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Separability of arbitration clauses contained in international treaties: an unrevealed truth

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1. Introduction

The doctrine of separability is a typical feature of domestic arbitration laws and arbitration rules all-around the world and it means that arbitration clauses (and, more in general, dispute resolution clauses)[1] shall be considered as separate agreements from the contract within which they are inserted. The rationale of this doctrine is simple: an arbitration agreement is, inter alia, meant to exactly deal with the situations in which one of the parties is affirming that the agreement is invalid and/or ineffective and, should such an invalidity affect also the arbitration agreement, its insertion within the contract would be useless.[2]

This paper will discuss the possibility that the doctrine of separability applies also to arbitration agreements contained in international treaties, with the effects that (*i*) such treaty provisions shall be considered as separated from the rest of the Treaty, and, as a consequence, (*ii*) the termination of the main treaty cannot affect the validity and effectiveness of arbitration agreements. Relatedly, (*iii*) with specific regard to arbitration agreements set forth within bilateral investment treaties (BITs) and providing for the individuals' right to start arbitration proceedings against States, it will be argued that they are also covered by separability and not necessarily governed by the same law which regulates the substance of the treaty (at least, as we will see, when the involved form of arbitration is not the one under the auspices of the International Centre for the Settlement of Investment Disputes – ICSID).

In the opinion of this author, the necessity for the application of the doctrine of separability and its validity in international law may be established by referring to the same reasons which led to the affirmation of the principle in international commercial law. If it is true, as it seems to be, that there is a general trend favouring the effectiveness of arbitration clauses (so-called *favor arbitrati*),[3] it is also true that such effectiveness, as well as the autonomy of the parties, shall be protected from the risk that the purported

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[1] See in this regard Regulation (EU) 1215/2012 (12 December 2012) of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1, art 25(5) affirming that: 'An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract'. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

[2] Giovanni Zarra, 'Separability and the Law Applicable to the Substantive Validity of Arbitration Agreements' [2024] Journal of international arbitration 29.

[3] See Andrea Atteritano and Giovanni Zarra, *Elementi di arbitrato commerciale internazionale* (Edizioni Scientifiche Italiane 2024) 11. For the existence of this trend refer to *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (1985).

invalidity of a treaty affects the arbitration clause contained therein. In order to protect the parties will to arbitrate, the principle of separability is the best tool developed by international arbitration practitioners in analogous situations regulated by private law. On the contrary, it will be shown that it does not seem that there are legal or factual reasons that may constitute an obstacle to the applicability of the doctrine of separability to BITs.

The discussion as to the applicability of separability in international treaties will initially focus on a general provision of the 1969 Vienna Convention on the Law of Treaties (VCLT), which has been largely ignored in scholarship and only once mentioned in the case law, namely article 65(4).[4] This provision, located within the broader framework of an Article discussing the 'Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty' – which mainly explains how the notification procedure shall work –, sets forth that 'Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes'. With this respect, it seems arguable that, lacking any contrary indicia, this provision shall be interpreted exactly based on what it says, ie that dispute settlement provisions are not affected by the invalidity, termination, withdrawal from or suspension of the operation of a treaty. This interpretation is also supported, as shown by scholarship,[5] by the different kind of goals and consideration which the arbitration agreement has for the parties in comparison with the other (substantive) obligations contained in an international treaty.

Systemic interpretation can also be, in this regard, supportive, as, according to article 31(3)(c) of the VCLT, general rules of international law may be taken into account in the interpretation of treaty provisions.[6] It will be shown that, with specific regard to arbitration as a private means of dispute settlement, the separability doctrine (concerning arbitration agreements in contracts) is so widely accepted that it may constitute a general principle common to domestic legal systems, which may therefore assume relevance also in the international legal system and may support an

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[4] It is important to note that the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, recognizes the word 'separability' but for an entirely different purpose, ie as an application of the *utile per inutile non vitiatur* principle, at art 44, providing, inter alia, that: '1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree. 2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60. 3. *If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where: (a) the said clauses are separable from the remainder of the treaty with regard to their application; (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and (c) continued performance of the remainder of the treaty would not be unjust*' (emphasis added).

[5] Alessandra Pietrobon, *Il sinallagma negli accordi internazionali* (CEDAM 1999) 344, 348.

[6] Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' [2008] International and Comparative Law Quarterly 279.

interpretation of article 65(4) VCLT providing for separability of arbitration clauses in treaties.

Overall, it will be shown that not only the applicability of separability to international treaties is desirable, but there are no reasons to escape from the applicability of this doctrine also to international treaties, especially those, such as BITs, setting forth arbitration as the method for the settlement of disputes involving individuals.

2. Article 65(4) VCLT

The content of current article 65(4) VCLT was already present in the Draft Articles on the Law of Treaties of 1966, were it was contained in article 62(4). No particular attention was devoted to this rule in the commentary, where it was said that 'Paragraph 4 merely provided that nothing in the article is to affect the position of the parties under any provisions regarding the settlement of disputes in force between the parties'.[7]

Subsequent scholarship continuously ignored this specific provision and its potential meaning, nor it is possible to find further explanation in the *travaux preparatoires* of the VCLT, namely in the various reports by Brierly, Fitzmaurice and Waldock. The rule has only rarely been directly dealt with in the case law (ie, as shown below, twice, as far as this author is concerned) and it is thus fully understandable why, so far, it (as the entire article 65 VCLT) has been *not* considered as a codification of customary international law.[8]

As far as this author is concerned, few scholars briefly dealt with this specific provision. Among such scholars is Villiger, who, in his commentary to the VCLT,[9] affirms that article 65(4) can be seen as a derogation to article 65(3), which provides that if an objection to the notification of termination is raised by any other party to the relevant treaty, 'the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations'. As a consequence, the possibility to make recourse to the way of dispute settlement set forth at article 33 and following of the UN Charter should not preclude the recourse to the forms of dispute settlement set forth in the treaty to be terminated. The same solution was very briefly proposed by Adolfo Maresca.[10] However, this interpretation is not convincing, insofar as article 65(4) affirms that '*nothing in the foregoing paragraphs* shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes' (emphasis added). It is therefore clear that it intends to operate as a derogation to the entire provision of article 65 and not only to article 65(3) as Villinger and Maresca

[7] International Law Commission, *Draft Articles on the Law of Treaties with commentaries* (1966) vol II *Yearbook of the International Law Commission* 263.

[8] Mario Prost, 'Article 65' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties, A Commentary* (OUP 2011) 1486.

[9] Mark E Villiger, *Commentary on the 1969 Vienna Convention on the law of treaties* (Martinus Nijhoff Publishers 2009) 811–12.

[10] Adolfo Maresca, *Il diritto dei trattati: Convenzione codificatrice di Vienna del 23 maggio 1969* (Giuffrè 1971) 733-741, especially 739–40.

purport. The same idea may come from the commentary to article 62(4) of the Draft articles (mentioned above) which, in defining the scope of application of this provision, says that 'nothing *in this article*' (emphasis added) shall affect dispute resolution clauses contained in international treaties subject to notification for termination, withdrawal, etc. The reference, thus, applies, also to paragraphs 1 and 2 of article 65: the application of these provision is without prejudice to the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes. More in detail, paragraph 1 states that:

> A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

Paragraph 2 then clarifies that:

> If, after the expiry of a period (so-called moratorium) which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

The reading of the provisions above (especially paragraph 2), thus, confirms that they not only deal with the procedure to be followed for termination, but also regulate the effects of the application of this procedure, ie its effects in terms of timing and of measures that the notifying party may take (ie the measure, among invalidity, termination, withdrawal from or suspension of the operation of a treaty, which it proposed)[11] after the so-called moratorium period set forth at paragraph 2 ends.[12] With this last regard, the operationality of article 65 is also prospective, as it allows the notifying party to adopt the measures it proposed and to carry out the legal effects of this measure. Against this background, it is hereby suggested that article 65(4) shall be interpreted as merely meaning what it says, ie that all the previous paragraphs (1-3) of the provision of article

[11] As to the legal effects of termination, art 70 VCLT titled 'Consequences of the termination of a treaty', provides that: '1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (*a*) releases the parties from any obligation further to perform the treaty; (*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination'. Letter (*b*) of this provision has been interpreted as a potential further legal reason for the separability of arbitration agreements by Hervé Ascensio, '1986 Vienna Convention: Article 70 Consequences of the termination of a treaty', in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties, A Commentary* (OUP 2011) 1585.

[12] Prost (n 8) 1491, 1495.

65 – referring to the notification procedure, including its prospective effects – shall not affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes. This solution seems to be the most compliant with the rule of interpretation at article 31(1) VCLT, which attains extreme importance to the wording of the treaty to be interpreted.[13] In other words, even if article 65(4) is located in the context of the provision of the VCLT (article 65) on the termination procedure, its wording is clear in saying that it might be interpreted as not only referring to (*i*) disputes as to the termination, but also to (*ii*) disputes concerning the effects and the consequences of the termination, withdrawal, invalidity etc., that are not affected by the termination as the dispute resolution clause remains in force.

The former category of disputes was specifically dealt with by a PCA Arbitral Tribunal in *Croatia v Slovenia*[14] which analysed the scope of application of article 65(4) VCLT in a dispute concerning the validity of a termination agreement, by saying that:

> This article explicitly recognises and preserves a tribunal's ability, pursuant to its own mandate, to resolve disputes falling within its jurisdiction. The Tribunal has already stated that it has jurisdiction under the Arbitration Agreement to settle the dispute between the Parties concerning the validity of the termination of the Agreement by Croatia (see paragraph 162 above). That jurisdiction is not affected by article 65 of the Vienna Convention, which on the contrary preserves it in paragraph 4.[15]

As to the applicability of article 65(4) VCLT to the latter category of disputes (ie those on the effects and the consequences of the termination, withdrawal, invalidity etc), convincingly, Dorr and Schmalenbach take a very general approach to article 65(4) and say that:

> Article 65 paragraph 4 makes it clear that existing agreements on the settlement of disputes between the parties are not affected. The paragraph guarantees that the will of the parties as expressed in their treaties is not ignored so that a certain settlement procedure would be imposed upon them. *In addition*, parties may

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13 Luigi Crema, *La prassi successiva e l'interpretazione del diritto internazionale scritto* (Giuffrè 2017).

14 *Partial Award* (30 June 2016) <https://pcacases.com/web/sendAttach/1787>.

15 Ibid paras 165-166. For a similar conclusion see Loris Marotti and Martina Buscemi, 'Obblighi procedurali e conseguenze del recesso dai trattati: quale rilevanza della Convenzione di Vienna nella prassi recente?' [2019] Rivista di diritto internazionale 966. For a contrary opinion see Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Part four' (1992) 63 British Yearbook of International Law 1, 92, according to whom this solution would be correct 'only to the extent that the jurisdictional clause in question, according to its terms, enabled the relevant tribunal to judge whether the treaty was or was not "no longer operative"'. Indeed, 'if the compromissory clause is in the usual form, extending to disputes as to the interpretation or application of the treaty, this cannot be said necessarily to apply to disputes as to termination; but if, as will almost always be the case, the dispute as to termination turns on the question of interpretation – eg, whether a given article has been breached – the compromissory clause will pro tanto come into effect'.

> choose other forms of dispute settlement or may waive the procedure foreseen in the VCLT[16] (emphasis added).

In other words, the clause on dispute settlement survives termination (*rectius*: the notification) and may still be used by the parties and the waiver to the methods of dispute settlement set forth at article 65(3) VCLT is seen as an additional possibility to the general rule which safeguards the applicability of dispute resolution clauses in treaties to be terminated.

The survival of dispute settlement agreements cannot logically take place if it is not previously accepted that the clause is separable/autonomous from the rest of the treaty.

In this last regard, it has been convincingly argued that, regardless from the scope of article 65(4) VCLT, separability of arbitration agreements in international treaties may be due to the fact that an arbitration agreement expresses an *accessory synallagma* with respect to the main treaty. In other words, the kind of exchange (consideration) between the contracting parties is different when they negotiate the main treaty obligations and the obligations as to jurisdiction. The consideration of the main treaty attains to the substantive advantage that each party is willing to get from such a treaty. The consideration related to the arbitration agreement relates to a procedural safeguard (viz. access to a form of justice) which the parties want to guarantee should any dispute arise. In this respect, the consideration for the parties deriving from arbitration agreements also involves the consequence that these agreements do not suffer the invalidity/ineffectiveness of the main treaty, as this consideration involves, inter alia, the consequence that, when invalidity or ineffectiveness of the treaty are alleged, the arbitration agreement potentially comes into play.[17] It seems that the proposed approach is also the only compatible with the two decisions by the ICJ which dealt with this matter. In the *Fisheries Jurisdiction* case,[18] having relied on a change of circumstances in order not to apply the provisions of an Exchange of Notes between the Government of the United Kingdom and the Government of Iceland of 11 March 1961, Iceland challenged the jurisdiction of the ICJ, which was provided in the same Exchange of Notes. However, the Court stated that the recourse to the ICJ was correct as 'in the present case, the procedural complement to the doctrine of changed circumstances is already provided for in the 1961 Exchange of Notes, which specifically calls upon the parties to have recourse to the Court in the event of a dispute relating to Iceland's extension of fisheries jurisdiction'.[19] More in detail, 'the change of circumstances alleged by Iceland cannot be said to have transformed radically the extent of the jurisdictional obligation which is imposed in the 1961 Exchange

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16 Oliver Dorr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 1211-32, especially 1229-30.

17 Pietrobon (n 5) 344, 348.

18 *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) (Judgment) [1973] ICJ Rep 3.

19 Ibid [45].

of Notes'.[20]This solution could not have been applied without an implied reliance on the doctrine of separability, which involved the separation of the dispute resolution clause from the rest of the treaty (which, in Iceland's view, was allegedly inapplicable). Scholarship who dealt with this topic fully agrees with this position, as it says 'in the reasoning of the Court, the jurisdictional clause is separable from the rest of the Treaty: indeed, the Court rules in favour of his jurisdiction without going into the merit of the case' (emphasis added; own translation).[21]

Not differently, in Appeal Relating to the Jurisdiction of the ICAO Council,[22] the ICJ again considered that the jurisdictional clauses at article 84 of the 1944 Chicago Convention on civil international aviation, and at article 2, section 2, of the International Air Services Transit Agreement, can found the jurisdiction of the ICAO Council independently from the validity of the Treaties in which they were inserted. As noted in scholarship, the clauses were thus to be considered as 'separable from the rest of the agreement due to its specific function'.[23] Doubts have been expressed as to the disputes to which the continuity of dispute resolution clauses (due to separability) shall apply (ie the temporal scope of the effects of separability). Some scholars affirm that the dispute resolution clauses shall apply to disputes which *crystallized* before termination.[24] However, while the word *crystallized* is somehow ambiguous, it is also arguable that, if it is accepted that the doctrine of separability protects the right of the parties to access to a form of justice after termination, withdrawal, invalidity, etc, it should come as a consequence that the dispute resolution clause is still applicable to all disputes arisen from facts preceding termination, regardless of the existence of a formal notice of dispute with respect to such facts before termination, withdrawal, invalidity, etc. As is well-known, general international law does not provide for time limits to bring disputes before international courts and tribunals (and, as a consequence, reference shall be made to the relevant treaty).

3. Separability, a general principle common to domestic legal systems

The approach proposed above as to the interpretation of article 65(4) VCLT may be also supported by systemic interpretation, as it is arguable that the doctrine of separability of arbitration agreements within contracts is also a general principle common to domestic legal systems which may be relevant for the purpose of the interpretation of this (non-customary) rule of the VCLT,[25] as dispute resolution clauses overall share the purpose of allowing the parties to have an access to a form of justice whenever a problem arises with the relevant legal instrument (either a contract or a treaty). In contract law, it is

20 Ibid [43].
21 Pietrobon (n 5) 343.
22 *India v Pakistan (Judgment)* [1972] ICJ Rep 46.
23 Pietrobon (n 5) 339. The Author, at 340, links this approach also to the principle of *effet utile*.
24 Marotti and Buscemi (n 15) 966-967.
25 McLachlan (n 6).

universally accepted that, in presence of an arbitration clause, arbitral tribunals have jurisdiction even if the relevant contract is invalid or inapplicable.[26] 'The doctrine of separability recognises the arbitration clause in a main contract as a separate contract, independent and distinct from the main contract'.[27] 'Separability protects the integrity of the agreement to arbitrate and plays an important role in ensuring that the parties intention to submit disputes is not easily defeated. In this way it also protects the jurisdiction of the arbitration tribunal'.[28]According to separability, if a party claims that the main contract is invalid, this does not involve the invalidity of the consent to arbitration that such a party has already given and on which the other party relied.[29] Scholarship has already argued that separability might be considered as a fundamental principle of arbitration law[30] and a general principle of law recognized by civil nations (one of the sources of international law established by article 38 of the Statute of the ICJ)[31] and it actually seems undisputed that, when referred to contract, separability of arbitration agreements is a general principle of law which is common to the vast majority of legal systems. With regard to the application of the principle by national courts, in the words of Born:

> National judicial authority is *essentially unanimous* in recognizing the basic principle that an agreement to arbitrate is presumptively separable from the underlying commercial contract in which it is contained and that a defect in the

[26] The application of separability is not without any limit: in case the contract has been never concluded, it is logical that also the arbitration clause has never been concluded. Anyway, arbitral tribunals still have jurisdiction to rule on the existence of the contract. In this sense, separability is strictly related to the principle of *kompetenz-kompetenz* and protects the jurisdiction of the tribunal.

[27] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 102.

[28] Ibid. Note that separability operates also as a conflict of laws rule, according to which the arbitration agreement may be governed by a law different from the one of the main contract. On this point, see Adam Samuel, 'Separability of arbitration clauses – some awkward questions about the law on contracts, conflict of laws and the administration of justice' [2000] Arbitration and Dispute Resolution Law Journal 36 <http://www.adamsamuel.com/pdfs/separabi.pdf> accessed 30 April 2025.

[29] *Heyman v Darwins Ltd* [1942] AC 356, 374 (HL) (Lord Macmillan) 'It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clauses survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract'.

[30] Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 199; Stephen M Schwebel, Luke Sobota and Ryan Manton, *International Arbitration: Three Salient Problems* (2nd edn, CUP 2021) 64, noting that the principle of separability is sustained in arbitral case law concerning public international law, international commercial arbitration and national arbitration.

[31] Roberto Ruoppo, 'Autonomia della clausola arbitrale e legge applicabile' in Daniele Mantucci (ed), *Trattato di diritto dell'arbitrato*, vol XII, *L'arbitrato nei rapporti commerciali internazionali* (Edizioni Scientifiche Italiane 2021) 164-165. Antonias Dimolitsa, 'Separability and Kompetenz-Kompetenz' in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No 9 (Wolters Kluwer 1999) 217-256; this author does not expressly mention art 38 of the ICJ Statute, but it seems to implicitly refer to this category when she affirms that 'arbitrators no longer need to determine the law applicable to the contract and/or the arbitration agreement in order to check a plea concerning the existence or the validity of the main contract does not affect ipso facto their jurisdiction. They do not even have to try to determine the intention of the parties in this regard since the principle inherently implies that this is the parties' intention. So long as the validity of the arbitration agreement itself is not questioned, the arbitrators must declare that they have jurisdiction and proceed to judge on the merits, whereby they may possibly rule that the main contract is non-existent or void'.

> underlying contract will not ordinarily affect the validity of the associated arbitration agreement[32] (emphasis added).

To verify the truthfulness of this authoritative statement, a short digression is due to explain – without any ambition of exhaustiveness – what these principles are according to the recent approach taken by the International Law Commission. According to the International Law Commission[33] these are:

> General principles of law derived from national legal systems, (with regard to which) there is broad agreement that the basic approach for their identification consists of a two-step analysis to ascertain: (*i*) the existence of a principle common to the various legal systems of the world, substantiating in a commonality to the various legal traditions, and (*ii*) its transposition to the international legal system.

With regard to the latter issue (transposition), the Special Rapporteur argued that:

> National legal systems and the international legal system have important differences, and municipal rules and principles are put in place taking into account the needs and characteristics of the former. Therefore, some form of recognition that a principle common to the various legal systems of the world is capable of applying at the international level appears to be necessary.[34]

With this last respect, recent scholarship has expressed the view that transposition corresponds to a compatibility test with the structure of the international legal system, which substantiate with the non-contrariness to the fundamental principles of international law.[35] Salerno has talked about a 'continuity of values between domestic and international law'.[36] Against such background, it is arguable that, certainly, separability (as referred to contracts) is a general principle of international law in the sense indicated above. With regard to the application of separability in different legal traditions, it should be emphasized that this principle is – as of today – so widely accepted that it is defined by the leading international arbitration scholars as 'one of the true transnational rules of

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[32] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 389. Anyway, as stated by Lew, Mistelis and Kröll (n 26) 106, 'full acceptance of the doctrine is still outstanging in certain Arab countries'. This consideration is not sufficient to let us consider separability as a principle that is not applied throughout the world. As an example of the wide acceptance of separability, we can refer to the decision *Sojuznefteexport v Joc Oil* (Bermuda Court of Appeal, 1990) XV YBCA 384, 407ff.

[33] Marcelo Vázquez-Bermúdez, 'Third report on general principles of law' A/CN.4/753 (2022) para 2(d).

[34] Ibid para 13.

[35] Donato Greco, 'Su natura e limiti della trasposizione di principi comuni in foro domestico nell'ordinamento internazionale [2022] Rivista di diritto internazionale 297ff.

[36] Francesco Salerno, *Diritto internazionale* (7th edn, Cedam 2024) 235. See also Marcelo Vázquez-Bermúdez, 'Second report on general principles of law' A/CN.4/741 (2020) para 83.

international commercial arbitration'[37] and as 'a general principle of international arbitration law, reflected in international arbitration conventions, national arbitration legislations and judicial decisions, institutional arbitration rules and arbitral awards'.[38] Separability is not only recognized by all arbitration rules (showing a general acceptance of this concept within the relevant community)[39] but it 'is widely established in the arbitration statutes of all developed jurisdictions'[40] and is a 'world-recognized doctrine in commercial arbitration'[41]. The doctrine has been initially developed in Germany[42] and in Switzerland[43], but is today accepted and applied in all geographical areas of the world and legal traditions, including, inter alia, in USA, [44] France, [45] England, [46] Japan, [47] China, [48]

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[37] Lew, Mistelis and Kröll (n 26) 106.

[38] Born (n 32) 353.

[39] See, inter alia, UNCITRAL Model Law on International Commercial Arbitration, art 16(1); UNCITRAL Arbitration Rules (2010), art 20(1); Permanent Court of Arbitration, Arbitration Rules (2012), art 23; ICC Arbitration Rules (2021), art 6(9); LCIA Arbitration Rules (2020), art 23(2); SIAC Arbitration Rules (2025), art 28(2); HKIAC Administered Arbitration Rules (2018), art 19.

[40] A similar statement is also made by Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 119.

[41] Jidong Lin, 'Comparative Analysis of Doctrine of Separability between China and the UK' [2023] Conflict of laws <https://conflictoflaws.net/2023/comparative-analysis-of-doctrine-of-separability-between-china-and-the-uk/> accessed 30 April 2025.

[42] Zivilprozessordnung (German Code of Civil Procedure), s 1040(1)(2): 'An arbitration clause that forms part of a contract shall be treated as an independent agreement' (own translation).

[43] Federal Act on Private International Law (Switzerland), art 178(3): 'The validity of an arbitration agreement cannot be contested on the ground that the main contract is invalid'.

[44] Based on the separability (sometimes referred to as severability) doctrine, US law generally treats an arbitration clause that is contained within a larger contract as a separate agreement. In this regard see *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395, 403–04 (1967); *Buckeye Check Cashing Inc v Cardegna*, 546 US 440, 445–46 (2006). The Restatement (Third) of the US Law of International Commercial Arbitration para 2(7)(c) says that: 'The invalidity of the main contract does not necessarily render the agreement's arbitration clause invalid. Parties often agree to separability by their selection of arbitral rules that usually incorporate the separability doctrine. Because the doctrine is only a presumption, it may be modified or eliminated contractually'. See <https://uk.practicallaw.thomsonreuters.com/w-011-2065?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

[45] In France the principle of separability is brought to its extreme and scholars talk about the principle of autonomy of the arbitration clauses. In this sense, see art 1447 French NCCP and the 1963 decision by the Cour de Cassation in *Ets Raymond Gosset v Carapelli*, JCP G 1963, II, 13, para 405.

[46] Arbitration Act 1996 (UK), s 7: 'Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement'.

[47] Arbitration Act (Act No 138 of 2003) (JP), art 13(6): 'The Arbitration Law recognises the separability of arbitration agreements. If any or all of the contractual provisions (excluding the arbitration agreement) in a contract are found to be null and void, cancelled or for other reasons invalid, the validity of the arbitration agreement is not necessarily affected' (own translation). See Hiroyuki Tezuka, Azusa Saito and Motonori Ezaki, 'Arbitration procedures and practice in Japan: overview' [2017] Global Practial Law <https://www.nishimura.com/sites/default/files/images/51254.pdf> accessed 30 April 2025.

[48] Arbitration Law 1994 (CN), art 10 which stipulates that: 'Insofar as the parties reach an arbitration agreement during the negotiation, the non-existence of the contract would not affect the validity of the arbitration agreement' (own translation).

India,[49] Canada,[50] The Netherlands,[51] Sweden,[52]Italy,[53] United Arab Emirates,[54] Bahrein,[55] Portugal,[56] Turkey,[57] Russia,[58] Indonesia,[59] Malaysia,[60] Scotland,[61] Algeria,[62] Brazil,[63]

[49] Arbitration and Conciliation Act 1996 (IN), s 16 talks about the 'Competence of arbitral tribunal to rule on its jurisdiction' and clause (*a*) states that: 'an arbitration clause from a main contract will be treated as an independent agreement' (own translation). This means that the validity and enforceability of the arbitration agreement are considered independent of the validity of the contract as a whole.

[50] Laurence Ste-Marie, Dina Prokic and Stephen L Drymer, 'Commercial Arbitration: Canada' [2025] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/canada> accessed 30 April 2025. This report says that: 'all common law provinces have incorporated article 16 of the Model Law, which enshrines the doctrine of separability'. In Québec, art 2642 of the Civil Code is to the same effect. Courts across the country have confirmed the doctrine's applicability in Canada (see, eg *General Entertainment and Music Inc v Gold Line Telemanagement Inc*, 2022 FC 418, paras 41–42, confirmed on appeal 2023 FCA 148; *Specter Aviation v Laprade*, 2021 QCCA 1811, paras 52–54; *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41, paras 167–168, 194).

[51] Code of Civil Procedure (NL), art 1053 entitled 'Separability of the arbitration clause' says that: 'An arbitration agreement shall be considered and decided upon as a separate agreement' (own translation).

[52] Arbitration Act (SE), s 3 provides that: 'the arbitration agreement is deemed to constitute a separate agreement when the validity of the arbitration agreement is determined in conjunction with a determination of the jurisdiction of the tribunal' (own translation).

[53] Code of Civil Procedure (IT), art 808(2) where it is stated that: 'The validity of the arbitration clause must be evaluated independently of the underlying contract' (own translation).

[54] See Chatura Randeniya and Mevan Bandara, 'In brief: arbitration agreements in United Arab Emirates' [2021] Lexology <https://www.lexology.com/library/detail.aspx?g=075bb22b-5535-49be-a197-db2b1ba5df27> accessed 30 April 2025,where it is stated that 'The Arbitration Law provides that an arbitration agreement must be treated as an agreement independent from the other terms of a contract'. In May 2018, Federal Law No 6 of 2018 on Arbitration (UAE), art 6 states that: '1. An Arbitration Agreement shall be separate from other clauses of the contract. The nullity, rescission or termination of the contract shall not affect the Arbitration Agreement contained if said Agreement is valid by itself, unless the matter relates to the incapacity of any party. 2. An argument on the nullity, rescission or termination of the contract which includes the Arbitration Agreement shall not result in the stay of the arbitration proceedings, and the Arbitral Tribunal may decide on the validity of said contract'.

[55] See Amel Alaseeri and Noor Sadiq, 'Commercial Arbitration: Bahrein' [2023] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/bahrain> accessed 30 April 2025.

[56] Miguel de Almada, Frederico Bettencourt Ferreira, Miguel Pereira da Silva and Afonso Moucho Diogo, 'Commercial Arbitration: Portugal' [2023] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/portugal> accessed 30 April 2025.

[57] International Arbitration Code (TR), art 4; Civil Procedure Code (TR), art 412.

[58] Evgeny Raschevsky, Vladimir Talanov, Natalia Soldatenkova and Yana Bagrova, 'Commercial Arbitration: Russia' [2025] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/russia> accessed 30 April 2025. This principle is established in art 16(1) of the International Commercial Arbitration Law (ICA Law) and art 16(1) of the Domestic Commercial Arbitration Law (DCA Law).

[59] Art 10(h) of the Law on Arbitration and Alternative Dispute Resolution.

[60] Arbitration Act 2005 (MY), s 18(2) provides that: 'an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement and a decision by the arbitral tribunal that the agreement is null and void shall not ipso jure entail the invalidity of the arbitration clause. The validity of an arbitration agreement is not affected by the validity of the main contract and hence, a decision by an arbitral tribunal that the main contract is null and void does not invalidate the agreement to arbitrate'. See Sharon Chong Tze Ying and Muhammad Suhaib Bin Mohamed Ibrahim, 'Commercial Arbitration: Malaysia' [2025] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/malaysia> accessed 30 April 2025.

[61] Arbitration Act (GB-SCT), s 5 titled 'Separability' para 1: 'an arbitration agreement which is part of another agreement is to be treated as separate from the principal contract'.

[62] See Aceris Law, 'Arbitration in Algeria' (Aceris Law LLC, 11 November 2021) <https://www.acerislaw.com/arbitration-in-algeria/> accessed 30 April 2025.

[63] The principle of separability is incorporated into art 8 of the Brazilian Arbitration Act, which provides that: 'the arbitration clause is autonomous from the agreement in which it is contained, such that nullity of the agreement does not necessarily entail nullity of the arbitration clause'.

Chile,[64]Ecuador, [65] Mexico, [66] Guatemala, [67] Vietnam, [68] Nigeria, [69] Kenya, [70] Egypt. [71] The doctrine is moreover applied in all the Model Law countries (including, for instance, Spain, Belgium, San Marino, Australia and Singapore).[72] As to the transposition test (ie non-contrariness of the principle of separability to any fundamental principle of international law), it seems that no rule, among the ones which are typically categorized among the general principles of international law, runs against the possibility of recognizing separability as a source of this kind. Separability might also be considered as a general principle common to domestic legal systems by applying other conceptions (slightly different from the ILC's recent position) of general principles of international law common to domestic legal systems emerged during the years.[73] In conclusion, if – as it

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64 The principle of separability is contained in art 16 of the ICA Act (CL).

65 Arbitration clauses are considered separable from the main contract under Ecuadorian law. This principle is expressly recognised in art 5 of the Arbitration and Mediation Law, which establishes that: 'the nullity of the main contract does not affect the validity of the arbitration agreement'. See Robalino Orellana and Hernan Escudero, 'Commercial Arbitration: Ecuador' [2025] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/ecuador#:~:text=Yes%2C%20arbitration%20clauses%20are%20considered,validity%20of%20the%20arbitration%20agreement> accessed 30 April 2025.

66 Code of Commerce (MEX), art 1432 covers the separability of the arbitration agreement from the main agreement. Under Mexican law, arbitration clauses are generally considered to be separable from the main contract. This means that an arbitration clause can be enforced even if the main contract is found to be invalid or unenforceable. See Daniel Garcia Barragan, 'Commercial Arbitration: Mexico', [2025] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial/arbitration/report/mexico#:~:text=Yes%2C%20under%20Mexican%20law%2C%20arbitration,to%20be%20invalid%20or%20unenforceable> accessed 30 April 2025.

67 The Guatemalan Arbitration Law [arts 10(1) and 21(1)] recognises the arbitration agreement as an independent agreement from the other stipulations of the contract. Even the fact of declaring a contract null and void does not invalidate the arbitration agreement contained in the contract. See Alvaro Castellanos, Elías Arriaza and Luis Pedro Rayo, 'Commercial Arbitration: Guatemala' [2025] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/guatemala> accessed 30 April 2025.

68 Nguyen Thi Thu Trang, Dang Vu Minh Ha, Dang Anh Ngoc and Do Ngoc Minh, 'Commercial Arbitration: Vietnam', [2025] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/vietnam> accessed 30 April 2025. Vietnamese laws uphold the principle of separability. In particular, according to art 19 of the LCA (VN), the arbitration agreement is entirely separate from the contract, and the changing, extending, cancelling of the contract, or making the contract invalid or unenforceable does not invalidate the arbitration agreement.

69 Adedapo Tunde-Olowu, Oluwaseun Philip-Idiok and Oluwatosin Fajolu, 'Commercial Arbitration: Nigeria' [2025] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/nigeria> accessed 30 April 2025.

70 John M Ohaga, Benard J Ogutu and Pressy Akinyi, 'Commercial Arbitration: Kenya' [2025] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/kenya> accessed 30 April 2025.

71 According to Arbitration Act (EG) art 23 and the decisions of Egyptian courts, arbitration agreements are separable from the main contract and are not affected by the latter's invalidity, termination and/or rescission insofar as the arbitration agreement itself is valid. Mohamed S Abdel Wahab and Noha Khaled, 'Commercial Arbitration: Egypt' [2025] Global Arbitration Review <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/egypt> accessed 30 April 2025.

72 UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006), art 16(1). The art stipulates that: 'The arbitral tribunal may rule on its jurisdiction, including any objections concerning the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause'.

73 The reference applies to the thought of professor Conforti in Benedetto Conforti and Massimo Iovane, *Diritto internazionale* (12th edn, Editoriale Scientifica 2023) 56, according to whom, in order to establish the existence of a general principle of international law, two conditions must be fulfilled: (*i*) the uniform application of such principle in the domestic law of the various developed States (*diuturnitas*); (*ii*) the principle shall be recognized as necessary within domestic legal

seems quite evident to the present author from an analysis of the available date – separability of arbitration agreements in private contracts is a general principle common to domestic legal systems, this information – which per se does not involve the applicability of the doctrine to international treaties (notwithstanding the intuitive similarities which one is tended to infer between contracts and treaties)[74] – is another piece of the puzzle leading to an interpretation of article 65(4) VCLT as encapsulating the doctrine of separability.

4. Effects of separability in the case of bilateral investment treaties

Peculiar effects might derive from the application of separability to arbitration clauses contained in BITs or even in multilateral investment agreements. It is well-known that, according to the doctrine of 'arbitration without privity',[75] arbitration agreements contained in investment treaties are to be considered as standing offers by the contracting States to investors of each other, which may be accepted by directly starting arbitration proceedings against the State (party of the treaty) where the investment is located or by somehow accepting the arbitration offer contained in BITS, eg with a letter of acceptance or also by means of a trigger letter sent by the investor to the State in order to inform it of the existence of a potential claim. BITs provide for the various forms of arbitration which the parties may choose and very often BITs (or other investment treaties) do not refer only (or at all) to ICSID arbitration – ie, as well known, a truly internationalized form of arbitration, without a legal seat – but they also refer to typical forms of commercial arbitration (viz. ad hoc arbitration administered in accordance with the UNCITRAL Rules, ICC, SIAC, SCC). These forms of arbitration involves that proceedings have a legal seat and the legal system of the seat has a significant importance in the regulation and support of

systems (*opinion juris sive necessitatis*). While the first prong of this test seems substantially coincident with the one put forward by Special Rapporteur Vazquez Bermudez, the second is somehow different (as it does not look at the specificities of the international law system), but it is nevertheless satisfied. With regard to the aspect of *opinio juris sive necessitatis*, it is clear that the unanimous application of the principle is a clear demonstration of the States' feeling of the necessity to apply the doctrine of separability within their legal systems. It is anyway worth to make an analysis of the reasons for which the principle has been so widely accepted. The most important reason emerging from the case-law is the necessity to ensure the effectiveness of arbitration clauses and to avoid that specious allegation of invalidity of the main contract may also impede the applicability of arbitration as the dispute resolution mechanism previously agreed by the parties, the autonomy of which shall be protected and ensued. US courts, referring to separability, stated that it is aimed at ensuring that 'arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts' [*Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395, 404 (1967) (US SC)].With the same vein, an English Court stated that 'there is the imperative of giving effect to the wishes of the parties unless there are compelling reasons of principle why it is not possible to do so' (see *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 3 All ER 897 (CA). See also German Bundesgerichtshof, Judgment of 27 February 1970, reported in (1990) 6 Arb Intl 79-85. For similar statements issued by other courts, refer to Born (n32) 349-471. See also Philippe Landolt, 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' (2013) 30(5) Journal of International Arbitration 511. Other reasons which emerged from the case-law are the protection of international trade and the effectiveness of the arbitration mechanism. With this regard, it is worth noting, as Born did [Born (n 32) 361], that in UK Department of Trade and Industry, 'Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill' (1994) 10 Arb Intl 189 is stated that 'it is not generally considered possible (for arbitration) to operate effectively in jurisdictions where the doctrine is precluded'.

74 Conforti and Iovane (n 73) 76.

75 Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Rev-FILJ 232.

arbitrations. Suffices it to say that arbitration awards, even based on an international treaty, will be subject to a challenge at the place of the seat.

As a consequence, while in the case of ICSID arbitration it is undoubtable that the arbitration agreement remains within the scope of public international law, in all the other cases it will be worth thinking about the law applicable to arbitration agreements contained in BITs.

In this respect, two main theories have been advanced[76]: one which sees the law applicable to the main contract as regulating the arbitration agreement too (with the consequence that, in the present case, international law would continue governing the arbitration agreement contained in investment treaties), and another which applies the law of the seat to the arbitration agreement. The latter theory has gained significant importance over the years and in 2025 it has been even legislatively recognized by the 2025 English Arbitration Act.

While this is not the place where to take a position on this longstanding debate, it is very important here to highlight that the application of separability to arbitration clauses contained in BITs may constitute a peculiar way to let domestic law (even of a State which has nothing to do with the parties of the treaty, considering that arbitration seats are often chosen in neutral place) be applied to an international treaty provision.

A second issue concerning the applicability of separability to arbitration clauses contained in BITs relates to the moment from which the arbitration agreement contained in BITs may be considered as perfected between the host State and the investor and, thus, separable from the rest and not subject to termination without the investor's consent.

The issue then becomes the understanding of when a right could be considered as validly attributed to an investor, and, for the present purposes, when separability starts operating.

There are many discussions between scholars on the time from which the consent to arbitration expressed through a BIT may become irrevocable[77] and it is here impossible to take a definitive position on this longstanding debate.

Suffice it to mention that Schreuer[78] affirms that consent is irrevocable only from the time it is formally perfected, ie from the moment the investor accepts the offer of the State (made through the BIT) by means of a formal statement of acceptance (which, in the opinion of the present author, may be also assimilated to a *trigger letter* sent to the State by the investor by means of which the investor formally informs the State of the existence

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[76] Giovanni Zarra, 'Separability and the law applicable to the arbitration agreement' (2024) 41 Journal of International Arbitration 29.

[77] For a full survey on the matter, refer to Michael D Nolan and Frederic G Sourgens, 'Limits of Consent-Arbitration without Privity and Beyond' in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 873.

[78] This theory is also followed by other authors. See Voon et. al., *supra*, note 38, 457. (a quale contributo si riferisce? Eliminare?)

of a dispute and of its intention to start arbitration) – that may be perfect a new private agreement on arbitration between the State and the investor – or through the commencement of an arbitration. Until that time, the offer of the State may be considered fully revocable.

On the contrary, others consider the offer as firm and irrevocable for a stated period of time (ie that of duration of BITs), irrespective of a formal acceptance by the investor.[79] Such a result may be achieved applying the international law principles of good faith and legitimate expectations, which also mirror domestic law concepts such as common law theory of jurisdictional estoppel[80] or the German law principle of irrevocability of pending offers.[81][82]

5. A case-study: the intra-EU BITs termination agreement of 2020

It is well-known that on 24 October 2019 EU Member States reached an agreement on a plurilateral treaty for the termination of intra-EU BITs. The agreement follows the declarations of 15 and 16 January 2019 on the legal consequences of the judgment of the Court of Justice[83] in *Achmea* and on investment protection in the European Union, where member states committed to terminate their intra-EU BITs. On 5 May 2020, 23 Member States signed the agreement for the termination of intra-EU bilateral investment treaties ('Termination Agreement').

The main provisions of the Termination Agreement are the following:

> Article 2(1), 'Termination of Bilateral Investment Treaties', intra-EU BITs (listed in Annex A of the Termination Agreement) are terminated according to the terms set out in the Termination Agreement. For the sake of clarity, arts 2(2) and 3 also provide that sunset clauses contained in these treaties (and in those already

[79] Emmanuel Gaillard, 'The Denunciation of the ICSID Convention' (2007) *New York Law Journal*. See also Oscar M Garibaldi, 'On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy' in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Cristoph Schreuer* (OUP 2009) 251.

[80] According to this theory, as stated by Nolan and Sourgens (n 76) 875, 'one exception to the common law rule of revocability is the instance in which there is detrimental reliance by the investor on an offer before a formal acceptance is made. In the case of offers of arbitration, such detrimental reliance may present issues of proof. Yet, it appears theoretically possible as an extension of the power of the investor ability to accept an offer of arbitration on account of an estoppel'. The authors also refer to Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (reprint, CUP 2006) 143-144. The only limit to the application of such a theory is the requirement of a writing consent required in case of ICSID arbitrations by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art 25.

[81] Nolan and Sourgens (n 76) 876, referring to art 145 BGB, according to which: 'whoever offers another to conclude a contract is bound by its offer unless the binding nature of the offer is expressly excluded'.

[82] It is worth noting that the aforementioned theories assume that BITs directly confer rights to investors, ie apply the so-called direct rights theory (on which see below). Eliminare?

[83] Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection <https://finance.ec.europa.eu/publications/declaration-member-states-15-january-2019-legal-consequences-achmea-judgment-and-investment_en> accessed 1 May 2025.

expired, but with sunset clauses still in force) are also incapable of producing legal effects.

Article 5, 'New Arbitration Proceedings', states that 'Arbitration Clauses shall not serve as legal basis for New Arbitration Proceedings', with a dubious wording as it is not clear whether, considering that the arbitration agreement is separate from the rest of the treaty, whether the parties effectively intended to terminate such clause.

Should article 5 not be existing, there would be little doubt as to the full validity and effectiveness of perfected arbitration agreements contained in terminated BITs until the date of termination of the relevant BIT (or of expiration of the sunset clause).[84] Separability would have dictated that the Termination Agreement did not involve arbitration agreements contained in terminated BITs.

In presence of article 5, and due to its dubious wording, it is not certain what States intended to do with arbitration agreements (they could have more easily expressly terminated them).

The issue ends up being a test for the applicability of the doctrine of acquired rights in international law, according to which if the State has freely decided to accept a binding limitation on its sovereignty for a certain limited period of time, in order to gain a certain legal advantage, it is obvious that it cannot withdraw the rights it has granted to the investor *ad libitum*.[85]

In other words, can we say that States are free to revoke perfected arbitrate contained in BITs?

[84] The power of States to validly terminate sunset clauses is also subject to debate.

[85] For a survey on the doctrine of acquired rights, see Ko Swan Sik, 'The Concept of Acquired Rights in International Law: A Survey' (1977) 24(1–2) Netherlands International Law Review 120. Such a doctrine is strictly related to the so-called 'doctrine of inter-temporal law', for which see Taslim O Elias, 'The Doctrine of Intertemporal Law' (1980) 74 American Journal of International Law 285. This has been considered as a general principle of international law by several scholars, eg Stephen Wittich, 'Article 70 – Consequences of the Termination of a Treaty' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 1207; James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2008) 13 Journal of World Investment and Trade 935, bases the existence of such a theory on an alleged general principle of international law, the content of which should be analogous to art 37(2) of the VCLT. The problem related to this argument is that art 37(2) of the VCLT requires that: 'in order to render a third-party right irrevocable, it must be clear that the parties intended that such right not be revocable'. While it is easy to argue that the host State agreed to render the right irrevocable in the case it entered into an investment contract with the investor, such a conclusion is not so immediate in cases of 'arbitration without privity' (ie in cases of arbitrations started on the basis of the wording of the sole BIT). See also Elena Sciso, *Gli accordi internazionali confliggenti* (Cacucci 1986) 151-63, who has grounded the irrevocability of the rights of the third party on the presence of a collateral agreement between the original contractors and the third party.

The majoritarian position is that States are the masters of treaties[86] and there are not acquired rights under international law.[87]

It is hereby submitted that the situation should, however, be most carefully examined in light of the peculiarities of investment treaties, which seem to directly attribute rights to investors and could somehow reduce the States discretionality.[88] Hence, once the arbitration agreement between a State and an investor is considered to be perfected (which is subject to doubt, as explained above), the sudden withdrawal of conferred rights might also involve the responsibility of the State which is withdrawing such a right.

On this basis, article 5 of the 'Termination Agreement' – stating that arbitration Clauses shall not serve as legal basis for new arbitration proceedings – could not operate for arbitration agreements perfected before the entry into force of the Termination Agreement and until the moment in which the arbitration clause contained in terminated BITs come to its natural expiry date, ie the termination of the BIT as set forth in the same BIT (a timing which, according to some scholars, could be prolonged also for the duration of sunset clauses, which, according to the theory of acquired rights, could not be lawfully terminated by States).

This position seems to be indirectly confirmed by article 25(1), last sentence, of the ICSID Convention, stating for the irrevocability of consent in ICSID arbitration once such consent has been given. As noted by Schreuer,[89] 'consent, once it is perfected, may not be withdrawn indirectly through an attempt to remove one of the other jurisdictional requirements under the Convention' and 'the ICSID Convention not only declares the unilateral withdrawal of consent inadmissible, but also makes provision for the institution and continuance of proceedings despite the refusal of a party to cooperate'. A closer look to the effects of the irrevocability of consent provided by article 25(1) ICSID Convention reveals that the Convention impliedly accepts the effects of the separability doctrine in the framework of investment arbitration, even if it does not expressly refer to it. The protection of party autonomy through the irrevocability of consent is – in fact – the main purpose of the doctrine of separability.

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[86] Loris Marotti, 'Aspetti problematici dell'accordo sull'estinzione dei trattati bilaterali di investimento tra Stati membri dell'Unione europea' (2020) Rivista di diritto internazionale privato e processuale 843.

[87] See in this regard the position taken by the House of Lords, European Union Committee, 82nd Report of Session 2016–17: Brexit: The 'Divorce' Bill (2017) <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/82/82.pdf.> accessed 1 May 2025.

[88] Pasquale De Sena and Massimo Starita, *Corso di diritto internazionale* (Il Mulino 2024) 306; Campbell McLachlan, Laurence Shore and Matthew Weininger, *International Investment Arbitration: Substantive Principles* (OUP 2017) para 61(2); *Occidental v Ecuador* [2005] EWCA Civ 1116 (CA), para 37; *ePlama Consortium Limited v Republic of Bulgaria* ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) para 141.

[89] Consent to Arbitration *UNCTAD Course on Dispute Settlement in International Trade, Investment and Intellectual Property* (UNCTAD, 2006) 37-39 <http://unctad.org/en/docs/edmmisc232add2_en.pdf>.

6. Brief conclusions

While separability of arbitration clauses is a well-established doctrine of all national law systems, the subject of separability of arbitration agreements contained in international treaties has been very rarely dealt with in scholarship and only indirectly touched by two decisions by the ICJ.

This notwithstanding, the separability of arbitration agreements contained in international treaties seems to be an assumption even in international law, as the same functions of these agreements impose that they are considered as autonomous from the rest of the treaty where they are inserted. The case law of the ICJ is very clear in this regard.

In this respect, moreover, an important role may be played by a provision of the VCLT which has been rarely the subject of analysis, ie article 65(4). In saying that the remaining part of article 65 VCLT is without prejudice to the dispute resolution clauses contained in international treaties subject to termination, this provision seems to accept that also the effects of termination (ie the actions taken after a valid notification of termination, withdrawal, etc) do not affect dispute resolution clauses, which are, thus, necessarily to be considered as autonomous from the rest of the (terminated) treaty.

Support for this position may be found also in the consideration that – being separability a general principle common to domestic legal systems – it may contribute to the interpretation of article 65(4) VCLT based on the principle of systemic interpretation.

The doctrine of separability may also regard arbitration clauses contained in BITs and providing investors directly with the right to start arbitration against the host State, determining that also the law of the seat of arbitration (if any) may be relevant for the regulation of such arbitration agreements. In this respect, for the application of separability, it is important to take into account the moment from which the arbitration agreement is considered to be perfected.