of economic difficulties specifically aimed at accessing justice – have guaranteed the funding of the dispute in exchange for a return of an economic nature.

This is the so-called recent and growing phenomenon of third-party funding, which is now getting a massive importance especially in ISDS.

5. THIRD-PARTY FUNDING AND ITS RELEVANCE IN ISDS.

It seems worthwhile to first clarify that third-party litigation funding is not a practice which has only been used in recent years.[799]

From this point of view, the issues that appear to be most interesting are

---

[796] On the difficulties of SMEs in international investment law, see J. KARL, *The treatment of small and medium- sized enterprises in international investment law*, pp. 245-249, 2017.

[797] Cf., A. GEBERT, *Legal Protection for SMEs through Investor-State Dispute Settlement: Status Quo, Impediments, and Potential Solutions*, Oxford University Press, pp. 292-293, 2017.

[798] See the analysis made by J. KARL, *supra* note 220, p. 261.

[799] For a comprehensive examination of Third-party funding, including the historical perspective, see G. M. SOLAS, *Third Party Funding: Law, Economics and Policy*, Cambridge University Press, pp. 17-37, 2019.

precisely those arising from the overlapping of the TPF with respect to ISDS[800], although the application of this mechanism within the domestic jurisdictions has also attracted the interest of both academics and practitioners.[801]

However, ISDS litigation strategy often deals with issues beyond the application of domestic law, incorporating matters that frequently have as their main reference the sovereignty of a State, and thus consequently the application of principles of international law.[802]

Therefore, balancing the interests of private funders against the main objective of the funded entity – access to justice – is the main difficulty in an ISDS system, that often hides many legal, economic and social pitfalls.

Indeed, following the 2008 financial crisis, the legal market has become an interesting strategic point for several economic speculators, who have found that with TPF[803] it is possible to make investments – with moderate risks – with very satisfactory possibilities of economic return.[804]

Among the reasons behind this trend, great importance should be drawn to the uncertainty surrounding the international regulation of the TPF phenomenon, which has prompted scholars to question the legal suitability of such a funding mechanism in ISDS.[805]

---

800 In general, it has been called defined as the financialization of international law, see N. KALYANPUR AND A. L. NEWMANTHE, *The Financialization of International Law. Perspectives on Politics*, 19, pp. 773-790, 2020.

801 Cf., S. LATHAM AND OTHERS, *The Third Party Litigation Funding Law Review*, Available online https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review, 2021.

802 See J. E. VIÑUALES, *The Sources of International Investment Law*, S. Besson and J. d'Aspremont (eds.), The Oxford Handbook on the Sources of International Law, Oxford University Press, pp. 1071-1072., 2015.

803 See T. SANTOSUOSSO AND R. SCARLETT, *Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*, 60 B.C. L. Rev. E. Supp. I.-8, pp. 8-16, 2019.

804 Cf., F. J. GARCIA, *Third-Party Funding as Exploitation of the Investment Treaty System*, Boston College Law Review, Vol. 59, No. 8, Boston College Law School Legal Studies Research Paper No. 505, p. 2913, 2018.

805 See B. GUVEN AND L. JOHNSON, *Third-Party Funding and the Objectives of Investment Treaties: Friends or foes?*, in Investment Treaty News, pp. 3-7, 2019.

Considering these general difficulties, the topic will be addressed on three consequential perspectives: first, some consideration will be made on the definition of TPF in relevant international instruments; secondly, it will be necessary to understand in particular what advantages and disadvantages the TPF might bring to ISDS, by making a critical assessment of the substantive and procedural law aspects; thirdly, what consequences the choice of the TPF entails in practice and whether or not this instrument facilitates access to justice for the investor.

5.1. DEFINING THIRD-PARTY FUNDING IN ISDS: A STRATEGY FOR CLARITY.

Although there is no statutory definition, in ISDS the TPF agreement is generally considered as a funding mechanism where a third-party[806] (also referred as "Funder")[807] finance the costs of investment arbitral proceedings for a party (usually the "Investor") in a dispute (or in a potential one).

In return, the funder receives a high percentage of the awarded compensation (if the claim is successful) and could also gain some degree of control over the case (litigation strategy) and/or client.[808]

---

[806] The term 'third-party' is used because it is a third party to the dispute between the state and the investor. These are usually private investment funds, which have found excellent investment opportunities in the current legal market, see for example the OMNI BRIDGEWAY ANNUAL REPORT (2020), in section "*Proceeds from litigation funding*", pp. 6-7, available online at https://omnibridgeway.com/InvestorPresentations/omni-bridgeway-annual-report-2020/8/.

[807] In current market there are several third-party funders with a background in international litigations and arbitrations. In this respect, the work carried out by the "*TPF Observatory*", an independent initiative from the "*ICCA/QMUL Task Force on Third Party Funding*", is quite interesting. The Observatory created a list of TPFunders and TPF Brokers (whose task is not to directly fund a dispute but to act as an intermediary between parties seeking funding and funders). The list is available online http://third-party-funding.org/list-of-funders/.

[808] The tasks carried out by the fund, particularly at the time when the funding opportunity is submitted, consists of due diligence work. In this sense, see Third Party Funders for International Arbitration, specifying that "[…] *Factors taken into consideration by funders when deciding whether to find an international arbitration include (1) the value and complexity of a claim, (2) the amount of funding needed and the litigation budget, (3) the likelihood of success of the claim, (4) whether other parties have an interest in the claim, (5) the jurisdiction in which the arbitration takes place, (6) the arbitral institution that administrators*

The lack of an unambiguous definition has therefore given rise to several definitions[809], some of which can be found in treaties, thus providing a useful tool to better understand the functioning of this mechanism.

In treaties with investment provisions, reference can be made to the *EU-Canada Comprehensive Economic and Trade Agreement* (CETA)[810], where TPF "[…] *means any funding provided by a natural or legal person who is not a disputing party but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute* […]".[811]

This is a rather clear and detailed definition of the funding agreement, highlighting the typical aspects of TPF.

However, besides the definition, what is striking within CETA is the disclosure policy, which obliges the funded party to disclose – both to the Court and to the counterparty – the name and address of the third-party funder.[812]

Such obligation and, more generally, the regulation of the TPF within CETA,

---

a case, (7) whether counterclaims may be made and (8) the ease of enforcement of the arbitral award to be rendered. […]", available at https://www.international-arbitration-attorney.com/third-party-funders-international-arbitration/.

809 Clearly, a share of the responsibility for this vacuum lies with legal practitioners, who have failed to create/regulate the phenomenon through clear indications. However, as authoritative scholars have often acknowledged, "[…] "*One reason why third-party funding is difficult to define is that economic interests in a party or a dispute can come in many shapes and sizes. Arrangements may be structured as debt instruments, equity instruments, risk-avoidance instruments, or as full transfers of the underlying claims. Some agreements permit or require active participation of the third party funder in key strategic decisions in the case, while other agreements are limited to periodic updates* […]" see W. W. PARK AND C. A. ROGERS, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, Austrian Yearbook on International Arbitration, Boston Univ. School of Law, Public Law Research Paper No. 14-67, Penn State Law Research Paper No. 42-2014, p. 4, 2014.

810 Cf. *Comprehensive Economic and Trade Agreement* (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, provisionally entered into force on Sept. 21st, 2017.

811 See CETA, Chapter eight "Investment", Section A "Definitions and scope", article 8.1 "definitions".

812 See CETA, Chapter eight "Investment", Section F "Resolution of investment disputes between investors and states", article 8.26 "Third party funding".

have not been addressed in Opinion 1/17 of the ECJ[813] and this silence could legitimise at the entry of private actors – *i.e.* third-party funder – into the system.[814]

Moreover, in the text of the *European Union-Vietnam Investment Protection Agreement* (EVFTA)[815] there is also a quite similar definition of TPF[816] and an almost identical disclosure obligation upon the disputing party benefiting from TPF.[817]

What makes the EVFTA more peculiar with respect to CETA are the considerations on Security for Costs[818] and on Provisional Award[819], which allow to understand how in reality the issue of third-party financing is strictly connected – or in any case subject to an assessment by the Court – to provisional measures.[820]

Certainly, these investment treaties represent a significant breakthrough in the recognition and definition of the TPF in the context of potential state-investor disputes. However, not the same kind of attention has been paid to in BITs and in Model BITs.

---

[813] See C-1/17 EU:C:2019:341 (30 April 2019) (Opinion 1/17).

[814] See M. FANOU, *The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17*, in Europe and the World: A law review, Vol. 4(1), UCL Press, p. 16, 2020. See also M. FANOU, *The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future*, Cambridge Yearbook of European Legal Studies, 22, 106-132, 2020.

[815] See *EU - Viet Nam Investment Protection Agreement* (EVFTA) (2019), signed on 30th June 2019 and entered into force on August 1st, 2020.

[816] See EVFTA, article 3.28, letter (i), which defines TPF as "[…] *means any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute, or any funding provided by a natural or juridical person who is not a party to the dispute in the form of a donation or grant* […]".

[817] See EVFTA, article 3. 37, paras 1 and 2.

[818] See EVFTA, article 3.48.

[819] See EVFTA, article 3.53.

[820] See EVFTA, article 3. 37, para 3.

In this respect, the Colombia Model BIT (2017)[821] represents one of the first instruments that outlined the TPF framework, including both a definition of the agreement[822] and an obligation of immediate disclosure at the time of claim submission[823], as well as attractive considerations on monetary damages in the award. [824]

Few years later, thus demonstrating how the topic is being placed at the centre of the legal interest of states in investment disputes, the Netherlands Model BIT (2019), has included in the text not a definition of TPF, instead a duty upon the claimant to disclose the third-party funder.[825]

Furthermore, the same sort of disclosure obligations in matter of TPF can be found also in the Slovakia Model BIT (2019)[826], which become even more specific and appealing in the matter of Provisional Measures, since it is specified that the Tribunal may issue an order of Security for Costs if there is a "*reasonable doubt*" that the subject financed in the dispute by the Funder will not be able to fulfil the costs award. [827]

This is undoubtedly an important indication that considers the extensive practice of the TPF on of Security for Costs, that however leaves some legal uncertainty behind the reasonable doubt, which therefore could increase the – already very high – discretion of the arbitrators within the dispute.[828]

---

[821] Cf., *Colombia Model BIT* (2017), available online at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6082/download.

[822] See *Colombia Model BIT* (2017), page 5.

[823] See *Colombia Model BIT* (2017), where it is also specified that the form must contain "[…] *any sort of financing agreement is reached, even if it takes place after the submission of a claim to arbitration, without delay as soon as the agreement is concluded* […]", page 16.

[824] See *Colombia Model BIT* (2017), page 21.

[825] See *Netherlands model Investment Agreement* (2019), article 19, para 8.

[826] See *Slovakia Model BIT* (2019), article 21, paras 1 and 2.

[827] See *Slovakia Model BIT* (2019), article 21, para 3.

[828] Specifically, even on the role of arbitrators in the context of investment arbitration regime see P. VARGIU, *Stakeholders of Investment Arbitration: establishing a dialogue among arbitrators, states, investors, academics and other actors in international investment law*, in K. Fach Gomez (ed.), *Private Actors in*

Finally, also the Canada Model BIT (2021)[829] has embedded in its text an article entirely dedicated to the TPF, including more stringent factual and timing disclosure requirements than the above-mentioned texts, specifying to disclose the TPF agreement immediately or – if it has been arranged after the submission of the claim – within 10 days from when it was arranged.[830]

Such an approach should be particularly welcomed, as clear terminology and timing on the disclosure obligation will only benefit the funded party and the established arbitral tribunal.

While TPF is beginning to be increasingly defined in Model BITs, a similar situation cannot be observed in bilateral investment treaties. For example, the Argentina - United Arab Emirates BIT (2018) clearly forbids TPF.[831]

The only one that stands out in this respect is the recent Colombia - Spain BIT (2021)[832], which not only reiterates the disclosure obligation on the funded party to the dispute[833], but also specifies that if the funded party does not comply with the disclosure obligations (transparency), it will have to bear the costs and expenses of the proceedings regardless of the outcome of the award.[834]

Against the background of these definitions and obligations concerning the TPF, some rather clear facts emerge.

Firstly, it appears that the main focus on the TPF is the disclosure obligation, which therefore represents the first hurdle in ISDS litigation.

International Investment Law, Special Issue of the European Yearbook of International Economic Law, Springer, pp. 13-15, 2021.

829 See *Canada Model BIT* (2021), available online https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6341/download.

830 See *Canada Model BIT* (2021), article 42.

831 See *Argentina-United Arab Emirates BIT* (2018), article 24, available online https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5761/download.

832 Cf. *Acuerdo entre la República de Colombia y el Reino de España para la promoción y protección recíproca de inversiones* (2021), available online https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6373/download.

833 See *Colombia – Spain BIT* (2021), article 22 para 4.

834 See *Colombia – Spain BIT* (2021), article 33 para 5.

Secondly, it seems – comparing the high number of Model BITs to BITs – that the intention of states (taken individually) is to define the general scope of application of the TPF, but that this intention clashes with diplomatic realities when the financing agreement is to be included in a bilateral investment treaty.

Thirdly, these are still sporadic episodes that do not regulate all the aspects – legal, economic, and social – that the TPF has within the international legal market.

However, from the latter point of view, it should be noted that an example of good practice – aimed at outlining the most significant aspects and related impacts of the TPF – comes from the European Union, through the recent "*Draft Report with recommendations to the Commission on Responsible private funding of litigation*".[835]

This Report, supported by a well-defined and detailed study[836], is currently the first real attempt to regulate the wide scope of the TPF[837], albeit within the vast legal and economic field of the EU.

It will be worth noting the attitude of the main actors – Funders and Funded Parties – towards such stringent requirements, also considering the impact that the ISDS disputes have had in the European context after the well-known "Achmea judgement".[838]

With the main features of the TPF clarified, it is now necessary to understand its legal implications in order to lay the groundwork for the final considerations of this chapter.

---

[835] See European Parliament (Committee on Legal Affairs), 2020/2130(INL), (2021), available online https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf.

[836] Cf. J. SAULNIER, K. MÜLLER AND I. KORONTHALYOVA, *Responsible private funding of litigation. European added value assessment*, in: EPRS |European Parliamentary Research Service. Available https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf.

[837] Some reference to the TPF can be found in the *Directive (Eu) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC*, Official Journal of the European Union (2020), recital nn. 25, 52 and articles 10, para 2, (a) and 18.

[838] Cf., CJEU, Case C-248/16, *Slovak Republic v. Achmea*, ECLI:EU:C:2018:158.

5.2. THIRD-PARTY FUNDING LEGAL IMPLICATIONS: BETWEEN DISCLOSURE AND SECURITY FOR COSTS.

The necessity to regulate the system behind the TPF has very precise practical reasons. In this sense, as mentioned above, the main consequence concerns the so-called duty/obligation to disclose.

That being said, it should be noted that there is currently no obligation for the funded party to disclose the existence – at the outset or during the arbitration proceedings – of the TPF agreement.

In this sense, it appears from the previous practice examined above, that states are increasingly pushing towards an obligation to disclose but the arbitration jurisprudence on this point is by no means consistent.

As a matter of fact, it appears that arbitral tribunals have not found a uniform solution yet to resolve the obligation to disclose the existence of a TPF agreement.

In the case *S & T Oil v. Romania* the Tribunal disclosed – for the first time – both the terms of the financing agreement and the identity of the Funder[839]; the opposite reasoning was followed in the case *Oxus Gold plc v. Republic of Uzbekistan*, where the Panel clarified that it was not necessary to identify the nature of the third party financing because the agreement would not affect the proceeding in any way[840].

Indeed, disclosure of the Funder's identity has been ordered in few cases.

In *South American Silver v. Bolivia*, "for purposes of transparency", and considering that claimant had not opposed disclosing the name of the funder, the tribunal ordered such disclosure by claimant but refused to order disclosure of the funding agreement.[841]

Similarly, in *EuroGas v. Slovakia* the tribunal ordered that claimant disclose the identity of the funder who, as noted by the tribunal "[had] *the normal obligations of*

---

[839] Cf., *S & T Oil Equipment and Machinery Ltd. v. Romania*, ICSID Case No ARB/07/13, Order of Discontinuance of the Proceeding (16 July 2010).

[840] Cf. *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL Case, Final Award (17 December 2015), para 127.

[841] Cf., *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No 2013-15, Procedural Order No. 10 (11 January 2016) para. 79.

confidentiality".[842]

In contrast with the aforementioned cases, in *García Armas v. Venezuela* the tribunal went beyond ordering disclosure of the identity of the funder.

After an in-camera review of a redacted version of the funding agreement, the tribunal decided that such redacted version would be provided to respondent to protect its legitimate interest in the event of a favourable award on costs, while protecting claimants' legitimate interest to keep confidential certain information.[843]

One of the first cases where such an agreement was found to exist was *Kardassopulos and Fuchs v. Georgia*[844], where the existence of the financing agreement had been communicated to the arbitral tribunal.

Notwithstanding the counterpart's arguments that it was not liable for legal fees because they were incurred by a third party unrelated to the dispute, the Tribunal ruled that the existence of a funder did not affect the recoverability of the losing party's costs and ordered the respondent state to pay.

Considering these arbitration trends and, above all, state practice in BITs or investment treaties, it is certainly important to note that investment resolution centres are now also moving to make disclosure mandatory for the funded party.

In this sense, see the recent ICC Rules of Arbitration, entered into force on January 1st 2021[845], specifying that "[…] *In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or*

---

842 Cf., *EuroGas Inc and Belmont Resources Inc v. Slovak Republic*, ICSID Case No ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures (17 March 2015), p. 145.

843 Cf., *Manuel Garcia Armas et al v Bolivarian Republic of Venezuela*, UNCITRAL PCA Case No 2016-08, Procedural Order No 9, Decision on Request for Provisional Measures (original in Spanish), para. 2-3.

844 *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Award (3 March 2010), para 691.

845 See ICC Arbitration Rules (2021), International Chamber of Commerce, available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration. Accessed 27 Feb 2022.

defences and under which it has an economic interest in the outcome of the arbitration. […]".[846]

This is a different disclosure requirement from the more tempered disclosure requirements already in place[847], but it is set from the perspective of a potential conflict of interest for arbitrators or future arbitrators.

In light of the above considerations, it is reasonable to assume that a mandatory, prompt and full disclosure of the TPF agreement would be beneficial for all parties involved.

Firstly, there would be clarity and transparency in the relationship between the Funder and the funded party, in order to avoid cases where the court might award costs directly to the party and the latter refuses to reimburse the funders.[848]

Secondly, any conflicts of interest that might arise between the parties would be prevented at an early stage. The issue of conflicts of interest, already well known in investment arbitration, could in the case of the TPF lead to difficulties of an objective nature especially for the arbitrators.[849]

Thirdly, it would be of great help to the Tribunal, both in avoiding possible lengthening of the proceedings and in the decisional phase, as regards the allocation of costs in the final award.

Indeed, in the context of a request for security for costs, the TPF institution is

---

[846] Cf. ICC Arbitration Rules (2021), article 11 para 7.

[847] For comparison, see SCC Policy disclosure of third parties with an interest in the outcome of the dispute (2019), Stockholm Chamber Commerce Board, where it is immediately specified that "[…] *Each party is encouraged to disclose* […]",

[848] This refers to the well-known events concerning the case *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No ARB/05/15, where the established Tribunal had decided in favour of the investor, which in turn would later have to reimburse its lawyers for financing part of the litigation. However, the company later decided to settle with the Egyptian state, thus having no obligation to reimburse the law firm, and this resulted in several difficulties and related further disputes between the company and the financing law firm.

[849] See both the IBA Guidelines on Conflicts of Interest in International Arbitration (2014), International Bar Association, General standard (7) "Duty of the Parties and the Arbitrator", available online https://www.camera-arbitrale.it/Documenti/IBA-guidelines-on-conflict-of-interest-nov2014.pdf. and the recent Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021), International Chamber of Commerce, available at https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/.

even more stressed, because it represents a difficult balancing of rights that may arise in certain situations[850], for example when a potential company finds itself in a less than positive financial situation as a result of the alleged illegal conduct of the state where it made the investment.

As is well known, this request is often made by the respondent state in the dispute, which – in the event that it has a well-founded suspicion that the investor may be insolvent and therefore unable to pay an adverse cost award – requests the constituted Tribunal for security for cost order.[851]

This is clearly a subject which concerns provisional measures in arbitration[852] and which, at the moment, has not yet found much implementation within the TPF.

For example, in *Guaracachi Inc. v. Bolivia*,[853] the respondent state asked the Tribunal the production of the TPF Agreement and further documentation, being one of the reasons behind the request for *cautio judicatum solvi*.[854]

Although the Tribunal made it clear that "[…] *The issue – analyzed by scholars and some tribunals – of the appropriate balance between the right of access to justice of entities that have been allegedly expropriated and the protection of States against alleged frivolous claims by parties who may not have sufficient assets to guarantee the payment of an adverse costs award*

850 Cf., E. STORSKRUBB, *Emergency Arbitration: A Maturing and Evolving Procedure*, in: Axel Calissendorff and Patrik Schöldström (Ed.), Stockholm Arbitration Yearbook 2020, Wolters Kluwer, p. 115, 2020.

851 On the relation between security for costs and TPF, specifically in ICSID regime, see Y. H. CHUN, *Security for Costs' Under the ICSID Regime: Does it Prevent 'Arbitral Hit-andRuns' or Does it Unduly Stifle Third Party Funded Investors' Due Process Rights?*, 21 Pepp. Disp. Resol. L.J. 477, pp. 478-498, 2021.

852 See D. PAUCIULO, *Provisional Measures in ICSID Arbitration Proceedings: Between the Current Legal Framework and the Proposed Reform*, in Provisional Measures Issued by International Courts and Tribunals, Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds.), pp. 319-364, 2021.

853 Cf. *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No 2011-17.

854 See *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No 2011-17, Solicitud de *cautio judicatum solvi* (12 February 2013), paras-26-27.

is a serious issue […]"[855] however, it was specified that the role of an external funder in this case had a minimal impact on the overall analysis of the request for provisional measures – and thus the request for security for costs – by defining that the presence of a Funder cannot in itself facilitate an order on costs.[856]

In the case of *RSM Production v. Santa Lucia*, although often regarded as one of the most important cases on security for costs, the Tribunal pointed out that one of the reasons that led the arbitrators to order the payment of security for costs to the investor was precisely the presence of the third-party funder.[857]

The very issue of security for costs in relation to disclosure is a link that the TPF argument has with the right of access to justice.

In the event of an initial disclosure, there would be no security-for-costs problem or, at least, the time taken by the judges would be greatly shortened.

In this sense, if the Tribunal was already aware of the TPF Agreement, the request for security for costs could also be processed much more quickly, without having to first find out who the financing party is and then decide whether it makes sense to make a security order.

Such an argument would only support the decision-making capabilities of the Tribunal, which could therefore focus only on the merits of the claim asserted in arbitration.

5.3. THIRD-PARTY FUNDING ENHANCE ACCESS TO JUSTICE: AT WHAT COST?

Considering all the above reflections, it is necessary to give a positive answer to the question addressed in the final part of this work, *i.e.*, the TPF enhance access to justice in ISDS.

This is a unique opportunity especially for small and medium-sized enterprises,

---

855 *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No 2011-17, Procedural Order No. 14 (11 March 2013), para 9.

856 *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No 2011-17, Procedural Order No. 14 (11 March 2013), paras. 6-10.

857 *RSM Production Corp v Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (13 August 2014), para 83.

which otherwise would not have the resources – especially economic resources – to initiate litigation against a state, thus not affecting their economic and financial stability.

As recognised by the ICSID tribunal in *Giovanni Alemanni v. Argentina*, this is a well-recognised practice also in the investment arbitration context[858], which can therefore provide a practical implementation of the recognition of the right of access to justice in the ISDS.

However, funding of justice does not mean equitable access to justice, *i.e.*, it does not mean that the moment a TPF agreement is reached, the investor's right of access to justice will automatically be fully achieved.

In this sense, while the TPF facilitates access to justice, it is true that the use of this instrument comes up against several technical and factual difficulties, which require action by all operators involved in the sector.

Firstly, it should be noted that it is already difficult to have access to litigation funding, especially for medium or small claims. Investment funds are driven by a purely economic interest, and this means that being able to reach a Funder to have the prospects of investing in their litigation analysed – when there are no prospects with a large economic return – is already difficult.

On this matter, it could be useful to bring the major investment funds together with the major representatives of the commercial companies of a state[859], to provide a mechanism that could help small and medium-sized companies – and often the lawyers representing them – with investment funds.

Secondly, even if an entity willing to finance the litigation is successfully found, a partnership between the Fund's lawyers and the Fund's operational team may sometimes be difficult. In this sense, the Fund could provide its own lawyers who would complement the already established defence team, creating complications both for the setting up of the defence strategy and for the final objective.

---

[858] *Giovanni Alemanni and others v. Argentine Republic,* ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014), para. 278.

[859] For example, creating a kind of agreement that can be consolidated between chambers of commerce (national and international) and representatives of investment funds.

It is precisely the final objective that could be the moment where all these difficulties could be synthesised: on the one hand, the company's lawyers who had already been looking after the interests of their client beforehand could have different targets from those of the fund, perhaps deciding to settle and not arrive at the award; on the other hand, the fund's lawyers would have a completely different interest, pushing for an award and therefore a probable victory relating to damages, which would allow the fund to gain.

One perspective, from this point of view, should be the utmost clarity in the moment in which the TPF Agreement is stipulated, to avoid problematic situations that would only disadvantage the financed subject.

Therefore, it seems appropriate that all actors involved in the ISDS system, including – in the specific area of the TPF – investment funds, should set themselves the main objective of regulating the funding mechanism in a consistent manner, to facilitate the right of access to international arbitration disputes and overcome the long-standing issue of high costs.

6. CONCLUSION.

On the basis of the preceding considerations, the following conclusions can be drawn.

One of the first conclusions reached is that individual investor rights protection has now reached such a level of specificity that it is even made up of protections that are both substantive and procedural in nature.

Surprisingly enough, this kind of protection is precisely what prompted the revolution of an entire system: the right to access justice to complain about alleged violations of the foreign investment by the host state.

In this sense, the jurisdictional requirement created a necessity, namely the need for regulation: states, through bilateral treaties, did no more than extend protections that were typically of a substantive nature, but then took the form of the investor's right to litigate against a state.

Hence, what emerges from the examination is that the creation of a right of access to justice has been one of the main factors contributing to the spread and, subsequently, the establishment of international investment law.

That being said, it does not appear that one can discuss a right that is tout court

at the disposal of the investor, given that there are various legal situations that are still entrusted to the states, including strictly substantive (i.e., bilateral agreements) and procedural (i.e.. becoming part of a dispute resolution centre).

However, it is also true that a right of access for the investor exists and over the years one can think of continuous and future transformations.

The main problem that arises from the above logical argumentation is clearly economic, since the costs are really high even in the initial phase of the litigation.

Therefore, it seems quite clear that this is a highly limiting type of justice, even in the case of third-party financing, since the results – between a cost-benefit analysis – would not seem to be productive.

Finally, with the new possibilities of transparent third-party financing, it appears that the distances between costs and the right of access to justice in ISDS are increasingly shrinking: This will lead to a new possibility for potential claimants/investors to recover important capital to reinvest in the market.

CHAPTER IV

FINAL REMARKS.

SUMMARY: 0.1. Overall conclusion. - 1. Applicability of human rights principles in ISDS: towards stronger dual protection? - 1.1. International law perspective: how to create a correlation between human rights and investment? - 2. Expectations of protections: the consequences of multiple fora and forum shopping. - 2.1. Forum-shopping: what relevance for the right of access to justice? - 3. Conclusion.

0.1. OVERALL CONCLUSION.

The observations carried out in the three preceding chapters offer the possibility to draw up some general conclusions, which are the result of practical and factual assessments.

These conclusions can be summed up within certain transversal reasoning, useful to make a comparison between the different modes of access to justice taken into consideration, *i.e.*, human rights and international investment law.

These final considerations are intended to qualify the work analysis on two levels.

At the first level, it will be observed how the space of application between human rights and investment is increasingly narrowing, with the applicability of human rights principles now being discussed in the field of ISDS and how this intercorrelation cooperates to the development of international law.

Secondly, it will be pointed out that the issue of more than one international forum available for individual international complaints has created problems regarding forum shopping.

In the second and final level, since the dissertation aims to "reconstruct how international law guarantees direct or indirect access to justice for individuals", the potential final conclusions – in light of the analyses carried out – will be twofold: *i)* on one hand, in the area of human rights and foreign investments disputes litigation, there is a space to assert the existence of an individual right of access to international justice; *ii)* on the other hand, if such a right exists, it can nevertheless be observed that it is subject to various constraints – both economic and legal – that compromise its effectiveness.

1. APPLICABILITY OF HUMAN RIGHTS PRINCIPLES IN ISDS: TOWARDS

As previously discussed, the motivations behind the assertion of the right of access to justice in international law are manifold and include historical and social reasons, which have shaped the development of a *sui generis* legal personality of the individual in international law.

Highlighting the two fields of observation examined above, one can derive different motivations that prompt an individual to bring a dispute against a state.

Certainly, in the field of human rights, individual access to international justice stems from a need to protect the individual against his or her own state, especially in the event of serious violations.

This is what prompted states, from a conventional point of view, to create a 'system' – such as the one set up within the Council of Europe – of individual protection, which would be able to meet individual needs.

However, from the analysis of the caselaw under investigation, the following consideration can undoubtedly be made: the system of individual access was certainly created with the aim of protecting the fundamental rights of the individual, but this did not mean that it was not possible to develop protection that was more and more oriented towards the "economic side".

While it is true that the European Court of Human Rights is always considered as an international human rights tribunal, it is also true that in recent years the analysis of human rights has widened to include, above all, rights of an economic nature, for the various possible violations of the right to property.[860]

On the other hand, as regards the scope of application of international investment law, such a subject always had as its main reason the economic protection of the investor abroad, through a series of recognitions – both substantive and procedural – which have allowed it to extend judicial protection.

Thus, it is clear that in the context of international investment law the reason for protection is of an "economic" nature and not of a human rights nature, although in recent years there has been an increasing trend towards affirming the importance of human rights principles in investment disputes.

[860] Cf. Art. 1, Protocol 1, ECHR.

Indeed, the evolution of the investment arbitration tribunals' practice has led to a real recognition and application of human rights principles, although the two disciplines appear *prima facie* different.

In this sense, it has often been observed that the protection of human rights and the rules of international investment law have two totally different purposes.

International investment law monitors and regulates the behaviour of investors, who are mainly considered as legal persons, as they generally act as private companies or public law entities. Conversely, as far as the body of human rights law is concerned, it has been considered to address the individual in his or her basic human condition.

In reality, this view appears to be anchored in a very traditionalist conception, which – in the writer's opinion – no longer represents the various protections that have been offered to the individual in accessing international law, regardless of whether he or she is a natural or legal person.

A few instances of human rights principles used in the context of state-investor arbitrations may better clarify this passage.

For example, in arguing about moral damage suffered by companies, the European Court of Human Rights interpreted the rules of the European Convention broadly, recognising for the first time that a private entity – specifically a limited liability company – was entitled to compensation for moral damage.

As argued by the Strasbourg judges in *Comingersoll v. Portugal*[861], since a legal person is artificially created by law, it does not have the possibility of suffering "mental harm", but the deterioration of commercial reputation could lead a legal person to suffer non-material damage.

In fact, the Court explains that the deprivation of the possibility for the entity to pursue its objectives together with the mental suffering of the persons composing the corporate entity clearly fit into the Court's reconstruction of non-material damage. [862]

---

[861] *Comingersoll S.A. v. Portugal* [GC], app. no. 35382/97, ECHR 2000-IV.

[862] *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 35, ECHR 2000-IV; *Microintelect OOD v. Bulgaria*, app. no. 34129/03, § 59, 4 March 2014.

As a confirmation of what has been stated, several arbitration tribunals, in the context of State-investor disputes, have recognised this kind of non-pecuniary damage.

Indeed, the protection of the investor from the point of view of non-pecuniary damage is a perfect framework for the application of human rights principles to state-investor disputes, since it represents a useful point to create a link between the right of access to justice in human rights and investment arbitration.

According to the practice of investment arbitration tribunals, moral damages can be awarded for the pain, suffering and reputational damage suffered by the investor.

In particular, in *Von Pezold v. Zimbabwe*, the tribunal recognised that moral damages may also be awarded to legal persons. [863]

With respect to such recognition, the first arbitral tribunal to provide compensation for moral damage to the investor was in *Benvenuti v. Congo*, where the ICSID tribunal awarded compensation for moral damage considering the measures relating to the nationalisation process to which the claimant had been subjected. [864]

Moreover, as indeed stated in *Rompetrol v. Romania*, in the impossibility of linking the notion of "suffering" to a legal person, the court transformed this violation into "reputational damage", considering this as a perfectly plausible consequence of the State's wrongful conduct. [865]

On the basis of the above, in *Desert Line v. Yemen* – a case in which non-material damages were awarded because of the plaintiff's loss of reputation – the court stated: "[...] *Non-material damages may be 'very real and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no*

[863] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, paras. 911-916.

[864] *Ltd Benvenuti et Bonfanti srl v The Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, August 8, 1980.

[865] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, para. 289.

reason why the injured person should not be compensated [...]". [866]

Indeed, it can be argued that human rights protection and international investment law both aim at the legal protection of individual rights from legal limitations put in place by government agencies, safeguarding individuals from abuses of power. [867]

In support of this contention and in light of the findings in chapters II and III, there is thus a legal space within which the principles concerning the individual's access to justice – outlined in the first part of this work – may be equally compatible for arbitral disputes.

In support of the previous argumentation, a common concept between human rights protection and international investment law is the principle of non-discrimination. [868]

The concept of treating equal situations in the same way could easily be found in the human rights system and is at the same time a legal standard to be followed by the host state of the investment *vis-à-vis* the investor.

For example, the concept of fair and equitable treatment (FET)[869] and most-

---

[866] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008, para. 289. See aldo Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *International Law Commission*, United Nations, 2001, p. 102.

[867] Clearly, the enforcement practice of international investment law is today considered unique, as it provides foreign private investors with direct access to international arbitral tribunals – often without domestic remedies having been exhausted – to challenge and seek redress for damages incurred by national governments. See, on this topic, H. MANN, *International Investment Agreements, Business and Human Rights* (Global Forum on Int'l Investment 2008), available online at https://www.iisd.org/system/files/publications/iia_business_human_rights.pdf. From this point of view, it is interesting to note the conclusions of E. U. PETERSMANN, "*International Rule of Law and Constitutional Justice in International Investment Law and Arbitration*" Indiana Journal of Global Legal Studies: Vol. 16: Iss. 2, Article 6, who states that: "[…] *The equal procedural status of private and state parties in investor-state arbitration and the development of the customary international law prohibition of "denial of justice" into the human right of access to justice and judicial protection of human rights reflect the increasing recognition of citizens as legal subjects and democratic owners of international law*. […]", p. 529, 2009.

[868] See for example, A. F. BAYEFSKY, *The principle of equality or non-discrimination in international law*, Elsevier B.V., 2019.

[869] Among several contributors, see: F. M. PALOMBINO, *Fair and Equitable Treatment and the Fabric*

favoured-nation treatment (MFN)[870] derive from the notion of non-discrimination.

Another point of contact between the disciplines is undoubtedly the notion of ownership, in a sector such as foreign investment where nationalisation processes are – almost always – on the agenda. In this sense, on the subject of expropriation and compensation, several arbitral tribunals have taken up the legal reasoning of the ECtHR. [871]

Moreover, parties to the proceedings have also often referred to human rights jurisprudence in support of their arguments, although the courts have not always complied. An example of this is the *Spyridon case*, where the investor invoked human rights instruments to support his arguments.[872]

For these reasons, there is a well-established arbitral case-law which: *i)* invokes human rights protection as a useful tool to cover legal loopholes aimed at protecting (mainly) the investor; *ii)* analyses the violation of human rights instruments which could have taken place before arbitral tribunals and; finally *iii)*, is formed through the so-called parallel proceeding[873], which confirms the proximity of the issues dealt with by the jurisprudence of human rights tribunals

---

of General Principles, T.M.C. Asser Press, The Hague and Springer-Verlag, Berlin Heidelberg, 2018.

[870] Cf. P. ACCONCI, *Most-Favoured-Nation Treatment*, in (eds.) P. Muchlinski, F. Ortino, and C. Schreuer, *The Oxford Handbook of International Investment Law*, Oxford University press, 2008.

[871] See *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, para 312. si veda inoltre *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB/00/2, Award of 29 May 2003, para 122, where the Arbitral Tribunal expressly refers to the case law of the European Court of Human Rights, arguing that: "[…] *the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality* […]". In making this reference, the Tribunal takes as its basis the case-law of the ECHR (*In the case of Matos e Silva, Lda., and Others v. Portugal*, judgment of September 16, 1996, 92, p. 19), concluding that: "[…] *The Arbitral Tribunal understands that such statements of the Strasburg Court apply to the actions of the State in its capacity as administrator, not only to its capacity as law-making body.* […]".

[872] *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, paras. 306- 312.

[873] On this topic, see G. ZARRA, *Parallel Proceedings in Investment Arbitration*, Den Haag and Torino, Eleven International Publishing and Giappichelli, 2017.

to that of arbitral tribunals.[874]

With regard to access to justice – understood as a group of norms encompassing several rights aimed at guaranteeing an individual's access to justice – several references made by arbitrators can be found in arbitral jurisprudence.[875]

For example, Article 6 of the ECHR was expressly referred to when determining what is meant by fair and equitable treatment.[876]

Such a context, within a multilevel regulation of international trade which, on the other hand, clearly demands a multilevel protection of individual rights against abuses of public and private power, at national, transnational and international levels.[877]

---

[874] In this respect, the Yukos case must be brought to the attention: it is indeed an atypical case, both in international arbitration and in the jurisprudence of the European Court of Human Rights. The literature on the subject is extensive, see: E. DE BRABANDERE, '*Yukos Universal Limited (Isle of Man) v The Russian Federation*: Complementarity or Conflict? Contrasting the *Yukos* Case before the European Court of Human Rights and Investment Tribunals' 30(2) *ICSID Review* 345, 2015; M. TIMOFEYEV, '*Money Makes the Court Go Round: The Russian Constitutional Court's Yukos Judgment*', Verfassungsblog on Matters of Constitutional Law, 2017; L. C. SIM, *Case Study of YUKOS. In: The Rise and Fall of Privatization in the Russian Oil Industry*. St Antony's Series. Palgrave Macmillan, London, 2008; D. GOLOLOBOV, *The Yukos Money Laundering Case: A Never-Ending Story*, 28 Mich. J. Int'l L. 711, 2007. Even if some aspect will be address later, see,: *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Award (14 July 2014); *OAO Neftyanaya Kompaniya Yukos v Russia* (merits) App no 14902/04 (ECtHR, 20 September 2011); *OAO Neftyanaya Kompaniya Yukos v Russia* (just satisfaction) App no 14902/04 (ECtHR, 31 July 2014).

[875] See for example: *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB/99/2, Award of 11 October 2002, paras. 141-144 and *Loewen Group Inc and Raymond Loewen v. United States of America*, ICSID Case No ARB/98/3, Final Award of 26 June 2003, para 119.

[876] Cf. *Toto Costruzioni Generali SpA v. Lebanon*, ICSID Case No. ARB/07/12, *Decision on Jurisdiction* of 11 September 2009, paras. 157-158, where it was clearly stated that "*Article 6 of the ECHR certainly covers the question to which extent lengthy court proceedings are a breach of the right to due process and to a fair and equitable trial.*"

[877] In tal senso si veda: J. PAULSSON*, Denial of Justice in International Law*. Cambridge: Cambridge University Press, 2005; E. U. PETERSMANN, *Multi-level Trade Governance Requires Multilevel Constitutionalism*, in Constitutionalism, Multilevel Trade Governance and Social Regulation 5, Christian Joerges & Ernst-Ulrich Petersmann eds., 2006.

There is therefore a genuine investor's right of access to justice, both national and international, in the protection of investments.

This correlation between the two areas of observation has therefore created a space within which the right of access to justice, with the ensuing substantive and procedural safeguards, is a useful pivotal point as it makes a significant contribution to the field of international law.

1.1. INTERNATIONAL LAW PERSPECTIVE: HOW TO CREATE A CORRELATION BETWEEN HUMAN RIGHTS AND INVESTMENT?

It may be briefly noted, however, that it is important to understand through which means of international law a reference to two diametrically opposed disciplines can be made.

More clearly and in light of the importance attached to the protection of human rights in arbitral jurisprudence, it is necessary to understand whether these principles are invoked on the basis of the BITs and a subsequent broad interpretation made pursuant to Article 31(3) VCLT 1969[878] or on the basis of other rules of international law relevant to the parties.

In this sense, arbitral tribunals have sometimes made specific reference to human rights instruments in settling state-investor disputes.

For example, in the case of *Hesham Talaat M. Al Warraq v. Indonesia*, the court held that the State had breached its obligation of fair and equitable treatment of the investor by referring primarily to the International Covenant on Civil and Political Rights: on the one hand, it clarified that Indonesia was a party to this treaty and that the State was under an obligation to comply with the rules contained therein; on the other hand, the court clarified that the Covenant was to be regarded as a universal instrument containing legal obligations binding on the parties. [879]

However, there are examples supporting a systematic interpretation between

[878] Cfr. O. DÖRR, *Article 31*, in *Vienna Convention on the Law of Treaties A Commentary*, O. Dörr and K. Schmalenbach (eds), Springer, 2018, pp. 557-616.

[879] *Hesham Talaat M Al-Warraq v Indonesia*, UNCITRAL, Final Award of 15 December 2014, paras 559 – 621.

human rights law and international investment law, which can be invoked by an arbitral tribunal in the light of Article 31(3) of the Vienna Convention on the Law of Treaties.[880]

Such an analysis is based, at the outset, on the circumstance that - in accordance with the principle of systematic interpretation - the arbitrators composing an Investment Arbitral Tribunal have the power to interpret BITs based on general rules of international law. [881]

Moreover, as acknowledged also by the International Court of Justice[882], Article 31(3) reflects customary international law and is therefore binding also on States that are not parties to the Convention.

In this respect, see the annulment decision rendered by the Arbitral Tribunal in ICSID *Tulip Real Estate v. Turkey*, which held that there is a widespread belief that human rights standards are being supplemented by standards concerning international investment law. [883]

In light of these corresponding views, it appears that the practice of arbitral tribunals in analysing BITs - given the generally recognised binding rules of international law and on the basis of a systemic-extensive interpretation of Article 31(3) - is increasing in recent years, thus avoiding a conflict between human rights norms and international investment law norms.

Thus, the primacy of systematic interpretation has been recognised: due to this principle, arbitral tribunals established for the settlement of state-investor disputes can interpret bilateral investment treaties in the light of other rules of

---

[880] On this topic see, H. ASCENSIO, *Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law*, in *ICSID Review*, Vol. 31, No. 2, 2016, pp. 366–387; O.K. FAUCHALD, '*The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*', in EJIL, 19, 2008, p. 301; A. SALDARRIAGA, '*Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement*', in *ICSID Review*, 28 (2013) 197.

[881] Cf. E. E. TRIANTAFILOU, *Contemporaneity and Evolutive Interpretation under the Vienna Convention on the Law of Treaties*, in *ICSID Review*, Vol. 32, No. 1 (2017), pp. 138–169; G BÜCHELER, *Proportionality in Investor-State Arbitration*, Oxford University Press, 2015.

[882] *Oil Platforms* (Iran v United States), ICJ, Judgment of 6 Novembre 2003, para 41.

[883] *Tulip Real Estate and Development Netherlands BV v. Turkey*, ICSID ARB/11/28, Decision on Annulment of 30 December 2015, paras.

international law. [884]

Finally, even the International Law Commission – in its "Report on Fragmentation" – has clarified that the interpretation of treaty rules and solutions to apparent conflicts of norms are in fact parts of the same process since rules that appear to be compatible or in conflict with each other are nevertheless to be regarded as a result of an interpretative process. [885]

Thus, there seem to be different arguments for the different actors involved in support of an integration that would have as a necessary consequence an even stronger individual right of access to justice, further consolidating the now strong link between the two different fields of application.

2. EXPECTATIONS OF PROTECTIONS: THE CONSEQUENCES OF MULTIPLE FORA AND FORUM SHOPPING.

The procedural conditions of access to justice in the area of human rights and investment are certainly different, as has been noted among the main legal acts through which the different proceedings are triggered.

A first consideration can only concern costs, which are important both in the access phase and in the phase related to "compensation".

If one compares the two different ways of access to justice, it is quite easy to see that for an application to the ECHR the economic sum to be invested to obtain justice is far less than for a foreign investment arbitration.

It is true that the main objectives are different: in human rights, a judgment with subsequent financial satisfaction is important, but it can never equal an award on damages by an arbitral tribunal set up for a dispute.

But while this is undoubtedly relevant, there appears to be a gap here: it seems as if human rights tribunals do not have such a compelling force to be useful for

[884] See the ICSID Tribunal in *Marfin Investment Group Holdings SA, Alexandros Bakatselos and Others v Cyprus*, ICSID ARB/13/27, Award of 26 July 2018, para 827.

[885] Cf.: '*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*', Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682 (4 April 2006) para 412.

obtaining such attractive economic compensation, especially for subjects who might start a dispute with the one and only purpose of obtaining compensation.

However, this could clearly be extended to violations involving multinational corporations as well as individuals who, due to a possible error by domestic courts, have undergone a lengthy process with consequent legal costs, which then add up to a considerable final figure.

Therefore, another consideration to be reached is that the individual's right of access to international justice now seems to be closely linked to the economic expectations of the individual at the end of the proceedings, and therefore could create a useful discussion on forum shopping.

2.1. FORUM-SHOPPING: WHAT RELEVANCE FOR THE RIGHT OF ACCESS TO JUSTICE?

Leaving aside the different definitions that have triggered the doctrine and jurisprudence on the subject of forum-shopping, it seems appropriate to make a brief consideration in light of the subject matter of this study.

From the analysis carried out, it seems rather clear that two different issues concerning forum-shopping and the right of access to justice arise: on the one hand, the first issue concerns only human rights systems, with the peculiarities that will now be mentioned; on the other hand, the second issue concerns an alleged convenience - on certain matters - of investment arbitration over human rights systems.

As far as human rights issues are concerned, it now seems possible to ascertain that the system of protection established in Strasbourg has far surpassed all other systems of protection.

Returning precisely to the subject matter of the research, it is clear that the highest expression of the individual right of access to international justice is that which is grafted with the application form for individual redress under Article 34 ECHR.

This consideration is even more important in the light of the clear differences with the individual communication to the HRC, especially from two points of view: i) the protections of the ECHR are extended also to legal persons, thus allowing recourse to justice also by those subjects who do not complain of

violations of their "extremely personal" rights, but also of a purely economic nature.

Considering then that the Court has intervened in a decisive manner also and above all on the protection of the shareholders of the companies, it seems therefore possible to affirm that for economic issues that are triggered by the lack of protection of human rights the best solution for the individual access to justice is the Strasbourg Court; ii) the second point of view, already briefly anticipated in chapter II, concerns the enforceability of a sentence of these courts following the ascertained violation of human rights. This different situation leads to an unbalancing of the access choices towards the ECHR protection systems, since as we have already mentioned, an HRC decision is not binding for the state.

As regards, instead, the possible repercussions of forum-shopping between different international forums, it is necessary to make a brief premise.

As we will have the opportunity to specify later on, it may happen that the ways of access to justice for certain subjects may even be of three types, implying one access to domestic jurisdiction, one to human rights jurisdiction and the other concerning possible ISDS disputes. In this respect, there seems to be an interconnection between forum-shopping, right of access to justice and fork in the road provisions.

Indeed, often a company investing abroad might be involved in legal issues within the host state, but as is well known, not every time a company appears before a domestic court does this mean that the fork in the road provision has been chosen.

These differences concern, precisely, the way in which these disputes are linked to the investment: this is of fundamental importance for the recognition of the investor's right of access to justice.

Well, taking up a rather well-known modality (and also taken up within the dissertation), it might be useful to take up the reasoning of an arbitral tribunal concerning the famous Yukos case, that has caused a stir in international case law, precisely because it was brought before domestic courts, on human rights and on investment matters.

It is precisely the reasoning of the investment court that could outline the

peculiarities of a choice concerning forum shopping, starting from the assumption of fork in the road. In this sense, the jurisprudence of the arbitral tribunals has repeatedly stated that one loses the possibility to have access to international arbitration, under the fork in the road clause, only when a "triple identity test" is met, consisting of: *i)* the same dispute concerning the same ground on which the claim is brought; *ii)* the same subject matter; *iii)* the parties must be the same as in the domestic proceedings.[886]

Precisely in light of these reasons, which intersect perfectly with the right of access to justice and the possibility of reference to several international fora, in the Yukos case the Claimant/Investor specified that any objection would have to be based in light of the aforementioned "triple identity test". These arguments were confirmed by the tribunal, which specified that precisely the various domestic proceedings and the proceedings before the ECHR, clearly highlighted by the Respondent, failed to satisfy the forks in the road provision of the ECT.[887]

These considerations lead to two conclusions. Firstly, especially when there are multiple forums (national and international) available, it is necessary to construct a defence strategy that takes into account above all that, once certain jurisdictional choices have been made, it will be difficult to go back. Secondly, and as a consequence of the preceding point, the right of access to justice might entail a jurisdictional limitation for the individual, especially as a result of possible overlapping international jurisdictions.

3. CONCLUSION.

In the light of the considerations made in this research, it is possible to make some final considerations, which will be articulated respectively under three consequential points of view.

Firstly, from the analyses carried out it can be observed how international law is increasingly evolving to meet the new needs - legal and social - of the

[886] Cf. *Toto v. Lebanon*, Decision on Jurisdiction, 11 September 2009, paras 203-217; Khan Resources v. Mongolia, Decision on Jurisdiction, 25 July 2012, paras 390-400.

[887] See *Yukos Universal v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 598.

individual. This shift of mindset, which, however, does not invalidate the traditional rules of international law, highlights how the issue of the subjectivity of the individual may be an important topic in the coming years, given the new demands that the international community places on states. This clearly does not mean that the individual will attain the status of the classic 'subject' of international law, but it is nevertheless undeniable that there is a certain tendency towards an increasingly articulated sui generis subjectivity.

Secondly, precisely in light of the previous point, it seems that the question of the individual's access to international justice has become a pivotal – and sometimes unavoidable – aspect of international law. This observation becomes even clearer if one considers how it is possible to start from the general concept of access to justice and translate this concept into a specific field of application such as that of international law. Moreover, the two fields of application examined in the paper provide a clear and effective demonstration of how access to international bodies is not only permitted, but sometimes facilitated by a series of norms that guarantee substantive and procedural protection to the individual. Moreover, these rules are reaching such a level of importance that they are forming a real body of general principles, which clearly represents an additional weapon for the international judicial protection of the individual.

Thirdly and finally, it can certainly be assumed that a common concept of individual access to international justice exists, which will clearly have to undergo further work to create a harmonisation process capable of representing the demands of all types of actors.

BIBLIOGRAPHY

ACCIOLY H., *Tratado de Direito Internacional Público*, vol. I, 1st. ed., Rio de Janeiro, Imprensa Nacional, 1933

ACCONCI P., *Most-Favoured-Nation Treatment*, in (eds.) P. Muchlinski, F. Ortino, and C. Schreuer, *The Oxford Handbook of International Investment Law*, Oxford University press, 2008

ALBORNOZ M. S., *Legal Nature and Legal Consequences of Diplomatic Protection. Contemporary Challenges*. Anuario Mexicano de Derecho Internacional, [S.l.], 2006

ALDRICH G. H., *The Jurisprudence of the Iran-United States Claims Tribunal*, Oxford University Press, 1996

ALI F., SHAHLA AND REPOUSIS G., *Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat*?, Denver Journal of International Law and Policy, Vol. 45, No. 2, 2018

ALTWICKER T., *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, in *European Journal of International Law*, Volume 29, Issue 2, May 2018

ALVAREZ A., *La Reconstrucción del Derecho de Gentes – El Nuevo Orden y la Renovación Social*, Santiago de Chile, Ed. Nascimento, 1944

ALVAREZ H., *The Status and Duty of an Arbitrator: Is a BIT Arbitrator Different?*, 10th IBA International Arbitration Day - The Role and Responsibilities of an Arbitrator, International Bar Association, Madrid, 2007

AMERASINGHE C., *Local Remedies in International Law*, 2nd ed., Cambridge Studies in International and Comparative Law, Cambridge: Cambridge University Press, 2004

ANDREEVA Y., *Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions*, Arbitration International, Volume 27, Issue 2, 2011

ANTKOWIAK M. AND GONZA A., *The American Convention on Human Rights*, First Edition, New York, Oxford University Press, 2017

ANZILOTTI D., *Corso di Diritto Internazionale*, Rome, 1912

ARANGIO RUIZ G., '*Le domaine réservé: L'organisation internationale et le rapport entre droit international et droit interne: Cours général de droit international public'*, (225), in: *Collected Courses of the Hague Academy of International Law*, 1990

ARANGIO-RUIZ G., "*La persona internazionale dello Stato*", in Digesto delle discipline pubblicistiche, UTET giuridica, 2014

ARKIN H. L., *International Ad Hoc Arbitration: A Practical Alternative*, 15 INT'l Bus. LAW. 5, 1987

ASCENSIO H., *Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law*, in *ICSID Review*, Vol. 31, No. 2, 2016

ASSAREH A., *Forum shopping and the cost of access to justice: cost and certainty in international commercial litigation and arbitration*, Journal of Law and Commerce, 31, 1–44, 2013

ASTORGA R. L., *The Nationality of Juridical Persons in the ICSID Convention in Light of Its Jurisprudence*, Max Planck Institute for Comparative Public Law and International Law and the University of Chile, University of Heidelberg, 2007

BAYEFSKY A. F., *The principle of equality or non-discrimination in international law*, Elsevier B.V., 2019

BALLADORE PALLIERI G., *Diritto Internazionale Pubblico*, Giuffrè, 8th edition, 1962

BALORO J., "*The Legal Status of Concession Agreements in International Law.*", The Comparative and International Law Journal of Southern Africa, vol. 19, no. 3, 1986

BANIFATEMI Y., "*The Law Applicable in Investment Treaty Arbitration* (Chapter 9)", in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Katia Yannaca-Small (ed.), Oxford University Press, 2010

BANTEKAS I., *Corporate Social Responsibility in International Law*, in Boston University International Law Journal, 2004

BARENDRECHT M., MULDER J. AND GIESEN I., *How to Measure the Price and Quality of Access to Justice?*, SSRN Electronic Journal, 2006

BARNETT L. G., *International Human Rights Norms and their Domestic Application*, in Revista Instituto Interamericano de Derechos Humanos, n. 29, 1999

BASEDOW J., *International economic law and commercial contracts: promoting cross-border trade by uniform law conventions*, Uniform Law Review, Volume 23, Issue 1, 2018

BEAULAC S., *The Westphalian Model in Defining International Law: Challenging the Myth*, Australian Journal of Legal History, 8, 2005

BEDERMAN D., '*The United Nations Compensation Commission and the Tradition of International Claims Settlement*', 27 NYUJIntlL&Pol, 1994

BÉGUIN N., *The Rule of Precedent In International Arbitration*, in: Jusletter 5, 2009

BENEDETTELLI M. V., RADICATI DI BROZOLO L. G. AND CONSOLO C., *Commentario breve al diritto dell'arbitrato nazionale ed internazionale*, Milano, Wolters Kluwer, CEDAM, 2017

BERMANN G. A., "*International Arbitration and Private International Law General Course on Private International Law (Volume 381)*", in: Collected Courses of the Hague Academy of International Law", 2017

BHABHA F., *Institutionalizing Access-to-Justice: Judicial Legislative and Grassroots Dimensions*, 33 Queens' L.J. 139, 2007

BIANCHI A., (ed) *Non-State Actors and International Law*, Ashgate, Farnham, 2009

BIJLMAKERS S., *Effects of Foreign Direct Investment Arbitration on a State's Regulatory Autonomy Involving the Public Interest*, The American Review of International Arbitration (ARIA), v23/no2, 2012

BJORKLUND A. AND VANHONNAEKER L., *Applicable Law in International Investment Arbitration*, 2021

BLACKABY N., *Redfern and Hunter on International Commercial Arbitration*, 5th edn, Oxford University Press, Oxford, 2009

BLANKE G., *Institutional versus Ad Hoc Arbitration: A European Perspective*, ERA Forum 9, 2008

BLOCH, F. S., *Access to Justice and the Global Clinical Movement*, 28 Wash. U. J. L. & POL'y, 111, 2008

BLYTHE S. E., "*The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties*." The International Lawyer, vol. 47, no. 2, 2013

BOBEK M., *The Effects of EU Law in the National Legal Systems*, C. Barnard and S. Peers (eds.), *European Union Law*, Oxford University Press, 2013

BOISSON DE CHAZOURNES L., MCLACHLAN C.L, *Preface: The Intersection of Investment Arbitration and Public International Law*, *ICSID Review - Foreign Investment Law Journal*, Volume 31, Issue 2, 2016

BOTTINI G., TITI C., AZNAR F. P., CHAISSE J., JOVANOVIC M. AND PUDGEMONT SOLA O., '*Excessive Costs and Recoverability of Cost Awards in Investment Arbitration'*, in Journal of World Investment & Trade 21 (2020), 2019

BRADFIELD M. AND VERDIRAME G., *Litigating International Investment Disputes*, 2014

BROWNLIE I., *Principles of Public International Law*, 7th ed., Oxford and New York: Oxford University Press, 2008

BRUNET-JAILLY E., *Cross-border cooperation: a global overview*. *Alternatives*. 2022

BÜCHELER G, *Proportionality in Investor-State Arbitration*, Oxford University Press, 2015

BUERGENTHAL T., *The Contemporary Significance of International Human Rights Law*, in *Leiden Journal of International Law*, 22(2), 2009

BÜHLER M. W., *Costs of Arbitration: Some Further Considerations*, in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner, ICC Publishing, 2005

BUNGENBERG M., GRIEBEL J., HOBE S., AND REINISCH A., eds. *International Investment Law: A Handbook*. Oxford: Hart, 2015

BUTLER P. AND HERBERT C., *Access to justice vs access to justice for small and medium-sized enterprises: the case for a bilateral arbitration treaty*, 26 N.Z.U. L. REV., 2014

BUYSE A., *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, in *Nomiko Vima (The Greek Law Journal)*, Vol. 57, 2009

CABRAL P., NEVES R., *General Principles of EU Law and Horizontal Direct Effect*, 17, in *European Public Law*, Issue 3, 2011

CAMILLERI S. P., *Between rags and riches: rethinking security for costs in international commercial arbitration*, Arbitration International, Volume 37, Issue 4, 2021

CAMPBELL B., *The Dynamic Evolution of International Law - The Case for the More Purposeful Development of Customary International Law*, 49 Victoria U. Wellington L. Rev., 2018

CAMPIGLIO C., MOSCONI F., *Diritto internazionale privato e processuale*, UTET Giuridica, 9th edn, 2019

CANÇADO TRINDADE A.A., '*El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000): La Emancipación del Ser Humano como Sujeto del Derecho Internacional de los Derechos Humanos'*, 30/31 Revista del Instituto Interamericano de Derechos Humanos, 2001

CANÇADO TRINDADE A.A., '*International Law for Humankind: Towards a New Jus Gentium – General Course on Public International Law – Part I*', 316 Recueil des Cours de l'Académie de Droit International de la Haye, 2005

CANÇADO TRINDADE A.A., '*The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments*', in K. Vasak Amicorum Liber – Les droits de l'homme à l'aube du XXIe siècle, Bruxelles, Bruylant, 1999

CANÇADO TRINDADE A.A., '*Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne'*, 14 Revue québécoise de droit international, 2001

CANÇADO TRINDADE A.A., *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001

CANÇADO TRINIDADE A. A., *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights*, Cambridge, 1983

CANÇADO TRINIDADE A. A., *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, in *Columbia Human Rights Law Review*, 30(1),1998

CAPLAN L., *The Invisible Justice Problem*, in Daedalus, 148:1, 19-29, MIT Press Journal, 2019

CAPPELLETTI M., BRYANT G., (editor/s), *Access to Justice Vol. I: A world survey (Book I & II)*, Milano, Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1978

CAPPELLETTI M., BRYANT G., (editor/s), *Access to Justice Vol. III: Emerging issues*, Milano, Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1979

CARBONE S. M., SCHIANO DI PEPE L., *States, Fundamental Rights and Duties*, in Max Planck Encyclopedias of International Law, 2009

CARBONNEAU T. E., (ed) *Handbook on Commercial Arbitration*, 2nd edn, Juris Net, Huntington, 2010

CARLSTON K., *Concession Agreements and Nationalization*, American Journal of International Law, 52(2), 260-279, 1958

CHARNOVITZ S., *What is International Economic Law?*, Journal of International Economic Law, Volume 14, Issue 1, March 2011

CHAVEZ, R. B., *The Rule of Law and Courts in Democratizing Regimes*, in The Oxford Handbook of Law and Politics, Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (eds.), 2008

CHUN Y. H., *Security for Costs' Under the ICSID Regime: Does it Prevent 'Arbitral Hit-andRuns' or Does it Unduly Stifle Third Party Funded Investors' Due Process Rights?*, 21 Pepp. Disp. Resol. L.J. 477, 2021

CINOTTI D. N., *How Informed Is Sovereign Consent to Investor-State Arbitration*, 30 MD. J. INT'l L. 105, 2015

CLAPHAM A.*, Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, 2006

COE J. J., JR, *Should Mediation Of Investment Disputes Be Encouraged, And, If So, By Whom And How*? In: Contemporary Issues in International Arbitration and Mediation: The Fordham Papers, 2009

CONFORTI B., *Diritto internazionale*, Editoriale Scientifica, Napoli, 11th edition, 2018

COOMBS M., *Kaunda v. President of the Republic of South Africa*. Case CCT 23/04. 2004 (10) BCLR 1009. American Journal of International Law, 99(3), 2005

CRAWFORD J. R., GRANT T. D., *Local Remedies, Exhaustion of*, in Max Planck Encyclopedia of Public International Law, 2007

CUNIBERTI G., *The recognition of foreign judgments lacking reasons in Europe: access to justice, foreign court avoidance, and efficiency*. International and Comparative Law Quarterly*, 57*(1), 2008

D'ASCOLI S., SCHERR K. M., *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, in Working Paper, EUI LAW, 2007

DALRYMPLE C. K., '*Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*', CornellIntlLJ, 29, 1996

DASGUPTA R., *International Interplay: The Future of Expropriation across International Dispute Settlement*. Newcastle upon Tyne, UK: Cambridge Scholars, 2013

DE BRABANDERE E., '*Yukos Universal Limited (Isle of Man) v The Russian Federation*: Complementarity or Conflict? Contrasting the *Yukos* Case before the European Court of Human Rights and Investment Tribunals' 30(2) *ICSID Review* 345, 2015

DE SCHUTTER O., *International Human Rights Case Law: Cases, Materials*, Commentary, 2nd ed., Cambridge, CUP, 2015

DE SCHUTTER O., *International Human Rights Law Cases, Materials, Commentary*, Cambridge University Press, 3rd ed, 2019

DELANY L., SIGNAL L., & THOMSON G., *International trade and investment law: a new framework for public health and the common good*, BMC Public Health 18, 602, 2018

DENZA E., *The Relationship between International and National Law*, in *International Law*, 4th ed., edited by Malcolm Evans, 412–440, Oxford: Oxford University Press, 2006

DESHPANDE V.S., *The applicable law in international commercial arbitration*, Journal of the Indian Law Institute, Vol. 31, No. 2, 1989

DI MACIO N. AND PAUWELYN J., '*Non Discrimination in Trade and Investments Treaties: Worlds Apart or Two Sides of the Same Coin*?', 102 AJIL, 2008

DIALLO M.F., DJELASSI S., KUMAR V., *Marketing and globalization: Relevance, trends and future research. Recherche et Applications en Marketing* (English Edition), 36(3):2-7, 2021

DIAS S., FERNANDO C., *Investment Dispute Settlement Ever Be Depoliticized?*, 4(2) Cardozo International and Comparative Law Review (2021), The Chinese University of Hong Kong Faculty of Law Research Paper No. 2021-20, 2021

DIXON M., *Textbook on International Law*. Oxford: Oxford University Press, 2005

DOLZER R., '*Mixed Claims Commissions*' in Max Planck Encyclopedia of Public International Law, 2011

DOLZER R., AND SCHREUER C., *Principles of International Investment Law*. 2d ed. Oxford: Oxford University Press, 2012

DÖRR O., *Article 31*, in *Vienna Convention on the Law of Treaties A Commentary*, O. Dörr and K. Schmalenbach (eds), Springer, 2018

DÖRR O., *Privatisierung des Völkerrechts, JuristenZeitung*, 60, 905–916 (905), 2005

DOUGLAS Z., *The International Law of Investment Claims*, CUP Cambridge, 2009

DOUGLAS Z., VIÑUALES J. E. AND PAUWELYN J. (ed(s)), *The Foundations of International Investment Law*, Oxford University Press, 2014

DUMBERRY P., *Are BITs Representing the New Customary International Law in International Investment Law*, 28 PENN St. INT'l L. REV. 675, 2010

EBERHARDT P. AND OLIVET C. (T. AMOS AND N. BUXTON CONTRIBUTORS), *Profiting from injustice: how law firms, arbitrators and financiers are fuelling an investment arbitration boom*, in Corporate Europe Observatory: Transnational Institute, Brussels, 2012

EFTEKHAR R., *The Relevance of the Host State Domestic Law in Investment Treaty Arbitrations: Revival of the Localisation Theory?*, in The Role of the Domestic Law of the Host State in Determining the Jurisdiction ratione materiae of Investment Treaty Tribunals, 2019

EGGER P., AND MERLO V., "*BITs Bite: An Anatomy of the Impact of Bilateral Investment Treaties on Multinational Firms.*" The Scandinavian Journal of Economics, vol. 114, no. 4, 2012

EGGER P., PFAFFERMAYR M., *The impact of bilateral investment treaties on foreign direct investment*, Journal of Comparative Economics, Volume 32, Issue 4, 2004

ELKINS Z., GUZMAN A. & SIMMONS B., *Competing for Capital: The Diffusion of Bilateral Investment Treaties*, 1960–2000. International Organization, 60(4), 811-846, 2006

FANOU M., *The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future*, Cambridge Yearbook of European Legal Studies, 2020

FANOU M., *The independence and impartiality of the hybrid CETA Investment Court System: Reflections in the aftermath of Opinion 1/17*, in Europe and the World: A law review, Vol. 4(1), UCL Press, 2020

FAROUK Y., '*The Notion of Investment in ICSID Case Law: A Drifting Jurisdictional Requirement?*', 22, Journal of International Arbitration, Issue 2, 2005

FERSTMAN C., GOLDBERG A., GRAY T., ISON L., NATHAN R., NEWMAN M. (eds), *Contemporary Human Rights Challenges The Universal Declaration of Human Rights and its Continuing Relevance*, Routledge, London, 2018

FAUCHALD O.K., '*The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*', in EJIL, 19, 2008

FOURET J., PENA COSTA L. S., "*The Preamble of the ICSID Convention*", ELECD 3017, 2019; in Fouret, Julien; Gerbay, Remy; Alvarez, M. Gloria (eds), "The ICSID Convention, Regulations and Rules", Edward Elgar Publishing, 2019

FRANCIONI F., *Access to Justice as a Human Right*, Oxford University Press, 2007

FRANCIONI F., *Access to Justice, Denial of Justice and International Investment Law*, European Journal of International Law, Volume 20, Issue 3, August 2009

FRANCIONI F., *Compensation for Nationalisation of Foreign Property: The Borderline Between Law and Equity*, 24 INT'L & COMP. L.Q. 255, 1975

FRANCIONI F.; GESTRI M.; RONZITTI N.; SCOVAZZI T., in "*Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*", Milano, Giuffrè, Collana di studi (Università di Siena, Dipartimento di diritto pubblico, Facoltà di giurisprudenza), 2008

FRANCK S. D., *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*, Oxford University Press, 2019

GAETA P., VIÑUALES J. E., AND ZAPPALÁ S., *Cassese's International Law*, 3rd ed., Oxford University Press, 2020

GAJA G., *'The Position of Individuals in International Law: An ILC Perspective'*, 21, EJIL, 2010

GALANTER M., *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 2010

GARCIA F. J., *Third-Party Funding as Exploitation of the Investment Treaty System*, Boston College Law Review, Vol. 59, No. 8, Boston College Law School Legal Studies Research Paper No. 505, 2018

GÄRDITZ K. F., *Bridge of Varvarin*, American Journal of International Law, 2014

GAUKRODGER D. AND GORDON K., "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", in OECD Working Papers on International Investment, https://www.oecd.org/investment/investment-policy/WP-2012_3.pdf, 2012

GEBERT A., *Legal Protection for SMEs through Investor-State Dispute Settlement: Status Quo, Impediments, and Potential Solutions*, Oxford University Press, 2017

GERARDS J. H., FLEUREN J., *Implementation of the European convention on human rights and of the judgments of the ECtHR in national case law*, 1st ed., Intersentia, 2014

GIARDINA A., *La legittimità internazionale dell'indennizzo in caso di nazionalizzazioni*, in *Dem. Dir.*, 1970

GIESEN I., KLAMING L., *Access to Justice: The Quality of the Procedure*. SSRN Electronic Journal, 2008

GIORGETTI C., *Rethinking the Individual in International Law*, 22 Lewis & Clark L. Rev. 1085, 2019

GIORGETTI C., *The Selection and Removal of Arbitrators in Investor-State Dispute Settlement*, in Brill Research Perspectives in International Investment Law and Arbitration, 2019

GIOVANNI D., *Fundamentals of public international law: a sketch of international legal orde*r, in *Queen Mary studies in international law*, v. 38, Leiden; Boston: Brill Nijhoff, 2019

GLAS L. R., *The European Court of Human Rights Supervising the Execution of Its Judgments*, in *Netherlands Quarterly of Human Rights*, 37, no. 3, 2019

GLASER S., '*Les droits de l'homme à la lumière du droit international positif*', Mélanges offerts à H. Rolin – Problèmes de droit des gens, Paris, Pédone, 1964

GOLDIE L. F. E., *State Responsibility and the Expropriation of Property*, 12 INT'l L. 63, 1978

GOLOLOBOV D., *The Yukos Money Laundering Case: A Never-Ending Story*, 28 Mich. J. Int'l L. 711, 2007

GOODRICH L., *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, in *American Journal of International Law*, 32(4), 738-758, 1938

GORSKI S., *Individuals in international law*, in Max Planck Encyclopedia of Public International Law, 2013

GRABOWSKI A., "*The Definition of Investment under the ICSID Convention: A Defense of Salini*," Chicago Journal of International Law: Vol. 15: No. 1, 2014

GRAMATIKOV M., *A Framework for Measuring the Costs of Paths to Justice*, 2 J. Juris 111, 2009

GRAY C.D., *Judicial Remedies in International Iaw*, Oxford: Clarendon, 11, 1987

GROTE R., *Westphalian System*, in Max Planck Encyclopedia of Public International Law [MPEPIL], 2006

GRÜNWALDOVÁ V., *General and Particular Approaches to Implementation of the European Convention on Human Rights*, in *Canadian Yearbook of International Law/Annuaire Canadien De Droit International*, 55, 2018

GUIGUO W., *Consent in Investor–State Arbitration: A Critical Analysis*, Chinese Journal of International Law, Volume 13, Issue 2, 2014

GUILLAUME G., *The Use of Precedent by International Judges and Arbitrators*, Journal of International Dispute Settlement. 2, 2011

GUVEN B. AND JOHNSON L., *Third-Party Funding and the Objectives of Investment Treaties: Friends or foes?*, in Investment Treaty News, 2019

GUZMAN A. T., *Explaining the Popularity of Bilateral Investment Treaties*, in The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows, Karl P. Sauvant and Lisa E. Sachs, Oxford Scholarship Online, 2009

HADFIELD G. K., *The cost of law: Promoting access to justice through the (un)corporate practice of law*, International Review of Law and Economics, Volume 38, Supplement, 2014

HAFNER G., *The Emancipation of the Individual from the State under International Law*, Recueil des Cours 358, 2011

HAIDER D., *The Pilot-Judgment Procedure of the European Court of Human Rights*, Martinus Nijhoff Publishers, 2013

HALLWARD-DRIEMEIER M., *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit And They Could Bite*, 2003

HAMMASH A., & ALSHAKHANBEH K., *The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Advances in Social Sciences Research Journal, 4(16), 2017

HEFFES E., KOTLIK M. D., VENTURA M. J. (eds), *International Humanitarian Law and Non-State Actors Debates, Law and Practice*, Springer, 2020

HELLWEG C., *COVID-19 and Force Majeure: How Will International Arbitral Tribunals Treat Force Majeure Clauses Entered into Prior to the Pandemic?*, in The American Review of International Arbitration, 2020

HERDEGEN M., *Principles of International Economic Law*, (2nd Edition), Oxford University Press, 2016

HESSBRUEGGE J. A., *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 Buff. Hum. Rts. L. Rev. 21, 2005

HO J., *State Responsibility and Expropriation. In State Responsibility for Breaches of Investment Contracts (Cambridge Studies in International and Comparative Law)*, Cambridge: Cambridge University Press, 2018

HO J., *The meaning of 'investment' in ICSID arbitrations.* Arbitration International. 26. 633-648, 2010

HODGSON M., KRYVOI Y. AND HRCKA D., *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, 2021

HOFFMANN A.K, (ed) *Protection of Foreign Investments through Modern Treaty Arbitration*, ASA, Geneva, 2010

HOLTZMANN H. M., (ed) *International Mass Claims Processes*, OUP Oxford, 2007

HOLTZMANN H. M., *Mass Claims*, in Max Planck Encyclopedia of Public International Law [MPEPIL], 2008

HORN H., TANGERÅS T., *Economics of international investment agreements*, Journal of International Economics, Volume 131, 103433, 2021

HULME M. H., *Preamble in Treat Interpretation*, in *University of Pennsylvania Law Review*, 164(5), 2016.

IJALAYE D. A., *The Extension of Corporate Personality in International Law*, New York, Leiden, 1978

JACOBS M., *Transnational corporations and the proliferation of bilateral investment treaties: more than a bit influential*, Transnational Corporations Review, 8:2, 2016

JESSUP P. C., *A modern Law of Nations – An Introduction*, New York, MacMillan Co., 1948

JOHNSON JR. E., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'l L.J. S83, 2000

JOSEPH S., *Committees: Human Rights Bodies*, in Max Planck Encyclopedia of International Procedural Law [MPEiPro], 2019

JUILLARD P., *L'Evolution des Sources du Droit des Investissements*, 250 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 74, 1994

KALYANPUR N. AND NEWMANTHE A. L., *The Financialization of International Law. Perspectives on Politics*, 19, 2020

KARL J., *The treatment of small and medium- sized enterprises in international investment law*, 2017

KAUFMANN-KOHLER G., *Arbitral Precedent: Dream, Necessity or Excuse*?: The 2006 Freshfields Lecture, Arbitration International, Volume 23, Issue 3, 2007

KAUFMANN-KOHLER G., POTESTÀ M., *Investor-State Dispute Settlement and National Courts Current Framework and Reform Options*, European Yearbook of International Economic Law, Springer, 2020

KERNER A., "*Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties*.", in International Studies Quarterly, vol. 53, no. 1, 2009

KJELDGAARD-PEDERSEN A., *The International Court of Justice and the Individual*, Forthcoming in Achilles Skordas (ed), Research Handbook on the International Court of Justice, Edward Elgar, 2019

KLABBERS J., *International Law*, Second Edition, Cambridge University Press, 2017

KONRAD K. A., *Large investors, regulatory taking and investor-state dispute settlement*, European Economic Review, Volume 98, 2017

KOROWICZ M. S., *La personalité de l'individu d'après la Convention relative à la Haute-Silésie*, in Revue internationale française du droit des gens, 1938

KOROWICZ M. S., *The Problem of the International Personality of Individuals. American Journal of International Law*, 50(3), 1956

KORZUN V., *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance* (November 26, 2018), University of Pennsylvania Journal of International Law, Vol. 40, No. 1, 2018

KRAUSE C., SCHEININ M. (eds.), *International Protection of Human Rights: A Textbook*, in *Åbo Akademi University Institute for Human Rights*, 2009

KREINDLER R. H., KOPP T., *Commercial Arbitration, International*, in Max Planck Encyclopedia of Public International Law, 2013

KRIEBAUM U., *Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes*, ICSID Review - Foreign Investment Law Journal, Volume 33, Issue 1, Winter 2018

KUDRNA J., *Arbitration and Right of Access to Justice: Tips for a Successful Marriage*, New York University Journal of International Law and Politics (JILP) Online Forum, 2013

KURTZ J., '*National Treatment, Foreign Investment and Regulatory Autonomy: The Search of Protection or Something More*?' in P. Kahn (ed) *Les aspects nouveaux du droit des investissements internationaux*, Nijhoff, Leiden, 2007

LABORDE G., *The Case for Host State Claims in Investment Arbitration*, Journal of International Dispute Settlement, Volume 1, Issue 1, 2010

LATHAM S. AND OTHERS, *The Third Party Litigation Funding Law Review*, 2021

LAUREN P. G., *The Evolution of International Human Rights*, in Pennsylvania Studies in Human Rights, 3rd ed., University of Pennsylvania Press, 2011

LAUREN P. G., *The Foundations of Justice and Human Rights in Early Legal Texts and Thought*, in *The Oxford Handbook of International Human Rights Law*, D. Shelton (ed.), 2013

LAUTERPACHT H., *International Law and Human Rights*, London, Stevens, 1950

LAUTERPACHT H., *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 HARV. L. REV., 549, 1935

LEANZA P. AND PRIDAL O., *The Right to a Fair Trial. Article 6 of the European Convention on Human Rights*, Kluwer Law International, 2014

LEGUM B., *Defining Investment and Investor: Who is Entitled to Claim?*, Arbitration International, Volume 22, Issue 4, 2006

LEMMENS K., *Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?*, in *European Constitutional Law Review*, 15(4), 2019

LILLICH R. B. AND WESTON B. H., *Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims*, The American Journal of International Law, Vol. 82, No. 1, 1988

LILLICH R. B., *International Claims: Their Adjudication by National Commissions*, Syracuse: University Press, 1962

LIMA V., GOMEZ M., *Access to Justice: Promoting the Legal System as a Human Right*. in: Peace, Justice and Strong Institutions. Springer International Publishing, Cham, 2020

LIPSTEIN K., *The place of the Calvo Clause in International Law*, in British Yearbook of Int. Law, vol. 22, 1945

LOOS M., *Access to justice in consumer law*. Recht der Werkelijkheid. 36, 2015

LOWENFELD A. F., *International Economic Law*, Second Edition, Oxford University Press, 2002

LOWENFELD A. F., *Investment Agreements and International Law*, 42 COLUM. J., Transnat'l L. 123, 2003

LOWENFELD A. F., *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'l & COMP. L. 47, 2009

LUPU Y. AND VOETEN E., *The Role of Precedent at the European Court of Human Rights: A Network Analysis of Case Citations*, Paper 12, 2010

MACDONALD R. A., *Access to Justice and Law Reform*, 10 Windsor Y.B. Access Just. 287, 1990

MACKLEM P., *What is International Human Rights Law? Three Applications of a distributive account,* 52, McGill L.J. 575, 2007

MANCINI F., *Access to Justice: Individual Undertakings and EEC Antitrust Law - Problems and Pitfalls*, 22 J. Reprints Antitrust L. & ECON. 443, 1993

MANNING-CABROL D., '*The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*', Law and Policy in International Business, 26, 1995

MARCOUX J-M., *International Investment Law and Globalization, Foreign Investment, Responsibilities and Intergovernmental Organizations*, 1st edition, Routledge, 2020

MAURO M. R., *Diritto internazionale dell'economia. Teoria e prassi delle relazioni economiche internazionali,* Edizioni Scientifiche Italiane, Napoli, 2019

MAZILU F. D., "*The Rule of Exhausting Local Remedies within the Framework of Diplomatic Protection*," International Journal of Academic Research in Business and Social Sciences, Human Resource Management Academic Research Society, International Journal of Academic Research in Business and Social Sciences, vol. 5(9), 2015

MCCLURE M., KIM D., *COVID-19 and Force Majeure: Dealing with the Ongoing Waves of COVID-19*, in Kluwer Arbitration Blog, 2020

MENON P. K., *The Legal Personality of Individuals*, Sri Lanka Journal of International Law, 6, 1994

MERRILLS J., *International Dispute Settlement* (6th ed.). Cambridge: Cambridge University Press, 2017

MICHEL J., *Alternative Dispute Resolution and the Rule of Law in International Development Cooperation*, Justice and development working paper series no. 12. World Bank, Washington, DC, World Bank, 2010

MILLS A., *Rethinking Jurisdiction in International Law*, British Yearbook of International Law, Volume 84, Issue 1, 2014

MOECKLI D., SANGEETA S., AND SIVAKUMARAN S., *International Human Rights Law*, Oxford University Press, 3rd ed, 2017

MORAN N., *Preambles and the Right to Regulate*, in Engagement Between Trade and Investment. European Yearbook of International Economic Law, vol 18. Springer, Cham, 2021

MORTENSON J. D., "*International Investment Law.*", in Conceptual and Contextual Perspectives on the Modern Law of Treaties, edited by Michael J. Bowman and Dino Kritsiotis, 653-676. Cambridge: Cambridge University Press, 2018

MORTENSON J. D., *The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'l L.J. 257, 2010

MORTENSON J., *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History? American Journal of International Law*, 107(4), 2013

MOSS G., *Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?*, international investment law for the 21st century. essays in honour of Christoph Schreuer. ed. by christina binder etc. - oxford: oxford university press, 2009

MUCHLINSKI P., "*Corporations and the Uses of Law: International Investment Arbitration as a "Multilateral Legal Order*", Oñati Socio-Legal Series, 2011

MUCHLINSKI P., *Multinational Enterprises and the Law*, 2d ed. Oxford: Oxford University Press, 2007

MUCHLINSKI P., ORTINO F. AND SCHREUER C., (eds) *The Oxford Handbook of International Investment Law*, OUP, Oxford, 2008

MUCHLINSKI P., *The Framework of Investment Protection: The Content of BITs*, 2009

MULLEN T., *Access to justice in administrative law and administrative justice*. In: Palmer, E., Cornford, T., Guinchard, A. and Marique, Y. (eds.) *Access to Justice: Beyond the Policies and Politics of Austerity*. Hart: Oxford, 2016

NAPOLETANO, G., *Autorità indipendenti e agenzie amministrative*, in *Diritto costituzionale. Dizionari sistematici*, 2008

NERETS V., *Nationality of investors in ICSID arbitration*, in RGSL Research Papers no. 2, 2011

NEWCOMBE A. AND PARADELL L., *Law and Practice of Investment Treaties: Standards of Treatment*, Leiden, Kluwer, 2009

NEWCOMBE A. P., *The Boundaries of Regulatory Expropriation in International Law*. ICSID Review-Foreign Investment Law Journal, Vol. 20, No. 1, 2005

NEWMAN L. W., ZASLOWSKY D., "*The Difference Between Commercial and Investment Arbitration*", The Practice of International Litigation – 2nd Edition, 2010

NOORTMANN M., REINISCH A., RYNGAERT C., *Non-State Actors in International Law*, Bloomsbury Publishing, 2015

O'FLAHERTY M., *Human Rights and the UN: Practice before the Treaty Bodies*, Kluwer Law International, 2002

O'NEILL H., *What New International Economic Order?*, Irish Studies in International Affairs, vol. 1, no. 2, 1980

ORREGO VICUÑA F., *Individuals and Non-State Entities before International Courts and Tribunals*, J.A. Frowein and R. Wolfrum (eds), Max Planck Yearbook of United Nations Law, Volume 5, 2001

PADELLETTI M. L., *Nazionalizzazioni nel diritto internazionale*, in Digesto delle discipline pubblicistiche, vol. 10, 1995

PALOMBINO F. M., *Fair and Equitable Treatment and the Fabric of General Principles*, T.M.C. Asser Press, The Hague and Springer-Verlag, Berlin Heidelberg, 2018

PALOMBINO F. M., *Introduzione al diritto internazionale*, Laterza, Bari, 2019

PALOMBINO F. M., *Revisiting the 'humanization of international law' argument through the lens of international investment law*, in Diritto del Commercio Internazionale, fasc. 3, 2020

PAPARINSKIS M., *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, European Journal of International Law, Volume 30, Issue 2, 2019

PARK W. W. AND ROGERS C. A., *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, Austrian Yearbook on International Arbitration, Boston Univ. School of Law, Public Law Research Paper No. 14-67, Penn State Law Research Paper No. 42-2014, 2014

PARLETT K., *The Individual in the International Legal System: Continuity and Change in International Law*, Cambridge University Press, 2011

PARRA R., *The New Amendments to the ICSID Regulations and Rules and Additional Facility Rules*, 3 LAW & PRAC. INT'l Cts. & Tribunals 181, 2004

PARRY C., '*Some Considerations upon the Protection of Individuals in International Law'*, 90 RCADI, 1956

PASCALE G., *La tutela internazionale dei diritti dell'uomo nel continente africano*, Jovene editore, Napoli, 2017

PAUCIULO D., *Provisional Measures in ICSID Arbitration Proceedings: Between the Current Legal Framework and the Proposed Reform*, in Provisional Measures Issued by International Courts and Tribunals, Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds.), 2021

PAULSSON J., "*Arbitration without Privity*", 10 ICSID Rev. 232, 1995

PAULSSON J.*, Denial of Justice in International Law*. Cambridge: Cambridge University Press, 2005

PAULSSON J., (ed) *International Handbook on Commercial Arbitration: National Reports and Basic Legal Texts*, Kluwer, The Hague, 2008

PETERS A., *Beyond Human Rights: The Legal Status of the Individual in International Law*, Cambridge Studies in International and Comparative Law, J. Huston, Trans., Cambridge: Cambridge University Press, 2016

PETERSMANN E. U., "*International Rule of Law and Constitutional Justice in International Investment Law and Arbitration*" Indiana Journal of Global Legal Studies: Vol. 16: Iss. 2, Article 6, 2009

PETERSMANN E. U., *Multi-level Trade Governance Requires Multilevel Constitutionalism*, in Constitutionalism, Multilevel Trade Governance and Social Regulation 5, Christian Joerges & Ernst-Ulrich Petersmann eds., 2006

PETSCHE M. A., *The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches*, 18 WASH. U. GLOBAL STUD. L. REV. 391, 2019

PILLAY R., *The Politics of Interim Measures in International Human Rights Law*. In: Rieter E., Zwaan K. (eds) *Urgency and Human Rights*. T.M.C. Asser Press, The Hague, 2021

PISILLO MAZZESCHI R., *Diritto internazionale dei diritti umani. Teoria e prassi*, Giappichelli, 2020

PISILLO MAZZESCHI R., *Esaurimento dei ricorsi interni e diritti umani*, Torino, G. Giappichelli Editore, 2004

PISILLO MAZZESCHI R., *Il rapporto fra norme di ius cogens e la regola sull'immunità degli Stati: alcune osservazioni critiche alla sentenza della Corte Internazionale di giustizia del 3 febbraio 2012*, in *Diritti Umani e Diritto Internazionale*, Fascicolo 2, 2012

PISILLO MAZZESCHI R., *Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme*, in *Recueil des Cours*, vol. 333, 2008

POHL J., MASHIGO K. AND NOHEN A., "*Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*", OECD Working Papers on International Investment, 2012

POTESTÀ M., *The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws*, Arbitration International, Volume 27, Issue 2, 2011

PUIG S., STREZHNEV A., *The David Effect and ISDS*, European Journal of International Law, Volume 28, Issue 3, August 2017

PUSTORINO P., *Lezioni di tutela internazionale dei diritti umani*, Cacucci Editore, Bari, 2020, 2 ed.

PUSTORINO P., *Movimenti Insurrezionali e diritto internazionale*, Cacucci, Bari, 2018

PUSTORINO P., *Protezione diplomatica e interesse legittimo dell'individuo*, in Rivista di diritto internazionale, fasc. 1, 2012

QUADRI R., *Diritto internazionale pubblico*, Naples, 1968

QUADRI R., Diritto Internazionale Pubblico, third edition, 1986

RADOVIĆ R., *Beyond Consent Revisiting Jurisdiction in Investment Treaty Arbitration*, Nijhoff International Investment Law Series, Volume: 18, 2021

RAIBLE L., *Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship*, in *Leiden Journal of International Law*, 31(2), 315-334, 2018

RAMSHAW S., *Rainbow Family: Machine Listening, Improvisation and Access to Justice in International Family Law*, The Routledge Handbook of International Law and the Humanities, eds., Shane Chalmers and Sundhya Pahuja (Routledge, Forthcoming), 2020

RAPISARDI-MIRABELLI A., *La capacità giuridica internazionale degli individui*, in Studi in onore di S. Romano, III, 1940

REDFERN A. & HUNTER M., *Law and Practice of International Commercial Arbitration*, 2d ed., 1991

REIF L. C., *The Use of Conciliation or Mediation for the Resolution of International Commercial Disputes*, 45 CAN. Bus. L.J. 20, 2007

REINISCH A., & C. SCHREUER C., *International Protection of Investments: The Substantive Standards*, Cambridge: Cambridge University Press, 2020

RICKETT C., TELFER T. (eds.), *International Perspectives on Consumers' Access to Justice*. Cambridge: Cambridge University Press, 2003

RIZZO A., *Commento alla Carta dei diritti fondamentali dell'Unione europea*, Giuffré Editore, 2014

ROBERTS A., *Divergence Between Investment and Commercial Arbitration*, Proceedings of the ASIL Annual Meeting, 2012

ROBIN-OLIVIER S., *The evolution of direct effect in the EU: Stocktaking, problems, projections*, in *International Journal of Constitutional Law*, Volume 12, Issue 1, 2014

RÖLING B.V.A., *International Law in an Expanded World*, Amsterdam, Djambatan, 1960
ROUSSEAU C., *Droit International Public*, Volume 1, Paris, Sirey, 1970

SACERDOTI G., *The Proliferation of Bits: Conflicts of Treaties, Proceedings and Awards*, Bocconi Legal Studies Research Paper No. 07-02, 2007

SALACUSE J. W. & SULLIVAN N. P., *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'l L.J., 2005

SALDARRIAGA A., '*Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement*', in *ICSID Review*, 28, 2013

SALERNO F., *Diritto Internazionale*, CEDAM, 2017

SALERNO F., *Rapporti fra procedimenti concernenti le medesime istanze individuali presso diversi organismi internazionali di tutela dei diritti umani,* in *Rivista di diritto internazionale,* 1999

SANDERS P., *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Nederlands Tijdschrift Voor Internationaal Recht, 6(1), 1959

SANDRINI L.*, La concorrenza tra il Comitato dei diritti umani e la Corte europea dei diritti dell'uomo nell'esame di istanze individuali: brevi note sulle clausole di coordinamento,* in *Diritti individuali e giustizia internazionale. Liber Fausto Pocar (a cura di Venturini e Bariatti), Milano,* 2009

SANTOSUOSSO T. AND SCARLETT R., *Third-Party Funding in Investment Arbitration: Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*, 60 B.C. L. Rev. E. Supp. I.-8, 2019

SCHÄFER J. K., *Alternatives to Investment Arbitration in: International Investment Law*, 2005

SCHANER L. S., *Madrid Conference Report-Record Turnout Gathers in Madrid to Discuss the Role and Responsibilities of an Arbitrator*, arb. comm. newsl. 5-8, 2007

SCHEFFLER, S., *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, Oxford University Press, 2001

SCHILL S. W., *The Multilateralization of International Investment Law, Chapter I "Introduction: globalization and international investment law"*, Cambridge University Press, 2010

SCHILL S., *The Multilateralization of International Investment Law*, Cambridge University Press, 2009

SCHNEIDERMAN D., *Revisiting the Depoliticization of Investment Disputes,* Yearbook on International Investment Law and Policy, 2010-11 (Oxford University Press), 2011

SCHREUER C., *Consent to Arbitration through Legislation*, available online at: https://www.nomos-elibrary.de/10.5771/9783845299051-447.pdf, 2019

SCHREUER C., *Investment Disputes*, in Max Planck Encyclopedias of International Law, Oxford Public International Law, Oxford University Press, 2022

SCHWARZENBERGER G., *The ABs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary*, 9 J. PUB. L. 147, 1960

SCHWEBEL S. M., "*The Influence of Bilateral Investment Treaties on Customary International Law.*" Proceedings of the Annual Meeting (American Society of International Law), vol. 98, 2004

SCHWEBEL S., SOBOTA L., & MANTON R., *The Severability of the Arbitration Agreement*, In International Arbitration: Three Salient Problems (Hersch Lauterpacht Memorial Lectures, pp. 1-64). Cambridge: Cambridge University Press, 2020

SEELMANN-EGGEBERT S., *Amendment of the ICSID Arbitration Rules: Comment from Counsel's Perspective in: Evolution, Evaluation and Future Developments in International Investment Law*, Proceedings of the 10 Year Anniversary Conference of the International Investment Law Centre Cologne, 2021

SEIDL-HOHENVELDERN I., *International Economic Law*, 3rd revised edition, Kluwer Law International, 1999

SHAW M., *The international protection of human rights*, in *International Law*, Cambridge: Cambridge University Press, 2008

SHELTON D. AND GOULD A., *Positive and Negative Obligations*, in The Oxford Handbook of International Human Rights Law, Dinah Shelton (ed), Oxford Handbooks in Law, 2013

SHEN J., *'National Sovereignity and Human Rights in a Positive Law context'*, in *Brooklyn Journal of International Law*, 26, 417, 2000

SIAN D. C. G., "*Agreements to Refer Disputes to Arbitration*.", Singapore Journal of Legal Studies, 1993

SIM L. C., *Case Study of YUKOS. In: The Rise and Fall of Privatization in the Russian Oil Industry*. St Antony's Series. Palgrave Macmillan, London, 2008

SLAUGHTER AM., *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'l L. & POL'y 717, 1995

SMITH R. K. M., *International Human Rights Law*, Oxford University Press, 9th ed, 2019

SNYDER E., *Foreign Investment Protection: A Reasoned Approach*, 61 MICH. L. REV. 1087, 1963

SOHN L. & BAXTER B., *Draft Convention on the International Responsibility of States for Injuries to Aliens*, American Journal of International Law, 55(3), 1961

SOLAS G. M., *Third Party Funding: Law, Economics and Policy*, Cambridge University Press, 2019

SPERDUTI G., '*L'individu et le droit international*', 90 RCADI, 1956

SPERDUTI G., *L'individuo nel Diritto Internazionale*, Milano, Giuffrè Ed., 1950

SPERDUTI G., *L'individuo nel diritto internazionale: Contributo all'interpretazione del diritto internazionale secondo il principio dell'effettività*, Giuffrè, Milano, 1950

SPERDUTI G., *Sulla soggettività internazionale*, in Rivista di diritto internazionale, 1972

SPIRO P. J., *A New International Law of Citizenship*, in *American Journal of International Law*, 694, 2011

SPIROPOULOS J., *'L'individu et le droit international'*, 30 RdC V, 1929

STEIN T., *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, American Journal of International Law, 78(1), 1984

STEINGRUBER A. M., *The Mutable and Evolving Concept of 'Consent' in International Arbitration – Comparing rules, laws, treaties and types of arbitration for a better understanding of the concept of 'Consent'*, Oxford U Comparative L Forum 2 at ouclf.law.ox.ac.uk, 2012

STERIO M., *The Evolution of International Law*, 31 B.C. Int'l & Comp. L. Rev. 213, 2008

STORSKRUBB E., *Emergency Arbitration: A Maturing and Evolving Procedure*, in: Axel Calissendorff and Patrik Schöldström (Ed.), Stockholm Arbitration Yearbook 2020, Wolters Kluwer, 2020

SUCHARITKUL S., *State Responsibility And International Liability Under International Law*, 18 Loyola of Los Angeles Int'l. & Comp. L.J., 1996

SUPNIK K. M., "*Making amends: amending the ICSID Convention to reconcile competing interests in international investment law*." Duke Law Journal, vol. 59, no. 2, 2009

TANCREDI A., *Lo Stato nel diritto internazionale tra effettività e legalità/legittimità*, in Ars Interpretandi, 16, 2011

TANZI A., *Introduzione al diritto internazionale contemporaneo*, CEDAM, 5th edition, 2016

TANZI A., *On judicial autonomy and the autonomy of the parties in international adjudication, with special regard to investment arbitration and ICSID annulment proceedings*, Leiden Journal of International Law, 33(1), 2020

TIMMER L. J.E., *The Meaning of 'Investment' as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre*, 29, Journal of International Arbitration, Issue 4, 2012

TIMOFEYEV M., '*Money Makes the Court Go Round: The Russian Constitutional Court's Yukos Judgment*', Verfassungsblog on Matters of Constitutional Law, 2017

TITI C., *Applicable Law in Investment Agreements*, in Oxford Bibliographies, 2019

TOMUSCHAT C., *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, in Recueil des Cours 281, 1999

TORIELLO P., *The additional facility of the international centre for settlement of investment disputes*, The Italian Yearbook of International Law Online, 4(1), 1978

TRAVI, A., *Gli artt. 24 e 111 della Costituzione come principi unitari di garanzia*, in Tutela dei diritti e sistema ordinamentale: atti del 6. Convegno Nazionale 31 marzo/1-2 aprile 2011, Capri, 2012

TRIANTAFILOU E. E., *Contemporaneity and Evolutive Interpretation under the Vienna Convention on the Law of Treaties*, in *ICSID Review*, Vol. 32, No. 1, 2017

VALASEK M., MARTIN AND DUMBERRY P., *Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Dispute*, 26(1) ICSID Review-Foreign Investment Law Journal, 2011

VAN AAKEN A., *Fragmentation of International Law: The Case of International Investment Protection*, published in: Finnish Yearbook of International Law (2008) Vol. XVII, U. of St. Gallen Law & Economics Working Paper No. 2008-01, 2008

VAN HARTEN G. AND MALYSHEUSKI P., *Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants*, Osgoode Legal Studies Research Paper No. 14/2016, 2016

VAN HARTEN G., *Private authority and transnational governance: the contours of the international system of investor protection*, Review of International Political Economy, 12:4, 2005

VAN HOUTTE H., *'Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina'*, 48 ICLQ 625–38, 1999

VANDEVELDE K., *A Brief History of International Investment Agreements*, University of California at Davis Journal of International Law and Policy, 12, 2009

VARGIU P., *Stakeholders of Investment Arbitration: establishing a dialogue among arbitrators, states, investors, academics and other actors in international investment law*,

in K. Fach Gomez (ed.), *Private Actors in International Investment Law*, Special Issue of the European Yearbook of International Economic Law, Springer, 2021

VERDIER P., VERSTEEG M., *International Law in National Legal Systems: An Empirical Investigation*, in *American Journal of International Law*, 109(3), 2015

VERWEY W. & SCHRIJVER N., *The taking of foreign property under international law: A new legal perspective?*, Netherlands Yearbook of International Law, 15, 1984

VICUÑA F. O., *Claims, International*, in Max Planck Encyclopedia of Public International Law, 2010

VILJANEN J., *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, 2008

VIÑUALES J. E., *The Sources of International Investment Law*, S. Besson and J. d'Aspremont (eds.), The Oxford Handbook on the Sources of International Law, Oxford University Press, 2015

VOGIATZIS N., *The admissibility criterion under article 35(3)(b) echr: a 'significant disadvantage' to human rights protection?*, in *International and Comparative Law Quarterly*, 65(1), 2016

VOGIATZIS N., *When Reform Meets Judicial Restraint Protocol 15 Amending the European Convention on Human Rights*, in *Northern Ireland Legal Quarterly*, 66(2), 2015

VON CARLOWITZ L., '*Settling Property Issues in Complex Peace Operations: The CRPC in Bosnia and Herzegovina and the HPD/CC in Kosovo'*, 17 LJIL, 2004

WAIBEL M., *Subject Matter Jurisdiction: The Notion of Investment* 19 ICSID Rep, (eds. Jorge Viñuales and Michael Waibel), Cambridge, University Press, 2021

WAIBEL M., *Subject matter jurisdiction: The notion of investment*. ICSID Reports, 19, 25-82, 2021

WEISSBRODT D., AOLAIN F., & RUMSEY M., *The development of international human rights law*, Taylor and Francis, 2017

WELLMAN C., *Judicial Recognition of Human Rights*, in *The Moral Dimension of Human Rights*, Oxford University Press, Chapter 9, 2010

WILLIAMS D. AND WALTON, J. "*Costs and Access to International Arbitration*", 80 (4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, 2014

WILSKE S., RAIBLE M. & MARKET L., *International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a Status Thing*, 1 CONTEMP. Asia ARB. J. 213, 2008

WILSKE S., RAIBLE M. & MARKET L., *International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a Status Thing*, 1(2) contemp. asia arb. j. 213, 2008

WISNER R., & GALLUS N., *Nationality Requirements in Investor-State Arbitration*, The Journal of World Investment & Trade, 5(6), 2004

WOLFRUM R., *Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia?*, in From Bilateralism to Community Interest: Essays in Honour of Bruno Simma, Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder (eds), Oxford University Press, 2011

WOUTERS J. ET AL, *International Law: a European perspective*, Oxford: Hart, 2019

WOUTERS J., RYGAERT C., RUYS T. AND DE BAERE G., *International Law: A European Perspective*, Oxford, Hart, 2018

WRIGHT Q., *Due Process and International Law. American Journal of International Law*, 40(2), 1946

YACKEE J*., Investor-State Dispute Settlement at the Dawn of International Investment Law: France, Mauritania, and the Nationalization of the MIFERMA Iron Ore Operations*, American Journal of Legal History, Volume 59, Issue 1, 2019

ZAGREBELSKY V., DE SENA P., BARTOLE S., (eds.), *Commentario breve alla convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, CEDAM, Padova, 2012

ZAGREBELSKY V., *Manuale dei diritti fondamentali in Europa*, 2 ed., 2019

ZANGHÌ C., PANELLA L., *La protezione internazionale dei diritti dell'uomo*, quarta edizione, Giappichelli, 2019

ZARRA G., *Parallel Proceedings in Investment Arbitration*, Den Haag and Torino, Eleven International Publishing and Giappichelli, 2017

ZICCARDI P., *La costituzione dell'ordinamento internazionale*, Giuffrè, Milano, 1943

INTERNATIONAL TREATIES AND DOCUMENTS

Acuerdo entre la República de Colombia y el Reino de España para la promoción y protección recíproca de inversiones, 2021

African Charter on Human and Peoples' Rights, 1981

American Convention on Human Rights, 22 November 1969

Arbitral Commission on Property, Rights and Interests in Germany established by the *Convention on the Settlement of Matters Arising out of the War and the Occupation*, signed at Bonn on 26 May 1952

Arbitration (Additional Facility) Rules (International Centre for Settlement of Investment Disputes [ICSID]), created on September 27, 1978

Argentina-United Arab Emirates BIT, 2018

Charter of Fundamental Rights of the European Union, [2012/C 326/02], 2000

Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, provisionally entered into force on Sept. 21st, 2017

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, 1985

Convention between the United States and Mexico for reciprocal settlement of claims, signed in Washington, September 8, 1923

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, 1979

Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, 1989

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159, 1965

Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950

Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952

Council of Europe, *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, ETS 155 11 May 1994

Council of Europe, *Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention*, CETS 194, 13 May 2004

Council of Europe, *Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms*, CETS 213, 24 June 2004

Council of Europe, *Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms*, CETS 214, 2 October 2013

Dayton Peace Agreement, Annex 7: Agreement on Refugees and Displaced Persons, 14 December 1995

Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovinia, 21 November 1995

Energy Charter Treaty 2080 UNTS 100, ECT, 1994

EU - Viet Nam Investment Protection Agreement (EVFTA) (2019), signed on 30th June 2019 and entered into force on August 1st, 2020

General Treaty for the Re-establishment of Peace, signed 30 March 1856, entered into force 27 April 1856, 114 CTS 409, 1856

Geneva Convention on the Execution of Foreign Arbitral Awards, 1927

Geneva Protocol on Arbitration Clauses, 27 L.N.T.S. 157, 1923

Germany–Pakistan BIT, signed 25 November 1959, Bundesgesetzblatt, Pt II, No. 33, 6 July 1961
Havana Charter, United Nations Conference on Trade and Employment. *Havana Charter for an International Trade Organization*, March 24, 1948

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, 1965

International Covenant on Civil and Political Rights, 16 December 1969

International Covenant on Civil and Political Rights, adopted by General Assembly Resolution N.U. 2200° (XXI) of 16 December 1966

League of Nations, *Covenant of the League of Nations*, 28 April 1919

London Agreement, *Agreement for the prosecution and punishment of the major war criminals of the European Axis* of 1945

Optional Protocol to the International Covenant on Civil and Political Rights, 1966

Organisation of American States (OAS), *American Convention on Human Rights 'San José Pact'*, Costa Rica, 22 November 1969

Statute of The International Court of Justice, 18 April 1946

The Anglo-Italian Conciliation Commission established under Article 83 of the treaty of Peace with Italy (United Kingdom - Italy), 1952-1961

Treaty concerning the Recognition of the Independence of Poland and the Protection of Minorities (signed 28 June 1919, entered into force 10 January 1920, 1919

Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 November 1962), 1959

Treaty for the Settlement of Affairs in the East [signed 13 July 1878, entered into force 3 August 1878] (1908) 2 AJIL Supp 401, 1878

Treaty of Amity, Commerce and Navigation between Great Britain and the United States (signed 19 November 1794) (1793–95), 1794

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958

Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, 1969

INTERNATIONAL CASE LAW

EUROPEAN COURT OF HUMAN RIGHTS

"Blondje" v. the Netherlands (dec.) app. no. 7245/09, 15 September 2009

A, B and C v. Ireland [GC], app. no. 25579/05, 16 December 2010

Abdoella v. the Netherlands, app. no. 12728/87, 25 November 1992

Agbovi v. Germany (dec.), app. no. 71759/01, 25 September 2006

Agrotexim and Others v. Greece, app. no. 14807/89, 24 October 1995

Ahunbay and Others v. Turkey (dec.), app. no. 6080/06, 29 January 2019

Aizpurua Ortiz and others v. Spain, app. no. 42430/05, 28 June 2010

Al-Moayad v. Germany (dec.), app. no. 35865/03, 20 February 2007

Al-Skeini v. United Kingdom [GC], app. no. 55721/07, 7 July 2011

Aliev v. Georgia, app. no. 522/04, 13 April 2009

Amarandei and Others v. Romania, app. no. 1443/10, 26 July 2016

Andronicou and Constantinou v. Cyprus, app. no. 86/1996/705/89, 9 October 1997

Apinis v. Latvia (dec.), app. no. 46549/06, 20 September 2011

Aquilina v. Malta [GC], app. no. 25642, 29 April 1999

Assanidze v. Georgia [GC], app. no. 71503/01, 8 April 2004

Ataykaya v. Turkey, app. no. 50275/08, 22 July 2014

Ayuntamiento de Mula v. Spain (dec.), app. no. 55346/00, 1 February 2001

Azinas v. Cyprus [GC], app. no. 56679/00, 28 April 2004

Bagheri and Maliki v. the Netherlands (dec.), app. no. 30164/06, 15 May 2007

Bakanova v. Lithuania, app. no. 11167/12, 31 August 2016

Banković and Others v. Belgium and Others (dec.) [GC], app. no. 52207/99, 12 December 2001

Bazorkina v. Russia, app. no. 69481/01, 11 December 2006

Beizaras and Levickas v. Lithuania, app. no. 41288/15, 14 May 2020

Benavent Díaz v. Spain (dec.), app. no. 46479/10, 31 January 2017

Bencheref v. Sweden (dec.), app. no. 9602/15, 5 December 2017

Bijelić v. Montenegro and Serbia, app. no. 11890/05, 6 November 2009

Bivolaru v. Romania, app. no. 28796/04, 28 May 2017

Blečić v. Croatia [GC], app. no. 59532/00, 8 March 2006

Bock v. Germany (dec.), app. no. 22051/07, 19 January 2010

Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], app. no. 45036/98, 30 June 2005

Burden v. The United Kingdom [GC], app. no. 13378/05, 29 April 2008

Burdov v. Russia, app. no. 33509/04, 4 May 2009

Buzadji v. The Republic of Moldova [GC], app. no. 23755/07, 5 July 2016

Canea Catholic Church v. Greece, app. no. 25528/94, 16 December 1997

Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], app. no. 47848/08, 17 July 2014

Centro Europa 7 S.r.l. and Di Stefano v. Italy [GC], app. no. 38433/09, 7 June 2012

Comingersoll S.A. v. Portugal, GC, Rec. app. no. 35382/97, 6 April 2000

Cordella and Others v. Italy, app. no. 54414/13 and 54264/15, 24 June 2019

D.H. and Others v. the Czech Republic [GC], app. no. 57325/00, 13 November 2007

De Becker v. Belgium, Commission decision, app. no. 214/5, 27 March 1962

De Pace v. Italy, app. no. 22728/03, 1 December 2008

Delecolle v. France [GC], app. no. 37646/13, 25 January 2019

Denisov v. Ukraine [GC], app. no. 76639/11, 25 September 2018

Di Salvo v. Italy (dec.), app. no. 16098/05, 11 January 2007

Dobbertin v. France, app. no. 13089/87, 25.2.1993

Doğan and Çakmak v. Turkey (dec.), app. nos. 28484/10 and 58223/10, 14 May 2019

Döşemealtı Belediyesi v. Turkey (dec.), app. no. 50108/06, 23 March 2010

Drijfhout v. Netherlands (dec.), app. no. 51721/09, 22 February 2011

Drozd and Janousek v. France and Spain, app. no. 12747/87, 26 June 1992

Dudgeon v. the United Kingdom, app. no. 7525/76, 24 February 1983

Duringer and Others v. France (dec.), app. nos. 61164/00 and 18589/02, 4 February 2003

Dvořáček and Dvořáčková v. Slovakia, app. no. 30754/04, 28 October 2009

Eğitim ve Bilim Emekçileri Sendikası v. Turkey, app. no. 20641/05, 25 December 2012

Enukidze and Girgvliani v. Georgia, app. no. 25091/07, 26 July 2011

Fabris and Parziale v. Italy, app. no. 41603/13, 19 March 2020

Folgerø and Others v. Norway (dec.), app. no. 15472/02, 29 June 2007

Forcadell i Lluis and Others v. Spain (dec.), app. no. 75147/17, 7 May 2019

Fressoz and Roire v. France [GC], app. no. 29183/95, 21 January 1999

Gherghina v. Romania (dec.) [GC], app. no. 42219/07, 9 July 2015

Giusti v. Italy, app. no. 13175/03, 18 October 2011

Gogitidze and Others v. Georgia, app. no. 36862/05, 12 August 2015

Göktan v. France, app. no. 33402/96, 2 October 2002

Golder v. United Kingdom, app. no. 4451/70, 21 February 1975

Gorraiz Lizarraga and others v. Spain, app. no. 62543/00, 10 November 2004

Grande Stevens and Others v. Italy, app. no. 18640/10, 4 March 2014

Greek Federation of Bank Employees' Unions v. Greece (dec.), app. no. 24581/94, 6 April 1995

Gürdeniz v. Turkey (dec.), app. no. 59715/10, 18 March 2014

Hadrabová and Others v. Czech Republic (dec.), app. nos. 42165/02 and 466/03, 25 September 2007

Harkins v. the United Kingdom (dec.) [GC], app. no. 71537/14, 15 June 2017

Hirsi Jamaa and others v. Italy [GC], app. no. 27765/09, 23 February 2012

Hristozov and other v. Bulgaria, app. nos. 47039/11 and 358/12, 29 April 2013

Ilaşcu and Others v. the Republic of Moldova and Russia, app. no. 48787/99, 8 July 2004

Ionescu v. Romania (dec.), app. no. 36659/04, 1 June 2010

Ireland v. United Kingdom, app. no. 5310/71, 18 January 1978
Jeronovičs v. Latvia [GC], app. no. 44898/10, 5 July 2016

Kafkaris v. Cyprus (dec.), app. no. 21906/04, 11 April 2006

Kalfagiannis and Pospert v. Greece (dec.), app. no. 74435/14, 9 June 2020

Karakó v. Hungary, app. no. 39311/05, 28 July 2009

Karoussiotis v. Portugal, app. no. 23205/08, 1 May 2011

Karpylenko v. Ukraine, app. no. 15509/12, 11 May 2016

Kemmache v. France (no. 3), app. no. 17621/91, 24 November 1994

Khadzhialiyev and Others v. Russia, app. no. 3013/04, 6 April 2009

Kiousi v. Greece (dec.), app. no. 52036/09, 20 September 2011

Klass and Others v. Germany, app. no. 5029/71, 6 September 1978

Koç and Tosun v. Turkey (dec.), app. no. 23852/04, 13 November 2008

Kongresna Narodna Stranka and Others v. Bosnia and Herzegovina (dec.), app. no. 414/11, 26 April 2016

Konstantin Markin v. Russia [GC], app. no. 30078/06, 22 March 2012

Kotilainen and others v. Finland, app. no. 62439/12, 17 December 2020

Kotov v. Russia [GC], app. no. 54522/00, 3 April 2012

Kozacıoğlu v. Turkey [GC], app. no. 2334/03, 19 February 2009

Molla Sali v. Greece [GC], app. no. 20452/14 19 December 2018

Municipal Chamber of Antilly v. France (dec.), app. no. 45129/98, 23 November 1999

Mutu and Pechstein v. Switzerland, app. nos. 40575/10 and 67474/10, 4 February 2019

N.D. and N.T. v. Spain [GC], app. nos. 8675/15 and 8697/15, 13 February 2020

Nassau Verzekering Maatschappij N.V. v. the Netherlands (dec.), app. no. 57602/09, 4 October 2011

Nicolae Virgiliu Tănase v. Romania [GC], app. no. 41720, 25 June 2019

OAO Neftyanaya Kompaniya Yukos v. Russia, app. no. 14902/04, 8 March 2012

Olaechea Cahuas v. Spain, app. no. 24668/03, 10 August 2006

Oliyevskyy v. Ukraine, (dec.), app. no. 65117/11, 14 January 2020

Otto v. Germany (dec.), app. no. 27574/02, 24 November 2005

Paksas v. Lithuania [GC], app. no. 34932/04, 6 January 2011

Paladi v. Moldova [GC], app. no. 39806/05, 10 March 2009

Papachelas v. Greece [GC], app. no. 31423/96, 25 March 1999

Paposhvili v. Belgium [GC], app. no. 41738/10, 13 December 2016

Paşa and Erkan Erol v. Turkey, app. no. 51358/99, 23 May 2007

Pauger v. Austria, Commisison decision, app. no. 24872/94, 9 January 1995

Petrović v. Serbia, app. no. 40485/08, 15 July 2014

Philis v. Greece (dec.), app, no. 28970/95, 17 October 1996

POA and Others v. the United Kingdom (dec.), app. no. 59253/11, 21 May 2013

Popov v. Moldova (no. 1), app. no. 74153/01, 17 April 2006

Portu Juanenea and Sarasola Yarzabal v. Spain, app. no 1653, 13 May 2018

Şimşek, Andiç and Boğatekin v. Turkey (dec.), app. nos. 75845/12, 79989/12 and 75856/12, 17 March 2020

Sindicatul "Păstorul cel Bun" v. Romania [GC], app. no. 2330/09, 9 July 2013

Slovenia v. Croatia [GC], (dec.), app. no. 54155/16, 18 November 2020

Soering v. the United Kingdom, app. no. 14038/88, 7 July 1989

Stukus and others v. Poland, app. no. 12543/03, 1 July 2008

Sürmeli v. Germany (dec.), app. no. 75529/01, 29 April 2004

Tagiyev and Huseynov v. Azerbaijan, app. no. 13274/08, 5 March 2020

Tănase v. Moldova [GC], app. no. 7/08, 27 April 2010

The Former King of Greece and Others v. Greece, app. no. 25701/94, 23 November 2000

Tinnelly & Sons Ltd and Others and McElduff and Others v. United Kingdom, app. no. 20390/92, 10 July 1998

Tsalikidis and others v. Greece, app. no. 73974/14, 16 February 2018

Tyrer c. Regno Unito, app. no. 5856/72, 25 April 1978

Vallianatos and others v. Greece [GC], app. nos. 29381/09 and 32684/09, 7 November 2013

Van der Tang v. Spain, app. no. 19382/92, 13 July 1995

Varnava and others v. Turkey [GC], app. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009

Velikova v. Bulgaria (dec.), app. no. 41488/98, 4 October 2000

Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) [GC], app. no. 32772/02, 30 June 2009

Vučković and Others v. Serbia (preliminary objection) [GC], app. nos. 17153/11, 17157/11, 17160/11, 17163/11, 17168/11, 17173/11, 17178/11, 17181/11, 17182/11, 17186/11, 17343/11, 17344/11, 17362/11, 17364/11, 17367/11, 17370/11, 17372/11, 17377/11, 17380/11, 17382/11, 17386/11, 17421/11, 17424/11, 17428/11, 17431/11, 17435/11, 17438/11, 17439/11, 17440/11 and 17443/11, 25 March 2014

Yaşa v. Turkey, app. no. 22281/93, 27 June 2002

Ziętal v. Poland, app. no. 64972/01, 12 August 2009

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction, 4 August 2011

AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005

Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983

Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, (1997) 4 ICSID Rep. 246

Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award of 14 July 2006

Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, 28 July 2015

Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017

Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis, ICSID Case No. ARB/95/2, award, 13 January 1997

Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999

CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003

Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008

EuroGas Inc and Belmont Resources Inc v. Slovak Republic, ICSID Case No ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures, 17 March 2015

Europe Cement Investment & Trade S.A. v. Republic of Turkey, ICSID Case No ARB(AF)/07/2, Award, 13 August 2009

Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997

Giovanni Alemanni and others v. Argentine Republic, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014

Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia, ICSID Case Nos ARB/05/18 and ARB/07/15, Award, 3 March 2010

Loewen Group Inc and Raymond Loewen v. United States of America, ICSID Case No ARB/98/3, Final Award of 26 June 2003

Ltd Benvenuti et Bonfanti srl v The Government of the People's Republic of the Congo, ICSID Case No. ARB/77/2, Award, 8 August 1980

Marfin Investment Group Holdings SA, Alexandros Bakatselos and Others v Cyprus, ICSID ARB/13/27, Award of 26 July 2018

Mondev International Ltd. v. United States of America, ICSID Case No. ARB/99/2, Award of 11 October 2002

RSM Production Corp v Saint Lucia, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014

S & T Oil Equipment and Machinery Ltd. v. Romania, ICSID Case No ARB/07/13, Order of Discontinuance of the Proceeding, 16 July 2010

Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on jurisdiction, 3 August 2004

Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction I, 27 November 1985

Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award of 7 December 2011

Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006

Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, Preliminary Award, 53 ILR 389, 27 November 1975

The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award,

6 May 2013

Toto Costruzioni Generali SpA v. Lebanon, ICSID Case No. ARB/07/12, *Decision on Jurisdiction* of 11 September 2009

Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996
Tulip Real Estate and Development Netherlands BV v. Turkey, ICSID ARB/11/28, Decision on Annulment of 30 December 2015

Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/13/11, Award, 25 July 2017

Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, 8 May 2008

Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No ARB/05/15, 2009

HUMAN RIGHTS COMMITTEE

A.G. et al. v. Angola, UN Doc. CCPR/C/129/D/3106/2018-3122/2018, 21 July 2020

A.M.vc. Denmark, UN Doc. CCPR/C/OP/1, p. 32 (1984), 23 July 1982

Abromchik v. Belarus, UN Doc. CCPR/C/122/D/2228/2012, 20 March 2018

Abubakar Amirov and Aïzan Amirova v. Russian Federation, UN Doc. CCPR/C/95/D/1447/2006, 2 April 2009

Alberto Velásquez Echeverri v. Colombia, UN Doc. CCPR/C/129/D/2931/2017, 21 July 2021

Alekseev v. Russian Federation, UN Doc. CCPR/C/109/D/1873/2009, 25 October 2013

Althammer c. Australia, UN Doc. CCPR/C/78/D/998/2001, 8 August 2003

Annakkarage Suranjini Sadamali Pathmini Peiris v. Sri Lanka, UN Doc. CCPR/C/103/D/1862/2009, 26 October 2011

Anver Prince v. South Africa, UN Doc. CCPR/C/91/D/1474/2006, 14 November 2007

Aumeeruddy-Cziffra et al. v. Mauritius, UN Doc. CCPR/C/12/D/35/1978, 9 April 1981

Bakhytzhan Toregozhina v. Kazakhstan, UN Doc. CCPR/C/129/D/2503/2014, 23 July 2020

Beydon et al. v. France, UN Doc. CCPR/C/85/D/1400/2005, 16 July 2004

Dmitry Koreshkov v. Belarus, UN Doc. CCPR/C/129/D/2482/2014, 23 July 2020

E.W. et al. v. Netherlands, UN Doc. CCPR/C/47/D/429/1990, 19 November 1990

Erzhan Sadykov v. Kazakhstan, UN Doc. CCPR/C/129/D/2456/2014, 23 July 2020

Fanali v. Italy, UN Doc. CCPR/C/OP/2, p. 99 (1990), 31 March 1983

Gennady Yakovitsky and Aleksandra Yakovitskaya, UN Doc. CCPR/C/128/D/2789/2016, 12 March 2016

Gobin v. Mauritius, UN Doc. CCPR/C/72/D/787/1997, 25 November 1996

Humanitarian Law Center v. Serbia, UN Doc. CCPR/C/89/D/1355/2005, 26 March 2007

Idieva v. Tajikistan, UN Doc. CCPR/C/95/D/1276/2004, 31 March 2009

Isabel López Martínez et al. v. Colombia, UN Doc. CCPR/C/128/D/3076/2017, 11 March 2020

Kohoutek v. Repubblica ceca, UN Doc. CCPR/C/93/D/1448/2006, 2 September 2008

Koreshkov v. Belarus, UN Doc. CCPR/C/121/D/2168/2012, 9 November 2017

Kouidis v. Greece, UN Doc. CCPR/C/86/D/1070/2002, 28 March 2006

Kovaleva and Kozyar v. Belarus, UN Doc. CCPR/C/106/D/2120/2011, 29 October 2012

Länsman and consorts v. Finland, UN Doc. CCPR/C/52/D/511/1992, 26 October 1994

Linderholm v. Croatia, UN Doc. CCPR/C/66/D/744/1997, 27 July 1999

Lopez Burgos v. Uruguay, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981

Lovelace v. Canada, UN Doc. CCPR/C/13/D/24/1977, 30 July 1981

Lozenko v. Belarus, UN Doc. CCPR/C/112/D/1929/2010, 24 October 2014

Lukpan Akhmedyarov v. Kazakhstan, UN Doc. CCPR/C/129/D/2535/2015, 23 July 2020

Mahabir v. Austria, UN Doc. CCPR/C/82/D/944/2000, 11 November 2004

Mbenge v. Zaire, UN Doc. CCPR/C/OP/2(1990), 25 March 1983

Mikhail Timoshenko et al. v. Belarus, UN Doc. CCPR/C/129/D/2461/2014, 23 July 2020

Mukunto v. Zambia, UN Doc. CCPR/C/66/D/768/1997, 23 July 1999

Murat Telibekov v. Kazakhstan, UN Doc. CCPR/C/128/D/2687/2015, 13 March 2020

Natalya Pinchuk v. Belarus, UN Doc. CCPR/C/112/D/2165/2012, 24 October 2014, para 7.6

Oldřiška (Olga) Jünglingová v. The Czech Republic, UN Doc. CCPR/C/103/D/1563/2007, 24 October 2011

Oleg Volchek v. Belarus, UN Doc. CCPR/C/129/D/2337/2014, 23 July 2020

Persan v. Czech Republic, UN Doc. CCPR/C/95/D/1479/2006, 28 April 2009

Picq v. France, UN Doc. CCPR/C/94/D/1632/2007, 28 May 2007

Pratt and Morgan v. Jamaïque, UN Doc. CCPR/C/35/D/225/1987, 6 April 1989

Rabbae et al. v. Netherlands, UN Doc. CCPR/C/117/D/2124/2011, 14 July 2016

Ramil Kaliyev v. Russian Federation, UN Doc. CCPR/C/127/D/2977/2017, 8 November 2019

Rivera Fernández v. Spain, UN Doc. CCPR/C/85/D/1396/2005, 22 November 2005

S.Y. c. the Netherlands, UN Doc. CCPR/C/123/D/2392/2014, 28 August 2018

Sabas Eduardo Pretelt de la Vega v. Colombia, UN Doc. CCPR/C/129/D/2930/2017, 21 July 2020

Saidova v. Tajikistan, UN Doc. CCPR/C/81/D/964/2001, 8 July 2004

Sergei Sotnik v. Russian Federation, UN Doc. CCPR/C/129/D/2478/2014, 23 July 2020

Sergio Euben Lopez Burgos v. Uruguay, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981

Siarhei Malashenak v. Belarus, UN Doc. CCPR/C/129/D/2486/2014, 23 July 2020

Singarasa v. Sri Lanka, UN Doc. CCPR/C/81/D/1033/2001, 21 July 2004

Sudalenko v. Belarus, UN Doc. CCPR/C/115/D/2016/2010, 5 November 2015

Tatsiana Reviako v. Belarus, UN Doc. CCPR/C/129/D/2455/2014, 23 July 2020

Tolipkhuzhaev v. Uzbekistan, UN Doc. CCPR/C/96/D/1280/2004, 22 July 2009

Umsinai Isaeva v. Uzbekistan, UN Doc. CCPR/C/95/D/1163/2003, 20 March 2009

V.M.R.B. v. Canada, UN Doc. CCPR/C/33/D/236/1987, 25 June 1987
Vladimir Malei v. Belarus, UN Doc. CCPR/C/129/D/2404/2014, 23 July 2020

Wallmann c. Austria, UN Doc. CCPR/C/80/D/1002/2001, 1 April 2004

Young-kwan Kim et al. v. Republic of Korea, UN Doc. CCPR/C/112/D/2179/2012, 15 October 2014

Z.H. v. Australia, UN Doc. CCPR/C/107/D/1957/2010, 21 March 2013

Zhanna Baytelova, UN Doc. CCPR/C/129/D/2520/2015, 23 July 2020

Zhurin v. Russian Federation, UN Doc. CCPR/C/82/D/851/1999, 2 November 2004

OTHER INTERNATIONAL COURTS AND TRIBUNALS

Access to German Minority Schools in Upper Silesia, Germany v Poland, Advisory Opinion, (1931) PCIJ Series A/B no 40, ICGJ 286 (PCIJ 1931), 15th May 1931

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012

Amin v Brown, Decision on preliminary question, [2005] EWHC

Anonymous v Netherlands (Ministry for Foreign Affairs), 18 March 2003, Official Case No KG 03/137

Appeal from a Judgement of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (the Peter Pázmány University), 15 December 1933

Avena and Other Mexican Nationals (Mexico v. United States of America), Judgement, I.C.J. Reports 2004 p. 12

Barbani Duarte et al. v. Uruguay, Merits, Reparations, and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 234, para. 122 (Oct. 13, 2011)

Case concerning East Timor [Portugal v Australia] [1995] ICJ Rep 89

CJEU, Case C-248/16, *Slovak Republic v. Achmea*, ECLI:EU:C:2018:158

Damien Ndarisigaranye c. Burundi, UN Doc. CAT/C/62/D/493/2012, 10.11.2017

Danilo Dimitrijevic c. Serbia and Montenegro, UN Doc. CAT/C/35/D/172/2000, 16.11.2005

Ecuador c. United States, Award, 29 September 2012

Estela Deolinda Yrusta and Alejandra del Valle Yrusta c. Argentina, UN Doc. CAT/C/65/D/778/2016, 23.11.2018

Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No 2011-17, Solicitud de *cautio judicatum solvi*, 12 February 2013

Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No 2011-17, Procedural Order No. 14, 11 March 2013

Hesham Talaat M Al-Warraq v Indonesia, UNCITRAL, Final Award of 15 December 2014

Interhandel Case, Judgment of March 21st, 1959: I.C.J. Reports 1959, p. 6

Jean Ndagijimana c. Burundi, UN Doc. CAT/C/62/D/496/2012, 30.12.2017

Joined Cases from C-128/09 to C-131/09, C-134/09 and C-135/09

Judgment no. 21581/2011 of the Italian Civil Cassation

Jurisdiction of the Courts of Danzig, Advisory Opinion, 3 March 1928

Kaunda v. President of the Republic of South Africa. Case CCT 23/04. 2004

La Grand (Germany v. United States of America), Judgement, I.C.J. Reports 2001, p. 466

Manuel Garcia Armas et al v Bolivarian Republic of Venezuela, UNCITRAL PCA Case No 2016-08, Procedural Order No 9, Decision on Request for Provisional Measures

Minority Schools in Albania, Advisory Opinion, PCIJ Series A/B no 64, ICGJ 314 (PCIJ 1935), 6th April 1935

NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Judgment of the Court of 5 February 1963

Oil Platforms (Iran v United States), ICJ, Judgment of 6 Novembre 2003

Oxus Gold plc v. Republic of Uzbekistan, UNCITRAL Case, Final Award (17 December 2015)

Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment), IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion: I.C.J. Reports 1949

South American Silver Limited v. Plurinational State of Bolivia, PCA Case No 2013-15, Procedural Order No. 10 (11 January 2016)

Velásquez Rodríguez v. Honduras, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, para. 91 (June 26, 1987)

Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227

UN DOCUMENTS AND MISCELLANEOUS

Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia

ALARCON M. J., *ICSID Reform: Balancing the Scales?*, in Kluwer Arbitration Blog *Netherlands model Investment Agreement* (2019)

AMERICAN BAR ASSOCIATION, *The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets*, 2014

AMERICAN LAW INSTITUTE, '*Waiver by Prior Agreement: The Calvo Clause' in American Law Institute Restatement of the Law: Second Foreign Relations Law of the United States*, American Law Institute St Paul Minnesota, 1958–62

Amin v Brown, [2005] EWHC 1670 (Ch), ILDC 375 (UK 2005), 27th July 2005, United Kingdom; England and Wales; High Court [EWHC]; Chancery Division [ChD], in *Oxford Reports on International Law*

Anonymous v Netherlands (Ministry for Foreign Affairs), Interlocutory Judgment, No KG 03/137, LJN: AF5930, ILDC 149 (NL 2003), 18th March 2003, Netherlands; The Hague; District Court, in *Oxfords Reports on International Law*

Canada Model BIT (2021)

CJEU, C-1/17 EU:C:2019:341 (30 April 2019) (Opinion 1/17)

Colombia Model BIT (2017)

Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Special Rapporteur on the situation of human rights defenders, 2011

Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106

Council of Europe, *Draft Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role the Courts*, study no. 690/2012, 2014

Council of Europe, *Rules of the Court*, Registry of the Court, new edition entered into force on 18 October 2021

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Algiers, 19 January 1981

Directive (Eu) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, Official Journal of the European Union (2020)

Draft articles on Responsibility of States for Internationally Wrongful Acts

Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, November 2001, (A/56/10)

European Commission, European contract law in business-to-business transactions: Summary (2011)

European Parliament (Committee on Legal Affairs), 2020/2130(INL), (2021)

Fourth report on State Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur: Yearbook of the International Law Commission, 1959, A/CN.4/119, vol. II

Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 4 April 2006

General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties, 13 December 2012

History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume I, Doc. 24

History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II-1, Doc No. 1

Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, *Concluding observations of the Human Rights Committee on Israel*, CCPR/C/ISR/CO/3, 3 September 2010

IBA Guidelines on Conflicts of Interest in International Arbitration (2014), International Bar Association

ICC Arbitration Rules (2021), International Chamber of Commerce

IUSCT website (available online at https://iusct.com/documents/)

MANN H., *International Investment Agreements, Business and Human Rights* (Global Forum on Int'l Investment 2008

Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021), International Chamber of Commerce

Notes for filling the application form, 2021/1, ECHR

Nuremberg Trial Proceedings, vol. 22

OECD (2019), *Equal Access to Justice for Inclusive Growth: Putting People at the Centre*, OECD Publishing, Paris, https://doi.org/10.1787/597f5b7f-en.

OECD (2020), *Gender Equality in Colombia: Access to Justice and Politics at the Local Level*, OECD Publishing, Paris, https://doi.org/10.1787/b956ef57-en.

OECD analysis, https://www.oecd.org/gov/access-to-justice.htm.

OECD/Open Society Foundations, 2019

OMNI BRIDGEWAY ANNUAL REPORT (2020), in section "*Proceeds from litigation funding*", 2020

Opinion of judge Cançado Trinidade, in the Court judgement merits (Diallo case), 2010

Rule of Law Checklist, https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

SAULNIER J., MÜLLER K. AND KORONTHALYOVA I., *Responsible private funding of litigation. European added value assessment*, in: EPRS |European Parliamentary Research Service, 2021

Slovakia Model BIT (2019)

The International Covenant on Civil and Political Rights - Cases, Materials, and Commentary, 3rd Edition by Joseph, Sarah; Castan, Melissa, 2013

Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946, Nuremberg, 1947, vol. I

UN General Assembly, *3201 (S-VI). Declaration on the Establishment of a New International Economic Order*, 1 May 1994, A/RES/3201(S-VI)

UN General Assembly, *Charter of Economic Rights and Duties of States: resolution / adopted by the General Assembly*, 17 December 1984, A/RES/39/163

UN General Assembly, *Permanent sovereignty over natural resources*, 17 December 1973, A/RES/3171

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11

UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to*

equality before courts and tribunals and to fair trial, 23 August 2007, UN Doc. CCPR/C/GC/32

UN Human Rights Committee (HRC), *General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, UN Doc. CCPR/C/GC/33

UN Human Rights Committee (HRC), *General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, UN Doc. CCPR/C/GC/33

UN Human Rights Committee (HRC), *Report of the UN Human Rights Committee*, 2020, A/75/40

UN Security Council Resolution 687 (UN Doc. S/RES/687 (1991), 8 April 1991)

UN Security Council*, Security Council resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo]*, 10 June 1999, S/RES/1244 (1999)

UN Security Council, *Security Council resolution 692 (1991) [Iraq-Kuwait]*, 20 May 1991, S/RES/692 (1991)

UN Security Council, Security Council resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)], 25 May 1993, S/RES/827 (1993)

UNCTAD, *World Investment Report 2003: FDI policies for development: national and international perspectives* 89, u.n. doc. unctad/wir/2003, 2003

UNGA Res 3/217, 10 December 1948 and UN Doc A/RES/3/217A

United Nations Compensation Commission (UNCC)

United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, Bangkok, UNDP, 2005

United Nations, Draft Articles on Diplomatic Protection with commentaries, 2006

UNMIK regulation No. 1999/23 on the establishment of the Housing and Property Directorate and the Housing and Property Claims Commission

World Bank and the International Finance Corporation Doing Business 2019 (2019)

World Justice Project, https://worldjusticeproject.org/about-us/overview/what-rule-law