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**Procedural Issues relating to Shared Responsibility
in Arbitral Proceedings**

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Procedural issues relating to shared responsibility in arbitral proceedings

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1. Introduction

International arbitration is one of the most suitable dispute resolution mechanisms for dealing with questions of shared responsibility due to its flexible procedural rules, making allowance for a multitude of parties on claimant as well as respondent side, including States, international organizations, individuals and private companies. Many recent multi-party disputes, such as the *Eurotunnel* case,² include a mixture of States and non-State actors, thereby adding to the already complex exercise of determining responsibility of a plurality of respondents.

Over the course of the last decades, several sets of procedural rules regulating arbitral proceedings have been developed, such as the early Model Rules on Arbitral Procedure adopted by the International Law Commission (ILC) in 1958.³ The ILC's Model Rules did not yet contain any reference to multi-party disputes but more

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² *Partial Award In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 19 of the Treaty Between the French Republic and the United Kingdom of Great Britain and Northern Ireland Concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link Signed at Canterbury on 12 February 1986 – Between 1. The Channel Tunnel Group Limited; 2. France-Manche S.A. – and – 1. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland; 2. Le Ministre de l'Équipement, des Transports, de l'Aménagement du Territoire, du Tourisme et de la Mer du Gouvernement de la République Française*, PCA (30 January 2007) 132 *ILR* 1. Three legal instruments are relevant to the discussion below: the Treaty concerning the construction and operation by private concessionaires of a channel fixed link (12 February 1986) (hereafter 'the Eurotunnel Treaty'), the Concession Agreement concerning the Channel Fixed Link (14 March 1986) (hereafter 'the Eurotunnel Concession Agreement') and the Arbitration Rules for the Channel Fixed Link (29 July 1987) (hereafter 'the Eurotunnel Arbitration Rules') (unpublished).

³ Model Rules on Arbitral Procedure, ILC Report, A/3859 (A/13/9), 1958, chapter II, paras 10-43.

recently, a clear development can be discerned whereby various sets of procedural rules have started making provisions for such disputes. For this paper, six such sets of procedural rules will be examined. Five of these sets of procedural rules emanate from international arbitral institutions, international organisations and professional associations: the United Nations Commission on International Trade Law, the Permanent Court of Arbitration, the International Centre for the Settlement of Investment Disputes, the International Court of Arbitration of the International Chamber of Commerce and the International Bar Association. The sixth set of rules addresses the special regime of the European Union (EU), drafted by the European Commission to anticipate procedural difficulties relating to the determination of the respondent and the apportionment of financial responsibility in multi-respondent disputes arising from treaties to which both the European Union and its Member States are parties. However, not all of these sets contain rules pertaining to all of the issues addressed in this paper. A brief introduction is provided below to familiarise the reader with the origins, relevance for multi-party disputes and legal status of these procedural rules.

First, the intention of the United Nations Commission on International Trade Law (UNCITRAL) was to create a neutral framework for the flexible and efficient resolution of disputes between (mainly private) parties from different jurisdictions. Since their entry into force in 1976,⁴ the UNCITRAL Arbitration Rules have acquired widespread recognition as the procedural benchmark for *ad hoc* (ie non-institutional) international arbitrations, as evidenced by their frequent incorporation in the dispute resolution clauses of transnational contracts between private parties as well as in bilateral investment treaties (BITs) between States. In addition, the UNCITRAL Rules have been applied by tribunals under the auspices of arbitral institutions, such as the London Court of International Arbitration,⁵ and have been adapted for proceedings before international panels dealing with public and private parties, such as ICSID and the Iran-United States Claims Tribunal.⁶ While the practice of these institutions has

⁴ UNGA Res 31/98 'Arbitration Rules of the United Nations Commission on International Trade Law' (1976) GAOR 31st Session Supp No. 17 (A/31/17), chapter V, section C.

⁵ A Winstanley, 'Multiple Parties, Multiple Problems: A View from the London Court of International Arbitration' in: *Permanent Court of Arbitration, Multiple Party Actions in International Arbitration* (OUP, 2009) 213-220.

⁶ V Heiskanen, 'Arbitrating Mass Investor Claims: Lessons of International Claims Commissions' in: *Permanent Court of Arbitration, Multiple Party Actions in International Arbitration* (OUP, 2009) 297-324.

contributed significantly to the jurisprudence of the UNCITRAL Rules, it also exposed fields in which these Rules could be improved upon. In 2010 a revision of the UNCITRAL Rules was undertaken, whereby one of the main objectives was to make these Rules better suited for multi-party disputes.⁷

Second, the Administrative Council of the Permanent Court of Arbitration (PCA)⁸ has adopted six sets of ‘Optional Rules’ for arbitrating disputes (1) between States; (2) between two parties of which only one is a State; (3) between international organisations and States; and (4) between international organisations and private parties. Special procedural rule-sets have also been drafted to address (5) joint responsibility claims relating to natural resources and the environment. The most recent set of optional rules offer (6) procedural support for disputes relating to outer space activities as it is envisaged that, with the expanding technological possibilities, the number of space-related disputes between multiple State and non-State actors will equally increase.⁹ Each set of rules is based on the UNCITRAL Arbitration Rules but have been modified to reflect the public international law element that pertains to disputes involving (multiple) States.¹⁰ The PCA provides also brief supplementary

⁷ GAOR 65th Session Supp No. 17 (A/65/17), chapter III and adopted by the UNGA in Res. 65/22 (10 January 2011).

⁸ All Member States are represented in the PCA Administrative Council. At the time of writing, 115 States had acceded to one or both of the PCA's founding conventions (Convention for the Pacific Settlement of International Disputes (adopted 29 July 1899, entered into force 4 September 1900) (1898–99) 187 *CTS* 410; Convention for the Pacific Settlement of International Disputes (adopted 18 October 1907, entered into force 26 January 1910) (1907) 205 *CTS* 233). In Spring 2011 the PCA Administrative Council gave a mandate to the International Bureau of the PCA to update the Optional Rules taking into account the changes in the modified 2010 UNCITRAL Arbitration Rules (PCA 111th Annual Report, para 15). One possibility that is being considered is to draft a single set of rules that will allow for all the combinations of parties previously foreseen; this would also facilitate a multi-party case involving a State *and* an international organisation *and* a private party – a construction that is not expressly provided for under the existing rules.

⁹ As all of these sets of procedural rules follow the same basic structure (I. Introductory Rules; II. Composition of the Arbitral Tribunal; III. Arbitral Proceedings; IV. The Award), they are not discussed separately here. http://www.pca-cpa.org/showpage.asp?pag_id=1188 (last access 4 November 2012).

¹⁰ One of the most important modifications is that States and international organisations are required to waive their sovereign immunity from jurisdiction (and preferably also their immunity from execution) in the arbitration agreement. Eg PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State, Introduction, para (ii): ‘[The Rules are based on the UNCITRAL Arbitration Rules with changes in order to] provide that agreement to arbitrate under the Rules constitutes a waiver of any sovereign immunity from jurisdiction (parties who choose to do so may also provide for waiver of sovereign immunity from execution [...]); exactly the same provision can be found in para (ii) of the PCA Optional Rules for Arbitration Between International Organizations and Private Parties.

guidelines for adapting these procedural rules to disputes arising under multilateral agreements and multi-party contracts.¹¹

Third, procedural rules governing arbitral disputes are set out in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).¹² In accordance with the provisions of the Convention, the International Centre for the Settlement of Investment Disputes (ICSID) provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.¹³ The Administrative Council of the Centre has also adopted Additional Facility Rules authorizing the Secretariat of ICSID to administer certain categories of proceedings that fall outside the scope of the ICSID Convention.¹⁴ The large majority of cases under the ICSID Convention and Additional Facility Rules concern claims of one or more investors against one sole host State due to the bilateral nature of the BITs which form the applicable substantive law in these disputes. Arguably this makes the ICSID system less relevant for the topic of shared responsibility but as it contains rules regarding non-disputing party submissions, it is nevertheless included in the present analysis.

Fourth, established in 1919, the International Chamber of Commerce (ICC) is an international business association promoting trade and investment, open markets and the free flow of capital. The ICC has created procedural rules such as the 2012

¹¹ http://www.pca-cpa.org/showpage.asp?pag_id=1188 (last access 4 November 2012).

¹² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. The Convention currently counts 147 Contracting States.

¹³ The provisions of the ICSID Convention are complemented by Regulations and Rules adopted by the Administrative Council of the Centre (the ICSID Regulations and Rules): ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) (1984) 1 ICSID Rep 153. The ICSID Regulations and Rules comprise Administrative and Financial Regulations; Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules); Rules of Procedure for Conciliation Proceedings (Conciliation Rules); and Rules of Procedure for Arbitration Proceedings (Arbitration Rules). The latest amendments of the ICSID Regulations and Rules and adopted by the Administrative Council of the Centre came into effect on 10 April 2006.

¹⁴ ICSID Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules) (1979) 1 ICSID Rep 217. The latest amendments of the ICSID Additional Facility Rules adopted by the Administrative Council of the Centre came into effect on 10 April 2006. The Additional Facility Rules regulate (i) fact-finding proceedings; (ii) conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a Contracting State or a national of a Contracting State; and (iii) conciliation and arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.

Arbitration and the 2001 Alternative Dispute Resolution Rules,¹⁵ applicable in disputes before the ICC's International Court of Arbitration. These rules have been developed for the purpose of international commercial arbitration, but as they contain a number of provisions facilitating multi-party disputes, they could provide inspiration for multi-party procedural issues in public or public-private arbitral cases.¹⁶

Fifth, the International Bar Association (IBA) is the world's leading organisation of international legal practitioners, bar associations and law societies. It has produced various sets of guidelines for good practice; among other a series of Guidelines for Drafting International Arbitration Clauses,¹⁷ including multi-party arbitration, so that contracting parties may decide in advance which procedural rules will apply in case disputes arise. Two particular IBA Guidelines for Multi-party Arbitration are discussed below: the consequences of the multiplicity of parties for the appointment of the arbitral tribunal (discussed below in section 2.1) and clauses addressing procedural complexities arising from the multiplicity of parties, such as intervention and joinder (discussed below in section 4.1 and 3.2, respectively). Moreover, the IBA also developed a series of Rules on the Taking of Evidence in International Arbitration which are relevant in this context (discussed below in section 3.1).¹⁸ Two caveats are in place here: first, the IBA Guidelines and Rules are codes of conduct, or best practices – in other words, they are non-binding soft law. Second, they were developed mainly with international commercial arbitral practice in mind, ie for the resolution of disputes between private parties. Nevertheless, these Guidelines and Rules are useful in the context of shared responsibility, since they can be adopted in for example public-private partnership contracts and be relied upon in

¹⁵ International Chamber of Commerce Rules of Arbitration (entered into force 1 January 1998) 36 ILM 1604 as revised in 2012 <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/> (last access 4 November 2012).

¹⁶ AM Whitesell, 'Multiparty Arbitration: The ICC International Court of Arbitration Perspective' in: *Permanent Court of Arbitration, Multiple Party Actions in International Arbitration* (OUP, 2009) 203-212.

¹⁷ International Bar Association, IBA Guidelines for Drafting International Arbitration Clauses and Commentaries thereto, adopted by a resolution of the IBA Council, 7 October 2010. http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last access 4 November 2012).

¹⁸ International Bar Association 'IBA Rules on the Taking of Evidence in International Commercial Arbitration', adopted by a resolution of the IBA Council, 29 May 2010. http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last access 4 November 2012).

arbitrations under public international law. States might for example draw upon them to draft their *ad hoc* agreement to arbitrate.

Interestingly, the IBA noted that the reason for developing its specific Guidelines was the practical reality that international agreements are currently often concluded between more than two parties and it was feared that drafters of such agreements ‘may fail to realize the specific drafting difficulties that result from the multiplicity of parties’.¹⁹ The standard model clauses of arbitral institutions were seen as inadequate for dealing with this situation as ‘these are ordinarily drafted with two parties in mind and may need to be adapted to be workable in a multi-party context.’²⁰ In this regard it would seem that private law practice is ahead of public law practice in foreseeing and reacting to the contemporary trend towards multi-party disputes. As such it is considered worthwhile to include private practice-oriented sets of procedural rules in the present analysis.

The sixth set of rules referred to in this paper is atypical in the sense that it was formulated to address multi-respondent disputes involving the European Union and one (or more) of its Members States.²¹ These draft rules were developed in 2012 by the European Commission in an attempt to anticipate shared responsibility problems which may arise from the EU/third State investment agreements under negotiation. At the time of writing, these rules have not been adopted yet. Currently such procedural rules for multi-respondent disputes are only relevant in the EU context but it is not unthinkable, if the present global tendency towards increased regionalisation continues, that these procedural rules could serve as a model for shared responsibility disputes in the context of other similar far-reaching integration projects.

Regarding the PCA, ICSID, UNCITRAL, ICC and IBA sets of procedural rules, it should be noted that, as is inherent to the arbitral system, they emphasise flexibility and party autonomy. Many treaties and contracts refer to several of these sets of rules, so that claimants may choose whichever set seems most suitable.

¹⁹ IBA Guidelines for Drafting International Arbitration Clauses, para 97.

²⁰ *Ibid*, para 97.

²¹ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335 final, 2012/0163 (COD) (21 June 2012) (hereafter Proposed Regulation for Managing Financial Responsibility).

Moreover, parties to a dispute can also consent to modify the applicable procedural rules in their *ad hoc* arbitration agreement. Important is that once such procedural rules have been agreed upon, they form a binding legal framework within which the arbitral panel operates and which cannot be changed or deviated from by one party unilaterally. A further distinction can be made in that the PCA, ICSID and ICC rules are linked to an arbitration centre under whose auspices arbitral proceedings can take place. Parties wishing to use the UNCITRAL rules will have to either set up an *ad hoc* panel entirely independently, or resort to the registry services of one of the arbitral centres.

In sum, for this paper, six sets of procedural rules will be examined according to the set-up of all contributions to this special issue of the journal: first, how to bring the relevant (co-responsible) parties before the arbitral tribunal (questions relating to the constitution of the tribunal, jurisdiction and determination of claimant and respondent status); secondly, how to handle multi-party disputes (questions of evidence and fact-finding, joinder and consolidation of proceedings); and, thirdly, how to deal with absent (co-responsible) parties (questions of intervention, effect of provisional measures and of final awards).²²

2. Bringing co-responsible parties before the arbitral tribunal

2.1 Constitution of the Tribunal

The first procedural hurdle which multi-party disputes may face, is presented at the very start of the arbitral proceedings: where disputes before the International Court of Justice for example are dealt with by the same bench, regardless of the number of respondents,²³ the common approach in arbitration is that each party can select its own arbitrator, for example, in *Eurotunnel* the arbitral panel consisted of five

²² With regard to all these procedural issues, all six sets of rules have been examined and references to specific provisions can be found in the footnotes; however, some issues are not regulated in all sets of rules.

²³ Bearing in mind the exception of article 31 of the ICJ Statute: 'If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge'. Moreover, although the Court generally discharges its duties as a full Court whereby a quorum of nine judges, excluding judges *ad hoc* is sufficient, it may also form permanent or temporary chambers in accordance with article 26(2) of the ICJ Statute.

arbitrators.²⁴ In multi-party cases, this could create difficulties with regard to the number of arbitrators, their appointment procedure and the sharing of costs.

First, specific modifications have been recommended in various sets of rules regarding the mechanisms for naming arbitrators. More specifically, particular care needs to be taken in drafting the provisions for appointing arbitrators in arbitrations involving several parties where the tribunal would be of impractical size or structure if each party appointed an arbitrator as ‘[t]he overriding requirement is ‘that all parties be treated equally in the appointment process’.²⁵ This might particularly be an issue in cases where responsibility is shared among a large number of respondents.²⁶ For example, the arbitral panel in a case with one claimant and three respondents will in principle consist of no less than seven arbitrators: three appointed by each side (ie one by each respondent and three by the claimant to maintain an equal number of arbitrators) and one chair. Arbitration clauses could in advance of any dispute ‘address the consequences of the multiplicity of parties for the appointment of the arbitral tribunal’.²⁷ One solution would be for a sole arbitrator to be appointed jointly by all parties (ie all claimants and all respondents) or, in the absence of such agreement by the institution or the designated appointing authority.²⁸ Alternatively, where the arbitration clause prescribes that the dispute is to be referred to three arbitrators, each side could jointly appoint one arbitrator (ie all claimants together agree on the appointment of one arbitrator; all respondents do the same) and both thus

²⁴ Article 19(2) of the Eurotunnel Treaty provides that: “The arbitral tribunal shall be constituted for each case in the following manner: (a) Within two months of the receipt of the request for arbitration each Government shall appoint one arbitrator; (b) The two arbitrators shall, within a period of two months of the appointment of the second, appoint, by mutual agreement, a national of a third State as third arbitrator, who shall act as chairman of the tribunal. [...] (f) In any case to which the Concessionaires are parties they shall be entitled to appoint two additional arbitrators. The two arbitrators appointed by the Governments shall appoint the chairman of the tribunal by agreement with the two arbitrators appointed by the Concessionaires. [...]”

²⁵ Commentary to Multi-party Guideline 1 of the IBA Guidelines for Drafting International Arbitration Clauses, para 99.

²⁶ Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes Arising under Multilateral Agreements and Multiparty Contracts, p 247; Commentary to Multi-party Guideline 1 of the IBA Guidelines for Drafting International Arbitration Clauses, para 98; J Collier and V Lowe, *The Settlement of Disputes in International Law – Institutions and Procedures* (OUP, 1999) 221.

²⁷ Multi-party Guideline 1 of the IBA Guidelines for Drafting International Arbitration Clauses.

²⁸ For example, article 19(2) of the Eurotunnel Treaty provides that: “(c) If within the time limits specified above any appointment has not been made, a party may, in the absence of any other agreement, request the President of the Court of Justice of the European Communities to make any necessary appointment.”

appointed arbitrators then elect a chairperson.²⁹ This would also apply in cases where an additional party has been joined later on in the proceedings.³⁰ This option would however only be ‘available when it can be anticipated at the drafting stage that certain contracting parties will have aligned interests.’³¹ In the *Dutco* case for example, the respondents were asked to jointly appoint one arbitrator – a request which they complied with, in spite of their different interests. The subsequent arbitral award, however, was successfully challenged before the French Cour de cassation as this apparent violation of party equality was considered in breach of public order.³²

In the absence of such joint nomination because the parties are unable to agree to a method for the constitution of the arbitral tribunal or to appoint ‘their’ arbitrator within a specified period, they could agree upon an appointing authority to designate the arbitrators.³³ In practice this would imply that the institution or appointing authority will have to appoint *all* arbitrators as soon as the parties on either claimant’s or respondent’s side do not succeed in agreeing on the appointment of their arbitrator – this in order to avoid a situation in which one side could select an arbitrator, while the other side could not. For example, such competence has been granted to the International Court of Arbitration which ‘may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator’.³⁴ More detailed rules were included by UNCITRAL for the use of default appointment functions by the appointing authority in multi-party disputes, including the power to reconstitute the tribunal in full and revoke prior appointments where one party fails to

²⁹ Article 10(1)-(2) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules as revised in 2010 (hereafter 2010 UNCITRAL Arbitration Rules); article 12(6) of the International Chamber of Commerce (ICC), 2012 Arbitration and 2001 ADR Rules (hereafter ICC Arbitration and ADR Rules); Commentary to Multi-party Guideline 1 of the IBA Guidelines for Drafting International Arbitration Clauses, para 98.

³⁰ Article 12(7) of the ICC Arbitration and ADR Rules.

³¹ Commentary to Multi-party Guideline 1 of the IBA Guidelines for Drafting International Arbitration Clauses, para 99.

³² *Sociétés BKMI et Siemens v. Société Dutco*, Cour de cassation, 1992 Rev. Arb. 470; 119 J. Droit Int’L (Clunet) 707 (1992); 28 *Y.B. Com. Arb.* 140 (1993).

³³ Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes Arising under Multilateral Agreements and Multiparty Contracts, p 247.

³⁴ Article 12(8) of the ICC Arbitration and ADR Rules.

appoint an arbitrator.³⁵ The IBA Guidelines also include a recommended model clause specifying a mechanism for appointing arbitrators in a multi-party context:³⁶

In the event that more than two parties are named in the request for arbitration [...] the claimant(s) shall jointly appoint one arbitrator and the respondent(s) shall jointly appoint the other arbitrator, [...]. If the parties fail to appoint an arbitrator as provided above, [the designated arbitral institution/appointing authority] shall, upon the request of any party, appoint all three arbitrators and designate one of them to act as presiding arbitrator.

Finally, specific modifications have been recommended by the IBA in the mechanism for sharing costs but none of the procedural sets of rules enters into detail in this regard.³⁷

2.2 Jurisdiction

Every arbitral tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.³⁸ The general rule in arbitration is that within a certain time period after the receipt of the notice of arbitration, the respondent has to submit its response to such notice to the claimant, including ‘[a]ny plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction’.³⁹ Such plea has to ‘be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off’.⁴⁰

Importantly, an arbitral tribunal may admit a later plea if it considers the delay justified – for example if the party was joined at a later stage.

In multi-party disputes, several respondents might entertain different views as to whether the tribunal has jurisdiction. The tribunal will have to examine each of

³⁵ Article 10(3) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules as revised in 2010 (hereafter 2010 UNCITRAL Arbitration Rules). For a detailed analysis of this provision, see S Grimmer, ‘The Expanded Role of the Appointing Authority under the UNCITRAL Arbitration Rules 2010’ (2011) 28 *Journal of International Arbitration* 5 501–517.

³⁶ This Model Clause is reproduced in the Annex to this paper.

³⁷ IBA Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes Arising under Multilateral Agreements and Multiparty Contracts, p 247.

³⁸ Article 23 of the 2010 UNCITRAL Arbitration Rules.

³⁹ Article 4 of the 2010 UNCITRAL Arbitration Rules.

⁴⁰ Article 23 of the 2010 UNCITRAL Arbitration Rules. When raising a set-off claim, ‘the defendant does not object the fact that the plaintiff’s claim exists and is due, but, instead, alleges that it has been extinguished through compensation against the claim that he (the defendant) has against the plaintiff.’ See eg V Pavić, ‘Counterclaim and Set-Off in International Commercial Arbitration’, (2006) 1 *Annals, International Edition* 103.

these objections separately and could potentially arrive at different conclusions *vis-à-vis* different respondents based on the terms of the arbitration agreement at hand. Furthermore, '[d]uring the course of the arbitral proceedings, a party may amend or supplement its claim or defence', unless 'the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances.'⁴¹ Again, in case of multiple respondent parties, tribunals will have to beware that counterclaims or claims for the purpose of a set-off are not amended or supplemented in such a manner that these claims fall outside the jurisdiction of the arbitral tribunal.

2.3 Party Status

2.3.1 Claimant Status

Procedural rules also determine who may bring a claim – even in cases where (some of the) parties have not ratified the treaty establishing the arbitral institution under whose auspices the proceedings are to take place. In other words, such lack of ratification by some of the respondents does not necessarily imply that the tribunal will not have jurisdiction to hear the case against all respondents jointly. For example, the PCA Optional Rules are available for disputes involving States that are not parties to either the 1899 or the 1907 Convention, so in order for a tribunal to have jurisdiction in a specific case, it is not required that all parties to the case have ratified either one of the relevant Conventions.⁴² Under the ICSID Additional Facility Rules, an ICSID arbitral tribunal will have jurisdiction over a dispute brought before an ICSID arbitral panel, even if the home State of the investor or the respondent State is not a party to the ICSID Convention.⁴³ The ICC Arbitration and ADR Rules provide that claims between multiple parties 'may be made by any party against any other party' as long as the jurisdictional requirements (particularly regarding the *prima facie* validity of the arbitration agreement) are fulfilled and 'and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal'.⁴⁴ Also the procedural requirements concerning the request for arbitration and counterclaims apply *mutatis mutandis* to

⁴¹ Article 22 of the 2010 UNCITRAL Arbitration Rules.

⁴² http://www.pca-cpa.org/showpage.asp?pag_id=1041 (last access 4 November 2012).

⁴³ See n 14.

⁴⁴ Article 8 of the ICC Arbitration and ADR Rules.

any claim made by any of the parties, but the arbitral tribunal can determine the procedure for additional claims on an *ad hoc* basis.⁴⁵

2.3.2 Respondent Status

The five sets of procedural rules do not address the determination of the status of respondent – they do not need to, the respondent party simply is the party against whom a claim is brought.⁴⁶ For example, the IBA Rules on the Taking of Evidence in International Arbitration define ‘Respondent’ as ‘the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counterclaim’,⁴⁷ making it clear that its guidelines apply to all, including multi-party, arbitral proceedings.

One area in which the determination of the appropriate respondent(s) might entail additional difficulties, relates to disputes arising from treaties to which the EU as well as its Member States are parties. The entry into force of the Treaty of Lisbon brought foreign direct investment within the scope of the European Union's common commercial policy. The EU is already party to one agreement which provides for investor-state dispute settlement (the Energy Charter Treaty – ECT) and is currently negotiating other investment treaties. In parallel, the European Commission is working on developing mechanisms to simplify complex shared responsibility questions in advance of any disputes, with varying success. One such attempt is the proposed Regulation establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the EU is a party.⁴⁸ In these cases, it would seem likely that both the EU and one or more of its Member States will be called upon as respondents. This

⁴⁵ For an overview of procedural issues relating to multiple claimants, see eg D Bishop, ‘Multiple Claimants in Investment Arbitration: Shareholders and Other Stakeholders’, in: *Permanent Court of Arbitration, Multiple Party Actions in International Arbitration* (OUP, 2009) 239-254.

⁴⁶ Some difficulties may arise regarding the party status of States and State enterprises, or private enterprises and their shareholders, but as these do not strictly concern shared responsibility issues, they are considered beyond the scope of this paper, see eg A Koutoglidou, ‘Multiple Party Investment Dispute Resolution: Who are the Proper Parties?’, in: *Permanent Court of Arbitration, Multiple Party Actions in International Arbitration* (OUP, 2009) 255-280.

⁴⁷ IBA Rules on the Taking of Evidence in International Arbitration, Definitions, p 5.

⁴⁸ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335 final, 2012/0163 (COD) (21 June 2012) (hereafter Proposed Regulation for Managing Financial Responsibility).

proposal aims to affect the finding of jurisdiction (more specifically, with regard to the identity of the respondent(s)) as well as the determination of damages (particularly the apportionment of financial responsibility).

First, with regard to the finding of jurisdiction and the status of respondent, the Commission aims to maintain the right to *unilaterally* decide when the Union (and *only* the Union) shall act as a respondent. This will be the case when one or more of the following circumstances arise:

(a) it is likely that the Union would bear at least part of the potential financial responsibility arising from the dispute in accordance with the criteria laid down in Article 3;

(b) the dispute also concerns treatment afforded by the institutions, bodies or agencies of the Union;

(c) it is likely that similar claims will be brought under the same agreement against treatment afforded by other Member States and the Commission is best placed to ensure an effective and consistent defence; or,

(d) the dispute raises unsettled issues of law which may recur in other disputes under the same or other Union agreements concerning treatment afforded by the Union or other Member States.⁴⁹

In cases where the Commission has not taken such decision, the Member State(s) concerned can also decide to act as respondent if it/they confirm(s) such intention to the Commission within 30 days of receiving notice of the initiation of arbitral proceedings. Member States might wish to act as respondents so as to maintain ‘control’ over the case, including defence strategy and conditions for settlement. The default position envisaged by the European Commission, however, seems to be that the Commission intends to act as *sole* respondent on behalf of the EU and all its Members States in order to avoid difficult questions of shared responsibility.

Furthermore, in this proposal, the Commission seeks to pre-apportion the financial responsibility by stipulating that such responsibility will be divided according to the following criteria:

(a) the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies or agencies of the Union;

⁴⁹ Article 8 of the Proposed Regulation for Managing Financial Responsibility.

*(b) the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State, except where such treatment was required by the law of the Union.*⁵⁰

However, ‘where the Member State concerned is required to act pursuant to the law of the Union in order to remedy the inconsistency with the law of the Union of a prior act, that Member State shall be financially responsible unless the adoption of such prior act was required by the law of the Union.’⁵¹ In other words, the Commission aims to obtain the self-judging competence to determine whether the allegedly violating treatment has been accorded by the Union or by the Member State(s). Moreover, it would seem that the Commission intends to adopt decisions determining the financial responsibility of the Member State(s) concerned – even though such Member State(s) may not have been parties to the dispute establishing their responsibility.

Notably, this proposal is currently being discussed (and severely criticized) in the European Parliament by various Member States so it is unlikely that the current version will also be the final one, but the ambitious intentions of the Commission are clear. However, even if the current version does survive in similar form, it is very likely that, in the event of an investor-State arbitration arising under one of the future EU/third State BITs (or the ECT), the investor will initiate such proceedings against both the Union and the Member State(s) concerned. In spite of the Commission’s determination of the ‘appropriate’ respondent, the investment tribunal will probably not wish to automatically relinquish its competence to examine the status of the respondent(s) and might indeed reach the conclusion that responsibility is to be shared and that all parties need to appear as respondents.⁵² Furthermore, the tribunal will

⁵⁰ Article 3(1) of the Proposed Regulation for Managing Financial Responsibility.

⁵¹ Article 3(1) of the Proposed Regulation for Managing Financial Responsibility.

⁵² At this point in time, any statements regarding the approach which investment tribunals will adopt, remain speculative. However, the postulation put forward in this paper is based on case law precedents related to tribunals’ attitude towards EU law, regarding the latter as relevant legal background but not inevitably prevailing over international investment law. For example, in *Eureko*, the tribunal considered that ‘the EU legal doctrines, including those of supremacy, precedence, direct effect, direct applicability, are part of the body of EU law that might fall to be applied by the Tribunal’ but ‘its jurisdiction is confined to ruling upon alleged breaches of the BIT’, leading it to conclude that there was ‘no doubt that it has jurisdiction in this case and that it can and, by virtue of its mandate, should exercise it in this case’. (*Eureko BV v Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No 2008-13, 26 October 2010, paras 289-291). Similar approaches were adopted in *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Hungary*, Final award on jurisdiction, merits and damages, ICSID Case No ARB/03/16, 27 September 2006; *Eastern Sugar BV v Czech Republic*, Partial award and partial dissenting opinion, SCC Case No 088/2004, 27 March 2007.

probably also prefer to determine for itself which conduct is the Union's conduct and which is attributable to the Member State(s). And finally, the tribunal might also not agree with the EU's distribution of damages – although the latter could of course always be re-apportioned at the internal European level, after the investor has been paid its dues according to the award of the international arbitral panel. Thus, the last word has not been said yet with regard to shared responsibility in the context of EU/third State investment treaties.

3. Handling multi-party disputes

3.1 Evidence and Fact-Finding

The basic principles of evidence adopted in the various procedural sets of rules broadly reflect international custom and practice.⁵³ Tribunals may for example call on witnesses, even if such an 'individual is a party to the arbitration or in any way related to a party' – which could imaginably be the case in multi-party disputes where respondents may call upon each others' testimony.⁵⁴ In any case, it remains up to the arbitral tribunal to determine the admissibility, relevance, materiality and weight of the submitted evidence. Three situations could be distinguished here. Situation 1 involves obtaining evidence which is in the hands of a third party that is not co-responsible and voluntarily offers to provide such evidence (*amicus curiae*). Situation 2 also relates to obtaining evidence from a third party that is not co-responsible, but this time the third party has not offered to provide it, while the tribunal and/or the parties to the dispute do wish to obtain it. Situation 3 deals with evidence belonging to a third party that is co-responsible, has not offered to provide it, while the tribunal and/or the parties to the dispute nevertheless wish to obtain it.

Whether *amicus curiae* evidence is to be accepted, largely lies within the margin of appreciation of the tribunal. Contrary to other sets of procedural rules in this regard, the ICSID Arbitration Rules contain relatively few rules applying specifically to multi-party arbitration, but they do contain a specific provision on

Similar questions are being debated with respect to the co-respondent mechanism in the European Court of Human Rights, see, eg T Lock, 'End of an Epic? The Draft Agreement on the EU's Accession to the ECHR', 15 December 2011, *Yearbook of European Law* (2012). Available at SSRN: <http://ssrn.com/abstract=2103514> (last accessed 4 November 2012).

⁵³ See eg the 2010 UNCITRAL Arbitration Rules.

⁵⁴ Article 27(2) of the 2010 UNCITRAL Arbitration Rules; 2012 IBA Rules on the Taking of Evidence in International Arbitration.

‘Submissions of Non-disputing Parties’, or *amicus curiae* briefs. According to this rule, after ‘consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute [...] to file a written submission with the Tribunal regarding a matter within the scope of the dispute.’⁵⁵ In determining whether to allow such a filing, the tribunal will consider, among other, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.⁵⁶

Moreover, the tribunal has to ‘ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission’.⁵⁷ Relatively little use has been made of this provision, but for example in *AES v. Hungary*, the office of the Acting Director-General, Legal Service, of the European Commission relied on it to file an application as a non-disputing party.⁵⁸ This case involved a multiplicity of claimants, not respondents, hence there was no question of shared responsibility, but the rules concerning non-disputing party submissions would be applied in the same way in cases with multiple respondents.⁵⁹

⁵⁵ Article 37(2) of the ICSID Arbitration Rules.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *AES Summit Generation Limited and AES-Tisza Erömi Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010); para 3.18; Decision on Annulment (29 June 2012): Applicants' claims for annulment were dismissed in their entirety.

⁵⁹ Similar cases involving non-disputing party submissions include *Pezold et al. & Border Timbers et al. v Zimbabwe*, ICSID Case No. ARB/10/15 and ARB/10/25, Procedural Order No. 2 (26 June 2012); *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. V. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae* (17 March 2006); *Biwater Gauff (Tanzania) LTD. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007); *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005); non-disputing party submissions have also been discussed in investor-State arbitral proceedings under the North American Free Trade Agreement (NAFTA) according to the requirements set forth in the recommendations of the Free Trade Commission (FTC) in *Apotex Inc v United States of America*, Procedural Order No. 2 (11 October 2011); *Glamis v. United States of America*, Decision on Application and Submission by Quechan Indian Nation (16 September 2005); *Methanex Corporation v. United States of America*, Decision of

Situations 2 and 3 both relate to obtaining evidence from third parties which have not voluntarily offered to provide such evidence while the tribunal and/or the parties to the dispute nevertheless wish to obtain it. The difference between these situations is that the third party may or may not be co-responsible. Various procedural sets of rules provide for the possibility to obtain evidence from third parties but they do not make the distinction as to whether these third parties are co-responsible or not. Hence the rules outlined in the next paragraphs apply to both situations 2 and 3.

In certain disputes a party may wish ‘to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own’.⁶⁰ In this case, such party may ask the arbitral tribunal ‘to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself’.⁶¹ Such request is subject to certain procedural requirements and the tribunal has the discretionary power to take the steps it considers appropriate if it determines that (i) the documents would be relevant to the case and material to its outcome; (ii) the request satisfies the necessary requirements;⁶² and, (iii) none of the reasons for objection applies. The tribunal can also, of its own volition, take steps to obtain documents from persons or organisations it deems relevant.⁶³ The IBA Commentaries explain that such provision may refer to three groups of documents, two of which are relevant in this context:

*(1) [...]; (2) documents that the party wants to use as evidence for its submissions but cannot produce on its own, because they are either in the possession of the other party in the arbitral proceedings or in the possession of a third party outside of the arbitration; and (3) documents that neither party has introduced or wants to introduce as evidence into the arbitral proceedings, but which are seen as relevant and material by the arbitral tribunal.*⁶⁴

The fact that a third party has documents in its possession that serve as evidence in a case, does not as such mean that this third party shares responsibility with the

the Tribunal on Petitions from Third Persons to intervene as ‘Amici Curiae’ (15 January 2001); *United Parcel Service of America Inc v. Canada*, Decision of the Tribunal On Petitions for Intervention And Participation as *Amici Curiae* (17 October 2001).

⁶⁰ Article 3(9) of the IBA Rules on the Taking of Evidence in International Arbitration.

⁶¹ *Ibid.*

⁶² Such requirements are enumerated in article 3(3) of the IBA Rules on the Taking of Evidence in International Arbitration.

⁶³ Article 3(10) of the IBA Rules on the Taking of Evidence in International Arbitration.

⁶⁴ IBA Commentaries to article 3 of the IBA Rules on the Taking of Evidence in International Arbitration.

respondent in the arbitration. It could be one way of ensuring that a dispute in which multiple parties possess evidence relevant to the case but not all have accepted the jurisdiction of the tribunal, could nevertheless be brought before an arbitral panel. The situation in which third parties actually bear some measures of shared responsibility with the applicant is discussed below in section 4 of this paper. Finally, the party filing the Request for Joinder is also invited to submit ‘documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute’, as addressed in the next section.⁶⁵

3.2 Joinder

In international arbitration, no third party can be compelled to join the proceedings without its consent and that of all parties to the dispute. This absence of a duty to join reflects the foundation stone of arbitration: party consent.⁶⁶ However, particularly in cases where there is a co-responsible third party, this may create significant difficulties as the following hypothetical situation illustrates.⁶⁷ A State concludes a concession agreement with a private company to build a major dam. The project is not completed according to the terms of the agreement and the State initiates (public-private) arbitral proceedings against the concessionaire, who argues that the breach of contract is due to actions on the part of the State. When this defence is rejected, the concessionaire invokes the arbitration clause in the agreement with its subcontractors to initiate a second (this time, commercial) arbitral case, in which the subcontractors rely on the same defence and this time, fault on the part of the State is accepted. As the subcontractors were not part to the agreement between the private company and the State, they could not be coerced to join the first arbitration – resulting in two incompatible decisions.

Most procedural sets of rules address procedural complexities relating to joinder – at least to the extent that the third party is a party to the arbitration agreement.⁶⁸ For cases such as the hypothetical illustration above, whereby the third

⁶⁵ Article 7(2) of the ICC Arbitration and ADR Rules.

⁶⁶ J Collier, and V Lowe, *The Settlement of Disputes in International Law – Institutions and Procedures* (OUP, 1999) 209.

⁶⁷ This illustration is based on a hypothetical case discussed in J Collier and V Lowe, *op. cit.* 209, referring to LJ Kerr, ‘Arbitration v. Litigation: the Macao Sardine case’ (1987) 3 *Arbitration International* 79.

⁶⁸ IBA Guidelines for Drafting International Arbitration Clauses, Second Multi-party Guideline, para 101.

party is not a party to the original agreement, there currently is no solution, unless all parties voluntarily agree to the joinder.⁶⁹ Arbitration clauses which do not address these complexities ‘leave open the possibility of overlapping proceedings, conflicting decisions and associated delays, costs and uncertainties’.⁷⁰ Concrete suggestions on how to draft a suitable arbitration clause include that:

*the clause should provide that notice of any proceedings commenced under the clause be given to each contracting party regardless of whether that contracting party is named as respondent. There should be a clear time period after that notice for each contracting party to intervene or join other contracting parties in the proceedings, and no arbitrator should be appointed before the expiry of that time period.*⁷¹

Defining joinder as a respondent wishing for another (non-respondent) contracting party to join the proceedings, the IBA Guidelines suggest a model clause providing for joinder of other parties to the same agreement.⁷² The drafters of the Eurotunnel Arbitration Rules for example determined that for all disputes arising under the Eurotunnel Treaty and/or the Concession Agreement, ‘any party to an arbitration may cause to be joined in the arbitration any party to these Rules which is not a party to the arbitration’.⁷³ However, the tribunal can refuse such joinder ‘if it is of the opinion that, at the stage at which such [...] joinder is proposed, it would be unjust to the existing parties to the arbitration or would unduly and unnecessarily delay the arbitration’.⁷⁴ In the 2007 *Eurotunnel* dispute this procedural rule was not invoked because all parties to the Arbitration Rules were also parties to the arbitral proceedings from their initiation.

⁶⁹ Some solutions have been worked out at the national level, for example in the English Arbitration Act of 1996, but discussion of these instruments goes beyond the scope of this paper. For a case example, see *Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corp.* [1982] 2 Lloyd’s Rep. 425; (1982) 21 *ILM* 1057. For solutions in international commercial arbitration, see eg WW Park, ‘Non-signatories and International Arbitration: An Arbitrator’s Dilemma’, 3–34; B Hanotiau, ‘Multiple Parties and Multiple Contracts in International Arbitration’, 35–68; AS Rau, ‘“Consent” to Arbitral Jurisdiction: Disputes with Non-signatories’ in: *Permanent Court of Arbitration, Multiple Party Actions in International Arbitration* (OUP, 2009) 69-148.

⁷⁰ IBA Guidelines for Drafting International Arbitration Clauses, Second Multi-party Guideline, para 102.

⁷¹ IBA Guidelines for Drafting International Arbitration Clauses, para 103.

⁷² This Model Clause is reproduced in the Annex to this paper. The part relevant to the issue of joinder states that: ‘Any party to this agreement named as respondent in a request for arbitration, or a notice of claim, counterclaim or cross-claim, may join any other party to this agreement in any arbitration proceedings hereunder by submitting a written notice of claim, counterclaim or cross-claim against that party, provided that such notice is also sent to all other parties to this agreement [and to the designated arbitral institution, if any] within [30] days from the receipt by such respondent of the relevant request for arbitration or notice of claim, counterclaim or cross-claim.’

⁷³ Article XIII(2) of the Eurotunnel Arbitration Rules.

⁷⁴ Article XIII(5) of the Eurotunnel Arbitration Rules.

Alternatively, parties may arbitrate under the applicable institutional rules,⁷⁵ which may offer a broad margin of discretionary power to the institution involved as seen for example in the ICC Rules. Hence, even if the arbitration clause does not explicitly regulate joinders, the applicable procedural rules may still allow for a joinder of other parties to the dispute settlement proceedings, provided they are parties to the arbitration agreement. Upon request of any party, the arbitral tribunal ‘may allow one or more third persons to be joined in the arbitration as a party [...], unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties.’⁷⁶ If the joinder is permitted, ‘[t]he arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.’⁷⁷ Furthermore, a respondent may also formulate a claim against ‘a party to the arbitration agreement other than the claimant’ in its Response to the Notice of Arbitration.⁷⁸

A party wishing to join an additional party to the arbitration has to submit its request for arbitration against the additional party (the ‘Request for Joinder’) to the Secretariat or Registry office under whose auspices the dispute is being settled, whereby the date of receiving the request is considered the date of the commencement of arbitration against the additional party.⁷⁹ Any such joinder is subject to the jurisdictional and procedural conditions (for example concerning the time limit and required information) and importantly, ‘[n]o additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree’.⁸⁰ The procedural requirements concerning the request for arbitration and counterclaims apply, *mutatis mutandis*, to the Request for Joinder and the additional party may make claims against any other party to the dispute.⁸¹

⁷⁵ IBA Guidelines for Drafting International Arbitration Clauses, para 104.

⁷⁶ Article 17(5) of the 2010 UNCITRAL Arbitration Rules.

⁷⁷ Article 17(5) of the 2010 UNCITRAL Arbitration Rules.

⁷⁸ Article 4(2)(f) of the 2010 UNCITRAL Arbitration Rules.

⁷⁹ See eg article 7 of the ICC Arbitration and ADR Rules.

⁸⁰ Article 7(1)-(2) of the ICC Arbitration and ADR Rules.

⁸¹ Article 7(3)-(4) of the ICC Arbitration and ADR Rules.

3.3 Consolidation

The consolidation of multiple arbitrations turns previously single-party disputes into multi-party cases on the claimant and/or respondent side. Arguments in favour of consolidation advocate its enhanced efficiency and the avoidance of inconsistent or contradictory awards, while opposite arguments point at problems relating to party consent, non-participation in the appointment of the tribunal, infringement of parties' substantive rights and the apportionment of the costs of arbitration.⁸² Of all sets of procedural rules analysed in this study, only the ICC Rules contain specific regulations for consolidation. At the request of a party, the International Court of Arbitration may merge ('consolidate') two or more arbitrations pending under the ICC Rules into a single arbitration, where:

- a) the parties have agreed to consolidation; or*
- b) all of the claims in the arbitrations are made under the same arbitration agreement; or*
- c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.⁸³*

Moreover, '[i]n deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant', which includes whether arbitrators have already been confirmed or appointed in more than one of the arbitrations. The resulting consolidated case is considered to have commenced when the first arbitration started, unless otherwise agreed by all parties.⁸⁴ In an a-typical and context-specific manner (and therefore not further discussed in this paper), the North American Free Trade Agreement (NAFTA) provides for the compulsory consolidation of arbitral proceedings in which 'claims have been submitted to arbitration [...] that have a question of law or fact in common'.⁸⁵ Consolidation can also be regulated in tailor-made rules for disputes arising from one particular treaty or

⁸² See eg K Yannaca-Small, 'Parallel Proceedings', in P Muchlinski, F Ortino, C Schreuer, (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008) 1008-1048.

⁸³ Article 10 of the ICC Arbitration and ADR Rules.

⁸⁴ Article 10 of the ICC Arbitration and ADR Rules.

⁸⁵ Article 1126 of the North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289.

concession agreement. The Eurotunnel Arbitration Rules for example provide that the “Tribunal shall have power to join separate requests for arbitration”.⁸⁶

4. Dealing with absent co-responsible parties

4.1 Intervention

Procedural complexities relating to the multiplicity of parties may also arise due to a third party’s wish to intervene in the proceedings. Defining ‘intervention’ as ‘a contracting party that is not party to an arbitration commenced under the clause may wish to intervene in the proceedings’,⁸⁷ the IBA Guidelines recommend parties to adopt a model clause providing this possibility for other parties to the same arbitral agreement.⁸⁸ As with joinder discussed above, the absence of a general right to intervene reflects the foundation stone of arbitration: party consent.⁸⁹ In other words, no third party may intervene in arbitral proceedings without the consent of the parties. In highly unusual cases, a right of intervention has been given by treaty – this was for example the case under the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes (which also established the PCA) with regard to arbitral disputes relating to ‘a question of interpreting a Convention to which Powers other than those concerned in the dispute are Parties’.⁹⁰ This right has, however, never been invoked. Also in the Eurotunnel Arbitration Rules a right to intervene was included as it was stipulated that for all disputes arising under the Eurotunnel Treaty and/or the Concession Agreement, ‘any party to these Rules which is not a party to an arbitration may intervene in the arbitration’.⁹¹ However, as was also the case concerning joinder under these Rules, the tribunal has the competence to refuse such intervention ‘if it is of the opinion that, at the stage at which such intervention [...] is proposed, it would be unjust to the existing parties to the arbitration or would unduly and unnecessarily

⁸⁶ Article IX(2) of the Eurotunnel Arbitration Rules.

⁸⁷ IBA Guidelines for Drafting International Arbitration Clauses, para 101.

⁸⁸ This Model Clause is reproduced in the Annex to this paper. The part relevant to the issue of intervention states that: ‘Any party to this agreement may intervene in any arbitration proceedings hereunder by submitting a written notice of claim, counterclaim or cross-claim against any party to this agreement, provided that such notice is also sent to all other parties to this agreement [and to the designated arbitral institution, if any] within [30] days from the receipt by such intervening party of the relevant request for arbitration or notice of claim, counterclaim or cross-claim.’

⁸⁹ J Collier and V Lowe, *The Settlement of Disputes in International Law – Institutions and Procedures* (OUP, 1999) 208.

⁹⁰ Article 56 of the 1899 Convention for the Pacific Settlement of International Disputes; article 84 of the 1907 Convention for the Pacific Settlement of International Disputes.

⁹¹ Article XIII(1) of the Eurotunnel Arbitration Rules.

delay the arbitration'.⁹² In the 2007 *Eurotunnel* dispute this procedural rule needed not be applied.

4.2 Effect of Provisional Measures and Final Award

The arbitral tribunal customarily has the authority in addition to making a final award, to make interim, interlocutory or partial awards, subject to various conditions, even where the arbitration agreement is tacit in this regard.⁹³ The main focus of all procedural rules is to ensure that provisional measures preserve the respective rights of either party.⁹⁴ Equally, with regard to final awards, it is extensively stipulated that these are final and binding between parties. Nevertheless, the IBA Guidelines suggest the insertion of a model clause in arbitration agreements providing that also '[a]ny joined or intervening party shall be bound by any award rendered by the arbitral tribunal even if such party chooses not to participate in the arbitration proceedings'.⁹⁵

The procedural rules are silent on the possibility of arbitral awards possibly affecting the rights of co-responsible absent parties. In this regard, an analogous application could be made of the *Monetary Gold* principle according to which the International Court of Justice refused to adjudicate the case, because 'Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision'.⁹⁶ There is no reason to assume that the indispensable parties rule would not be applicable – when the *lex specialis*, ie the arbitration agreement, does not provide a specific solution, the arbitral panel will resort to the *lex generalis*, ie the *Monetary Gold* principle. Accordingly, an arbitral tribunal could possibly rule that it does not possess the required jurisdiction to decide on the matter if a third party's rights would form the very subject-matter of such ruling. Only the UNCITRAL Rules seem to contain a provision that could be used to address the rights of third parties, where it is stated that '[t]he party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure

⁹² Article XIII(5) of the Eurotunnel Arbitration Rules.

⁹³ Article 32 of the PCA Optional Rules for Arbitrating Disputes Between Two States.

⁹⁴ Article 47 of the ICSID Convention (and Rule 39).

⁹⁵ This Model Clause is reproduced in the Annex to this paper.

⁹⁶ *Monetary Gold*, ICJ Reports 1954, 32; For a more extensive analysis of this case and the subsequent ICJ cases discussing this topic, see A Orakhelashvili, 'The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: from *Monetary Gold* to *East Timor* and Beyond', (2011) 2 *JIDS* 2 373–392.

should not have been granted.’⁹⁷ Insofar as the tribunal’s award merely implicates a possible link to a third party’s actions, this ought not to prevent a finding of jurisdiction. However, if the finding would entail a direct determination of responsibility shared between the respondent(s) and an absent party which has not been a party to the dispute, the tribunal will not have the required competence to settle the dispute – but this has not been made explicit in the current procedural rules. In other words, under the scenario where State A (or investor A) brings an arbitration against State B, and on the facts State C (which is not a party to the proceedings) would be co-responsible, it would seem likely that the arbitral tribunal will only find jurisdiction if such finding (and the subsequent award on the merits) would at most merely affect the legal interests of State C, and not when C’s interests would form the very subject-matter of the arbitration.

Much in the previous paragraph is based upon analogous reasoning as there is relatively little arbitral case law on this topic,⁹⁸ but one recent case which has so far resulted in various international arbitral awards as well as judgments in several domestic jurisdictions, merits more extensive discussion: *Chevron Texaco v. Ecuador*. In 2003, a class action lawsuit was initiated in Ecuadorian courts against Chevron Texaco alleging severe environmental contamination of the area where oil exploration was conducted, leading to increased rates of cancer as well as other serious health problems for the residents of the region. In 2009, while the dispute was pending before the national courts, Chevron Texaco initiated international arbitral proceedings against Ecuador, alleging that the latter had acted in breach of the US-Ecuador BIT by unduly influencing its domestic judiciary and thereby compromising judicial independence.⁹⁹ In 2010 the arbitral panel ruled in favour of Chevron Texaco, finding that Ecuador had indeed violated its international obligations by delaying rulings on the dispute pending in Ecuadorian courts.¹⁰⁰ In 2011, the Ecuadorian Court of First

⁹⁷ Article 26(8) of the UNCITRAL Rules.

⁹⁸ *Daimler Financial Services AG v Argentina*, Award, ICSID Case No ARB/05/1 (22 August 2012) para 175 and Dissenting Opinion of Judge Charles N Brower, para 8; *Wintershall Aktiengesellschaft v Argentina*, Award, ICSID Case No ARB/04/14 (8 November 2008) para 160, n 135; *Hochtief AG v Argentina*, Decision on Jurisdiction, ICSID Case No ARB/07/31 (24 October 2011) Separate and Dissenting Opinion of J Christopher Thomas, para 76, n 69.

⁹⁹ Treaty Between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993 (entered into force 11 May 1997).

¹⁰⁰ *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. AA277, UNCITRAL, Partial Award on the Merits, 30 March 2010.

Instance issued a ruling in favour of the plaintiffs (Lago Agrio) in the class action lawsuit, ordering Chevron Texaco to pay \$8.6 billion in damages and cleanup costs, with the damages increasing to \$18 billion if Chevron Texaco did not issue a public apology.¹⁰¹ The same month, an international arbitral panel issued an Interim Measures Order ordering Ecuador to suspend enforcement of the Ecuadorian judgment.¹⁰² The domestic ruling was nevertheless upheld upon appeal before an Ecuadorian court in 2012,¹⁰³ while a month later, an international arbitral panels reviewed Ecuador's compliance with the Interim Measures Order¹⁰⁴ and issued an interim award on jurisdiction and admissibility which extensively elaborated on the rights of third parties.¹⁰⁵

In the latter interim award, the panel discussed the disagreement between the parties as to the applicability of the *Monetary Gold* principle to investor-State arbitrations, particularly relating to 'circumstances in which a tribunal adjudicating upon the liability of a State may have to consider matters that are the subject of litigation between private persons'.¹⁰⁶ The tribunal, however, was not convinced that it had to decide that disagreement, as it considered that 'even if the *Monetary Gold* principle should be applicable in this arbitration it would not operate so as to prevent the Tribunal from exercising jurisdiction over the Parties' dispute'.¹⁰⁷ Nevertheless, it explained its reasoning, assuming 'for the sake of argument' that the principle should be applicable, based on a three-pronged understanding of the *Monetary Gold* decision as implementing three principles. First of all, *Monetary Gold* gives effect to the principle of consent, meaning 'that no international tribunal may exercise jurisdiction over a State without the consent of that State; and, by analogy, no arbitration tribunal has jurisdiction over any person unless they have consented', in other words,

¹⁰¹ *Maria Aguinda et al. v. Chevron Texaco Corporation*, Proceeding No. 002-2003 (at first instance) (14 February 2011), Provincial Court of Sucumbíos, Sole Division (*Corte Provincial de Justicia de Sucumbíos, Sala Única de la Corte Provincial de Justicia de Sucumbíos*), Nueva Loja, Ecuador.

¹⁰² *Chevron Corporation and Texaco Petroleum Company v Ecuador*, Order for Interim Measures, PCA Case No 2009-23 (9 February 2011).

¹⁰³ *Maria Aguinda et al. v. Chevron Texaco Corporation*, Proceeding No. 2011-0106 (on appeal) (3 January 2012), Provincial Court of Sucumbíos, Sole Division (*Corte Provincial de Justicia de Sucumbíos, Sala Única de la Corte Provincial de Justicia de Sucumbíos*), Nueva Loja, Ecuador.

¹⁰⁴ *Chevron Corporation and Texaco Petroleum Company v Ecuador*, Second interim award on interim measures, PCA Case No 2009-23 (16 February 2012).

¹⁰⁵ *Chevron Corporation and Texaco Petroleum Company v Ecuador*, Third interim award on jurisdiction and admissibility, PCA Case No 2009-23 (27 February 2012).

¹⁰⁶ *Ibid*, para 4.60.

¹⁰⁷ *Ibid*, para 4.60.

pertaining to the question of the tribunal's jurisdiction.¹⁰⁸ A corollary thereof is the 'indispensible third party' principle, purporting that 'if the very subject-matter of the case that [the adjudicatory body] has to decide is a question of the rights of a State not before it, [it] cannot proceed to decide that case', in other words, this relates to 'the question of the ability of the tribunal to decide the case justly and according to law'.¹⁰⁹ And thirdly, according to the due process principle, 'the rights of States should not be ruled upon unless they are properly before the Court and are given a full opportunity to present their case', forming the embodiment of the rights of the absent third party.¹¹⁰ Subsequently, the tribunal proceeded to apply all three principles to the case at hand.

With regard to the consent principle, it was held that the tribunal did not have any legal authority over the Lago Agrio plaintiffs and was thus unable to order them to follow any particular course of action, whereas it did have jurisdiction over both claimants (Chevron and TexPet) as well as Ecuador under the Arbitration Agreement.¹¹¹ Concerning the 'indispensible third party' principle, the tribunal recognized that if its award were to release Chevron from all liability, this would 'decide the legal rights of the Lago Agrio plaintiffs' but that would depend on the form and content of the decision on the merits, not on the mere exercise of jurisdiction.¹¹² The tribunal was emphasized that it was only asked to decide upon Ecuador's liability to the Claimants under the BIT and more precisely the question whether Ecuador was under an obligation to uphold a Settlement Agreement concluded in 1995. However,

It may be that the answer to that question is that the Respondent is indeed under such an obligation; and that the decisions of the Ecuadorian Courts are incompatible with that obligation. But that answer would not decide the question of the effect of the 1995 Settlement Agreement as between the Lago Agrio plaintiffs and Chevron. If there were an inconsistency between the Respondent's obligations under the BIT and the Lago Agrio plaintiffs' rights as determined by the Courts in Ecuador, it would be for the Respondent to decide how to resolve that inconsistency. On this analysis, the Lago Agrio plaintiffs cannot here be regarded as

¹⁰⁸ Ibid, para 4.61.

¹⁰⁹ Ibid, para 4.62.

¹¹⁰ Ibid, para 4.63.

¹¹¹ Ibid, para 4.65. TexPet, or Texaco Petroleum Company, is a legal person organised under US law, with its principal place of business in the US and a wholly-owned subsidiary of Chevron Corporation.

¹¹² Ibid, para 4.66.

indispensable third parties; and this case can properly proceed to the merits of the Claimants' claims without them.¹¹³

Regarding the due process principle, the tribunal admitted that 'even though the Lago Agrio plaintiffs may not be indispensable third parties to this arbitration, a decision by this Tribunal may nonetheless have a significant effect upon their legal rights and interests'.¹¹⁴ The problem therefore was how the principle of due process in relation to the Lago Agrio plaintiffs would affect the decision. The tribunal's answer was that this question had 'to be answered in the context of the Respondent's objection to jurisdiction' and 'in the light of the rights of due process possessed by the Parties to this arbitration'.¹¹⁵ Focusing on its core task of determining whether Ecuador had violated the rights of Chevron and TexPet under the BIT, it held that

[t]he question is one of the rights and obligations existing between the Claimants and the Respondent; and the Lago Agrio plaintiffs, who are not parties to the settlement agreements or to the BIT, do not have rights that are directly engaged by that question. If it should transpire that the Respondent has, by concluding the Release Agreements, taken a step which had the legal effect of depriving the Lago Agrio plaintiffs of rights under Ecuadorian Law that they might otherwise have enjoyed, that would be a matter between them and the Respondent, and not a matter for this Tribunal.¹¹⁶

Accordingly, the Tribunal decided to reject the Ecuador's objections insofar as these were based upon third party rights.¹¹⁷

In sum, the *Chevron Texaco v. Ecuador* panel issuing the third interim award applied a rather restrictive interpretation of the *Monetary Gold* principle which, if deemed predictive of future case law, might incite arbitral agreement drafters to more extensively foresee procedural difficulties in this regard and, if so desired, better protect the rights of absent parties.

5. Conclusion

This paper has examined six sets of procedural rules in the light of the following aspects of procedural issues relating to shared responsibility: first, how to bring the relevant (co-responsible) parties before the arbitral tribunal. This entailed a discussion

¹¹³ Ibid, para 4.67.

¹¹⁴ Ibid, para 4.68.

¹¹⁵ Ibid, para 4.69.

¹¹⁶ Ibid, para 4.70.

¹¹⁷ Ibid, para 4.71.

of questions relating to the constitution of the tribunal, such as the number and appointment of arbitrators. Furthermore, arbitral procedural rules regulate the finding of jurisdiction in multi-party disputes as well as the determination of claimant and respondent status. Secondly, this paper examined how to handle multi-party disputes in terms of evidence and fact-finding, joinder and consolidation of proceedings. Thirdly, with regard to how to deal with absent (co-responsible) parties, questions arise concerning intervention and the effect of provisional measures and final awards. Most procedural sets of rules address most of these issues – with particular remarkable foresight in the detailed provisions on multi-party disputes worked out in the sets of rules developed by the IBA and the ICC. These sets are primarily aimed at regulating international commercial arbitration, but can with some modification easily be applied in international public arbitration as well. The key recommendation is for drafters to anticipate shared responsibility claims at the outset: to include appropriate procedural rules when the agreement is being negotiated – as was the case with regard to the Eurotunnel project. Arbitration as a mechanism to settle international disputes is due to its flexibility an ideal means to solve shared responsibility claims arising from treaties or contracts. Such multi-party disputes will be less complex if these instruments from their inception already provided for arbitration as the chosen mechanism to address potential future claims concerning application or interpretation of rules.

ANNEX: International Bar Association, IBA Guidelines for Drafting International Arbitration Clauses and Commentaries thereto, adopted by a resolution of the IBA Council, 7 October 2010, para. 105, Recommended Clause for Multi-party Arbitration

All disputes arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration under [selected arbitration rules], except as they may be modified herein or by mutual agreement of the parties.

The place of arbitration shall be [city, country]. The language of arbitration shall be [...]. There shall be three arbitrators, selected as follows.

In the event that the request for arbitration names only one claimant and one respondent, and no party has exercised its right to joinder or intervention in accordance with the paragraphs below, the claimant and the respondent shall each appoint one arbitrator within [15] days after the expiry of the period during which parties can exercise their right to joinder or intervention. If either party fails to appoint an arbitrator as provided, then, upon the application of any party, that arbitrator shall be appointed by [the designated arbitral institution]. The two arbitrators shall appoint the third arbitrator, who shall act as presiding arbitrator. If the two arbitrators fail to appoint the presiding arbitrator within [45] days of the appointment of the second arbitrator, the presiding arbitrator shall be appointed by [the designated arbitral institution/appointing authority].

In the event that more than two parties are named in the request for arbitration or at least one contracting party exercises its right to joinder or intervention in accordance with the paragraphs below, the claimant(s) shall jointly appoint one arbitrator and the respondent(s) shall jointly appoint the other arbitrator, both within [15] days after the expiry of the period during which parties can exercise their right to joinder or intervention. If the parties fail to appoint an arbitrator as provided above, [the designated arbitral institution/appointing authority] shall, upon the request of any party, appoint all three arbitrators and designate one of them to act as presiding arbitrator. If the claimant(s) and the respondent(s) appoint the arbitrators as provided above, the two arbitrators shall appoint the third arbitrator, who shall act as presiding arbitrator. If the two arbitrators fail to appoint the third arbitrator

within [45] days of the appointment of the second arbitrator, the presiding arbitrator shall be appointed by [the designated arbitral institution/appointing authority].

Any party to this agreement may, either separately or together with any other party to this agreement, initiate arbitration proceedings pursuant to this clause by sending a request for arbitration to all other parties to this agreement [and to the designated arbitral institution, if any]. Any party to this agreement may intervene in any arbitration proceedings hereunder by submitting a written notice of claim, counterclaim or cross-claim against any party to this agreement, provided that such notice is also sent to all other parties to this agreement [and to the designated arbitral institution, if any] within [30] days from the receipt by such intervening party of the relevant request for arbitration or notice of claim, counterclaim or cross-claim.

Any party to this agreement named as respondent in a request for arbitration, or a notice of claim, counterclaim or cross-claim, may join any other party to this agreement in any arbitration proceedings hereunder by submitting a written notice of claim, counterclaim or cross-claim against that party, provided that such notice is also sent to all other parties to this agreement [and to the designated arbitral institution, if any] within [30] days from the receipt by such respondent of the relevant request for arbitration or notice of claim, counterclaim or cross-claim. Any joined or intervening party shall be bound by any award rendered by the arbitral tribunal even if such party chooses not to participate in the arbitration proceedings.