9. REGULATION AS A QUESTION OF ARBITRAL TECHNIQUE: THE APPROACH OF INVESTMENT TRIBUNALS TO REGULATING JURISDICTIONAL COMPETITION

This chapter discusses the techniques[1] used by investment tribunals in resolving problems arising out of jurisdictional competition between domestic courts and investment tribunals. In contrast to the next two chapters, which focus essentially on the possibility of regulating jurisdictional interactions through various drafting techniques, and through the conduct of the litigating parties and the State contracting parties in general, the focus of the present chapter is on the repertoire of argumentative techniques that arbitrators themselves have so far deployed in resolving jurisdictional conflicts, both actual or potential. In this regard, the analysis is predicated on the assumption that there are, broadly speaking, two ways for resolving such conflicts: either by eliminating the conflict altogether (which is usually by means of denying the existence of a jurisdictional overlap); or by actually regulating the conflict through the application of jurisdiction-regulating principles. While the former relates more to the process of interpretation and application of the relevant norms, the latter is more concerned with the exercise of adjudicatory powers. Fundamental to both is, of course, the exercise of discretion on the part of the adjudicator. Of interest to the present chapter is not the existence of such discretion, but the way it is exercised. Specifically, the attention is on the reasoning and argumentative techniques employed by investment in justifying particular outcomes. As the chapter intends to demonstrate, such outcomes in most cases entailed the path leading to international arbitration – the dispute settlement mechanism considered superior to litigation before local courts.

The discussion proceeds in the following way. The first two sections look at two specific strategies that have most often been employed to eliminate jurisdictional overlaps: the more general strategy of narrowly construing and applying pertinent norms (9.1.), and the more specific strategy of distinguishing claims on the basis of cause of action; that is, the technique of claim splitting (9.2.). The third section looks at the various ways through which conflicts resulting from actual jurisdictional concurrence have actually been resolved in practice (9.3.).

9.1. Avoiding Jurisdictional Overlaps through the Exercise of Discretion in the Process of Interpretation and Application of Relevant Norms

Jurisdictional overlaps can be eliminated at two stages of the adjudicating process: at the stage of interpretation of the applicable norm (abstract phase), or at the stage of its application to the specific circumstances of the case (concrete phase). The removal of overlaps at both stages depends on the exercise of discretion on the part of the investment tribunal.[2] As the ensuing

[1] I use the term technique here losely as a shorthand for various forms or methods of argumentation adopted in the adjudication of particular claims.

[2] Modern legal doctrines generally acknowledge that there is a certain range of discretion that is left to adjudicatory bodies even in relatively clear cases. See M Koskenniemi, *From Apology to Utopia* (CUP 2005), 34. The exercise of such discretion is then tolerated provided it takes place within the existing legal framework, i.e. *infra legem*. For the purposes of the present analysis, adjudicatory discretion will be taken to denote the specific legal condition in which the arbitrator, when required to determine the meaning of a particular legal provision, or to establish whether a particular provision applies to a specific set of facts, has the freedom to choose among a number of alternative options, none of which capable of being clearly identified as the "correct" legal answer to the issue in question. On such an understanding of the of judicial discretion, see

discussion will demonstrate, in exercising this discretion, tribunals have frequently opted for solutions that were aimed at avoiding direct jurisdictional conflicts with domestic courts, while still remaining faithful to the purported *raison d'etre* of the system of investment arbitration: the provision of an alternative to litigation in local courts.

9.1.1. Removing Potential Jurisdictional Overlaps at the Stage of Interpretation of the Applicable Norm

A particularly effective way for removing any jurisdictional overlaps potentially existing between investment tribunals and domestic courts is by interpreting such overlaps away. The technique has essentially been a simple one: in circumstances where pursuant the ordinary meaning of the text a provision could be constructed as allowing an investment tribunal to exercise jurisdiction over the same type of claims as those falling within the ambit of domestic courts, a narrower construction of the provision has instead been adopted, which has had the effect of excluding any concurrence of jurisdiction. Support for such narrower construction has usually been sought in extra-textual, policy considerations. Common to this technique has also been the employment of interpretative presumptions, even though the attempt has commonly been made to remain within the canons of treaty interpretation prescribed by Articles 31-33 VCLT. Instances where the technique has successfully been put to use were particularly common in the interpretation of umbrella clauses (1) and treaties' dispute-settlement clauses (2), as well as in the interpretation of contractual disputes-settlement provisions (3).

9.1.1.1. Interpretation of Umbrella Clauses

The interpretation of umbrella clauses has given rise to considerable controversy in practice. As is known, such clauses have been designed to bring under the protective "umbrella" of an investment treaty all obligations that a host State may have entered into with a foreign investor, including those assumed in the context of a contractual relationship or under domestic law in general. However, by turning the observance of such obligations into an obligation under international law, umbrella clauses have necessarily also the potential of bringing within the jurisdictional ambit of investment tribunals claims which would ordinarily fall – in some cases even exclusively – within the jurisdiction of domestic courts or some other dispute settlement body. Concerned about the potentially disruptive effects that such clauses could have on the traditional distinction between the domestic and international legal orders and on the relationship between the various adjudicatory bodies, some tribunals therefore deemed it appropriate to adopt a restrictive approach to their interpretation. The leading precedent in that respect is the award in *SGS v. Pakistan* (2003), which happened to be also the first occasion on which the effects of umbrella clauses were properly considered.[3] In the circumstances of that case, the Tribunal faced a provision in Article 11 of the Switzerland-Pakistan BIT (1995) requiring the State to "constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party". The Tribunal, as is well known, refused to interpret the provision as entailing that the breaches of SGS's contract with Pakistan would be elevated into breaches of the treaty itself.

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eg CA Ford, 'Judicial discretion in international jurisprudence: art 38(1)(C) and "general principles of law"' (1994) 5 Duke Journal of Comparative & International Law 35, at 44ff. Applied to the context of the present analysis, adjudicatory discretion therefore entails that an investment tribunal, when facing the possibility that its jurisdiction may overlap with that of domestic courts, choses such an interpretation of the applicable provisions, or applies those provisions in such a way, that denies the existence of an overlap in the first place.

[3] The first reported case to consider an umbrella clause was actually *Fedax v Venezuela*. But while the Tribunal held that the Respondent's failure to honor payments under several promissory notes had violated the umbrella clause in art 3(4) of the Netherlands-Venezuela BIT (1991), it did not actually discuss the operation of the clause in question. *Fedax NV v Venezuela (Final Award)* (ICSID Case No ARB/96/3, 9 March 1998) [29].

According to the *SGS* Tribunal, pursuant to a textual reading, the scope of the provision would be susceptible to an "almost indefinite expansion".[4] Such an expansive reading would then have three important implications: first, the clause would amount to "incorporating by reference" an unlimited number of State contracts, as well as other municipal law obligations, into the treaty; second, by allowing breaches of those obligations to be treated as breaches of the treaty, it would make other substantive treaty standards "substantially superfluous"; and third, by allowing contractual claims to be advanced in the context of treaty arbitration, it would make it possible for an investor to "at will, nullify any freely negotiated dispute settlement clause in a State contract."[5] According to the Tribunal, a broad reading of the clause would therefore entail legal consequences that were "so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party" that could only be accepted if "clear and convincing evidence" had been adduced that this was indeed the shared intent of Switzerland and Pakistan in concluding the BIT.[6] In other words, the Tribunal advanced what was in effect a presumption[7] against a broad interpretation of umbrella clauses – a presumption that it further deemed to follow from the principle that, under general international law, a violation of a contract entered into by a State with a foreign investor was not by itself a violation of international law – and advocated, instead, an approach to interpretation that should "enhance mutuality and balance of benefits in the inter-relation of different agreements located in differing legal orders."[8]

This restrictive approach to the interpretation of umbrella clauses was later strongly criticized by the Tribunal in *SGS v. Philippines*, which saw no reason for the meaning of such provisions to be determined by any presumptions, preferring instead to give full effect to the ordinary meaning of the umbrella clause applicable in the circumstances of that case.[9] In retrospect, the solution adopted in *SGS v. Pakistan* of giving no effect at all to an umbrella clause has generally remained an isolated one.[10] But the technique of relying on systemic considerations extraneous to the actual treaty language has occasionally been used by other investment tribunals, even in circumstances where the umbrella clause under interpretation was formulated perhaps more categorically than the clause at issue in *SGS v. Pakistan*. By virtue of such considerations, for example, a number of investment tribunals deemed it appropriate to limit the protective scope of the umbrella clause to breaches of contract resulting from host State's conduct in its capacity as sovereign.[11] This, again, because of the potentially disruptive effects that a literal interpretation of

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[4] SGS v Pakistan (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Case No ARB/01/13, 6 August 2003) [166].

[5] ibid [168].

[6] ibid [167].

[7] This was, indeed, merely a presumption. The Tribunal did not otherwise reject, as a matter of principle, that States could agree in a BIT that such contractual breaches were converted into and treated as a breach of the BIT. Nor did the Tribunal otherwise preclude the possibility of a claim being asserted under the umbrella clause in the exceptional circumstances where the breach complained of would be one transcending the threshold of a normal contractual breach, such as where the host State would be taking action that materially impedes the ability of the investor to prosecute its claims before the arbitration tribunal stipulated by the contract, or where the State would refuse to go to such arbitration at all and leave the investor only with the option of going before its ordinary courts. ibid [172]-[173].

[8] ibid [168].

[9] *SGS v Philippines (Jurisdiction)* (ICSID Case No ARB/02/6, 29 January 2004) [161], [115]-[125].

[10] In this regard, one must distinguish the case of *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan (Decision on Jurisdiction)* (ICSID Case No ARB/02/13, 9 November 2004) [126], where jurisdiction was refused because the provision at issue did not constitute a proper umbrella clause. That Tribunal did not rely on any extra-textual concerns, but in fact construed the clause in light of the ordinary meaning of the text.

[11] See eg Joy Mining Machinery Limited v Arab Republic of Egypt (Award on Jurisdiction) (ICSID Case No ARB/03/11, 6 August 2004) [81]; CMS Gas Transmission Company v The Republic of Argentina (Award) (ICSID Case No ARB/01/8, 12 May 2005) [299]-[303]; El Paso Energy International Company v The Argentine Republic (Decision on Jurisdiction) (ICSID Case No ARB/03/15, 27 April 2006) [82]-[84]; Pan American Energy LLC and BP Argentina Exploration

an umbrella clause could have on the traditional distinction between the domestic and international legal orders, and because of the fear that allowing even simple violations of a contract to engage the responsibility of the State under international law would result in a flood of contractual claims.[12] Though, surprisingly, not because of the disruptive effects that a more expansive reading of umbrella clauses could have on contractual forum selection clauses that may be present in the underlying contracts.[13]

9.1.1.2. Interpretation of Treaty Dispute Settlement Clauses

Just as in constructing the scope of umbrella clauses, a restrictive approach has occasionally been adopted also in the interpretation of treaties' dispute settlement clauses, particularly where the question was one of determining whether a tribunal established pursuant to an investment treaty could pronounce upon claims that are based solely on a contract and do not relate to a breach of the treaty's substantive provisions. The language through which States express their consent to arbitrate disputes with investors can vary considerably among investment treaties. In some treaties, consent is limited to disputes concerning violations of the substantive rights under the treaty,[14] or even a specific category of those rights;[15] in others, it is expressed broadly, often extending to any or all disputes concerning, relating to, arising out of, or being in connection with an investment,[16] or simply to any dispute between an investor and a host State.[17] In view of the breadth of the language used in this latter type of clauses, the view has thus been taken – both by investment tribunals, and commentators alike – that such clauses should, in principle, provide treaty tribunals with jurisdiction over claims other than those based on the investment treaty, and particularly over contract claims.[18]

Company v The Argentine Republic (Decision on Preliminary Objections) (ICSID Case No ARB/03/13, 27 July 2006) [97]-[103]; or Sempra Energy International v The Argentine Republic (Award) (ICSID Case No ARB/02/16, 28 September 2007) [310]-[311].

[12] See eg *El Paso v Argentina*, ibid [82] (noting the 'far-reaching consequences […] quite destructive of the distinction between national legal orders and the international legal order').

[13] In fact, in those decisions where the umbrella clause was considered to apply only to breaches of contract committed by the host State in the exercise of sovereign authority, the Tribunals did not consider such claims to be further affected by the presence of a contractual forum selection clause. See eg *El Paso v Argentina*, ibid, where the Tribunal concluded it had jurisdiction over claims relating to the breaches of the umbrella clause ([79]-[86]), regardless of Argentina's objection that all the claims arose out of concessions and contracts and therefore had to be submitted to the consented forum, the national courts of Argentina, as freely agreed upon by the parties ([49], [63]).

[14] See eg Egypt-Belgo-Luxemburg Economic Union BIT (1977), art IX ('any dispute relating to a measure contrary to this Agreement'); Canada-Egypt BIT (1996), art XIII(1) ('any dispute […] relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach'); or Egypt-Chile BIT (1999), art 8(1) ('disputes, which arise within the terms of this Agreement').

[15] See eg Egypt-Bulgaria BIT (1991), art 9(1) ('Any dispute […] concerning the amount of the compensation for expropriation'); or Egypt-Cyprus BIT (1998), art 9(1) ('Any dispute […] concerning expropriation of an investment').

[16] See eg France-Egypt BIT (1974), art 7 ('les différends qui pourraient l'opposer à un res-sortissant ou à une société de l'autre Partie contractante'); UK-Egypt BIT (1975), art 8(1) ('any legal dispute […] concerning an investment'); Italy-Egypt BIT (1989), art 9(1) ('All kinds of disputes or differences […] concerning an investment'); Egypt-China BIT (1994), art 9(1) ('Any dispute […] in connection with an investment'); Australia-Egypt BIT (2001), art 13(1) ('a dispute […] relating to an investment'); Austria-Egypt BIT (2001), art 9(1) ('Any dispute arising out of an investment'); or Egypt-Germany BIT (2005), art 9(1) ('Disputes concerning investments').

[17] Pakistan-Egypt BIT (2000), art 8(1) ('any dispute').

[18] Such views were expressed in several cases as *obiter*. See eg *Consortium RFCC v Royaume du Maroc (Decision on Jurisdiction)* (ICSID Case No ARB/00/6, 16 July 2001) [67]-[69], and *Salini v Jordan* (n 10) [59]-[62]; *Vivendi v Argentina (Decision on Annulment)* (ICSID Case No ARB/97/3, 3 July 2002) [55]; *Generation Ukraine Inc v Ukraine (Award)* (ICSID Case No ARB/00/9, 16 September 2003) [8.12]; *Siemens AG v The Argentine Republic (Award)* (ICSID Case No ARB/02/8, 17 January 2007) [205]; *SGS v Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/07/29, 12 February 2010) [129]; *Teinver SA, Transportes de Cercanias SA and Autobuses Urbanos del Sur SA and the Argentine Republic (Decision on Jurisdiction)* (ICSID Case

Departing from such views is again the decision in *SGS v. Pakistan*, where the proposition was rejected that the applicable dispute settlement clause, which provided for arbitration in the event of "disputes with respect to investments", could extend the Tribunal's jurisdiction over the claims advanced by SGS that were based solely on alleged breaches of the contract. While recognizing at the outset that both treaty claims and pure contract claims were capable of being described as "disputes with respect to investments", the Tribunal considered such apparent conclusion not necessarily giving rise to the implication that the clause would thereby also apply to claims grounded solely in the contract; for, the relevant phrase, "while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims."[19] Instead of giving effect to the ordinary meaning of the dispute settlement clause, the Tribunal therefore again adopted a presumption against a broad interpretation of treaty's dispute settlement clauses.[20] And also here, the presence of the contractual forum selection clause – which provided for local arbitration in accordance with Pakistani law, and had purportedly been crucial for Pakistan to enter into the contractual arrangement with SGS in the first place – provided an important rationale for the restrictive approach to interpretation: the Tribunal was namely concerned that a broad reading "would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent."[21]

As the construction of the umbrella clause, the Tribunal's restrictive approach to the interpretation of the dispute settlement clause was subsequently heavily criticized by the arbitrators in *SGS v. Philippines*, which refused, on their part, to read into the treaty any non-textual limitations and thus saw no reason to decline jurisdiction over the Claimant's contract claims – even if it ultimately rejected such claims as inadmissible.[22] This is not to say that the arbitrators disagreed with the concerns expressed in *SGS v. Pakistan* that the general provisions of an investment treaty should in principle not override specific and exclusive dispute settlement arrangements made in the contract itself; yet, the arbitrators in *SGS v. Philippines* considered that such concerns should be divorced from the issue of treaty interpretation.[23] Furthermore, the arbitrators, among other issues, questioned the propriety of drawing "technical distinctions" between causes of action under the treaty and under the contract, since such distinctions were capable of giving rise to overlapping proceedings and jurisdictional uncertainty, which in their view was to be avoided "in the interests of the efficient resolution of investment disputes by the single chosen forum."[24]

Some tribunals subsequently endorsed the approach of *SGS v. Philippines* that favours the giving of full effect to the ordinary meaning of the treaty language – and thus either accepted jurisdiction over claims based on contract or domestic law in circumstances where the dispute settlement clauses were broadly formulated,[25] or rejected jurisdiction over such claims precisely

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No ARB/09/1, 21 December 2012) [112]; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (*Decision on Jurisdiction*) (ICSID Case No ARB/10/7, 2 July 2013) (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos SA v Oriental Republic of Uruguay*) [107].

[19] *SGS v Pakistan (Jurisdiction)* (n 4), [161].

[20] This was not more than a presumption, since the Tribunal on the other hand did not rule out the possibility that the parties could, by way of special agreement, vest it with jurisdiction to pass upon and decide claims arising solely under the contract; it merely did not believe that the parties had done so by accepting arbitration on the basis of the BIT. See ibid [162].

[21] ibid [161].

[22] *SGS v Philippines (Jurisdiction)* (n 9), [131]-[132].

[23] ibid [134].

[24] ibid [132].

[25] See eg *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v Republic of Moldova (Award)* (SCC, 22 September 2005) 4, 7, accepting jurisdiction over the sole claim concerning the violation of the principle of non-retroactivity in relation to the

because the clauses limited arbitration to treaty causes of action.[26] Yet, the decision in *SGS v. Pakistan* has not remained an isolated one. The technique of interpreting away a potential jurisdictional overlap has found application in some other cases. An example is the decision in *LESI-DIPENTA v. Algeria* (2005), where an ICSID Tribunal similarly decided not to adopt a literal construction of the dispute settlement clause in the Algeria-Italy BIT (1991), which otherwise provided for arbitration with regard to any dispute concerning an investment ("ogni controversia relativa ad investimenti"). The Tribunal interpreted the clause as not providing for consent that is general in scope and that establishes the basis of jurisdiction for any violation that the Claimant might invoke, but as one that is "of limited scope" and relates solely to violations of the treaty. Support for such narrow construction was not sought in general policy rationales, but in the text of the treaty itself: first, in the treaty's objective of protection, which was considered to be to ensure that investments at all times enjoy full protection and security and be subject to any unreasonable or discriminatory measures; and second, in the fact that the treaty did not contain an umbrella clause, which was seen as *a contrario* confirming that the Tribunal has not been granted jurisdiction to consider violations of the contract.[27] The arguments may not be particularly convincing,[28] but the *LESI-DIPENTA* Tribunal at least sought to provide a rationale for the narrow reading of the clause.

9.1.1.3. Interpretation of Contractual Dispute Settlement Clauses

A third example of how a specific construction of terms can be used to remove jurisdictional overlaps can be found in treaty tribunal's interpretation of contractual dispute-settlement provisions on the issue whether such provisions could vest the contractual forum with jurisdiction over treaty claims.[29] An instance of a restrictive approach to the interpretation of such provisions can again be found in *SGS v. Pakistan* (2003). The Claimant's concession contract in

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Moldovan Foreign Investment Act and another domestic regulation, by virtue of the broadly-formulated dispute settlement clause in the applicable BIT, which the Tribunal considered as permitting the Tribunal to extend its jurisdiction to 'any dispute between qualified parties […], as long as it arises in connection with an investment as defined in the BIT, and irrespective of whether the dispute is based on an alleged breach of the BIT, and alleged breach of a contract between the parties, or other alleged breach of obligation' (7). *Impregilo v Pakistan (Decision on Jurisdiction)* (ICSID Case No ARB/03/3, 22 April 2005) [196ff]. Essentially accepting that it could exercise jurisdiction over pure contract claims, provided that the contract had been entered into directly with the host State – a condition which was not present in circumstances where the contract was concluded with a separate state entity.

[26] See eg *Crystallex International Corporation v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB(AF)/11/2, 4 April 2016) [471], expressly relying on the wording of the dispute settlement clause in confirming that its jurisdiction was limited to disputes relating to alleged breaches of the treaty. *Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey (Award)* (ICSID Case No ARB/11/28, 10 March 2014) [348]; *Khan Resources v Mongolia (Decision on Jurisdiction)* (UNCITRAL, 25 July 2012) [437].

[27] Consortium Groupement LESI- DIPENTA v People's Democratic Republic of Algeria (Award) (ICSID Case No ARB/03/08, 10 January 2005) [25].

[28] Especially the argument based on the absence of an umbrella clause was a *non sequitur*, particularly as reference was made to the Energy Charter Treaty as an example of a treaty providing for such a clause. The problem with the argument, of course, is that arbitral jurisdiction under the ECT is limited to violations of the treaty, which could rather suggest the opposite; that the umbrella clause has been inserted precisely because of the limited scope of consent to arbitrate.

[29] Such possibility has been implicitly accepted by several investment tribunals. See eg *Joy Mining v Egypt* (n 11), [89] ('There is no question here of either exclusive ICSID jurisdiction or of concurrent jurisdiction'); *Salini v Jordan* (n 10), 96 ('the Tribunal will note that the dispute settlement procedures provided for in the Contract could only cover claims based on breaches of the Contract. Those procedures cannot cover claims based on breaches of the BIT'); *Aguas del Tunari, SA v Republic of Bolivia (Decision on Respondent's Objections to Jurisdiction)* (ICSID Case No ARB/02/3, 21 October 2005) [111], where the Tribunal considered 'as a threshold matter' that for a contractual forum selection clause in a separate document to be in conflict with the treaty tribunal's exercise of jurisdiction, 'that document must both deal with the same matters and Parties and contain mandatory conflicting obligations' and that only 'if a true conflict exists, there then arises the question of what effect such a document has on the Tribunal's jurisdiction'; or *BIVAC v Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/07/9, 29 May 2009) [127] ('The issue of fair and equitable treatment, and related matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the courts of Asunción. The treaty issue is therefore not one for that forum').

that case required that "[a]ny dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination or invalidity thereof" be resolved through domestic arbitration.[30] In spite of the breadth of the language employed in this clause, the ICSID Tribunal decided that the jurisdiction of the contractually-designated forum did not extend to treaty claims, on the following grounds. First, the applicable investment treaty did not provide for alternative dispute settlement mechanisms other than recourse to a tribunal constituted under the ICSID Convention, which therefore warranted the presumption that jurisdiction over treaty claims lay exclusively with the treaty tribunal. Second, the contract predated the treaty and could therefore not be presumed that the contractual forum was vested with competence over treaty claims. And third, no claims of treaty breaches had actually been submitted to the contractually agreed forum (which at the time the investor commenced arbitration under the investment treaty was already seized with a contractual claim brought against the SGS by Pakistan); nor was the contract forum found to be competent, as a matter of the applicable domestic law, to consider treaty claims.[31]

There is no doubt that the arguments advanced in favour of such an interpretation are quite plausible. Yet, one can notice the restrictiveness of the approach when comparing it to the more liberal interpretation of a similarly-formulated contractual dispute settlement provision in *BIVAC v. Paraguay* (2009), which in that case vested the local courts with exclusive jurisdiction over "any conflict, controversy or claim which arises from or is produced in relation to" the Claimant's contract. In contrast to the *SGS* Tribunal, the *BIVAC* Tribunal noted that, "[o]n its face", the text was "very broad" and "capable of being interpreted to include not only disputes relating directly to alleged breaches of the Contract but also disputes concerning acts that may be connected with the Contract which may give rise to claims under other instruments, including the BIT."[32] In the circumstances of the *BIVAC* case, however, the potential jurisdictional overlap was eliminated because the local courts did not possess competence under domestic law to interpret and apply the treaty. In both cases, therefore, the contractually-designated forum was found not to share jurisdiction over treaty claims with the investment tribunal in question.

9.1.2. Removing Potential Jurisdictional Overlaps at the Stage of Application of Specific Treaty Terms – The Problem of Counterclaims

Potential jurisdictional overlaps can be eliminated not only through a more or less expansive construction of particular treaty provisions, as discussed in the preceding section, but also at the stage of application of specific treaty terms. Especially in circumstances where such terms have an open-ended character, arbitrators may be left with a good deal of room in their appreciation as to how those terms are to be applied to the specific facts of a case. Also at the stage of application, therefore, arbitrators are in a position to exercise judicial discretion by choosing among various outcomes that could conceivably be defended as falling within the scope of the provision as such.

One of the instances where investment arbitrators exercised their discretion in a way that effectively led to the elimination of potential jurisdictional overlaps with domestic courts has been on the issue of counterclaims. In the context of counterclaims, of course, such overlap is not unlikely to occur, given that the law governing the investor's conduct, and thus the law on which the counterclaim will most often be based, is that of the host State. The assumption of authority over counterclaims necessarily raises the question of the extent to which investment tribunal should enforce domestic laws of the host State, and particularly its public laws, to entities and transactions which may not otherwise fall within the adjudicative jurisdiction of domestic

[30] *SGS v Pakistan* (n 4), [15].

[31] ibid [151]-[154].

[32] *BIVAC v Paraguay* (n 29), [145].

courts.[33] Furthermore, it necessarily raises questions concerning the proper allocation of authority as between investment tribunals and domestic courts.[34] Investment tribunals have not been oblivious to such concerns; the latter in fact seem often to have influenced decisions as to whether or not specific counterclaims should be heard. In the context of investment arbitration, of course, counterclaims are generally permissible to the extent that they fall within the scope of the parties' consent to arbitrate (and, if applicable, within the jurisdiction of the ICSID Centre), and provided that they arise "directly out of the subject-matter of the dispute" or else exhibit a "close connection" with the primary claim to which they are a response.[35] Therefore, when faced with counterclaims that were predominantly centred upon questions of local law, investment tribunals frequently found it convenient to conclude that a particular counterclaim does not fall within the scope of consent to arbitrate, or to determine that a counterclaim lacks sufficient nexus with the primary claim.

The specific structure of investment treaty arbitration – and specifically, the fact that investment treaties, as a rule, impose no obligations on investors, but only on the State contracting parties – provided occasionally a convenient argument for dismissing respondents' counterclaims based on investor's purported violations of contractual or other obligations under domestic law. In *Spyridon Roussalis v Romania* (2011), for example, the latter type of counterclaims were found to lie outside the scope of the parties' consent to arbitration, insofar as arbitration was limited in that case to disputes concerning breaches of the host State's obligations under the treaty in question.[36] Then again, even in the event of broadly formulated dispute settlement clauses, some tribunals were not necessarily willing to accept jurisdiction over counterclaims grounded solely in domestic law either. Thus, in *Urbaser v. Argentina* (2016), where the treaty dispute settlement clause otherwise applied to all disputes concerning an investment, counterclaims "based on domestic law only" were equally not deemed susceptible of falling within the scope of the arbitration agreement – in the circumstances of that case, however, out want of specific obligations demanding the investor's compliance with domestic law in the applicable investment treaty.[37] Pursuant to such an approach,

[33] This problem is sometimes called the 'public law taboo'; a phenomenon which is taken to explain the frequent refusal of courts to recognize foreign public law in enforcement proceedings. See on this, FD Strebel, 'The Enforcement of Foreign Judgments and Foreign Public Law' (1999) 21 Loy LA Int'l & Comp LJ 55.

[34] See on this in particular AK Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17 Lewis & Clark Law Review 461, at 465-66, making the important point that the investment tribunals' assumption of authority to hear counterclaims can alter the balance of power between domestic courts and international tribunals and that a reasonable trade-off needs to be made between, on the one hand, the assertion of such authority, and on the other hand, the encouragement of recourse to local courts and tribunals.

[35] See ICSID Convention, art 46, requiring a counter-claim to be one 'arising directly out of the subject-matter of the dispute'; and *Saluka Investments BV v Czech Republic (Decision on Jurisdiction over the Czech Republic's Counterclaim)* (UNICTRAL, 7 May 2004) [61]–[76], and *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* (Award on Jurisdiction and Liability) (UNCITRAL, 28 April 2011) [689]–[693], requiring in the context of UNCITRAL arbitrations that counter-claims have a "close connection with the primary claim to which they are a response".

[36] See *Spyridon Roussalis v Romania (Award)* (ICSID Abitral Tribunal, Case No ARB/06/1, 7 December 2011) [868]-[71]. Though not entirely indefensible, the solution seems to remain oblivious of other instruments that may potentially have implications on a tribunal's jurisdiction, such as the ICSID Convention. See on that point the dissent of Arbitrator Reisman, who argued that, when a State contingently consents in an investment treaty to ICSID jurisdiction, the consent component of Article 46 of the ICSID Convention "is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue". *Spyridon Roussalis v. Romania (Declaration of W. Michael Reisman)* (ICSID Case No. ARB/06/1, 28 November 2011). Indeed, not all tribunals facing similarly narrow dispute settlement clauses were equally dismissive of their jurisdiction over counterclaims. Cf *Gustav F W Hamester GmbH & Co KG v Ghana (Award)* (ICSID Case No ARB/07/24, 18 June 2010) [353]-[354], and *Oxus Gold v. Republic of Uzbekistan (Award) (UNCITRAL, 17 December 2015)* [948]-[958].

[37] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (Award)* (ICSID Case No. ARB/07/26, 8 December 2016), [1143]-[1155] and [1182]-[1192]. Cf. *Saluka* (Jurisdiction) (n 35) and *Paushok* (n 35) where similar counterclaims were found to fall within the scope of the tribunal's jurisdiction, as the applicable BITs provided for arbitration with respect to 'all disputes […] concerning an investment' and '[d]isputes […] arising in connection with realization of investments', respectively.

of course, counterclaims grounded in pure domestic law would practically never be capable of falling within a jurisdiction of an investment tribunal, given that investment treaties, as a rule, do not impose obligations upon investors.

Yet, the practice of invoking jurisdictional hurdles with a view to avoiding pronouncements on respondent's counterclaims is not entirely uncommon even in contract-based investment arbitration, where the link with the applicable domestic law is generally much more direct. In the resubmitted *Amco v. Indonesia* (1988) case a counterclaim concerning the investor's purported evasion of corporate tax and the commission of tax fraud thus equally failed, as the Tribunal found it not to be a claim arising directly out of the investment within the meaning of Article 25(1) ICSID Convention.[38] In arriving at this conclusion, the Tribunal believed it was "correct" to draw a distinction between rights and obligations that were "applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law", and those that were "applicable to an investor as a consequence of an investment agreement entered into with that host state", holding that only legal disputes relating to the latter would fall under Article 25(1) of the ICSID Convention, whereas legal disputes concerning the former would "in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention".[39] To the Tribunal, the obligation not to engage in tax fraud was "clearly" a general obligation of law in Indonesia, and not one "specially contracted for" in Amco's investment agreement.[40] The *Amco* Tribunal's argument appears at first sight to be a reasonable one; but the legal relationship between Amco and Indonesia in that case would have arguably supported the assumption of jurisdiction over the counterclaims, given that Amco's foreign investment application provided for ICSID arbitration with respect of "a disagreement and dispute" in general,[41] while Indonesia's Foreign Investment Law of 1967, on which that application was based, required foreign investors "to manage and control their enterprises in accordance with the principles of good business administration without harming the interests of the State",[42] and thus implicitly prohibited fraudulent tax practices. The narrowness of *Amco* Tribunal's approach becomes quite evident when compared to the much more flexible approach assumed by the ICSID Tribunal in *Perenco v. Ecuador* (2015) towards counterclaims relating to alleged breaches of obligations under Ecuadorian environmental law that the investor purportedly committed in relation to its oil exploitation activities. In the circumstances of that case, the Tribunal's competence to hear such counterclaims was not even considered. The tacit assumption of jurisdiction was seemingly premised on the fact that consent to ICSID jurisdiction was broadly formulated under the applicable contracts,[43] and the investor agreed to comply in those contracts with all applicable laws and regulations.[44]

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[38] Amco Asia Corporation and others v Republic of Indonesia (Decision on Jurisdiction in Resubmitted Proceeding) (ICSID Case No ARB/81/1, 10 May 1988) [126]-[127].

[39] ibid [125].

[40] ibid [126].

[41] See Amco Asia Corporation and others v Republic of Indonesia (Decision on Jurisdiction) (ICSID Case No ARB/81/1, 25 September 1983) [10].

[42] Foreign Investment Law of 1967, art 26, available at <http://www.flevin.com/id/lgso/translations/Laws/Law%20No.%201%20of%201967%20on%20Foreign%20Investment%20(BI).pdf>.

[43] The arbitration was based on the France–Ecuador BIT and two participation contracts for the exploration and exploitation of oil blocks located in the Ecuadorian Amazonian region. The arbitration clauses in the contracts provide for ICSID arbitration over, respectively, 'any technical and/or economic dispute' and 'controversies' arising out of such contracts. See *Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (*Decision on Jurisdiction)* (ICSID Case No ARB/08/6, 30 June 2011) [126], [160].

[44] See Perenco Ecuador Ltd v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (Interim Decision on the Environmental Counterclaim) (ICSID Case No ARB/08/6, 11 August 2015) [109]-[114].

Finally, even in circumstances where counterclaims grounded in domestic law were otherwise deemed capable of falling within the scope of consent to arbitration, it nonetheless happened that such claims were dismissed – but then for want a sufficiently close connection with the primary claim. This was the situation in *Saluka v. Czech Republic* (2004), where the primary claim concerned the Respondent's treatment of Claimant's shareholding of a local bank, whereas the counterclaims related to the purported non-compliance of the Claimant's parent company with the general law of the Czech Republic in the process of acquisition of that shareholding. The Tribunal found those counterclaims not to form part of "an indivisible whole" with the investor's primary claim, noting that the legal basis of the counterclaim was to be found "in the application of Czech law" and involved "rights and obligations which are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic's jurisdiction", with the consequence that "the disputes underlying those heads of counterclaim in principle fall to be decided through the appropriate procedures of Czech law and not through the particular investment protection procedures of the Treaty."[45]

Similar reasoning led to the dismissal of (parts of) the counterclaims in *Paushok v. Mongolia* (2011) and in *Oxus Gold v. Uzbekistan* (2015). In *Paushok*, the investor's key claims related to the introduction of a windfall tax and of legislation imposing a quota on the percentage of foreign nationals working for a mining company. The counterclaims, on their part, were based on allegations that Claimants owed unpaid windfall taxes and foreign worker fees, and that they were liable for environmental failings and other illegal activity including smuggling and tax-evasion. Notwithstanding that some of those counterclaims seemed related to the windfall taxes, the Tribunal did not consider them to have a reasonable nexus with the main claim, noting that "the Counterclaims arise out of Mongolian public law and exclusively raise issues of non-compliance with Mongolian public law, including the tax laws of Mongolia" and that "[a]ll these issues squarely fall within the scope of the exclusive jurisdiction of Mongolian courts, are matters governed by Mongolian public law".[46] Indeed, the Tribunal did not wish to acquiesce to "a possible exorbitant extension of Mongolia's legislative jurisdiction without any legal basis under international law to do so, since the generally accepted principle is the non-extraterritorial enforceability of national public laws and, specifically, of national tax laws."[47] In *Oxus Gold*, the Tribunal was less elaborate, but the grounds for dismissing counterclaims were similar ones. In the circumstances of that case, the relevant claims concerned Respondent's treatment of the company in which the Claimant held a substantive interest, whereas the counterclaim partly concerned certain financial irregularities allegedly committed by that company. The Tribunal found the counterclaim to lack the "necessary 'close connection'" with the main claim since it was "largely based on the alleged violations of Uzbek law restrictions regarding foreign currency and other financial regulations"[48] – issues which again touched on the enforceability of national public laws.

All in all, one cannot escape the impression that the tribunals' narrow approach to the issue of counterclaims was often motivated by the wish to avoid having to make pronouncements on issues that fall primarily within the adjudicatory authority of domestic courts, and then especially issues of domestic public law of the kind that were raised by the counterclaims in *Amco*, *Saluka, Paushok*, or *Oxus Gold*. This in itself is not surprising given the general propensity of investment tribunals to avoid jurisdictional competition with domestic courts. But the tribunals' predisposition could also have been a different one. As argued by Arbitrator Reisman in *Spyridon Roussalis*, accepting jurisdiction over counterclaims is not only a concession to the State Party, but

[45] *Saluka* (n 35) [79].

[46] *Paushok* (n 35) [694].

[47] *Paushok* (n 35) [695].

[48] *Oxus Gold* (n 36) [956].

works purportedly to the benefit of the investor as well. In Reisman's view, a narrow approach to the issue of counterclaims is at odds with the objectives of international investment law: "In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal […] perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant."[49]

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Looking now at the practice of restrictively interpreting and/or applying the pertinent jurisdiction-conferring instruments in general, there is little doubt that this has provided an effective way of removing potential jurisdictional overlaps between domestic courts and investment tribunals – though only overlaps at the micro-level. On closer inspection, one must namely not lose sight of the fact that such practice was only applied in circumstances where the investment tribunals' exercise of adjudicatory authority would have intruded into a sphere where domestic courts enjoy primary adjudicatory authority: in relation to the interpretation and/or application of domestic law. In practice, the deployment of this technique did not result in investment tribunals' relinquishing jurisdiction over the dispute between the host State and the investor altogether. What tribunals were willing to relinquish was merely the authority to deal with issues that were otherwise primarily governed by domestic law.

9.2. Avoiding Jurisdictional Overlaps through Claim Splitting

Another method for eliminating jurisdictional overlaps – in fact, one that has proven to be a particularly effective – has been that of claim splitting: the argumentative technique where jurisdictional competition in relation to a dispute arising out of the same underlying investment is removed by relying on the difference in the cause of action on the basis of which the dispute can be litigated before each of the competing adjudicatory bodies. The technique is, of course, a specific variation of the use of judicial discretion in the construction of the applicable jurisdiction-conferring instruments.

The most often cited authority for the use of such technique is probably the decision of the Annulment Committee in *Vivendi* (2002). Even though the decision may not have been the first occasion where a modern investment tribunal elaborated upon the qualitative distinction between the rights of an investor under an investment contract entered into with a host State and its rights under an investment treaty,[50] nor the first occasion where a treaty tribunal relied on this qualitative distinction to resolve questions of jurisdictional competition arising in relation to domestic courts,[51] the Committee's decision set out important pronouncements of principle that have decisively shaped the investment tribunals' understanding of their own role and positioning

[49] *Spyridon Roussalis* (Declaration Reisman) (n 36).

[50] A few months earlier, another ICSID Annulment Committee in *Wena v Egypt* also drew upon the distinction between contracts, which deal with questions 'that are by definition of a commercial nature', and the investment treaty, which deals with questions 'that are essentially of a governmental nature', and similarly noted that, while there is necessarily a connection between the contracts and the treaty to the extent that the former were designed to operate under the protection of the latter as a materialization of the investment, such connection did not involve 'an amalgamation of different legal instruments and dispute settlement arrangements' – the functions of those instruments were kept 'separate and distinct.' See *Wena Hotels Ltd v Egypt (Decision on Application for Annulment)* (ICSID Case No ARB/98/4, 5 February 2002) [31], [35].

[51] See eg *Eudoro Armando Olguín v Republic of Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/98/5, 8 August 2000) [30]; *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia (Award)* (ICSID Case No ARB/99/2, 25 June 2001) [330]-[332]; or *Ronald S Lauder v The Czech Republic (Final Award)* (UNCITRAL, 3 September 2001) [161]-[163], which relied on the differences in the causes of action in applying the fork in the road clause. See further infra section 10.2.

vis-à-vis domestic courts.[52] So much so that *Vivendi* has since then been recurrently relied upon by investment tribunals in asserting their jurisdiction over claims having their source in a contractual relationship between the foreign investor and the host State, even in the face of contractual stipulations vesting domestic courts with exclusive jurisdiction over disputes arising out of the contract.

The Committee's pronouncements were made against the backdrop of a situation where the initial Tribunal at once accepted jurisdiction over several claims that the French investor brought against Argentina pursuant to the Argentina-France BIT in relation to a dispute arising out of its concession contract, but then pronounced itself unable to decide them on their merits due to the "crucial connection" that those claims were perceived to have with issues of contract performance, directing the investor to first assert its rights in proceedings before the courts of Tucumán, as also required by the forum selection clause in the concession contract. The Tribunal emphasized that its decision should not be interpreted as imposing the requirement to exhaust local remedies; rather, the obligation to resort to the local courts was "compelled" by the contractual forum selection clause and by the "impossibility" on the facts of the case to determine which actions of the Province were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the concession contract, and thus to separate claims relating to potential breaches of contract from those relating to BIT violations, without undertaking a detailed interpretation and application of the concession contract – a task which was however left by the contracting parties to the exclusive jurisdiction of the administrative courts of Tucumán.[53]

The *Vivendi* Committee, however, disagreed with such outcome and concluded that by failing to exercise jurisdiction over treaty claims on the ground that these involved issues of contractual performance, the Tribunal committed a manifest excess of powers.[54] The Committee based its analysis on the "evident" proposition that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards of protection and questions of contract.[55] The fact that a potential contract breach could coincide with a purported treaty breach did not necessarily impair the jurisdiction of a treaty tribunal. This is because the substantive protections offered by an investment treaty "set an independent standard", which means that "[a] state may breach a treaty without breaching a contract, and *vice versa*".[56] Hence, whether there has been a breach of the treaty and whether there has been a breach of contract were "different questions", each to be determined by reference to its own applicable law.[57] This, in the view of the Committee, also followed from the general principle of the law of State responsibility that the characterization of an act of a State as internationally wrongful is governed by international law and not dependent upon the characterization of the same act as lawful by domestic law.

As explained then by the Committee, the conceptual distinction between breaches of treaty and breaches of contract had several implications. First, insofar as the division of competences between the treaty and the contract forum was concerned, it meant that "where 'the

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[52] For an analysis of *Vivendi*'s impact in practice, see C Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims: the *Vivendi I* Case considered' in T Weiler (ed), International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law (London: Cameron May, 2005), 281-323.

[53] *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Decision on Annulment)* (ICSID Case No ARB/97/3, 3 July 2002) (formerly Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic) [79], [81].

[54] ibid [93]-[115].

[55] ibid [60].

[56] ibid [95].

[57] ibid [95]-[96].

fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard".[58] Had that not been the case, as stressed by the Committee, a State would be capable of relying on such a contractual clause to avoid the characterization of its conduct as internationally unlawful under a treaty.[59] Conversely, where "the essential basis of a claim brought before an international tribunal is a breach of contract", the Committee was of the view that it was necessary to "give effect to any valid choice of forum clause in the contract."[60] This was in fact a test which had previously been used by the US-Venezuela Mixed Claims Commission in the *Woodruff* case (1903),[61] and from which the Committee also drew inspiration.

Second, since breaches of the treaty were conceptually distinct from contract breaches as a result of the fact that the treaty sets an independent standard, it necessarily followed that a finding of a violation of the substantive protections offered by the treaty was essentially not dependent upon the showing of a breach of a municipal contract. Hence, in the view of the Committee, there was also no basis for any assumption that the conduct of Tucumán carried out in the purported exercise of its rights as a party to the concession contract could not, *a priori*, have breached the BIT. In view of the difference in the applicable standard, the issue "whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights."[62] It was precisely for this reason that the Committee thus fundamentally disagreed with the Tribunal's conclusion that it was impossible to take a decision on the claim's merits for the reason that such a decision would necessitate the interpretation and application of the underlying concession contract. In the view of the Committee,

> "…it is one thing to exercise contractual jurisdiction (arguably exclusively vested in the administrative tribunals of Tucumán by virtue of the Concession Contract) and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 of the BIT."[63]

As noted by the Committee, pursuant to the BIT's own provisions on applicable law, the Tribunal was in fact perfectly entitled to "base its decision upon the Concession Contract, at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT."[64]

The Committee's pronouncements thus provided a theoretical framework, based on a conceptually simple, but rather effective analytical technique that could be used for the purpose of understanding and regulating the jurisdictional divide between the competence of treaty tribunals and the competence of domestic courts and other contractually agreed fora.[65] It is not

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[58] ibid [101]. Against this backdrop, the Committee therefore had no difficulty accepting the Vivendi I Tribunal's preliminary decision that the contractual forum selection clause did not affect the latter's jurisdiction with respect to a claim based on the provisions of the BIT (ibid., [76]).

[59] ibid [103].

[60] ibid [98].

[61] *Woodruff* case (IX UNRIAA, 1903) 213.

[62] *Vivendi* (n 53), [110].

[63] ibid [105].

[64] ibid [110].

[65] The clarity of the conceptual distinction has often been the object of praise by academic commentators. See e.g. BM Cremades and DJA Cairns, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes' in SM Kröll and N Horn (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer, 2004), 325-351, at 330ff; S Lemaire, 'Treaty Claims et Contract Claims: la compétence du Cirdi à l'epreuve de la dualité de l'Etat' (2006) 2

surprising that those pronouncements have had an enormous precedential effect. In subsequent jurisprudence, investment tribunals by and large accepted the fundamental premise that a dispute which is grounded in the same set of acts can give rise to parallel claims under both the contact and the treaty,[66] with the necessary consequence that both type of claims may perfectly coincide (in that a breach of a contract may also separately rise to a breach of the treaty), while nonetheless remaining independent from one another (in that a State may breach a treaty without breaching a contract and *vice versa*).[67] By the same token, tribunals accepted that each type of claims is premised on a different enquiry, given that the treaty sets an independent standard.[68] The emphasis has mostly been laid on the *difference* between the domestic and the international legal order, although, occasionally, arguments have also been advanced about the *separateness* and *self-containedness* of the two, in the most venerable tradition of the dualistic doctrine.[69]

Revue de l'Arbitrage 353; GS Tawil, 'The Distinction Between Contract Claims and Treaty Claims: An Overview' in AJ van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (Kluwer, 2007), 492-544, at 544; or JO Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Brill, 2010), 314-315.

[66] See eg *SGS v Pakistan* (n 4), [147] ('As a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders'); *Impregilo v Pakistan* (n 25), [258] ('the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim'); *Aguas del Tunari v Bolivia* (n 29), [114] ('The circumstance that a claim under the Concession against the Water Superintendency and a claim under the BIT against Bolivia could both point to the same set of facts should not blur the legal distinction between the two types of claims. It is often the case that one set of facts may give rise to disputes under different laws in different fora.'); or *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt (Decision on Jurisdiction)* (ICSID Case No ARB/04/13, 16 June 2006) [80] ('the fact that a dispute involves contract rights and contract remedies does not in and of itself mean that it cannot also involve treaty breaches and treaty claims'). For a restatement of the general principle, see *Ampal-American Israel Corporation and others v. Arab Republic of Egypt (Decision on Jurisdiction)* (ICSID Case No. ARB/12/11, 1 February 2016), [329] ('It is possible, as a jurisdictional matter, for different patties to pursue distinct claims in different fora seeking redress for loss allegedly suffered by each of them arising out of the same factual matrix. As a matter of general principle, contract claims are distinct from treaty claims').

[67] See eg *Consortium RFCC v Kingdom of Morocco (Award)* (ICSID Case No ARB/00/6, 22 December 2003) [48] ('A breach of the substantive provisions of a bilateral investment treaty can certainly result from a breach of Contract, without a possible breach of the Contract constituting, *ipso jure* and by itself, a breach of the Treaty'); *Eureko BV v Poland (Partial Award)* (19 August 2005), [112] (the Tribunal found it necessary to consider 'whether the acts of which Eureko complains, whether or not also breaches of the SPA and the First Addendum, constitute breaches of the Treaty.'); *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Award)* (*Vivendi II*) (ICSID Case No ARB/97/3, 20 August 2007) (formerly *Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v. Argentine Republic*) [7.3.10] (The treaty provisions 'set an independent standard. A state may breach a treaty without breaching a contract; it may also breach a treaty at the same time it breaches a contract.'); *BG Group Plc v The Republic of Argentina (Final Award)* (UNCITRAL, 24 December 2007) [183] ('The Tribunal therefore has jurisdiction to determine if the measures complained of by Claimant constitute a breach of the treaty with respect to "Investments" made by BG, regardless of whether or not the same measures are in breach of the MetroGAS License').

[68] *Impregilo v Pakistan* (n 25), [258] ('Even if the two [contract claim and treaty claim] perfectly coincide, they remain analytically distinct, and necessarily require different enquiries'); *Vivendi II*, ibid [7.3.10] ('Whether there is a breach of contract or a breach of the Treaty involves two different inquiries'); *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador (Award)* (ICSID Case No ARB/04/19, 18 August 2008) [342] ('treaty and contract breaches are different things, responding to different tests, subject to different rules'); or *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan (Award)* (ICSID Case No ARB/03/29, 27 August 2009) [137] ('Breach of contract and breach of treaty are separate questions giving rise to separate inquiries').

[69] See in particular *Noble Ventures v Romania (Award)* (ICSID Case No ARB/01/11, 12 October 2005) [53], where the Tribunal noted 'the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders) the second of which treats the rules contained in the first as facts', which had the consequence that, 'inasmuch as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State. But that responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other, a situation that further reflects the respective autonomy of the two legal systems (municipal and international) each one with regard to the other.'

But the greatest attraction of the analytical distinction between treaty and contract claims was in the justification it provided to investment tribunals to uphold their jurisdiction when faced with competing claims to adjudicatory authority from the side of domestic courts. Not only was the distinction thus employed with the view to overcoming the fact that certain domestic law-related issues otherwise relevant to the treaty claim had not yet been resolved by domestic courts.[70] The distinction proved above all useful to defeating forum selection clauses otherwise vesting domestic courts with exclusive competence over contract-related issues. Relying on the Committee's proposition in *Vivendi I* that the existence of an exclusive jurisdiction clause in a contract cannot operate as a bar to the application of the treaty standard in circumstances where the fundamental basis of the claim is a treaty,[71] investment tribunals in subsequent cases almost uniformly refused to give effect to such clauses if the claims before them invoked the applicable investment treaty as an independent cause of action.[72]

The premise was invariably that contract and treaty claims have a different legal basis, which automatically implies a different cause of action. Sometimes, the distinction between contract and treaty claims was presented in terms of a complete, dualist separation between the domestic and the international legal order. In *AES v. Argentina* (2005), for example, the exclusive jurisdiction that was granted to Argentine administrative tribunals under the concession contracts was considered ineffective on the level of international law, since "this *exclusivity only plays within the Argentinean legal order*, for matters in relation with the execution of these concession contracts. They do not preclude AES from exercising its rights as resulting, *within the international legal order* from two international treaties, namely the US-Argentina BIT and the ICSID Convention."[73] On another occasion, the contract/treaty claims distinction was presented as an issue of supremacy of international law over domestic law. Thus, in *Camuzzi v. Argentina* (2005), the observation was

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[70] See eg *Feldman v Mexico (Award)* (ICSID Case No ARB(AF)/99/1, 16 December 2002), [78]; *Nykomb Synergetics Technology Holding AB v The Republic of Latvia (Arbitral Award)* (SCC, 16 December 2003), 10; *or CME Czech Republic BV v The Czech Republic (Final Award)* (UNCITRAL, 14 March 2003), [398]-[412].

[71] *Vivendi (Annulment)* (n 53), [101].

[72] See eg *CMS Gas Transmission Company v The Republic of Argentina (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/01/8, 17 July 2003) [70]-[76]; *Azurix Corp v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/12, 8 December 2003) [26], [75]-[79]; *IBM World Trade Corporation v República del Ecuador (Decision on Jurisdiction and Competence)* (ICSID Case No ARB/02/10, 22 December 2003) [50]-[70]; *SGS v Pakistan (Jurisdiction)* (n 4), [146]-[148], [187]-[189]; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/3, 14 January 2004), [89]-[94], and *(Decision on Jurisdiction - Ancillary Claim)* (2 August 2004) [23]-[24], [47]-[51]; *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic (Decision of the Arbitral Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/02/1, 30 April 2004) [58]-[62]; *PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey (Decision on Jurisdiction)* (ICSID Case No ARB/02/5, 4 June 2004) [170]-[174]; *Salini v Jordan* (n 10), [92]-[96]; *Siemens AG v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/02/8, 3 August 2004) [180]; *AES Corporation v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/02/17, 26 April 2005) [90]-[99]; *Camuzzi International SA v The Argentine Republic (Decision on Objection to Jurisdiction)* (ICSID Case No ARB/03/2, 11 May 2005) [89], [109]-[119]; *Sempra Energy International v The Argentine Republic (Decision on Objections to Jurisdiction)* (ICSID Case No ARB/02/16, 11 May 2005) [86]-[88], [95]-[101]; *Eureko v Poland* (n 67), [92]-[114]; *Impregilo v Pakistan* (n 25), [286]-[287]; *Bayindir v Pakistan (Decision on Jurisdiction)* (ICSID Case No ARB/03/29, 14 November 2005) [151], [264]-[273]; *Aguas del Tunari, SA v Republic of Bolivia* (n 29), [114]; *El Paso Energy v Argentina* (n 11), [79]-[86]; *Jan de Nul* (n 66), [132]-[133]; *National Grid plc v The Argentine Republic (Decision on Jurisdiction)* (UNCITRAL, 20 June 2006) [167]-[169]; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/03/17, 16 May 2006) (formerly *Aguas Provinciales de Santa Fe SA, Suez, Sociedad General de Aguas de Barcelona, SA, and InterAguas Servicios Integrales del Agua, SA*) [41]-[45]; *Pan American Energy v Argentina* (n 11), [97]-[115]; *BG Group v Argentina* (n 67), [181]-[183]; *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan (Partial Award on Jurisdiction and Liability)* (SCC Case No V (064/2008), 2 September 2009) [157]-[159]; *SGS v Paraguay* (n 18), [138]; *Toto Costruzioni Generali SpA v The Republic of Lebanon* (*Decision on Jurisdiction*) (ICSID Case No ARB/07/12, 11 September 2009) [213]-[217]; *Abaclat v Argentina (Jurisdiction)* (ICSID Case No ARB/07/5, 4 August 2011) [498]-[499]; *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Award)* (ICSID Case No ARB/03/23, 11 June 2012) [930]-[931].

[73] *AES v Argentina*, ibid [93]; emphasis added.

made that, "[j]ust as a dispute that is purely contract-related will have to be brought before the forum envisaged in the contract, so too a dispute relating to the interpretation of a treaty can be submitted to the mechanisms of that treaty. *If the contrary were true, the contract would nullify the provisions of the treaty*."[74] Small variations in arguments notwithstanding, the analytical distinction between contract and treaty claims and the justification this provided for tribunals to uphold jurisdiction under the treaty were soon well-accepted. Thus, the Tribunal in *Enron v. Argentina* (2004) did not deem it necessary to even repeat the other tribunals' considerations in that respect when it rejected the Respondent's jurisdictional objections based on the existence of a contractually designated dispute settlement forum.[75]

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The attractiveness of the *Vivendi* approach as a means for regulating jurisdictional interactions between investment tribunals and contractually-agreed fora (and domestic courts more generally) is an obvious one. The distinction between treaty claims and contract claims has provided a conceptual device that *prima facie* allowed for a conciliation between international law's claims to supremacy, on the one hand; and commercial law's imperatives of party autonomy and sanctity of the contract, on the other. The analytical distinction enables treaty tribunals to retain unrestricted competence over treaty claims, which competence they undeniably have in being treaty organs deriving their powers from international law. At the same time, it allows for the contract forum to retain exclusive jurisdiction over questions of contract law, in accordance with the will of the contracting parties. Under such a division of labour, each forum can function independently from the other, and remains supreme within its own legal order.[76] Equally important, such a division of powers provides the possibility of maintaining the effectiveness of dispute settlement procedures under investment treaties, while preserving the integrity of contractual forum selection clauses, and thereby the overall contractual balance.

Yet, the problem with the analytical distinction is that it is also artificial and utterly formalistic. It is artificial because it ignores the possibility of normative overlap resulting from the fact that the content of treaty rights and contract rights (or rights under domestic law more generally) may substantively be analogous, if not identical.[77] And it is formalistic in that it considers a claim to be based on a different cause of action merely because the obligation asserted is one contained in a different legal instrument. Though such formalism is not uncommon in the practice of international adjudicatory bodies,[78] the investment tribunals' strict

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[74] *Camuzzi International SA v The Argentine Republic (Decision on Objection to Jurisdiction)* (ICSID Case No ARB/03/2, 11 May 2005) [112]; emphasis added.

[75] *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/3, 14 January 2004) (also known as Enron Creditors Recovery Corp and Ponderosa Assets, LP v The Argentine Republic) [91].

[76] Paradigmatic in this respect is *Gami Investments, Inc v The Government of the United Mexican States (Final Award)* (UNCITRAL, 15 November 2004) [41], where the Tribunal made the following observation: 'It was for the Mexican courts to rule on the licitness of the expropriation as a matter of Mexican law. The present Tribunal defers to the *Sentencia* as an authoritative expression of national law. The present Tribunal will moreover give respectful consideration to the Sentencia insofar as it applies norms congruent with those of NAFTA. […] But ultimately each jurisdiction is responsible for the application of the law under which it exercises its mandate. It was for the Mexican courts to determine whether the expropriation was legitimate under Mexican law. It is for the present Tribunal to judge whether there have been breaches of international law by any agency of the Mexican government.'

[77] On this, see Y Shany, 'Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims' (2005) 99 AJIL 835, at 837, who appositely notes that some domestic legal systems also directly incorporate international norms, including those provided under BITs.

[78] Cf. dictum by ITLOS in *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures, Order of 3 December 2001)*, ITLOS Reports 2001, 95, at [50]-[51] ("even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention" and "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results").

claim-splitting practice comes in marked contrast with the non-formalist attitude adopted in many domestic jurisdictions in dealing with cases of cross-boundary litigation, where the question of identity of actions is approached and dealt with in a flexible way – by reference to the sameness of the factual basis and *substance* of the legal entitlement sought to be established, and not merely by reference to the formal source of the rights invoked.[79] Of course, it is not the formalism in itself that is problematic, but the consequences that this formalism has had in practice. Namely, the analytical distinction between contract and treaty claims does not in itself foreclose the availability of domestic fora for the resolution of disputes arising out of an investment, and therefore retains the potential for duplication of proceedings – with all the negative consequences that this may entail. The distinction is therefore oblivious to the complex normative and institutional environment in which investors are operating. Hence, the investment tribunals' reliance on it as a means for regulating their jurisdictional interactions with domestic courts has also not without justification been described by some as "disintegrationist",[80] or else as an approach that has turned international investment arbitration into an "autonomous and self-referential system".[81] Others, of course, have expectedly defended it by reference to the special character and purposes of investment arbitration itself.[82]

Despite the analytical clarity of the conceptual distinction between contract and treaty claims, its application in practice has not been without hitches. First, distinguishing treaty claims from contract claims has not been without difficulty, particularly in circumstances where an alleged treaty claim has principally hinged on a breach of the contract (9.2.1). Specific problems have furthermore arisen in the application of the distinction in the context of umbrella clauses (9.2.2.).

9.2.1. Application of the Contract/Treaty Distinction in Practice

Distinguishing treaty claims from contract claims may be reasonably simple in circumstances where physical events overtake what was initially a contractual dispute,[83] or where the claimants in the treaty proceedings are different from the entities that entered into the contract out of which the dispute has arisen. Yet, in the event that a dispute involves the same parties and concerns the same object, it may be virtually impossible to separate contract issues from the treaty issues.[84] This is because the factual predicate on which a treaty claim will be based may often be the same

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[79] See C McLachlan, Lis Pendens *in International Litigation* (Brill, 2009), at 123-126, 186, discussing the non-formalist approach adopted in this respect by the ECJ and the Canadian Supreme Court. For a cogent critique of investment tribunals' practice on this point, see further M Swarabowicz, "Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System" (2017) 8(2) JIDS 280.

[80] See Shany (n 77), at 844, describing it as an approach that "seeks to resolve tensions between overlapping norms and procedures through rules of exclusion that draw lines of separation between legal regimes and judicial proceedings" and supports the construction of investment treaties as "self-contained instruments". For a more general discussion on disintegrationist approaches in the interactions between domestic and international adjudicatory bodies, see also Shany, *Regulating Jurisdictional Relations between Domestic Courts and International Tribunals* (OUP), 107ff.

[81] Swarabowicz (n 79), at 14. See also McLachlan (n 79), at 125-126, who takes the view that a non-formalist approach is only possible if courts approach the process of characterization of actions in "a suitably internationalist spirit, taking into account the impossibility of precise identity of action as between different legal systems". Curiously, however, McLachlan does not advocate the same non-formalist stance when dealing with investment treaty arbitration. Cf ibid 256ff.

[82] See eg E Gaillard, "'Vivendi" and Bilateral Investment Treaty Arbitration', New York Law Journal (6 February 2003), defending the *Vivendi* annulment decision as "perfectly well founded" and seeing nothing "pathological" in the coexistence of different adjudicative mechanisms under different instruments where such instruments do not have the effect of "developing their effects on the same plane".

[83] *Wena Hotels Ltd v Egypt* (n 50).

[84] See eg *SGS v Pakistan* (n 4), [148] ('BIT claims and contract claims appear reasonably distinct in principle. Complexities, however, arise on the ground…'); and *Joy Mining* (n 11), [75] ('To the extent that a dispute might involve the same parties, object and cause of action it might be considered to be a dispute where it is virtually impossible to separate the contract issues from the treaty issues and to draw any jurisdictional conclusions from a distinction between them.' Original footnotes omitted.)

as the factual predicate of a potential contract claim (indeed, in accordance with *Vivendi I*'s own logic, the same conduct on the part of the host State may constitute a breach of contract while also amounting to a breach of treaty, whereas it may also constitute simply a breach of contract, without more). Equally, the object and relief sought pursuant to each type of claim – especially when this takes the form of a request for payment of damages – may also be difficult to distinguish. Hence, in circumstances where the treaty claim essentially hinges on a breach of the contract, the question arises whether the jurisdiction of the treaty forum over treaty claims may nonetheless be affected by the presence of a mandatory contract forum.

In accordance with *Vivendi*, the question whether the claim is a treaty one or a contract one is determined by way of inquiry into the "fundamental basis" of the claim; it is only where "the essential basis" of the claim is a breach of contract the tribunal will give effect to any valid choice of forum.[85] The problem, as observed by some, is that this part of *Vivendi*'s decision could be interpreted as implying that the test of a claim's "essential basis" requires a tribunal to inquire into the *factual basis* of the treaty claim, with the possible consequence that a tribunal would be bound to decline jurisdiction over a treaty claim where such claim has an "essential basis" in the breach of a contract.[86] It needs to be said that such a reading would not find support in the *Woodruff* case from which the Committee drew inspiration. In accordance with the views expressed by Umpire Barge in that case, a claim would have an essential basis in the contract "wherever that contract is called upon as a source of those rights and duties whereon a claim may be based".[87] In the circumstances of that case, however, there was no issue of contractual claims being presented as treaty claims. The claimant did not actually allege violations of international law, but simply sought to recover from Venezuela the value of several bonds that were issued by a Venezuelan railroad company. As the cause of action was the contract, Umpire Barge also had no difficulty concluding that the "fundamental basis of the claim" was the contract, for a claim of a "denial or unjust delay of justice" – which according to the Umpire would have rendered the contractual forum selection clause inapplicable – "was not only not proven, but not even alleged".[88]

But misconceptions about the *Vivendi/Woodruff* test have not been uncommon in practice. In both *SGS v. Pakistan* and *Bayindir v. Pakistan* (2005), for instance, Respondent sought to fend off claimants' treaty claims by arguing that their "essential basis" was in fact a contractual one.[89] Referring to *Vivendi*, Pakistan therefore also demanded that effect be given to the relevant contractual forum selection clause.[90] Yet, such line of argument was not accepted by the respective tribunals, which concluded that, insofar as the Claimants' stated their claims as treaty claims, the essential basis of those claims was not contractual.[91] Considerable confusion in this respect, however, was generated by the jurisdictional decision *SGS v. Philippines* (2004). In that

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[85] *Vivendi I (Annulment)* (n 53), [98].

[86] See S Alexandrov, 'Breach of Treaty Claims and Breach of Contract Claims: is it still Unknown Territory?' in K Yannaca-Small (ed), *Arbitration under International Investment Agreements* (OUP, 2010), 323-350, at 347.

[87] *Woodruff* case (n 61), 222.

[88] ibid 223.

[89] See *SGS v Pakistan* (n 4), [43]-[44] and [62]-[63] (the contractual basis of those treaty claims was supposedly attested to by the fact that the contract and treaty claims were based on the same limited factual allegations, that the prayers for relief made before the treaty tribunal were virtually identical to those made in the contract-based arbitration that was proceeding concurrently in Pakistan, and that no specific treaty claims were formulated other than those relating to alleged breaches of the contract); and *Bayindir v Pakistan (Jurisdiction)* (n 72), [152]-[165] (The contractual nature of those claims was inferred from the fact that the treaty cause of action depended on the existence of a contract breach, that the amount of the treaty claims actually corresponded to the amount claimed under the contract, and that the Claimant initially even brought pure contract claims before the treaty tribunal.)

[90] *SGS v Pakistan* (n 4), [185]; *Bayindir v Pakistan,* ibid [151].

[91] In *Bayindir*, the Tribunal expressly noted that, insofar as Claimant was asserting only treaty claims, the case was thus not one where the essential basis of the claims was purely contractual. ibid [166].

case, the Tribunal concluded that two of the treaty claims that Claimant had raised in relation to its underlying concession contract, albeit validly stated at the level of jurisdiction, were premature and inadmissible, and therefore ordered a stay of proceedings until the contractual issues were determined in accordance with the contractually-agreed process.[92] Among the treaty claims to which this finding pertained was the one brought under the umbrella clause. As discussed in 9.2.2., the *SGS* Tribunal understood such claim as having an essential basis in the breach of the contract and thus, pursuant to the *Woodruff/Vivendi I* test, found it appropriate to give effect to the choice of forum clause in SGS' contract.[93] The problem, however, was that the Tribunal's findings with respect to the umbrella clause were then extended to SGS' claim under the fair and equitable treatment standard. Perplexing, in this regard, is the fact that in spite of its finding that Respondent's unjustified refusal to pay the sums due to SGS under the concession contract raised "arguable issues" under such standard,[94] the Tribunal eventually treated the FET claim as one which could not be "determined independently from the contractual issues" referred to the Philippine courts by the contractual forum selection clause.[95] It may be that the Tribunal simply lapsed into error in considering the viability of Claimant's FET claim. In fact, the Tribunal itself contradicted its finding by noting elsewhere that the dispute was "on its face a dispute about the amount of money owed under a contract" and that "[n]o question of a breach of the BIT independent of a breach of contract claim is raised".[96]

The findings in *SGS v. Philippines* can best be explained by the fact that the dispute between SGS and the Philippines was essentially a commercial one and that the Claimant had not successfully raised any viable treaty breaches apart from those based on the umbrella clause. Indeed, any other reading would be difficult to reconcile with *Vivendi*. In following the reasoning of the *Vivendi* Committee, if Claimant actually raised a *prima facie* treaty claim in relation to the FET obligation, there would have been no reason for such claim not being able to be determined independently from the contractual issues, given that such issues are not determinative as to whether particular conduct involves a breach of a treaty, and given that the tribunal would not be exercising contractual jurisdiction when taking into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law.[97] Such understanding was apparently shared by other tribunals. In *SGS v. Pakistan*, *Impregilo v. Pakistan*, *Bayindir v. Pakistan*, *Toto v. Lebanon*, and *BIVAC v. Paraguay,* the Respondents' requests for a stay of proceedings in favour of the contractually designated forum have all been flatly denied on the ground that treaty claims, being based on a different cause of action than contract claims and requiring the application of an independent standard, did not depend on a prior legal or factual determination by the contractually agreed forum.[98] While some of those tribunals have expressed

[92] *SGS v Philippines* (n 9), [162]-[163].

[93] ibid [153].

[94] ibid [162].

[95] ibid [156].

[96] ibid [159].

[97] *Vivendi (Annulment)* (n 53), [105], [110].

[98] See eg *SGS v Pakistan (Jurisdiction)* (n 4), [186] ('This Tribunal has jurisdiction over the Treaty claims. The right to exercise that jurisdiction does not depend upon the findings of the PSI Agreement arbitrator; that is, such findings are not a factual or legal predicate for the consideration of whether Pakistan violated the Treaty obligations to which SGS points.'); *Impregilo v Pakistan* (n 25), [289] ('such a stay, if anything, would confuse the essential distinction between the Treaty Claims and the Contract Claims.'); *Bayindir v Pakistan* (n 72), [270] ('In the Tribunal's view its jurisdiction under the BIT allows it – if this should prove necessary – to resolve any underlying contract issue as a preliminary question. Exactly like the arbitral tribunal sitting in Pakistan, this Tribunal should proceed with the merits of the case. This is an inevitable consequence of the principle of the distinct nature of treaty and contract claims.'); *Toto v Lebanon (Jurisdiction)* (n 72), [220] ('The Tribunal deems it improper to stay its proceedings, which only concern breaches of the Treaty.'); or *BIVAC v Paraguay* (n 29), [127] ('We see no other bar to the admissibility of the claim. Paraguay has argued that the existence of an agreed forum for the resolution of disputes under Article 9 of the Contract means that it is to that forum that the dispute should go. We disagree.

sympathy with the efforts of the tribunal in *SGS v. Philippines* to give effect to the parties' contractual commitments while respecting the general language of BIT dispute settlement provisions,[99] most of them did not consider that the exercise of treaty jurisdiction could undermine the integrity of the contract, either because taking account of contractual issues – which a treaty tribunal was entitled to consider in the exercise of its treaty jurisdiction – did not entail deciding contractual claims,[100] or because treaty claims at any rate could be decided irrespective of the facts underlying the claims before the contract forum.[101] Besides, there were also practical concerns that would make the ordering of a stay of proceedings impracticable, particularly the importance of resolving disputes expediently.[102] Furthermore, inasmuch as the doctrine of admissibility itself was concerned, there were found to be limitations to applying it to situations where the parties to the treaty-based proceedings were different from the parties to the proceedings pursuant to the contractually agreed procedure.[103]

In sum, the test of a claim's essential basis is thus nothing but an inquiry into the *cause of action* on which the claim is based. This is nothing but logical, as the most fundamental distinction between a treaty claim and a contract claim is precisely the source of the right on which the claim is based.[104] How does a treaty claim then differ from a contract claim in relation to a dispute arising out of the same contractual relationship, involving the same parties, and concerning the same object? Most tribunals appeared to understand the fact of a claim having an "essential basis" in the treaty as requiring the claimant to establish that the conduct impugned in the claim had a sovereign character (i.e. involving the exercise of *puissance publique*), and not a commercial one.[105]

It is well established that there is a significant distinction to be drawn between a treaty claim and a contract claim, even if there may be a significant interplay between the underlying factual issues.')

[99] *Bayindir v Pakistan* (n 72), [272].

[100] See *SGS v Pakistan (Jurisdiction)* (n 4), [186] ('This Tribunal can and must consider all facts relevant to determination of the BIT causes of action, including facts relating to the terms of the PSI Agreement. In doing so, we shall not seek to determine the claims asserted under the PSI Agreement; we will determine only the BIT claims of the Claimant.'); or *Impregilo v Pakistan* (n 25), [289] ('Since the two enquiries are fundamentally different (albeit with some overlap), it is not obvious that the contractual dispute resolution mechanisms in a case of this sort will be undermined in any substantial sense by the determination of separate and distinct Treaty Claims.').

[101] See *Toto v Lebanon (Jurisdiction)* (n 72), [220] (the Tribunal 'will not deal with the specific facts underlying the two claims submitted before the *Conseil d'Etat*'). See also *BIVAC v Paraguay* (n 29), [125], noting that, unlike in *SGS v Philippines*, there was no apparent unresolved dispute as to the amount payable, and that accordingly, it would not be premature to come to a decision on the merits of the alleged breaches of the FET standard.

[102] See eg *Impregilo v Pakistan* (n 25), [290] ('Further, if a stay was ordered, as Pakistan has sought, it is unclear for how long this should be maintained; what precise events might trigger its cessation; and what attitude this Tribunal ought then to take on a resumed hearing to any proceedings or findings that may have occurred in the interim in Lahore.'); *Bayindir v Pakistan* (n 72), [272] ('However, to do so raises several practical difficulties. In particular, it may be very difficult to decide, at this preliminary stage, which contractual issues (if any) will have to be addressed by the Tribunal on the merits.'); or *Toto v Lebanon (Jurisdiction)* (n 72), [220] ('Besides, as no other contractual claims have presently been introduced, the settlement of these claims, if ever introduced before the *Conseil d'Etat,* could take a substantial period of time. Even for mere reasons of expediency, the Tribunal cannot suspend its proceedings for such a substantial period waiting for judgments which, although indirectly related to some facts which are also the basis of Treaty claims before this Tribunal, have a completely different scope and cause of action.')

[103] See *Impregilo v Pakistan* (n 25), [289].

[104] See on this B Cremades and D Cairns, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes' in N. Horn (ed), *Arbitrating foreign investment disputes* (Kluwer, 2004), 325-351, at 326-31, distinguishing treaty and contract claims by reference to the different sources of rights, content of rights, the parties to the claim, applicable law, and the different consequences in terms of liability.

[105] See eg *BIVAC v Paraguay* (n 29), [127] (noting that '[t]he fundamental basis of the claim under Article 3(1) of the BIT, over which this Tribunal has jurisdiction, turns on the interpretation and application of that provision and alleged acts of Paraguay (as "puissance *publique"),* not on the interpretation and application of the Contract as such, although the Contract will necessarily be part of the overall factual and legal matrix.'); *Gustav F W Hamester GmbH & Co KG v Republic of Ghana (Award)* (ICSID Case No ARB/07/24, 18 June 2010) [329] (for the observation that Claimant's claims of treaty breach concerned the conduct of a separate legal entity in relation to the contract and the finding that the claimant's 'so-called

9.2.2. When Both Worlds Collide: Applying the Contract/Treaty Distinction to Claims under Umbrella Clauses

Another area where the application of the analytical distinction between contract and treaty claims runs into difficulties concerns claims brought under umbrella clauses. By imposing an obligation on the State to observe contractual commitments entered into with an investor, such clauses have caused the operation of the contract to fall under the protective umbrella of the treaty, thus creating an even stronger link between the contract and the investment treaty than simply through the treatment of the contract as one of the types of protected investments. The difficulties arise when it comes to determining the actual basis of the claim. On the face of it, a host State violates an umbrella clause if it fails to observe the contractual commitments it owes towards the investor. But the failure to observe contractual commitments is, at the same time, a breach of the contract. This could take to mean that, though amounting to a treaty breach, the violation of an umbrella clause in fact depends on the existence of a contract breach. In such circumstances, the question then necessary arises as to the fundamental basis of the claim that is brought pursuant to an umbrella clause – is that the treaty or the contract? Investment tribunals have given different answers to this question and, consequently, have also arrived at different conclusions as to whether the exercise of their jurisdiction over purported breaches of an umbrella clause was warranted in circumstances where a forum selection clause in the relevant contract mandated recourse to the courts of the host State or some type of domestic arbitration in relation to contractual claims.

The answer to the question to a certain extent depends on the supposed effect of umbrella clauses; an issue on which investment tribunals have also developed divergent views. The point of departure in this respect are the decisions in the two *SGS* cases which, as is well-known, involved the same claimant and arose out of similar transactions, but were brought against two different States on the basis of two different BITs and eventually resulted in diametrically-opposed (and potentially irreconcilable) outcomes. Though often discussed as representing two competing approaches to the interpretation of umbrella provisions, the SGS decisions in fact epitomize also two visions or understandings as to the effects that umbrella clauses have in relation to contractual obligations entered into between an investor and the host State. The Tribunal in *SGS v. Pakistan*, on the one hand, premised its notoriously narrow construction of the umbrella clause on the understanding that a broad interpretation of such clause would amount to "incorporating by reference" into the treaty an unlimited number of State contracts and other municipal law obligations, and would have the effect of converting contractual obligations into treaty obligations by way of "instant transubstantiation".[106] The Tribunal in *SGS v. Philippines*, on the other hand, rejected the idea of the umbrella clause entailing a full-scale internationalization of contractual and other commitments under domestic law, with the consequence that questions of contract law would be converted into questions of treaty law. Instead, the clause was considered to address only the performance of commitments entered into with regard to specific investments, whereas the scope of those commitments remained to be determined in accordance with their proper law, in most cases by reference to the terms of the contract.[107] Therefore, pursuant to the understanding epitomized by the *SGS v. Pakistan* decision,

"treaty claims," however skillfully repackaged, are inextricably linked to the JVA and are in reality contract claims. To use the language of the award in the *Vivendi (Annulment)* (n 53), "'the essential basis" of Hamester's claims is purely contractual.'); or *Tulip v Turkey*, [354] (for the holding that 'the determination of whether a claim arises under a BIT involves an inquiry into the "essential basis" or "normative source" of that particular claim. In order to amount to a treaty claim, the conduct said to amount to a BIT violation must be capable of characterisation as sovereign conduct, involving the invocation of puissance publique.')

[106] *SGS v Pakistan (Jurisdiction)* (n 4), [168], [172].

[107] *SGS v Philippines (Jurisdiction)* (n 9), [126]-[127].

claims under umbrella clauses were to be conceived as treaty claims by reason of the fact that the contractual obligations themselves have been elevated into treaty obligations. Indeed, the Tribunal in *SGS v. Pakistan* treated the umbrella clause claim as any other treaty claim, and did not consider the presence of a forum selection in itself being a bar to the Tribunal's jurisdiction in relation to such claims.[108] In contrast, in accordance with the understanding advanced in the *SGS v. Philippines* decision, the claims under the umbrella clause were to be treated as claims having a basis in the contract, which was eventually also reason for the Tribunal to give effect to a contractual forum selection clause.[109]

In the aftermath of the *SGS* cases, tribunals continued to disagree on the supposed effects of umbrella clauses. Some continued to assume that umbrella clauses have the effect of elevating contractual obligations into obligations under international law.[110] This was then also reason for concluding that a contractual forum selection clause did not divest the Tribunal of its jurisdiction to hear claims for breach of treaty.[111] Others, denied that such clauses would have the effect of changing the law of the underlying obligation,[112] or at least assumed that what is elevated by the umbrella clause is not the obligation itself, but the breach of such obligation.[113] In some

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[108] *SGS v Pakistan (Jurisdiction)* (n 4), [146]-[155] where the Tribunal essentially accepted jurisdiction over SGS's treaty claims as a whole.

[109] *SGS v Philippines (Jurisdiction)* (n 9), [155], [163].

[110] See eg *Noble Ventures Inc v Romania* (n 69), [53] (noting how '[a]n umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law') and [61] (concluding that the contracting parties 'had as their aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT'); *BIVAC v Paraguay* (n 29), [142] ('[a]ssuming that Article 3(4) [containing the umbrella clause] does import the obligations under the Contract into the BIT, giving this Tribunal jurisdiction to interpret and apply the Contract as such') and [147] (confirming the view that the umbrella clause 'has the effect of importing the obligations under the Contract into the BIT'); *Hamester v Ghana* (n 105) [348] (suggesting that, by virtue of the umbrella clause, contractual commitments could potentially be 'elevated – and transformed in nature – […] into treaty commitments of the State itself'); or *Tulip v Turkey* (n 26), [351] (observing that an umbrella clause 'may arguably be relied on in certain circumstances to "elevate" a contractual obligation "entered into" by the State "with regard to investments" […] to argue that the Contract […] is so converted into an international obligation'). See also *Salini v Jordan* (n 10), [127] (implicitly suggesting the same proposition in explaining that, insofar as the relevant clause was not capable of being construed as an umbrella clause, the contractual obligations owed by Jordan to the investor "remain purely contractual in nature").

[111] *El Paso Energy v Argentina* (n 11), [86].

[112] See eg *CMS Gas Transmission Company v The Republic of Argentina (Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic)* (ICSID Case No ARB/01/8, 25 September 2007) [95(c)] (holding that '[t]he effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law'); Toto v Lebanon (Jurisdiction) (n 72), [202] (holding that claims based upon the umbrella clause 'are governed by the law of the contract and may be affected by the other provisions of the contract'); *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine (Award)* (ICSID Case No ARB/08/11, 25 October 2012) [247] (the umbrella clause did not have the effect of converting 'the extent or content of such obligations into an issue of international law.' The scope of the contractual obligations had to be determined in accordance with the contract); *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile (Award)* (ICSID Case No ARB/01/7, 25 May 2004) [187]; and *Fedax NV v Venezuela (Final Award)* (ICSID Case No ARB/96/3, 9 March 1998) [30]-[33] (holding that it was necessary to consider the provisions of the Venezuelan Commercial Code and its Law on Public Credit to establish the amount of principal and accrued interest under the promissory notes, the failure of payment of which gave rise to Respondent's liability under the umbrella clause). See also *Micula v Romania (Final Award)* (ICSID Case No ARB/05/20, 11 December 2013), [417]ff.

[113] See eg *Eureko v Poland* (n 67), [250] ('breaches by Poland of its obligations under the SPA and its First Addendum, as read together, […] may be breaches of Article 3.5 of the Treaty [containing the umbrella clause]'); *LESI-Dipenta v Algeria* (n 27) [25(ii)] ('the effect of such clauses is to transform the violations of the State's contractual commitments into violations of the treaty umbrella clause and by this to give jurisdiction to the Tribunal over the matter'); *Invesmart v Czech Republic (Award)* (UNCITRAL, 26 June 2009) [526]. ('existence of an "umbrella clause" elevates breaches of a contract to breaches of the BIT'); *Khan Resources v Mongolia (Award on the Merits)* (UNCITRAL, 2 March 2015) [295] ('a breach by Mongolia of any provision of the Foreign Investment Law would constitute a breach of the ECT's so-called "umbrella" clause'); *Oxus Gold* (Award) (n 36) [365] ('[i]n the absence of an umbrella clause, the State is not liable, on the international level, for violation of purely contractual obligations') and [371] (discussing how 'the violation of any legal obligation contained in the national legal order would be transformed by an umbrella clause into a violation of the Treaty').

cases, this was then also reason to conclude that the basis of the claim remained a contractual one, with the consequence that the claim was affected by contractual forum selection clauses.[114]

In considering the effects that contractual forum selection clauses will have on claims based under umbrella clauses, the discussion eventually withered away from debates as to the purported effects of umbrella clauses, to the question of the legal nature of the obligations imposed by the clauses as such. Namely, some tribunals, though accepting the view of underlying obligations remaining unchanged, for example took the view that claims under the umbrella clause do have the character of treaty claims simply by reason of them being premised on an obligation that is itself set out in a treaty.[115] The obligation to respect commitments entered into by the host State being grounded in the treaty was then precisely reason for some to conclude that claims under the umbrella clause were not capable of being affected by contractual forum selection clauses.[116] In fact, in a great deal of cases, objections relating to the presence of a contractual forum selection clause were not even considered specifically in relation to the umbrella clause, but were dispensed with in relation to the totality of treaty claims, with those based on the umbrella clause included.[117]

The treaty-source of the obligation to respect commitments eventually prompted the discussion whether the umbrella clause actually sets out an independent standard. The Tribunal in *BIVAC v. Paraguay* (2009), though adhering to the view that the umbrella clause will have the effect of importing contractual obligations into the BIT, dismissed the idea that the clause itself would provide a "freestanding international treaty obligation", in the sense of an "independent standard", that would allow it to determine whether Respondent's acts gave rise to a violation of such clause.[118] Rather, in order to determine the breach of such clause, the Tribunal deemed necessary to interpret and apply the contract, and thus concluded that "the fundamental basis of the claim", in the *Vivendi's* familiar terminology, was not the BIT but rather the contract.[119] This conclusion was

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[114] *Toto v Lebanon (Jurisdiction)* (n 72), [202] (holding in relation to the umbrella clause that '[t]he contractual claims remain based upon the contract').

[115] *Burlington Resources Inc v Republic of Ecuador (Decision on Jurisdiction)* (ICSID Case No ARB/08/5, 2 June 2010) (formerly Burlington Resources Inc and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)) [189] ('the Tribunal notes that Burlington's umbrella clause claim is a Treaty claim'); *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Award)* (ICSID Case No ARB/03/23, 11 June 2012) [931].

[116] *Eureko v Poland* (n 67)*; EDF v Argentina,* ibid; see also See *SGS v Philippines* (Dissenting Opinion of Antonio Crivellaro, 29 January 2004) (n 9), [11] (arguing that '[i]f our jurisdiction derives from (also) Article X(2) [the umbrella clause], as unanimously admitted, I see no reason why our Tribunal could not deal with and decide on the merits of the payment claim').

[117] See *CMS Gas v Argentina* (n 72) [70]-[76], [98] (breaches of the umbrella clause were then upheld on the merits, Award of 12 May 2005; however, the award was later annulled in this part for failure to state reasons, *Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic* (25 September 2009) [97]); *Azurix Corp v The Argentine Republic* (n 72), [75]-[79] (the claim under the umbrella clause was later dismissed on the merits, on the ground that the Claimant was not privy to the relevant contract, Award of 14 July 2006, [384]); *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/3, 14 January 2004) [89]-[94], and *(Decision on Jurisdiction - Ancillary Claim)* 2 August 2004, [23]-[24], [47]-[51] (breaches of the umbrella clause were upheld on the merits, Award of 22 May 2007, [269]-[277]; the award was later annulled, but not for reasons relating to the application of the umbrella clause, *Decision on the Application for Annulment of the Argentine Republic* of 30 July 2010); *AES v Argentina* (n 72), [46], [90]-[99]; *Camuzzi International SA v The Argentine Republic (Decision on Objection to Jurisdiction)* (ICSID Case No ARB/03/2, 11 May 2005) [89]-[90], [105]-[119]; *Sempra Energy International v The Argentine Republic* (n 72), [86]-[101] (breaches of the umbrella clause were also upheld on the merits, Award of 28 September 2007, [305]-[314]); *Continental Casualty Company v The Argentine Republic (Award)* (ICSID Case No ARB/03/9, 5 September 2008) [286]-[302] (but the claims under the umbrella clause were dismissed by the Tribunal, after having upheld the defense of necessity with respect to some of those contractual obligations and finding already a breach of the FET obligation with regard to others, [303]); and *Al-Bahloul v Tajikistan* (n 72), [157]-[159] (subsequently upholding breaches of the umbrella clause, [257], [263]-[268]).

[118] *BIVAC v Paraguay* (n 29), [149].

[119] ibid.

subsequently disputed by the Tribunal in *SGS v. Paraguay* (2010), which criticized such line of reasoning on the ground that it "ignores the source in the treaty of the State's claimed obligation to abide by its commitments, contractual or otherwise"; for "[e]ven if the alleged breach of the treaty obligation depends upon a showing that a contract or other qualifying commitment has been breached, the source of the obligation cited by the claimant, and hence the source of the claim, remains the treaty itself."[120] Since the conceptual distinction between contract claims and treaty claims was thus found to apply "with equal force in the context of an umbrella clause",[121] the existence of the contractual forum selection clause – which in the circumstances of the case demanded that disputes relating to the contract be submitted to the Courts of the City of Asunción – was held not to operate as a bar to the application of the treaty standard.[122]

In the end, the problem with the application of the contract/treaty distinction to claims under the umbrella clause is not so much in determining the essential basis of such claims. In accordance with the way the test was applied in *Woodruff* (and as discussed in 9.2.1), the cause of action remains a right deriving from an obligation imposed by an investment treaty. The question is rather whether the umbrella clause can be deemed to set out an independent treaty standard; that is, a standard that is independent from a breach of the contract. It is difficult to argue that this would indeed be the case. In accordance with the logic of the *Vivendi* Committee, it is precisely because the treaty sets an independent standard that a state "may breach a treaty without breaching a contract, and *vice versa*".[123] A violation of an umbrella clause, however, is predicated on a breach of the contract. A host State cannot have failed to observe a contractual obligation it had entered into with an investor without also having breached the contract itself. In other words, in the absence of a contract breach, there is no breach of the umbrella clause. The Tribunal in *MTD v. Chile* perhaps summarized the position most accurately when holding that breaches of the umbrella clause are governed by international law, but "to establish the facts of the breach, it will be necessary to consider the contractual obligations undertaken by the Respondent and the Claimants and what their scope was under Chilean law".[124] A related question is whether or not in considering contractual obligations for the purpose of establishing the facts of the treaty breach, the tribunal must be deemed to be exercising contractual jurisdiction, or as formulated by the *Vivendi* Committee, merely "taking into account" the terms of a contract. The Tribunal in *EDF v. Argentina* denied that the former would be the case when it addressed the Respondent's conduct in relation to the umbrella clause, contending that it did "not act as a judge of contract questions, but rather as a tribunal considering treaty matters, in particular the specific commitments protected by the 'umbrella clause'."[125] It is open to discussion whether such a position is really defensible.

9.2.3. Avoidance of Forum Selection through Simple Redressing of Claim?

Given the investment tribunals' persistent refusal to abrogate their jurisdiction over treaty claims, the possibility arises that an investor could bypass an exclusive jurisdiction clause in the contract by simply citing provisions of an applicable treaty in the investor's notice of arbitration – that is, by redressing a contractual claim as a treaty one.[126] This raises the question as to the discretion of

[120] *SGS v Paraguay* (n 18), [142].

[121] ibid.

[122] ibid [166].

[123] ibid [95].

[124] *MTD Equity v Chile* (n 112), [187].

[125] *EDF v Argentina* (n 115), [944].

[126] Cf CI Suarez Anzorena, 'Multiplicity of Claims under BITs and the Argentine Case' (2005) 2 TDM 20, at 24 describing this phenomenon as a "labelling game".

the investor to characterize and present it claims as treaty claims; and conversely, as to the degree of scrutiny to be exercised by an investment tribunal in determining whether the claim as presented is indeed a treaty one already at the jurisdictional stage (for, obviously, the determination as to whether there truly has been a violation of the treaty will eventually be determined at the merits stage of the claim).

Investment tribunals have approached this question on the basis of a two-prong proposition.[127] On the one hand, it has generally been accepted that it is at the claimant's discretion to formulate its case as it sees fit, including by presenting its dispute as a treaty one.[128] On the other hand, it has been held that the mere assertion of the existence of a dispute under the treaty will not be sufficient to state a treaty claim, given that the test for jurisdiction is an objective one.[129] With a view to reconcile these considerations, most investment tribunals have considered it necessary, yet also sufficient, to ascertain whether the facts and legal contentions alleged by the claimant, if ultimately proven true, could give rise to a violation of the investment treaty.[130] Pursuant to this *prima facie* test – as such jurisdictional inquiry is commonly known[131] – tribunals thus assessed whether the stated claims were both *legally* and *factually* adequate for jurisdictional purposes.[132] Of course, the test being a *prima facie* one, the intensity of a tribunal's review has necessarily been a limited one. Insofar as the legal foundation of a claim is concerned, a tribunal needs not decide whether the claim *would* actually prevail as a matter of law if the factual allegations were proven, but only that it is *capable* of so prevailing.[133] Nor is a tribunal expected, in relation to the factual predicate of the claim, to determine at the jurisdictional stage that the facts which are relevant to the treaty claims have *conclusively* been proven.[134] Save for in exceptional circumstances,[135] the acts and omissions will instead be *taken as alleged* by the Claimant,

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[127] On the approach to be followed in relation to contract claims potentially disguised as treaty claims, see in particular *SGS v Pakistan* (n 4), [145]; *SGS v Philippines (Jurisdiction)* (n 9), [157]; *Azurix Corp v The Argentine Republic* (n 72), [76]; *Siemens AG v The Argentine Republic* (n 72), [180]; *SGS v Paraguay* (n 18), [137].

[128] On this discretion, see in particular *Bayindir v Pakistan* (n 72), [167], where the position was taken that 'when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty. The very fact that the amount claimed under the treaty is the same as the amount that could be claimed (or was claimed) under the contract does not affect such self-standing right.'

[129] *El Paso Energy v Argentina* (n 11), [60]-[61]; *Pan American Energy v Argentina* (n 11), [50]-[51]. On the objective nature of the test, see HE Kjos, *Applicable Law in Investor–State Arbitration* (OUP, 2013), 109-10.

[130] Cases where this test was applied to claims arising from a contractual relationship include eg *Vivendi (Annulment)* (n 53), [112]; *Azurix Corp v The Argentine Republic* (n 72), [76]; *Impregilo v Pakistan* (n 25), [254]; *Bayindir v Pakistan* (n 72), [197]; *Siemens AG v The Argentine Republic* (n 72), [180]; *Salini v Jordan* (n 10), [151]; *BIVAC v Paraguay* (n 29), [112]-[113]. For an example of an early and more general application of this test, see in particular *United Parcel Service of America v Government of Canada (Award on Jurisdiction)* (ICSID Case No UNCT/02/1, 22 November 2002) [37].

[131] See generally, A Sheppard, 'The Jurisdictional Threshold of a *Prima-Facie* case' in Muchlinski et al (eds), *The Oxford handbook of international investment law* (OUP, 2008), 932-961.

[132] cf *Continental Casualty Company v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/03/9, 22 February 2006) [60ff], considering the object of the investigation to extend to whether the claim meets the jurisdictional requirements 'both as to the factual subject matter at issue, as to the legal norms referred to as applicable and having been allegedly breached, and as to the relief sought.'

[133] On the scope of the test, see generally *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* [1996] ICJ Rep 803 ('Oil Platforms'), Separate Opinion of Judge Rosalyn Higgins, [33]. For a discussion in the context of investment arbitration, see *SGS v Paraguay* (n 18), [51]-[52].

[134] See on this *SGS v Paraguay* (n 18), [44]-[58]. The standard applicable to the *prima facie* inquiry differs from the standard for findings of fact necessary to establish certain threshold jurisdictional requirements, such as the existence of a protected investment or the investor possessing the proper nationality, which must in contrast be proven by the claimant already at the jurisdictional stage. See *Inceysa v Salvador (Award)* (ICSID Case No ARB/03/26, 2 August 2006) [149]-[155]; and *Phoenix Action, Ltd. v. The Czech Republic (Award)* (ICSID Case No. ARB/06/5, 15 April 2009), [61]-[62].

[135] See eg *SGS v Pakistan (Jurisdiction)* (n 4), [145] (not excluding the possibility 'that there may arise a situation where a tribunal may find it necessary at the very beginning to look behind the claimant's factual claims'). As to what such exceptional circumstances could be, see eg *Amco Asia* (n 41), [38], discussing the possibility for departing from the *prima*

while it will be left to the merits stage for the latter to prove those allegations. Of course, as noted by the Tribunal in *Joy Mining v. Egypt* (2004), this *prima facie* approach to jurisdictional decisions "must always yield to the specific circumstances of each case."[136]

Even though such *prima facie* test may not be a particularly demanding one, it has not prevented tribunals to occasionally reject certain treaty claims on the ground of them not being capable of giving rise to a treaty breach.[137] Furthermore, the test has allowed tribunals to ascertain already at the jurisdictional stage whether the "essential basis of the claim" is indeed the treaty, and not the contract. In *SGS v. Philippines* (2004), for example, the Tribunal found that what it was dealing with was "on its face a dispute about the amount of money owed under a contract", which meant that some of the claims were inadmissible given that their basis was in the contract.[138] The Tribunal in *Joy Mining v. Egypt* (2004) even found that all claims were contractual in nature, and declined to exercise jurisdiction over them.[139] Then again, not all tribunals were equally zealous in assessing the basis of the claim already as early as at the jurisdictional stage.[140] And there are good reasons for them not to be. As explained in *Salini v. Jordan* (2004), the purpose of the *prima facie* test is "to ensure that courts and tribunals are not flooded with claims which have no chance of success and sometimes are even of an abusive nature; but to ensure equally that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate."[141] It may well be in the interest of judicial economy that investment tribunals scrutinize already at the jurisdictional stage whether a claimant has not dressed a contractual claim into a treaty one for the purpose of overriding the mandatory jurisdiction of a contractually-agreed forum. At the end of the day, however, any claims arising out of a contractual relationship not meeting the threshold of a treaty breach will eventually fail at the merits stage. As appositely observed by sole arbitrator Paulsson in *Pantechniki v. Albania*: "there comes a time when it is no longer sufficient merely to assert that a claim is founded on the Treaty."[142]

9.3. Regulating Interactions in Cases of Jurisdictional Overlap

As discussed in the previous sections, investment tribunals have firmly and persistently refused to abrogate their jurisdiction over investment disputes by either adopting narrow interpretations of treaty provisions, or more commonly, by relying upon the differences in the respective causes of action. But such a conflict resolution technique can only be effective as long as the competence of the contractually agreed forum is indeed limited to contractual claims. The possibility however arises that the contractually designated forum could also have competence to pronounce upon violations of an applicable investment treaty, which would result in the treaty and the contract forum having

facie approach in the event of 'manifest or obvious misdescription or error in the characterization of the dispute by the Claimants'; or *Continental Casualty v Argentina* (n 132), [61], discussing the possibility of a respondent State supplying evidence showing that the case has no factual basis even at a preliminary scrutiny, in which case the Tribunal might dismiss the case if it found such evidence convincing at a summary exam.

[136] *Joy Mining v Egypt* (n 11), [30].

[137] See eg *SGS v Philippines* (n 9), [161], and *BIVAC v Paraguay* (n 29), [106]-[117], both rejecting at the jurisdictional stage the claim that the non-payment of contractual sums was capable of amounting to an expropriation of contractual rights.

[138] *SGS v Philippines* (n 9), [159], [163].

[139] *Joy Mining v Egypt* (n 11), [71]-[82].

[140] See eg *Salini v Jordan* (n 10), [160]-[166], where the Tribunal noted that the claimants had advanced little argument that the alleged breaches of the contract simultaneously constituted breaches of the treaty, and that the file submitted by the claimants was lacking, in terms of both the facts and the law, but nonetheless held that it must not rule out from the outset that the alleged facts, if established, might constitute breaches of the BIT.

[141] *Salini v Jordan* (n 10), [151].

[142] Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania (Award) (ICSID Case No ARB/07/21, 31 July 2009), [64].

concurrent jurisdiction over treaty claims. Although this possibility appears to have been implicitly accepted by some investment tribunals,[143] it has rarely been fully considered in practice.

One can envision three possible solutions to regulate interactions in the event of jurisdictional overlap: the investment tribunal declines jurisdiction over a claim that lies concurrently within the jurisdiction of the domestic court (1), the investment tribunal accepts jurisdiction over such claim in principle, but decline to exercise it due to the inadmissibility of a claim (2), the tribunal exercises jurisdiction notwithstanding the concurrent jurisdiction by the domestic court (3). All three solutions have so far been adopted in arbitral practice.

9.3.1. Denial of Jurisdiction

Lying on one side of the spectrum of conceivable solutions is the possibility that an investment tribunal pronounces itself without jurisdiction over the same claim over which a domestic court or similar forum enjoys exclusive jurisdiction.[144] This solution has been adopted in several cases where there was concurrency of jurisdiction in relation to contractual claims. The proposition that a treaty tribunal ought not exercise jurisdiction over pure contract claims where the contract in question contains a forum selection clause has already been made by the Annulment Committee in *Vivendi I*. Not only did the Committee state the principle that, where the fundamental basis of the claim is a treaty, the existence of such clause cannot operate as a bar to the application of the treaty standard, but also the converse principle that, where "the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract".[145] In the circumstances of *Vivendi* case, of course, this statement was essentially *obiter*, as the Claimant was not asserting contractual claims, and the Committee only hinted at the possibility of a treaty tribunal having competence to decide such claims by virtue of a broadly-formulated dispute settlement clause in the applicable BIT.[146] However, relying on the Committee's proposition, several tribunals subsequently pronounced themselves as lacking jurisdiction over claims that were subject to the exclusive jurisdiction of some other forum. The Tribunal in *Joy Mining v. Egypt* (2004), for example, declined for that reason jurisdiction over the investor's claims in circumstances where all the claims were found to be contract-based claims, precisely on account of a contractual forum selection clause.[147] On the same basis, the Tribunals in *Saluka v. Czech Republic* (2004) and *Oxus Gold v. Republic of Uzbekistan* (2015) denied jurisdiction over some of the counterclaims based on

[143] See eg *Joy Mining v Egypt* (n 11), [89] ('There is no question here of either exclusive ICSID jurisdiction or of concurrent jurisdiction'); *Salini v Jordan* (n 10), [96] ('the Tribunal will note that the dispute settlement procedures provided for in the Contract could only cover claims based on breaches of the Contract. Those procedures cannot cover claims based on breaches of the BIT'); *Aguas del Tunari v Bolivia* (n 29), [111], where the Tribunal considered 'as a threshold matter' that for a contractual forum selection clause in a separate document to be in conflict with the treaty tribunal's exercise of jurisdiction, 'that document must both deal with the same matters and Parties and contain mandatory conflicting obligations' and that only 'if a true conflict exists, there then arises the question of what effect such a document has on the Tribunal's jurisdiction'; or *BIVAC v Paraguay* (n 29), [127] ('The issue of fair and equitable treatment, and related matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the courts of Asunción. The treaty issue is therefore not one for that forum').

[144] This approach differs from the technique of interpreting away jurisdictional overlaps, to the extent that the tribunal denies jurisdiction in the event where such jurisdiction prima facie.

[145] *Vivendi (Annulment)* (n 53), [98]. The Committee's statement of principle was qualified by the condition that he treaty in question did not otherwise provide (ibid, fn 69). This question will be considered in Chapter 10.

[146] ibid [55].

[147] *Joy Mining v Egypt* (n 11), [89]-[90]. Admittedly, there was some incongruity in the Tribunal's reasoning as to whether it would actually have jurisdiction over pure contract claims in the absence of a forum selection clause. The Claimant, at any rate, relied on the treaty's broadly-formulated dispute settlement clause (covering any legal dispute 'concerning an investment') in asserting claims based on the contract. The Tribunal declared itself without jurisdiction in the absence of a treaty-based claim, without actually addressing the specific language of the clause, or the more general question whether pure contract claims could at all be asserted before a treaty tribunal. ibid [68]-[82].

alleged breaches of Claimant's contractual obligations in circumstances where the contract in question contained its own mandatory dispute settlement provisions.[148] In addition, several other tribunals adopted the Committee's logic, even without explicitly referring to the *Vivendi* precedents. Thus, the Tribunal in *Toto v. Lebanon* (2009) declared itself without jurisdiction over contractual claims that had been asserted pursuant to the umbrella clause, given that those claims remained, in the view of the Tribunal, based upon the contract, governed by the law of the contract, and affected by the other provisions of the contract, including therefore by the contractual jurisdiction clause requiring contractual claims to be submitted exclusively to the Lebanese courts for settlement.[149] Similarly, the tribunals in *Link-Trading v. Moldova* and *İçkale v. Turkmenistan*, though not actually asked to decide purely contractual claims, expressly considered that their competence would not to extend to such claims in view of mandatory dispute settlement provisions under the relevant contracts.[150]

9.3.2. Inadmissibility of the Claim as a Bar to the Exercise of Jurisdiction

Another way to dealing with problems of jurisdictional overlap is to regulate them as a matter of admissibility, instead of jurisdiction.[151] While concurrency of jurisdiction between investment tribunals and domestic courts is thus tolerated at the general level, jurisdictional conflicts are resolved at the level of a particular claim, either through the application of the principle of *litispendence*,[152] or by holding the particular claim generally inadmissible in circumstances where another forum is vested with exclusive jurisdiction over the same claim.

The application of the principle of *litispendence*, which in essence precludes the pursuit of proceedings before an adjudicatory body if the same action is already pending before another forum, appears particularly suitable in circumstances where the treaty tribunal and domestic courts would both enjoy concurrent jurisdiction, as alternatives, over the same particular claim. Under such scenario, the jurisdictional conflict could then be resolved in favour of the forum first seized of the claim. In the event that this be the domestic court, the investment tribunal would then be required to decline to exercise jurisdiction that it would otherwise have over the particular claim – of course, provided that the claims presented before, respectively, the domestic courts and the investment tribunal meet the conditions of formal identity. Investment tribunals seemingly accepted the principle of *lis pendens* as a means for regulating jurisdictional conflicts in circumstances of concurrent jurisdiction, even if they never applied it in practice, as the requisite identity of actions had usually not been present in the relevant circumstances. In *Benvenuti & Bonfant v. Congo* (1980), the principle was thus considered in relation to the Respondents' demand

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[148] *Saluka v The Czech Republic* (n 35) [53]-[58]; *Oxus Gold v Uzbekistan* (n 36) , [957]-[958].

[149] *Toto v Lebanon (Jurisdiction)* (n 72), 202.

[150] See eg *Link-Trading Joint Stock Company v Department for Customs Control of the Republic of Moldova (Final Award)* (UNCITRAL, 18 April 2002), [61] (considering to lack competence to determine contractual claims 'since said contracts create civil law relations and are governed by their own specific arbitration agreements between the parties thereto'; the Claimant had not formulated any claim based upon breach of contracts, even though the dispute-settlement provisions of the applicable US-Moldova BIT expressly covered disputes concerning 'investment agreements'); or *İçkale İnşaat Limited Şirketi v Turkmenistan (Award)* (ICSID Case No ARB/10/24, 8 March 2016) [306] (merely noting that its jurisdiction was limited to claims arising under the BIT and did not extend to claims arising under the contracts; the applicable treaty provided for arbitration with respect to disputes arising 'in connection with' an investment, but each contract contained a dispute resolution clause referring all disputes arising thereunder to the Arbitration Court of Turkmenistan).

[151] A distinction is made here between the existence of adjudicative power – which is a question of jurisdiction – and the exercise of adjudicative power – which is a question of admissibility. On this distinction, see in particular Z Douglas, *The International Law of Investment Claims* (CUP 2009) [297], [306]-[312]; and J Paulsson, 'Jurisdiction and Admissibility' in G Aksen & R Briner, *Global reflections on international law, commerce and dispute resolution* (ICC, 2005), 601-617.

[152] *Litispendence* equally operates at the level of admissibility. See eg *Sanum Investments Limited v Lao People's Democratic Republic (Award on Jurisdiction)* (UNCITRAL, PCA Case No 2013-13, 13 December 2013) [362], [366] (suggesting that *lis pendens* is an obstacle to admission of the claims).

that the ICSID Tribunal relinquish the case in circumstances where a contractual suit that had already been pending before the Revolutionary Court of Brazzaville. The Tribunal declared that the pendency of the case was not in order, since the suits pending before the two bodies involved different parties.[153] In *SGS v. Pakistan* (2003), on the other hand, the application of the *lis pendens* doctrine was found to have "no application" because the contractual dispute settlement forum (before which the Respondent had already brought claims for breaches of contract) had no competence to pronounce over treaty claims.[154] At least in principle, therefore, these holdings suggest that in case of concurrent jurisdiction over the same kind of claims, the doctrine of *lis pendens* could be applied for the purposes of resolving the jurisdictional conflict.

On the other hand, a somewhat different approach has been followed in some cases where the treaty tribunal and domestic courts were held to possess concurrent jurisdiction over the same type of claims, but where the jurisdiction over *specific* claims was eventually found to be vested exclusively with the domestic courts or another forum by virtue of contractual stipulations to that effect. A number of treaty tribunals considered that the presence of such forum selection clauses would not divest them of jurisdiction over such claims; instead, it would act as a bar to the exercise of that jurisdiction as long as the contractually-agreed forum has not been resorted first, with the possibility of such jurisdiction being revived in the exceptional circumstances that the contractual forum is unavailable, or fails to decide the claim in accordance with the standards prescribed by international law to the administration of justice.

The prime example of such an approach is the jurisdictional decision in *SGS v. Philippines*, where the Tribunal first accepted, as a matter of principle, jurisdiction over claims concerning the purported refusal on the part of the Philippines to pay the amount due under SGS' concession contract, but then declared such claims inadmissible insofar as the contract itself designated the Regional Trial Courts of Makati or Manila as the forum with exclusive jurisdiction to hear "[a]ll actions concerning disputes in connection with the obligations of either party" to the contract. The Tribunal's approach was premised on the idea that both the claim that SGS advanced under the BIT's broadly-formulated dispute settlement clause, and the one advanced pursuant to the umbrella clause had essentially a contractual basis, in the sense that they could not be determined independently from contractual issues.[155] In deciding those claims, the Tribunal would therefore be exercising jurisdiction over matters that were, by virtue of contractual stipulations, within the exclusive competence of the Philippines' courts. This gave rise to a jurisdictional conflict proper, which the Tribunal resolved by giving way to domestic courts.

The Tribunal's logic was essentially as follows. In accordance with Philippine law and with general principle, a contractual stipulation to accept the exclusive jurisdiction of a specific forum had to be treated as effective and binding on the litigating parties, as well as on the adjudicatory body involved in proceedings between those parties, unless overridden by another valid provision, either under domestic law (pursuant to matters of public policy) or under a treaty.[156] Insofar as the latter possibility was concerned, neither the BIT nor the ICSID Convention were considered to allow the investors to pursue contractual claims in disregard of the contractually chosen forum. The dispute-settlement provision of the BIT, on its part, was found to be too broadly formulated to be presumed to override specific provisions of particular contracts, freely negotiated between contractual parties. Furthermore, the BIT itself had the character of a framework treaty, presumably intended by the State Parties to support and supplement, rather than override or replace, actually negotiated contracts.[157] Neither could the ICSID Convention be considered as having such effects.

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[153] *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo (Award)* (ICSID Case No ARB/77/2, 8 August 1980) [1.14].

[154] *SGS v Pakistan* (n 4), [182].

[155] *SGS v Philippines* (n 9), [156]-[162], [170].

[156] ibid [138].

[157] ibid [141]-[143].

The stipulations in Article 26 thereof, that consent to ICSID Arbitration shall "be deemed consent to such arbitration to the exclusion of any other remedy", was deemed not to be a mandatory rule, but merely a rule of interpretation, which in itself provided for the possibility of being subject to modification by the parties.[158] At the same time, the applicable exclusive jurisdiction clause could not have deprived the Tribunal of its jurisdiction over the claims altogether, since treaty jurisdiction could in principle not be abrogated by contract.[159] Hence, the question for the Tribunal was not whether it had jurisdiction, but whether it should exercise it over a claim that was supposed to be decided exclusively by another forum. The Tribunal concluded that it was prevented from doing so, invoking the principle that "a party to a contract cannot claim on that contract without itself complying with it".[160]

This impediment being a matter of admissibility, rather than of jurisdiction, the Tribunal considered there was a degree of flexibility in the way such impediment was to be applied.[161] In the first place, this meant that the investor would not be precluded from bringing a claim under the umbrella clause if prevented from complying with the contractual exclusive jurisdiction clause for *force majeure* (i.e., in the event that the local courts were closed to it due to armed conflict), or another good reason.[162] Second, the Tribunal did not need to dismiss the claim altogether, but could decide, and in fact did decide, to stay the proceedings pending determination of the amount payable under the contract, either by agreement between the parties or by the Philippine courts.[163] This solution was thus an attempt to reconcile the principle of effectiveness of treaty jurisdiction and the principle of respect for the integrity of the contractual dispute settlement mechanism. The approach has generally not been met with approval. As an influential commentator observed, the stay of proceedings resulted "in the BIT tribunal having jurisdiction over an empty shell and depriving the BIT dispute resolution of any meaning";[164] though, this criticism later proved to be somewhat exaggerated.[165]

The approach was subsequently followed in *BIVAC v. Paraguay* (2009); the reasoning supporting it differed considerably, however. In contrast to the Tribunal in *SGS v. Phillipines*, the *BIVAC* Tribunal considered that the applicable umbrella clause did have the effect of importing the obligations under the contract into the BIT. And not just the obligation of Paraguay to make payment of invoices in accordance with the requirements of the Contract, but *all* of the obligations under the contract, including those flowing from the contractual forum selection clause, which in the circumstances of the case, vested the Courts of the City of Asunción with exclusive jurisdiction over "[a]ny conflict, controversy or claim which arises from or is produced in relation to" the contract.[166] The rationale for this was the same as that guiding the Tribunal in *SGS v. Phillipines*, namely that:

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[158] ibid [144]-[148].

[159] ibid [154].

[160] ibid. See also [155] (concluding that 'SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim').

[161] ibid [154], [170].

[162] ibid.

[163] ibid [171]-[175].

[164] E Gaillard, 'Investment treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered' in T Weiler (ed), *International investment law and arbitration: Leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May Ltd 2005), 334.

[165] After all, the proceedings in *SGS v Philippines* were not stayed indefinitely, but were resumed in 2007 after the unresolved questions concerning the quantum of the contractual amount due had been sufficiently clarified. See *SGS Société Générale de Surveillance SA v Republic of the Philippines (Order of the Tribunal on Further Proceedings)* (ICSID Case No ARB/02/6, 17 December 2007).

[166] *BIVAC v Paraguay* (n 29), [142]/[147].

> "having regard to the fundamental principle that the autonomy and will of the parties is to be respected, is that the parties to a contract are not free to pick and choose those parts of the Contract that they may wish to incorporate into an 'umbrella clause' provision […] and to ignore others. […] To allow BIVAC to choose those obligations it wished to incorporate into the BIT and to ignore others would seriously and negatively undermine contractual autonomy. If the parties to a contract have freely entered into commitments, they must respect those commitments, and they are entitled to expect that others, including international courts and tribunals, also respect them, unless there are powerful reasons for not doing so."[167]

The Tribunal was, of course, careful not to allow that this full scale importation to be interpreted as implying that the investor had also become party to the treaty. The process remained a one-sided one; the umbrella clause did not have the effect of importing into the treaty SGS's obligation to submit contractual disputes exclusively to the designated domestic courts of Paraguay. Rather, what the clause did import was Paraguay's "obligation (implicit if nothing else) to ensure that the Tribunals of the City of Asunción were available to resolve" any contractual dispute.[168] In other words, the obligations thus imported for Paraguay were "to pay its invoices in a timely way and if it failed to do so to allow any contractual dispute to go to the Tribunals of the City of Asunción."[169] It was this latter obligation that essentially prevented the Claimant to invoke the umbrella clause.

In view of Paraguay's obligation to make domestic courts available to resolve contractual disputes, the *BIVAC* Tribunal conceded that the contractual forum selection clause could be overridden in the exceptional circumstances where the contractual forum is unavailable.[170] The Tribunal also hinted at the possibility that there may be other "powerful reasons" that could justify it not to respect the contractual commitments entered into between SGS and Paraguay, without however identifying what those reasons could be.[171] Judging from the Tribunals analysis, an important element in this respect may be the language and the circumstances through which the selection of the contractual forum had been effected. In that respect, the Tribunal appeared to lay some emphasis on the fact that the exclusive jurisdiction clause had been voluntarily accepted, that contract had been executed almost two years after the BIT's entry into force, and that presumably aware of the existence of the BIT, the contracting parties nonetheless chose to include in the contract such a capaciously-formulated dispute settlement provision.[172] In the Tribunal's view, this was "not without relevance: it indicates, at the very least, that the parties to the Contract, including BIVAC, intended the exclusive contractual jurisdiction of the Tribunals of the City of Asunción to be absolute and without exception, and for it to mean what it says."[173]

Having concluded that the claim under the umbrella clause was inadmissible, the Tribunal was initially inclined to dismiss the claim altogether; yet, in the absence of arguments of the litigating parties on the matter, decided to join to the merits the question whether the claim should be dismissed or whether the exercise of jurisdiction should be stayed indefinitely or for some other period of time or until some other circumstances pertain.[174] In a subsequent decision, the Tribunal gave BIVAC three months time to decide to pursue its claims before the domestic courts, noting

[167] ibid [148].
[168] ibid [142].
[169] ibid [148].
[170] ibid [159(4)].
[171] ibid [148].
[172] ibid [145]-[146].
[173] ibid [146].
[174] ibid [160]-[161].

that in the event that BIVAC decides to do so and have its claim ascertained by the domestic courts, the claim under the umbrella clause could again become admissible in the event that the Respondent would somehow disregard the decisions eventually rendered by domestic courts. But in the event that BIVAC was not to file such claim, the Tribunal was to render its Award and terminate the proceedings.[175] In deciding so, the Tribunal was conscious that this would entail additional delays for the Claimant in obtaining relief. But such delays were entirely the responsibility of the Claimant – for, it was the latter that agreed to the exclusive forum selection clause when entering the contract, and the decision not to pursue claims in that forum "was taken by the Claimant and by it alone, without any inducement, and on its own account for 'commercial reasons.'"[176] BIVAC's claims were apparently further pursued before domestic courts, but the outcome of those procedures remains unknown.

The arguments of the *SGS v. Philippines* and the *BIVAC* tribunals were later endorsed in *Bosh v. Ukraine* (2012). Though merely as *obiter*, the *Bosh* Tribunal took the position that, in order to present a contractual claim under the umbrella clause in the BIT, the claimant in question must in principle comply with any dispute settlement provision included in that contract. However, the Tribunal conceded that the question whether the Claimants can submit contractual claims under the umbrella clause will also depend on an analysis of the contractual forum selection provision in question.[177] In the circumstances of the case, the relevant contractual stipulation was found to be an exclusive jurisdiction clause. The Tribunal therefore indicated that, were it necessary to decide this issue, it would have required that Claimants first submit their claims under the contract for settlement to the Ukrainian courts, in accordance with the contractual jurisdictional clause.[178]

9.3.3. Assertion of Jurisdiction Irrespective of the Jurisdiction of the Domestic Forum

Lying on the opposite side of the spectrum of conceivable solutions is the least deferential approach: the assertion of jurisdiction on the part of the investment tribunal over a specific claim, regardless of any contractual or other stipulations (potentially) vesting a domestic judicial or arbitral forum with exclusive jurisdiction over the same claim.

One comes across this type of solution already in the first case ever registered with the ICSID Centre, the *Holiday Inns v. Morocco* (1974).[179] In the circumstances of that case, the question of jurisdictional competition arose as disputes arising out of the main investment contract were to be submitted to ICSID arbitration, whereas the separate loan contracts, through which the financing for the investment was provided, contained standard choice-of-forum clauses in favour of Moroccan courts. The Respondent therefore argued that the ICSID Tribunal was barred from hearing the matter until the Moroccan courts decided the issues concerning the loan contracts. Yet, the ICSID Tribunal disagreed, holding that it could consider certain fundamental provisions of the loan contracts, regardless of the choice-of-forum clauses. This followed, according to the Tribunal, from the principle of "the general unity of an investment operation" and the principle that "international proceedings in principle have primacy over purely internal proceedings". This was not to say that certain aspects of the loan contracts "affecting the indirect or secondary aspects of the investment" could not be "isolated" and thus properly fall within the jurisdiction of the Moroccan courts. But in the event that those courts, "on the initiative of one of the parties

[175] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v The Republic of Paraguay (Further Decision on Objections to Jurisdiction)* (ICSID Case No ARB/07/9, 9 October 2012) [290], [294].

[176] ibid [291].

[177] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine (Award)* (ICSID Case No ARB/08/11, 25 October 2012) [250]-[254].

[178] ibid [257]-[258].

[179] *Holiday Inns S.A. and others v. Morocco (Decision on Jurisdiction)* (ICSID Case No. ARB/72/1, 12 May 1974).

to a loan contract, be faced with questions which the Arbitral Tribunal for its part would equally be called upon to decide", the courts were to "refrain from making decisions until the Arbitral Tribunal has decided these questions or, if the Tribunal had already decided them, the Moroccan tribunals should follow its opinion. Any other solution would, or might, put in issue the responsibility of the Moroccan State and would endanger the rule that international proceedings prevail over internal proceedings."[180]

The argument of supremacy of the kind raised in the *Holiday Inns* one was not a frequently invoked one. Instead, especially in the context of ICSID arbitrations, it was more common for tribunals to rely on the argument of exclusivity of the international remedy when dealing with situations of potential concurrency of jurisdictions. In *CSOB v. Slovakia* (2000), the situation was such that the ICSID Tribunal's jurisdiction was limited to claims arising out of a consolidation agreement, but to decide such claims, the Tribunal would have had to consider certain ancillary matters arising out of related loans agreements, which were otherwise subject to the jurisdiction of the competent local courts. While rejecting the proposition that its jurisdiction could extend over the latter agreements, the Tribunal held that its competence "must include" the determination of any ancillary matters. If the determination of those matters were to be left to the national courts, the Tribunal would have been deprived of its jurisdiction over the consolidation agreement. But given that, pursuant to Article 26 of the ICSID Convention, the Tribunal's competence over the latter was exclusive of any other remedy, Slovak national courts were precluded from retaining jurisdiction over issues arising under this agreement.[181]

Granted, the argument of the exclusive remedy was previously also invoked by the Tribunal in *Lanco v. Argentina* (1998). In the circumstances of that case, however, the argument was employed in combination with another argumentative device: as a preliminary matter, the Tribunal refused to treat the jurisdiction of the domestic forum as an exclusive one, by denouncing that the contractual stipulation in effect amounted to a selection of an exclusive forum. In the view of the ICSID Tribunal, the forum selection clause contained in Claimant's concession contract, which referred the contracting parties "for all purposes derived from the agreement" to the jurisdiction of the Federal Contentious-Administrative Tribunals of Buenos Aires, was not deemed capable of amounting to a previously agreed dispute settlement procedure, since the administrative jurisdiction of the courts could purportedly not be selected or waived under Argentinean law by mutual agreement.[182] Resort to such an argumentative device was not unusual,[183] and though subsequently criticized by other investment tribunals,[184] it has seemingly not entirely lost its appeal. In *Tulip Inn v. Turkey* (2014), the Tribunal was prepared to uphold a similar argument when taking the view that the applicable contractual dispute resolution clause, though providing that Turkish courts "shall have jurisdiction in the resolution of all disputes that might arise from" the contract, did not expressly state that the jurisdiction of the Turkish courts shall be to the exclusion of any other forum.[185]

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[180] Passages reproduced in P Lalive, 'The First 'World Bank' Arbitration (Holida y Inns v. Morocco) - Some Legal Problems' (1981) 51 Brit.Yb.Int'l L 123, at 159-160. Professor Lalive praised the outcome and considered that any other solution "would have jeopardized the credibility of international arbitration and the future of the whole ICSID system in particular'" ibid, at 160.

[181] *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic (Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction)* (ICSID Case No ARB/97/4, 1 December 2000) [35].

[182] *Lanco International Inc v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/97/6, 8 December 1998) [26].

[183] See eg *Ford Aerospace & Communications Corporation, Aeronutronic Overseas Services Inc. v. Air Force of the Islamic Republic of Iran et al* (1982) 1 Iran–USCTR 268; *Zokor International Inc. v. Iran & Societe du Chemin de Fer Urbain de Teheran et de sa Banlieue* (1982) 1 Iran–USCTR 271; or *E-Systems, Inc. v. Iran & Bank Melli* (1983) 2 Iran–USCTR 51.

[184] cf *SGS v Philippines* (n 9), [138].

[185] *Tulip v Turkey* (n 26), [362].

Finally, another way to justify the refusal to give effect to contractual forum selection clauses has been by considering the exclusivity of the forum as superseded as a result of the availability of dispute settlement procedures under an investment treaty. Professing such an approach, for example, was the dissenting arbitrator in *SGS v. Philippines*, Antonio Crivellaro, which saw little reason for qualifying the exercise of the Tribunal's jurisdiction pursuant to the umbrella clause as a result of the presence of a contractually agreed forum. According to Arbitrator Crivellaro, in accepting the exclusive jurisdiction clause in the contract, the investor could not have irrevocably waived its right to refer contractual disputes to the alternative fora offered in the BIT, since that treaty came only in force eight years after the contract.[186] With the treaty's entry into force, the contractually stipulated forum merely ceased to be an "exclusive" forum from the investor's perspective, meaning that the treaty forum and the contractual forum henceforth "survived" and "coexisted" alongside each other.[187] Underpinning Crivellaro's conclusions was, of course, also the policy argument concerning the role of investment treaties. Since, in his view, the most significant advantage granted by BITs to foreign investors was precisely to provide alternative fora for resolving their disputes with the host States, their practical significance would seriously diminish if that particular advantage was put into doubt or denied.[188] The same policy argument was later picked on by the Tribunal in *SGS v. Paraguay*, in explaining how it would not have hesitated to exercise jurisdiction over pure contract disputes, had it been asked to do so, in spite of the contractual forum selection clause that was applicable to Claimant's concession contract in that case. Taking note of the broad language of the treaty's dispute resolution provisions, which granted it jurisdiction over "disputes with respect to investments",[189] the Tribunal expressed the opinion that "deference to a contractual forum selection clause would significantly cut back Article 9's scope" and "effectively negate Article 9's open-ended language, reducing it to a mechanism solely for resolving claims of Treaty breach."[190] Since the contracting States could have stipulated otherwise, "[t]heir choice of language giving a broader scope to the dispute resolution articles of the BIT should not be so readily disregarded."[191] Furthermore, insofar as the choice-of-law clause in Article 9(6) of the BIT contemplated the application of "the terms of any particular agreement that may have been concluded with respect to the investment", the Tribunal concluded that the contracting parties evidently had no reservations that a tribunal constituted under the treaty would engage in the resolution of contract claims. Supporting such conclusion was then also the argument of effectiveness. According to the Tribunal, "a decision to exclude as inadmissible all […] contract claims that are directly advanced under Article 9 (unless the contract lacks a forum selection clause altogether) eliminates a large swath of claims for which this clause of Article 9(6) is applicable. Given Article 9(6)'s readiness to interpret and apply contracts to disputes, there is little reason to think that the State parties were expecting to see it so underutilized."[192]

* * *

An examination of the practice thus reveals a diversity of approaches that have thus far been adopted when dealing with situations of actual jurisdictional overlap. Some of these have been more deferential towards domestic courts than others. The question of deference depended on the importance attributed by arbitrators to the will of the contracting parties, but even more significantly perhaps, on the views that the arbitrators maintained as to their own mandate – i.e. the role that investment arbitration was to play in providing an alternative forum to the

[186] *SGS v Philippines* (Dissenting Opinion of Antonio Crivellaro, 29 January 2004) (n 9), [2].

[187] ibid [4].

[188] ibid [5]-[6].

[189] Switzerland-Paraguay BIT, art 9.

[190] *SGS v Paraguay (Jurisdiction)* (n 18), [183]. Footnotes omitted.

[191] ibid.

[192] Ibid [184].

resolution of investment disputes. All in all, one must not lose sight of the fact that in the great majority of cases, investment tribunals did not renounce their own jurisdiction altogether. For, even in circumstances where they declined to exercise jurisdiction over claims that were, or could have been, concurrently brought before domestic courts, such renouncement only concerned pure contract claims or counterclaims, but not their jurisdiction over treaty claims as such.

9.4. Concluding Observations

Looking at the general attitude adopted by investment tribunals in cases where a challenge to their adjudicatory authority was mounted from the side of domestic courts, one is able to discern a two-fold tendency. On the one hand, the tendency to eschew direct competition with domestic courts by finding ways to avoid formal jurisdictional overlap; and on the other hand, a predisposition towards solutions that allowed tribunals to assert jurisdictional authority over disputes involving the investor and the host State. Such conclusions may, admittedly, rest on a case-to-case analysis, but the investment tribunals' general disinclination towards accepting potential limitations on their authority or otherwise exercising restraint due to the role of domestic courts has also been confirmed by others empirically.[193]

Being primarily concerned with the repertoire of argumentative and analytical techniques deployed by arbitrators themselves, the chapter identified two broad strategies that were adopted in dealing with jurisdictional competition from domestic courts. In the first place, it discussed the practice of restrictively interpreting and/or applying the pertinent jurisdiction-conferring instruments with a view to removing potential jurisdictional overlaps between domestic and international remedies, actual or potential. Examples included the tribunals' approach to the interpretation of umbrella clauses and dispute settlement clauses in the applicable treaty, or the dispute settlement clauses in pertinent contracts, as well as the tribunals' general approach towards counterclaims. In reality, of course, whilst effective as a way to avoiding problems of jurisdictional overlap, the deployment of this technique did not result in investment tribunals' relinquishing jurisdiction over the dispute between the host State and the investor altogether. What tribunals were willing to relinquish was merely the authority to deal with issues that were otherwise primarily governed by domestic law.

As noted in this chapter, however, the primary means of dealing with the problem of such jurisdictional competition has been through the technique of claim splitting. By building on the premise that a dispute grounded in the same set of acts can give rise to parallel, but mutually independent claims – one the one hand, those grounded in a contract or domestic law, and on the other hand, those grounded in a treaty – investment tribunals simply conceived themselves as operating at a level different than that of domestic courts. The fact that such courts could equally be competent to adjudicate upon disputes arising out of the same underlying facts was thereby irrelevant. As organs of the host State, domestic courts were namely taken to apply standards provided for in domestic law, which were supposed to be materially not the same as the international standards applied by investment tribunals. Despite its obvious artificiality, the conceptual distinction between contract and treaty claims provided in practice an attractive way for dealing with the problem of jurisdictional competition between domestic courts and investment tribunals. Not the least because it provided a convenient way for tribunals to assert their authority over investment disputes, while supposedly respecting and maintaining the integrity of potentially applicable domestic adjudicatory procedures. As the following chapters will further demonstrate, the distinction between contract and treaty claims has in fact become

[193] See G Van Harten, Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration (OUP, 2013), at 125-156.

the dominant approach for regulating most forms of jurisdictional interactions between domestic courts and investment tribunals.

Reliance on the conceptual distinction between contract and treaty claims would obviously not have been conceivable was it not for the internationalization of investment protection standards, which enabled investment tribunals to emancipate themselves from the normative reach of domestic law, and thus the adjudicatory scope of domestic courts. This substantive shift – coupled with the functional one, which allowed investor-State arbitration to establish itself as an effective alternative to domestic litigation – provided the means for investment tribunals to assert themselves as unequal – indeed, as superior – competitors in jurisdictional interactions with domestic courts.