



Res judicata in international arbitration

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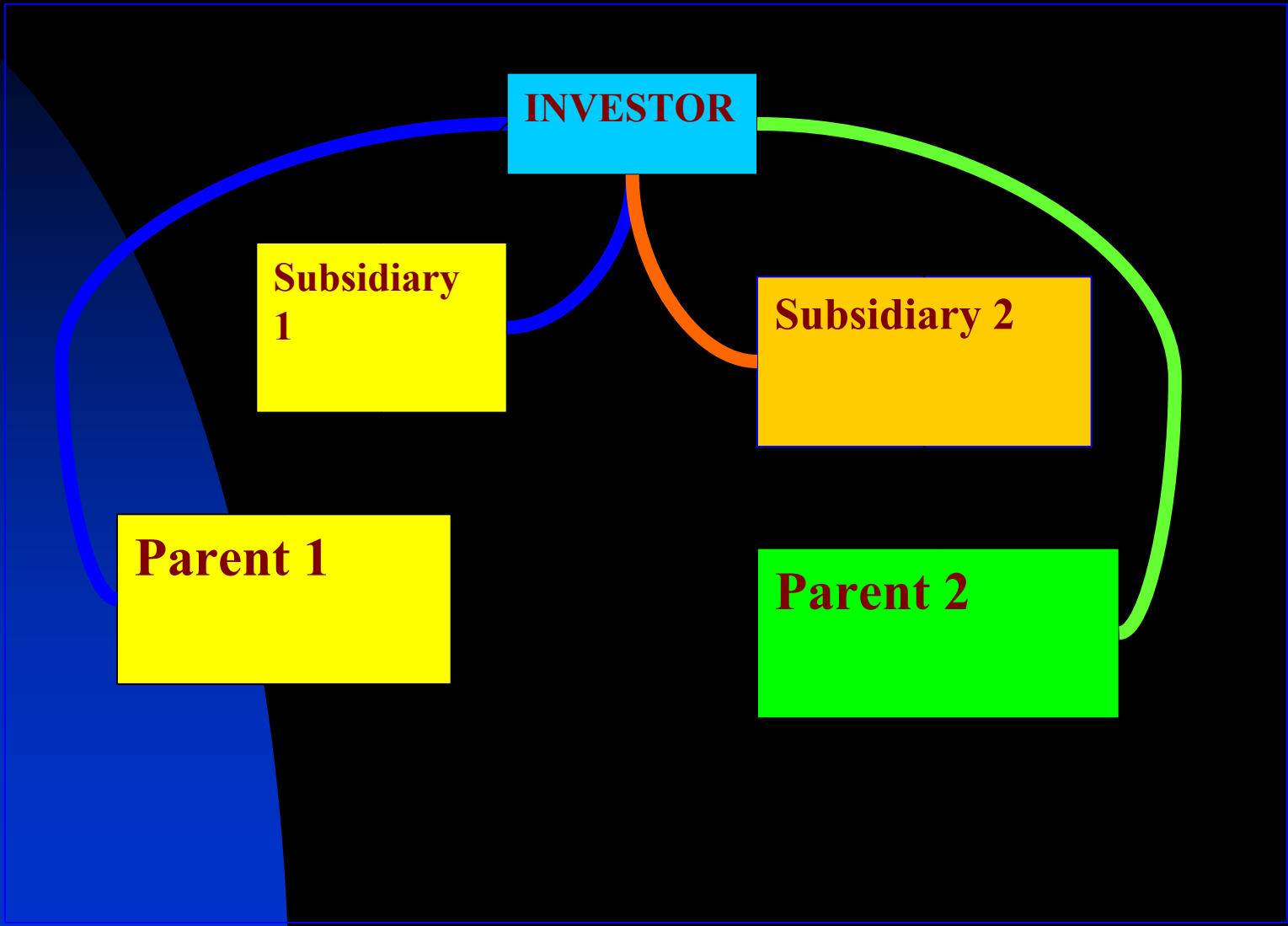
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Introduction

- An overview of some of the difficulties arising from determinations in multiple fora

BITs

- Protect direct and indirect investments
- Wide concept of investment
- ICSID cases:--
 - ◆ *CMS v Argentina (Jurisdiction)*
- Possibility of multiple actions
 - ◆ *Lauder v Czech Republic*
 - ◆ *CME v Czech Republic*



Res judicata

- “ ... a right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.”
 - ◆ (*Amco v Indonesia* [Resubmission: Jurisdiction])

Res judicata

- Triple identity:
 - ◆ identity of object
 - ◆ Identity of cause
 - ◆ Identity of parties

(Anzilotti in *Chorzów Factory*)

Issue estoppel

- A wider doctrine?
 - ◆ same question decided
 - ◆ final decision
 - ◆ same parties
- but not identity of cause.

The aims

- To ensure
 - ◆ finality in litigation
 - ◆ no harassment of respondents
 - ◆ *ne bis in idem*
 - ◆ good order among tribunals

The problems

- Points distinctly argued and distinctly decided
- Identity of parties

Points distinctly argued and distinctly decided

- Confidentiality in arbitration
 - ◆ ...of the award
 - ◆ ...of the pleadings
- No right of intervention in arbitration
- Few provisions for ordering joining of cases

Identity of parties

- Corporate affiliates
- Shareholders and companies

Different contexts

- Parallel arbitrations
- Incidental questions
- Different phases in different tribunals

Parallel proceedings

- The Czech arbitrations:-
 - ◆ Lauder (US) v Czech Republic (London, 2001)
 - ◆ CME (Netherlands) v Czech Republic (Stockholm, 2001, 2003)
- ★ also other proceedings

Incidental questions

- Standing to sue: the arbitral tribunal in *Mox* and the ECJ
- 'Loss' in national courts

Different phases in different tribunals

- Provisional measures in municipal courts
- ITLOS provisional measures: *Mox* and *Land Reclamation* cases

Approaches to solutions

- Cannot simply transplant private international law doctrines
- Necessary to preserve judicial good order
- Consider available forums as a system, not as isolated transactions
- Inherent powers of tribunals to preserve good order