10. REGULATING INTERACTIONS THROUGH SPECIFIC TREATY PROVISIONS

Apart from leaving regulation to investment tribunals themselves, guidance on how to deal with competing claims to adjudicatory authority can also be given in the very instrument that governs the tribunals' jurisdiction – nowadays most frequently the relevant investment treaty.[1] Admittedly, the ICSID Convention itself provides some guidance in this respect, by setting out in Article 26 a presumption that consent to ICSID arbitration operates "to the exclusion of any other remedy". The exclusive remedy rule, however, is merely a presumption that applies "unless otherwise stated".[2] Building on this exception, many investment treaties instead proceed to regulate more specifically the relationship between proceedings commenced before domestic courts (or other contractually-agreed fora) and those before international arbitral tribunals.

As the present chapter intends to demonstrate, there are several ways in which the relationship between domestic and international remedies can be regulated in an investment treaty (10.1.). Some can be more effective than others. Two types of the most frequently applied provisions – irreversible choice of forum clauses, and clauses imposing local litigation requirements – have thus far not proven particularly successful in that respect. While the effects of the former have usually been constrained through the application of the contract claim/treaty claim distinction and the reliance on the triple identity test (10.2), the latter have been rendered meaningless on account of most-favoured-nation provisions and reliance upon the futility exception (10.3.). In other words, even where the applicable treaty envisioned a role to be played by domestic courts in the resolution of investment disputes, investment tribunals employed a variety of devices that allowed them nonetheless to assume jurisdictional authority over disputes involving the investor and the host State. Notwithstanding treaty stipulations, investment tribunals thus did not perceive domestic courts as equal competitors.

10.1. Treaty Provisions Regulating the Relationship between Domestic and International Remedies

One would be mistaken to think that investment treaties invariably envision investment arbitration as a sole means for resolving investment disputes. On the contrary, current treaty language frequently reflects a compromise between the interests of capital-importing States, which often insist on some role to be left for their own judiciaries, and those of the capital-exporting States, which would rather prefer that investors be offered the possibility of unhindered recourse to investor-State arbitration.[3] The compromise between these opposing preferences can take the form of provisions offering domestic courts as an alternative to

[1] The relationship between different dispute settlement mechanisms, however, can likewise be regulated in domestic foreign investment codes. See eg art 25 of Mongolia's Foreign Investment Law, which was applied in *Khan Resources Inc, Khan Resources BV, and Cauc Holding Company Ltd v The Government of Mongolia (Decision on Jurisdiction)* (UNCITRAL, 25 July 2012) [432]-[438].

[2] On the issue of presumption, see eg *Lanco International Inc v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/97/6, 8 December 1998) [36]-[38].

[3] On the policy clashes between capital-exporting and capital-importing countries, see eg *Maffezini v Spain (Decision on Objections to Jurisdiction)* (ICSID Case No ARB/97/7, 25 January 2000) [57]. On the specific policy of Argentina in relation to the mandatory litigation periods, see also Explanatory Memorandum on the Netherlands Argentina BIT, Toelichtende Nota, Staten-Generaal, Vergaderjaar 1992-1993, 23126 (R 1469), nrs 267a en 1, at 4.

investment arbitration, but also the form of stipulations conditioning recourse to arbitration with some form of prior recourse to domestic judicial procedures.

10.1.1. Choice-of-Forum Provisions

Where domestic courts are thus foreseen as an alternative forum for the resolution of investment-related disputes, this creates potential for parallel litigation, with many of the problems that this brings with it: the possibility of conflicting legal outcomes, the risk of forum shopping, and the prospects of double recovery, to name just a few. Many BITs therefore contain stipulations aimed at preventing duplicative proceedings, and specifically, at precluding investors from having two bites of the same cherry; that is, re-litigating the same dispute before an investment tribunal in the event that it is not satisfied with the outcome of the litigation in the judicial system of the host State, or *vice-versa*. Such provisions can come in a variety of forms.

10.1.1.1. Fork-in-the-Road Clauses

Most dominant[4] among the currently existing BITs are provisions requiring investors to opt for either litigating investment disputes in domestic courts of the host State, or bringing them to (one or more types of) international arbitration, whereby the investors' choice, once made, is deemed final and operating at the exclusion of the other remedies.[5] Given the irrevocability of the choice, these provisions are commonly known as "fork-in-the-road" clauses.[6]

10.1.1.2. Reversible Choice-of-Forum Provisions

Not all fork-in-the-road clauses are necessarily irreversible ones. In some BITs, for example, the choice for the domestic judicial route remains revocable as long as no final decision has been rendered by the domestic forum.[7] Sometimes, the possibility of reversal is thereby subject to the condition that the investor desists from any further or subsequent pursuit of local remedies.[8] In other BITs, recourse to arbitration remains possible even after a decision has been rendered by domestic courts, in the event that such decision is not deemed to be in conformity with international law.[9] Then again, in other BITs, the choice for the domestic judicial route remains reversible if no final decision has been rendered by the domestic forum within a prescribed period of time, such as 18 or 36 months.[10]

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[4] More than a third of BITs concluded globally after 2000 contains provisions stipulating the finality of a choice for a particular dispute settlement mechanism, and an additional fifth of such BITs contains provisions stipulating the finality of a choice when such choice has been made in favour of domestic courts. See J Pohl, K Mashigo and A Nohen, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey', *OECD Working Papers on International Investment*, 2012/02 (OECD Publishing, 2012), at 12-13.

[5] An often invoked provision of this kind can be found in art 7, US–Argentina BIT, which provides in para 2 that the investor 'may choose to submit the dispute for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) [to treaty arbitration] in accordance with the terms of paragraph 3', while in para 3(a) it stipulates that resort to treaty arbitration can only be made '[p]rovided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b)'.

[6] See on this C Schreuer, 'Travelling the BIT route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 J World Investment & Trade 231, 240.

[7] See eg art 13, Austria–Lebanon BIT (2001); or art 12(3), Gambia–Spain BIT (2008).

[8] See eg art 11(3), Costa Rica–Spain BIT (1997).

[9] See eg art 8(2), France–Uruguay BIT (1993).

[10] See eg art 9(3), BLEU–Chile BIT (1992); or art 9(5), Austria–Chile BIT (1997).

10.1.1.3. No U-Turn Clauses

A particular variation of reversible choice-of-forum provisions are those that allow the investor to commence arbitration under an investment treaty on the condition that it discontinues any pending proceedings regarding the dispute in the domestic courts, as well as waives its right to commence such proceedings subsequent to investment arbitration.[11] This type of clauses differs from fork-in-the-road provisions, in that the investor's resort to domestic courts is without prejudice to eventual recourse to international remedies.[12] Hence, they are sometimes referred to as "no u-turn clauses". While the use of this treaty device was more common in the treaty-drafting practice of North American states, such clauses have recently become the preferred method for regulate the relationship between investment arbitration and domestic courts in EU agreements.[13]

10.1.1.4. Provisions Relating to Previously Agreed Contractual Remedies

Finally, some investment treaties contain specific stipulations regarding "previously agreed" contractual dispute settlement procedures, by either offering treaty-based arbitration as an alternative to existing contractually-agreed procedures,[14] or by excluding such procedures from the ambit of the treaty-based tribunal.[15] Such provisions remain the exception, rather than the rule.

10.1.2. Sequencing Clauses

Instead of compelling the investor to opt for either domestic judicial procedures or international arbitration, investment treaties may instead envision that both procedures can be used in the event of an investment dispute – sometimes mandating recourse to the local judicial forum as a condition precedent to arbitration; other times merely regulating the sequence in which resort to each forum is made so as to avoid concurrent proceedings.

10.1.2.1. Mandatory Local Litigation Requirements

Though provisions requiring complete exhaustion of local judicial remedies remain rather exceptional ones,[16] it is not uncommon for investment treaties to require the pursuit of domestic procedures for a defined period of time (such as 18 months in the case of the most commonly applied clauses) before resort can be made to investor-State arbitration. This can include

[11] The best-known example is art 1121 of the NAFTA, which allows a disputing investor and/or an enterprise it owns or controls to submit a NAFTA claim to arbitration only if they "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 [i.e. concerning the substantive obligations under Chapter 11 of the NAFTA]."

[12] Art 1121 of the NAFTA is specific in this regard, in that it does not only permit recourse to domestic courts prior to bringing a NAFTA claim, but allows domestic proceedings also in parallel to the NAFTA claim to the extent that these relate to 'proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages'.

[13] See eg art 8.22(1), CETA; or art 9.17(1), EU–Singapore FTA.

[14] See eg art 7, U.S.–Argentina BIT, which provides that the investor has the option of submitting an investment dispute (the latter being defined broadly as including disputes arising out of, or relating to, a contract between the State and the investor) to either domestic courts, to any previously agreed dispute-settlement procedure, or to international arbitration in accordance with the BIT.

[15] See eg article 9(2), Italy–Jordan BIT, which provides that "[i]n case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply."

[16] But see eg art 8(2), Albania–Lithuania BIT (2007); art 13, Australia–Poland BIT (1991) (for all treaty claims other than those for expropriation); or art 9(3)(b), China–Malta BIT (2009) (with respect to investors in Malta).

procedures of an administrative nature,[17] but it can also entail procedures before local courts. Especially under the BITs entered into with certain Latin American States (which, in line with the Calvo doctrine, have long resisted arbitration as a means for settling disputes with foreign investors), recourse to international arbitration is thus only allowed if no decision has been rendered within the prescribed period, or the dispute persists after such period despite the domestic judicial decision having been rendered[18] – though, in some cases, only if such decision is not in conformity with the treaty or international law in general.[19] Most of these BITs demand in this respect that, in the event that recourse is made to international arbitration, the domestic proceedings be discontinued,[20] or stipulate that any domestic judicial decisions will be without effect once an award is rendered.[21]

10.1.2.2. Other Provisions Preventing Concurrent Recourse to Different Procedures

Finally, there are also treaty clauses which, without otherwise making recourse to domestic courts mandatory, subject access to investment arbitration to specific conditions in case such recourse is nonetheless pursued, such as, by allowing commencement of arbitration only after a final judgment has been issued by domestic courts,[22] or conversely, only when no final judgment has been issued.[23]

* * *

Despite the almost infinite variation in which the clauses are drafted, essentially all types of provisions share a common purpose: the avoidance of parallel proceedings before domestic and international fora. In theory, therefore, the clauses are intended to operate as a device for regulating jurisdictional interactions between investment tribunals and domestic courts. Yet, as the following sections will demonstrate, such clauses have rarely been effective in practice.

10.2. Reversing the Irreversible: Strategies for Avoiding Forks in the Road

Among the treaty devices employed with a view to preventing the occurrence of parallel proceedings, choice-of-forum provisions probably provide the greatest challenge to the adjudicative authority of investment tribunals: by presupposing that investment disputes can be equally resolved before domestic courts as before investment tribunals, they of course set domestic procedures on equal footing with international ones. This, in itself, is not a problem. But where the choice to be made is intended to be a final one, such as in the case of fork-in-the-road clauses, complications can eventually arise, as litigation before domestic courts may have the effect of foreclosing recourse to investment arbitration. Investment tribunals responded to this challenge by adopting a very formalistic approach to the interpretation/application of such fork-in-the-road clauses and subjecting their operation to very strict conditions.

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[17] See eg art 8(3), China–Denmark BIT (1985); art 10(1), China–Poland BIT (1988); or art 9(3), China–Czech Republic BIT (2005).

[18] See eg art 8(3), Argentina–Italy BIT (1990); art 8(2), Argentina–UK BIT (1990); art 10(3), Argentina–Germany BIT (1991); or art 10(3), Argentina–Spain BIT (1991).

[19] See eg art 11(2), Germany–Uruguay BIT (1987); art 9(3), Netherlands–Uruguay BIT (1988); art 11 (3) BLEU–Uruguay BIT (1991); or art 10 Switzerland–Uruguay (1988) BIT.

[20] See eg art 12(4), Argentina–BLEU BIT (1990); art 8(4), Argentina–Italy BIT (1990); art 10(4), Argentina–Netherlands BIT (1992).

[21] See eg art 8(3)(b), Argentina–Austria BIT (1992).

[22] See eg art 9(5), Netherlands–Bulgaria (1999) BIT; or art 8(3), BLEU–Korea BIT (2006).

[23] See eg art 9(5), Netherlands–El Salvador (1999) BIT.

10.2.1. Triple Identity Requirement as a Condition for Triggering the Fork?

According to the terms of standard fork-in-the-road clauses, what matters for them to be triggered is the sameness of the "dispute". As a way of defending their exercise of adjudicatory authority over investment disputes, investment tribunals proceeded to determine the required "sameness" strictly. This meant that, for the purpose of establishing whether the dispute submitted to the national jurisdiction was potentially the *same* one as the dispute submitted to the international jurisdiction, they routinely applied the formal test of triple identity: the dispute brought before domestic courts had to involve the same parties, and the claim must have had the same object and the same cause of action as the dispute brought to the international tribunal, was the investor considered to have exercised the choice under the fork-in-the-road in favour of host State courts.[24]

The basis for applying the triple identity test, which is otherwise habitually employed in addressing questions of parallel proceedings in a transnational context,[25] are not entirely clear, although some tribunals did refer in this respect to the principle of *lis pendens*.[26] In itself, of course, the application of some sort of test for determining identity of actions is not necessarily problematic if such test is applied in a flexible way, considering the need to avoid inconsistent and contradictory decisions, prevent double recovery and double jeopardy, and also to minimize economically undesirable duplicative proceedings.[27] Instead, most investment tribunals adopted a formalistic approach in determining identity of causes of action – primarily by relying on the conceptual distinctions between contract and treaty claims, in line with the approach later developed by the *Vivendi* Annulment Committee.[28] Such a distinction makes arguably sense where the applicable investment treaty itself defines investment disputes as those relating to breaches of substantive treaty standards, as a result of which, the fork-in-the-road clause can only be triggered in circumstances where the relevant domestic action is based upon an alleged breach of the treaty

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[24] See eg *Eudoro Armando Olguín v Republic of Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/98/5, 8 August 2000) [30]; *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Award)* (ICSID Case No ARB/97/3, 21 November 2000) (formerly Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic) [55]; *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]; *Ronald S Lauder v The Czech Republic (Final Award)* (UNCITRAL, 3 September 2001) [161]-[163]; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt (Award)* (ICSID Case No ARB/99/6, 12 April 2002) [71]; *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) [80]; *Azurix Corp v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/12, 8 December 2003) [86]-[92]; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/3, 14 January 2004) [95]-[98]; *Occidental Exploration and Production Company v The Republic of Ecuador (Final Award)* (LCIA Case No UN3467, 1 July 2004) [43]-[63]; *Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic (Decision on Preliminary Objections)* (ICSID Case No ARB/03/13, 27 July 2006) [154]-[157]; *Toto Costruzioni Generali SpA v The Republic of Lebanon (Decision on Jurisdiction)* (ICSID Case No ARB/07/12, 11 September 2009), [203]-[212]; *Hulley Enterprises Limited (Cyprus) v The Russian Federation (Interim Award on Jurisdiction and Admissibility)* (UNCITRAL, PCA Case No AA 226, 30 November 2009) [597]-[599]; *Veteran Petroleum Limited (Cyprus) v The Russian Federation (Interim Award on Jurisdiction and Admissibility)* (UNCITRAL, PCA Case No AA 228, 30 November 2009) [609]-[611]; *Yukos Universal Limited (Isle of Man) v The Russian Federation (Interim Award on Jurisdiction and Admissibility)* (UNCITRAL, PCA Case No AA 227, 30 November 2009) [598]-[600]; *Khan Resources* (n 1), [388]-[400]; or *Charanne BV and Construction Investments SARL v Spain (Award)* (SCC Case No 062/2012, 21 January 2016) [398]-[410].

[25] See *supra* 1.4.2.

[26] See *Azurix* (n 24), [88]; and *Enron* (n 24), [97]; both relying, in turn, on the decision in *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo (Award)* (ICSID Case No. ARB/77/2, 8 August 1980).

[27] See *supra* 4.3.4.

[28] According to the Tribunal in *Olguín v Paraguay* (n 24, [30]), for example, the Claimant's application to domestic courts was thus simply not deemed possible to "have the same juridical effect as a claim against the Republic of Paraguay [under the BIT]". For other examples where support for the triple identity test was sought in the doctrinal distinction between contract and treaty claims as such, see eg *Vivendi I (Award)* (n 24), [50],[55]; *CMS v Argentina* (n 24), [80]; *Enron*, (n 24), [97].

as such.[29] But where the treaty dispute settlement clauses apply to any or all disputes concerning an investment, the introduction of distinctions based on the source of the rights alleged to have been violated can hardly find support in the ordinary meaning of such clauses.[30] Indeed, it is often neglected that the *Vivendi* Annulment Committee itself considered the distinction between contract and treaty claims irrelevant to the application of a fork-in-the-road clause where the dispute settlement clause was broadly-formulated: had the investor in that case brought its contract claims before the administrative courts of Tucuman, this would have constituted a final choice of forum, and foreclosed arbitration under the BIT, even with respect to treaty claims.[31] Still, the attractiveness of distinguishing causes of action by reference to formal differences between contract and treaty claims is not difficult to understand. In combination with a strict application of the triple identity test, such distinction permitted investment tribunals practically never to have had to rescind their jurisdiction, given that domestic proceedings typically involved litigants other than those in proceedings before the international tribunal and/or concerned causes of action based on other sources of law than the applicable investment treaty.

Furthermore, in determining whether proceedings before local courts constituted a final choice of forum, investment tribunals adopted a strict approach in their appraisal of facts. Fork-in-the-road provisions were thus not given effect where the choice made for the domestic remedy was not considered to have been a "genuine" one,[32] as in the case where claimants had merely raised pleas in defence of claims in domestic courts (as opposed to having raised actual counter-claims),[33] or where claimants had actually failed to take certain concrete steps in domestic

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[29] See eg *Middle East Cement* (n 24), [71], where the Tribunal was thus justified in interpreting the fork-in-the-road clause narrowly, since art 10(1) of the Egypt-Greece BIT (1993) applied to '[d]isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former'. See also *Corona Materials LLC v Dominican Republic (Award)* (ICSID Case No ARB(AF)/14/3, 31 May 2016) [269], where a similarly narrow definition of investment disputes under art 10.18.4 of DR-CAFTA was considered to require a narrow application of the fork-in-the-road provision.

[30] This notwithstanding, many commentators accept the contract/treaty claims distinction, without much hesitation, simply as pertinent to the operation of fork-in-the-road clauses. See eg K Hobér, 'Res Judicata and Lis Pendens in International Arbitration' (2014) 366 Recueil des cours 99, 364ff.

[31] *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Decision on Annulment)* (ICSID Case No ARB/97/3, 3 July 2002), [55]. The Committee's holdings on this issue were *obiter* and not further substantiated. On their face, the Committee's holdings on this issue could be taken to mean that an investor would be precluded from bringing subsequent treaty claims any time where such claims are related to a grievance previously submitted to domestic courts. Such an approach to the issue would be equally problematic. For criticism, see Z Douglas, *The International Law of Investment Claims* (CUP 2009), 155. The Committee's approach does not seem to have been directly followed by other tribunals in the application of fork-in-the-road provisions. An exception to this might be the decision in *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia (Decision on Jurisdiction*) (ICSID Case No ARB/06/2, 27 September 2012) [156]-[158], where the Tribunal seemingly relied on the broad definition of investment disputes in the applicable the Bolivia–Chile BIT in suggesting that any attempt to challenge the revocation of the Claimant's mining concessions in local courts would have triggered the fork-in-the-road provision.

[32] See eg *Occidental* (n 24), [60]-[61] (the tribunal insisting that 'the choice be made entirely free and not under any form of duress' and finding a 'powerful reason' for not applying the fork-in-the-road in the fact that Claimant purportedly had no 'real choice' but to challenge within the time prescribed the adverse resolutions issued by the Ecuadorian Tax authorities, for it would have otherwise forfeited its right to challenge such resolutions); or *Genin* (n 24), [333] (noting how the Claimants-owned bank 'had no choice' but to contest the revocation of its license in Estonia, in the interest of all its shareholders).

[33] See in particular *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (Third Interim Award on Jurisdiction and Admissibility)* (UNCITRAL, PCA Case No 2009-23, 27 February 2012) [4.81]-[4.82], where the Tribunal rejected the argument that the raising of a plea in defense could properly be described as the submission of a dispute for settlement in those courts, given that the notion of 'submission' connotes the making of a choice and a voluntary decision to refer the dispute to the court for resolution. In assessing the pleas advanced by Claimant as a defense in the domestic proceedings, the Tribunal refused to adopt a formalistic approach and was thus not willing to construe the Claimant's request that plaintiffs be exclusively liable as going beyond a simple defensive plea, even if such request could be implied as inviting the Tribunal to decide that plaintiffs were actually liable; see ibid [4.84]-[4.85]. See also *Enron* (n 24), [98] (noting: 'Moreover, the actions by TGS itself have been mainly in the defensive so as to oppose the tax measures imposed, and the

proceedings (resulting, for example, in the domestic claim never being heard).[34] Obviously, pursuit of domestic litigation was also not deemed capable of foreclosing access to the treaty forum, where the applicable investment treaty was not yet formally in force when recourse to domestic courts had been.[35] All in all, the adoption of a stringent approach in the application of fork-in-the-road provisions was deemed justified on account of general policy considerations. Some investment tribunals namely considered that, in view of the importance of investment arbitration to foreign investors, access to such arbitration should not be foreclosed "too easily" by reason of the fact that claims were previously brought before domestic courts.[36]

10.2.2. In Search for a Balanced Approach to the Application of Forks in the Road

The strict approach to the application of fork-in-the-road provisions, and particularly the tribunals' insistence on the triple identity test as a means for determining the sameness of the dispute, has attracted support,[37] but also criticism among commentators. The triple identity test has thus been considered untenable on several grounds.[38] First, as a matter of treaty interpretation, there is nothing suggesting that the word "dispute", according to its ordinary meaning in international law, would invite or allow distinctions to be made on the basis of the source of the legal obligation alleged to have been breached.[39] Second, a strict application of the triple identity test is contrary to the fundamental premise of fork-in-the-road provisions, which presuppose precisely the parity between domestic and international fora as a means for resolving the same investment dispute. Third, and finally, a strict adherence to the test is also contrary to the very *raison d'etre* of such clauses, given that it leads, in practice, to the existence of parallel proceedings – a possibility which was intended to be foreclosed. The proposed alternative has been to apply a test of double identity, whereby the sameness of a dispute would be determined – in addition to

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decision to do so has been ordered by ENARGAS, the agency entrusted with the regulation of the gas sector. The conditions for the operation of the principle electa una via or "fork in the road" are thus simply not present.'); or *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/09/1, 21 December 2012) [184] (finding that Claimants had 'not already "picked" the local court "fork", thereby forfeiting their access to arbitration' in circumstances where one of them merely appeared as a defendant in a suit brought against it in the Argentine courts by the Respondent itself).

[34] See *Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania (Award)* (ICSID Case No ARB/10/13, 2 March 2015) [204] (where the fork-in-the-road provision was not applied in circumstances where domestic proceedings were initiated, but had never proceeded due to non-payment of court fees and non-compliance with other formalities). However, the fact that a specific case has never been decided on the merits will not exclude the triggering of the fork-in-the-road; see *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador (Award)* (ICSID Case No ARB/03/6, 31 July 2007) [182].

[35] *MCI Power* (n 34) [180]-[190].

[36] See eg *Pan American* (n 24), [155], expressing the view that tribunals were 'undoubtedly right' not to assume lightly that choices of forum have been made by claimant parties in favour of the host State's judicial system, for '[i]f the contrary were true, there would be little use in setting up international arbitral procedures for investment disputes.' See also Schreuer (n 6), 241, similarly arguing that '[i]n light of the clear advantages that international arbitration offers to most investors over proceedings in domestic courts, a decision in favour of domestic courts cannot lightly be presumed.'

[37] See eg C Liebscher, 'Monitoring of Domestic Courts in BIT Arbitrations: A Brief Inventory of Some Issues' in CH Schreuer and C Binder, *International investment law for the 21st century: essays in honour of Christoph Schreuer* (OUP, 2009), 105-12, at 112-5; and especially H Wehland, *The coordination of multiple proceedings in investment treaty arbitration* (OUP, 2013), 89-98, who considers the strict triple identity test as 'the most appropriate approach' and as a 'natural solution' to determining identity of disputes.

[38] T Jardim, "The Authority of Domestic Courts in Investment Disputes" (2013) 4(1) JIDS 175, 191-192.

[39] Cf *Mavrommatis Palestine Concessions (Jurisdiction) (Judgment)* PCIJ (ser A) No 2 (30 August 1924), 11 ('A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.').

the identity of the parties – either by reference to the object of proceedings,[40] or else by the proceedings' "equivalence in substance".[41]

Investment tribunals have not been immune to such criticism and began to recognize that, insofar the triply identity test is usually difficult to satisfy in practice, its strict application has the effect of depriving fork-in-the-road causes of all or most of their practical effect.[42] The jurisprudence has now gradually been moving towards relaxing the test, through adopting a flexible approach when it comes to meeting one of the prongs of the triple identity requirement.

10.2.2.1. Fundamental Basis Test for Determining Identity of Actions

One way in which tribunals responded to the undesirable consequences of too strict an application of the triple identity test has been by adopting a non-formalist approach towards determining the required identity of causes of action. Representative of this approach is the award in *Pantechniki v. Albania* (2009) where, instead of relying on formal distinctions between contract and treaty claims, an inquiry was rather made into whether the treaty claim had the same "fundamental basis" as the claims submitted before domestic courts; an inquiry which – for the first time ever – resulted in a tribunal giving effect to the applicable fork-in-the-road clause. The Tribunal in that case, composed of Jan Paulsson as Sole Arbitrator, considered that the mere assertion that treaty claims were inherently different from contract claims was "argument by labelling – not by analysis."[43] With a view to determining whether the fork-in-the-road clause had been triggered, Paulsson found it more appropriate to rely on the test set forth by the American-Venezuelan Commission in the *Woodruff* case, and subsequently relied upon by the Annulment Committee in *Vivendi*, which mandated an inquiry into "whether or not 'the fundamental basis of a claim' sought to be brought before the international forum was autonomous of claims to be heard elsewhere."[44] Arbitrator Paulsson admitted that the inquiry in that respect was a difficult one and was not willing to concede that claims would have the same "essential basis" if they merely shared the same factual predicates and requested the same relief, as argued by Respondent. The subject of the inquiry was rather to determine whether the claimed entitlements had the same "normative source", which in the circumstances of the case boiled down to establishing whether the claim "truly does have an autonomous existence outside the contract."[45] On the facts of the case, it was clear that the relevant domestic court action had a contractual foundation, given that Claimant was enforcing its contractual right to compensation for damage suffered to its equipment during civil disturbances, in accordance with the contractually-agreed risks allocation provisions. But it was also clear that the Claimant's grievance before the ICSID Tribunal arose out of the same purported entitlement that it invoked in domestic proceedings. By virtue of the fork-in-the-road clause in the Albania-Greece BIT, the Claimant was therefore precluded from adopting the same fundamental basis as the foundation of its treaty claim.[46]

The same approach was later followed in *H&H Enterprises Investment v. Egypt* (2014), where the Tribunal also openly expressed reservations about the suitability of the triple identity test for determining whether a fork-in-the-road clause has been triggered. In the view of the Tribunal, not

[40] Jardim, at 194; Douglas (n 31), 156 at [325].

[41] McLachlan (n 79), 267.

[42] See eg *Chevron (Jurisdiction, 2012)* (n 33), [4.76]-[4.77].

[43] *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania (Award)* (ICSID Case No ARB/07/21, 30 July 2009) [61]. In that case, art 10(1) of the applicable Albania-Greece BIT (1991) defined disputes as 'any dispute […] concerning investments'. However, the Arbitrator did not expressly rely in his reasoning on the breath of the language.

[44] ibid [61].

[45] ibid [62], [64].

[46] ibid [63]-[67]. This finding, however, did not exclude a claim for denial of justice in relation to the treatment it received in Albanian courts, ibid [68].

only was there little basis for such test in the language of the applicable US-Egypt BIT, but its application would have also deprived the fork-in-the-road clause from any practical meaning, insofar as the purpose of the clause was precisely to ensure that the same dispute is not litigated before different fora.[47] The Tribunal further considered the test was not generally apt for application in the investment treaty context where "investment arbitration proceedings and local court proceedings are often not only based on different causes of action but also involve different parties."[48] Therefore, in following the *Pantechniki* precedent, the Tribunal considered it more appropriate to assess whether the claims brought to local courts shared the same "fundamental basis" with the claims brought to international arbitration, rather than focusing on whether the causes of actions relied upon in the claims were identical.[49] Having found that the Claimant's treaty claims shared the same fundamental basis with its contractual claims before the local arbitral tribunal and Egyptian courts, and that those claims had no autonomous existence outside the contract, the Tribunal ultimately gave effect to the fork-in- the-road and declined jurisdiction over most of the Claimant's treaty claims.[50]

Granted, not all investment tribunals wholeheartedly adopted a non-formalistic approach to determining identity of cause of action.[51] Nonetheless, the *Pantechniki* award clearly stirred the debate as to the proper approach to the application of fork-in-the-road clauses. What is clear is that the application of the triple identity test is not any longer self-evident.[52] Indeed, even tribunals otherwise opposed to the application of the "essential basis", such as that in *Khan Resources v. Mongolia* (2012), considered there to be "some persuasive force" in the argument that the triple identity test may be a too strict one, especially where only one of the requirements of the triple identity test is not satisfied, while the remaining requirements, as well as other aspects of the dispute are identical.[53] Yet, too soon a triggering of a fork-in-the-road provision will also have its disadvantages. As the same Tribunal in *Khan Resources* pointed out, should the test be too easy to satisfy, "this could have a chilling effect on the submission of disputes by investors to domestic fora, even when the issues at stake are clearly within the domain of local law", for it may result in "claims being brought to international arbitration before they are ripe on the merits, simply because the investor is afraid that by submitting the existing dispute to local courts or tribunals, it will forgo its right to later make any claims related to the same investment before an international arbitral tribunal."[54] In the long run, therefore, the application of the fork-in-the-road clauses requires the finding of an appropriate balance between, on the one hand, the imperative of giving effect to the intention of treaty drafters which included such explicit treaty provisions; and on the other hand,

[47] *He&H Enterprises Investments, Inc. v. Arab Republic of Egypt (Award)* (ICSID Case No. ARB 09/15, 6 May 2014) [364]-[367] and [382].

[48] Ibid [367].

[49] Ibid [368].

[50] Ibid [371]-[387].

[51] See particularly *Khan Resources* (n 1), [389]-[390], expressly refusing to apply the 'fundamental basis' test, founding 'ample authority' for the application of the triple identity test. It needs to be noted that the subsequent decision in *Toto v Lebanon* (n 24), [203]-[212], which endorses the triple-identity test, was delivered less than two months after the award in *Pantechniki*.

[52] See eg *Chevron (Jurisdiction, 2012)* (n 33), [4.77]-[4.78], avoiding to decide whether the triple identity test should be applied in the circumstances of the case, relying instead on the specific wording of the applicable BIT itself, which required the dispute to be submitted by the 'national or company concerned'; *Awdi v Romania* (n 34) [204], avoiding to examine the applicability of the triple identity test, relying instead on the fact that claims in domestic courts never proceeded and were never heard before the Romanian courts and thus have not triggered the application of the fork-in-the-road provision; or *Charanne v Spain* (n 24), [410], intentionally avoiding to examine the parties' arguments on subject identity/identity of legal basis, basing itself on the finding as to the absence of party identity.

[53] *Khan Resources* (n 1), [392].

[54] ibid [391].

the importance of not allowing that too strict an application of such provisions would discourage investors from seeking resolution of their disputes first in local courts.[55]

10.2.2.2. Factual Test for Determining Identity of Parties

Another issue which has been generating problems in the application of fork-in-the-road clauses concerns the required identity of parties. This has rarely been satisfied, as claims brought before local courts have typically involved locally established subsidiaries in suits against local administrative authorities, whereas treaty proceedings normally involved the foreign investor and the host State themselves. Already in *Genin v. Estonia* (2001), the Respondent thus argued that, since the Claimants in that case were the principle shareholders of an Estonian bank, they should have been, together with the bank itself, properly considered as a group, with the consequence that the local litigation pursued by that bank be considered an election of a remedy on behalf of the group as a whole. The argument found no sympathy with the Tribunal, which attached importance instead to the fact that the bank's efforts in Estonian courts had been undertaken on behalf of all the bank's shareholders (including minority ones), as well as on behalf of its depositors, borrowers and employees, as opposed to the investment dispute submitted to ICSID arbitration, which related solely to the losses purportedly suffered by the Claimants alone.[56]

Some investment tribunals, however, were more sympathetic towards the need for adopting a non-formalist approach in determining party identity. In the *He&H Enterprises v. Egypt*, for example, the Tribunal expressed itself in favour of flexibility, not only in determining identity of cause of action, but also of parties. The Tribunal considered that the language of the applicable fork-in-the-road provision did not "specifically" require that the parties be the same, but rather that the dispute not be submitted to other dispute resolution procedures. In the view of the Tribunal, it would furthermore "defeat the purpose of the Treaty and allow form to prevail over substance if the respondents were required to be strictly the same because in practice, local court proceedings are often brought against state instrumentalities having a separate legal personality and not the state itself."[57] Hence, the fact that the Respondent in that case was not *per se* a party to the local proceedings was without consequence to the application of the fork-in-the-road. The Tribunal added that "where […] jurisdiction is allegedly based on the conduct of an entity with legal personality separate from the respondent State […] the same standard must apply to the tribunal's assessment of all jurisdictional conditions and limitations, including a fork-in-the-road clause."[58]

Equally in favour of a non-formalistic approach has been the Tribunal in *Charanne v. Spain* (2016). This essentially agreed, as a matter of principle, with the Respondent's proposition that, in order to determine party identity, it was necessary to analyse the "economic reality of the corporate structure of the different entities present in the various procedures in question", particularly with a view to preventing the non-application of the triple identity test through a simple restructuring of the corporate chain.[59] To that end, Respondent would have to demonstrate that the Claimants and the local companies were "in fact the same entity" so that the actions brought in local courts would be considered as having been brought by the Claimants through intermediary companies. According to the Tribunal, however, for such factual identity to be established, it was necessary to demonstrate that Claimants enjoyed decision-making powers in the companies (and not merely to possess (minor) shareholding interests in the local subsidiaries that nominally belonged to the same group of companies). Alternatively, the Respondent would have to establish that the particular

[55] See also Douglas (n 31), 155-157; M Swarabowicz, "Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System" (2017) 8(2) JIDS 280, 295-297.

[56] *Genin* (n 24), [330]-[332].

[57] *He&H Enterprises* (n 47) [367].

[58] Ibid [383].

[59] *Charanne v Spain* (n 24), [406].

corporate structure had been designed or modified with a fraudulent purpose to allow the Claimants to avoid the fork in the road provision.[60] In the specific circumstances of that case, however, none of those facts were actually proven.

In view of the complex way in which foreign investment is presently conducted, where intricate corporate structures are frequently put into place so as to benefit from taxation and other specific advantages provided for by some jurisdictions, it certainly makes sense to adopt a less formalistic approach to determining identity of parties,[61] or else one risks fork-in-the-road provisions being circumvented by merely allowing that the claim be brought by another entity in the corporate chain.[62] There is little reason for investment arbitration to diverge in this respect from other instances of transnational litigation, where non-formalistic approaches are regularly employed in that respect.[63]

10.2.3. Relevance of Treaty Language

At the end of the day, much will depend on the language of the applicable investment treaty. The fork-in-the-road provision may itself dictate the application of the distinction between contract and treaty claims as a ground for determining identity in causes of action,[64] or else require strict identity of parties as a condition for its application.[65] What is clear, however, is that absent such express guidance, investment tribunals, as a rule, preferred to interpret silences or ambiguities in the applicable treaty in ways that allowed them to retain their adjudicatory authority, even at the cost of rendering fork-in-the-road provisions practically ineffective. Indeed, this phenomenon has not been limited solely to forks in the road, but was equally observable with investment tribunals' approach towards certain other types of choice-of-forum provisions.[66]

This is not to say that parallel litigation cannot be meaningfully regulated through treaty clauses. What is required, however, is more precise treaty language, as attested to by the example of no u-turn clauses. Unlike the typical fork-in-the-road clause, which precludes parallel proceedings in respect of the same "dispute", the typical no u-turn clause requires investors to desist from commencing parallel proceedings "with respect to the measure" alleged to be in

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[60] ibid [407]-[408].

[61] In the same vain, see C Schreuer, 'Concurrent Jurisdiction of National and International Tribunals', (1975/1976) 13 Houston Law Review 508 at 510-13, arguing against a formalistic conception of litispendence in the relationship between domestic courts and international tribunals, suggesting instead to look at "the true beneficiaries of a claim before determining whether there is a substantial identity of proceedings" insofar as "the conditions of international relations frequently require different actors to appear in the international arena than in the domestic arena".

[62] On this danger, see eg CI Suarez Anzorena, 'Multiplicity of Claims under BITs and the Argentine Case' (2005) 2 TDM 20, at 23-24.

[63] See eg McLachlan (n 79), 117-122. For a contrary view, see Liebscher (n 37), 112, arguing against importing tests developed under domestic laws insofar as the fork-in-the-road is a treaty rule and supposedly requires the application of international tests.

[64] See examples mentioned *supra* (n 29).

[65] See eg *Chevron (Jurisdiction, 2012)* (n 33), [4.77]-[4.78], sidestepping the application of the triple identity test precisely because the wording of the BIT itself required that, for the fork to be applied, not only must the dispute have been submitted for resolution to domestic courts, but the dispute also had to be submitted by the 'national or company concerned'.

[66] See eg *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan (Decision on Jurisdiction)* (ICSID Case No ARB/02/13, 9 November 2004) [92], [96]. In the circumstances of that case, Article 9(2) of the applicable Italy-Jordan BIT expressly stipulated that when an investment contract has been concluded between an investor and an entity of a Contracting State, the procedure foreseen in such a contract "shall" apply. The Respondent argued that the essential basis of the Claimants' request concerned a contractual dispute, which in accordance with Article 9(2) had to be submitted to the contractually-agreed procedure (which in that case was either domestic arbitration, or procedure before Jordanian courts). The Tribunal gave effect to Article 9(2) insofar as contractual disputes were concerned, but did not accept that this provision could deprive it of its jurisdiction to entertain claims based on breaches of the BIT.

breach of a treaty obligation.[67] Investment tribunals have generally interpreted this to mean that, in order for the no u-turn clause to be triggered, it suffices that both legal actions have a legal basis derived from the same "measure" (i.e. rest on the same factual predicate) and share the same object.[68] Hence, the fact that the domestic cause of action was grounded in contract violations,[69] or took the form of an administrative appeal under public law,[70] was taken to be sufficient to pre-empt recourse to treaty arbitration, even where no treaty violation as such was directly invoked in the domestic lawsuit. Arguably, though, it would seem that the domestic law suit in such cases would have to allege *in its essence* the equivalent of a violation of the treaty.[71]

Though no u-turn clauses proved therefore much more difficult to be sidestepped on the basis of the distinction between contract and treaty claims, their application has not been without problems either. Complications have thus arisen with respect to what constitutes a measure, and whether the impugned conduct amounts to a such a measure or merely a "component" thereof that could still be challenged in domestic courts.[72] Here, too, the argument was then made that an investor should not easily be barred from investment arbitration. In the words of Arbitrator Highet, "it would be an extreme price to pay in order to engage in NAFTA arbitration for a NAFTA claimant to be forced to abandon all local remedies relating to commercial law recoveries that could have some bearing on its NAFTA claim—but which nonetheless were not themselves NAFTA claims."[73]

On balance, arguments pertaining to the fundamental importance of investment arbitration and to its superior advantages compared to domestic court litigation have thus recurrently been employed in dealing with forum selection clauses. And as the following section will demonstrate, variations of those arguments found similar application in dealing with local litigation requirements.

10.3. Skipping the Unnecessary: Strategies for Avoiding Local Litigation Requirements

Though not intended to (irreversibly) foreclose access to international arbitration, provisions directing the aggrieved investors to first seek resolution of their disputes before host State's

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[67] See eg art 1121(1)(b) and (2)(b) NAFTA.

[68] See Waste Management, Inc v United Mexican States (I) (Award) (ICSID Case No ARB(AF)/98/2, 2 June 2000) [27].

[69] Ibid [28] (finding Claimant's waiver ineffective as it sought to exclude claims based on Mexican law while its treaty claims were premised on the same alleged contract breaches that Claimant had already alleged in domestic proceedings initiated by its local subsidiary).

[70] *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador (Award)* (ICSID Case No. ARB/09/17, 14 March 2011) [95]-[107] (pronouncing itself without jurisdiction as the Claimant failed to effectively discontinue proceedings before the courts of El Salvador, where those proceedings concerned the revocation of environmental permits that were also the object of the treaty claims under the CAFTA).

[71] Cf *Waste Management I* (n 69), [28] (holding that "the provisions referred to in the NAFTA constitute obligations of international law for NAFTA signatory States, but violation of the content of those obligations may well constitute actions proscribed by Mexican legislation in this case, the denunciation of which before several courts or tribunals would constitute a duplication of proceedings."); as well as *Waste Management Inc v United Mexican States* (Dissenting Opinion of Keith Highet) (ICSID Case No ARB(AF)/98/2, 8 May 2000) [47] (suggesting that "[i]t would only be where a lawsuit had been commenced in domestic courts *that essentially alleged the equivalent of a violation of Chapter Eleven* that there would be a clear preemption").

[72] In *Waste Management v Mexico (I),* the primary point of disagreement between the Tribunal's majority and Arbitrator Highet was whether the impugned conduct in fact constituted one such "measure" or was merely a part thereof. Arbitrator Highet argued that the term 'measure' was to be interpreted as an act of the State that was itself a breach of an international obligation at the level of the NAFTA and did not apply to local components of such an act that were not themselves breaches of international obligations. *Waste Management (I) (Dissenting Opinion of Keith Highet)* (n 72) [11]-[26].

[73] Ibid [44].

courts for a prescribed period of time were likewise perceived by investment tribunals as constituting a challenge to their adjudicative authority. In particular, these "mandatory local litigation requirements" were frequently considered as unnecessary and costly rituals, leading tribunals to often restrain their effects in practice.

In principle, such requirements have all the potential to serve as a device for regulating jurisdictional interactions between domestic courts and investment tribunals. Procedurally, such requirements will have the effect of temporarily barring the exercise by the investment tribunal of jurisdiction over an investment dispute, in favour of the domestic courts of the host State. Most investment tribunals namely considered them to constitute mandatory *preconditions to arbitration*,[74] and non-compliance with them leading to the tribunal lacking competence to hear the case (and not merely resulting in the claim being inadmissible).[75] This distinguishes them from clauses prescribing consultation or waiting periods, which have sometimes been interpreted as mere procedural formalities or directives that could be dispensed with under appropriate circumstances.[76] Furthermore, substantively, mandatory local litigation requirements may remove the actual need for the investment tribunal to exercise its jurisdiction because, at least in principle, the investment dispute may already be resolved through recourse to domestic courts. In that,

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[74] See eg *Maffezini (Jurisdiction)* (n 3), 36; *BG Group Plc. v. The Republic of Argentina (Final Award)* (UNCITRAL, 24 December 2007) [146]; *Wintershall Aktiengesellschaft v The Argentine Republic (Award)* (ICSID Case No ARB/04/14, 8 December 2008) [115]-[119]; *Abaclat v The Argentine Republic (Decision on Jurisdiction and Admissibility)* (ICSID Case No ARB/07/5, 4 August 2011) [578]; *Ambiente Ufficio v Argentine Republic (Decision on Jurisdiction and Admissibility)* (ICSID Case No ARB/08/9, 8 February 2013), [589]-[591]; *Giovanni Alemanni and Others v The Argentine Republic (Decision on Jurisdiction and Admissibility)* (ICSID Case No ARB/07/8, 17 November 2014) [305]; *Daimler Financial Services AG v Argentine Republic (Award)* (ICSID Case No ARB/05/1, 22 August 2012) [180]-[183]; *ICS Inspection and Control Services Limited (United Kingdom) v The Republic of Argentina (Award on Jurisdiction)* (UNCITRAL, PCA Case No 2010-9, 10 February 2012), [246]-[251]; *Impregilo SpA v Argentine Republic (Award)* (ICSID Case No ARB/07/17, 21 June 2011), [79]-[94]; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No. ARB/07/26, 19 December 2012), [130]; *Ömer Dede and Serdar Elhüseyni v. Romania (Award)* (ICSID Case No. ARB/10/22, 5 September 2013), [212]-[225]. Mandatory in this context relates to the fact that the potential claimant cannot unilaterally amend these conditions, but must accept them as such in order to perfect the agreement to arbitrate. Litigation clauses do not otherwise impose an obligation on investors to pursue local litigation. See on this *Alemanni*, ibid [305].

Sometimes the same clauses were interpreted differently by arbitral tribunals. See eg *Hochtief AG v The Argentine Republic (Decision on Jurisdiction*) (ICSID Case No ARB/07/31, 24 October 2011) [32]-[55], considering it ambiguous whether art 10 of the Argentina-Germany BIT imposed a mandatory submission to domestic courts as a precondition of recourse to arbitration, contrary to the opinion of the *Wintershall* and *Daimler* tribunals. For a similar discrepancy, compare *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan (Award)* (ICSID Case No ARB/10/1, 2 July 2013), [6.1.6]-[6.2.9], interpreting art VII(2) of the Turkey-Turkmenistan BIT as containing a mandatory litigation requirement; and *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v Turkmenistan (Decision on Respondent's Objection to Jurisdiction*) (ICSID Case No ARB/12/6, 13 February 2015) under art VII(2), [280]-[281], interpreting the same provision as merely giving the investor an option to bring proceedings in local courts, in the event of which the then arbitration proceedings cannot be brought until one year has elapsed and no decision has been issued by that court. See also *Camuzzi International SA v The Argentine Republic (Decision on Objection to Jurisdiction)* (ICSID Case No ARB/03/2, 11 May 2005) [117], interpreting a *prima facie* mandatory litigation clause in art 12 BLEU-Argentina BIT merely as providing 'the possibility of recourse to local jurisdiction'.

[75] See *Maffezini (Jurisdiction)* (n 3), 36; *Wintershall* (n 74), 156; *ICS Inspection* (n 74), [262]-[273]; *Daimler* (n 74), [192]-[193]; *Kiliç v Turkmenistan* (n 74), [6.3.1]-[6.3.15]; as well as *Hochtief AG v Argentine Republic (Separate and Dissenting Opinion of JC Thomas)* (ICSID Case No ARB/07/31, 7 October 2011), [42]. For the contrary approach, see *Abaclat* (n 74), [496], concluding that non-compliance with such requirements would only lead to a lack of admissibility of the claim. But this has been subject to criticism. See *Abaclat v The Argentine Republic (Dissenting Opinion of G Abi-Saab)* (ICSID Case No ARB/07/5, 4 August 2011), [126], considering the majority's legal characterization of the plea as 'conceptually wrong'; or *Kiliç v Turkmenistan* (n 74) [6.3.4], finding that the majority in *Abaclat* 'fell into legal error' (n 74). cf also *Telefónica SA v The Argentine Republic (Decision of the Tribunal on Objections to Jurisdiction*) (ICSID Case No ARB/03/20, 25 May 2006) [93] (characterizing such jurisdictional objections as an 'exception of admissibility', yet one that would result in 'the Tribunal's temporary lack of jurisdiction'); or *Ambiente Ufficio* (n 74), [573] (the Tribunal refusing to 'draw a neat dividing line between these two concepts and to endorse one of the many controversial views articulated as to where the exact difference lies between them'). For an extensive discussion on the distinction, see *Urbaser* (n 74), [112]-[128].

[76] See eg *Biwater Gauff v Tanzania (Award)* (ICSID Case No ARB/05/22, 24 July 2008) [343]-[344].

such provisions essentially serve the same purpose as the local remedies requirement: to give the host State an opportunity – albeit a more limited one – to redress, within the framework of its own domestic legal system, the consequences of conduct on the part of the host State that could potentially amount to a violation of the applicable investment treaty.[77]

In practice, however, mandatory litigation requirements have rarely fulfilled any of these functions. As will be demonstrated in the following sections, investment tribunals often permitted claimants to avoid them, by either relying upon MFN clauses so as to invoke third-party treaties which did not contain such pre-arbitration conditions (10.3.1.), or by releasing the claimants from those conditions on the basis of the futility exception (10.3.2.). This, notwithstanding the investor's unrestrained ability to submit the dispute to arbitration. Such local litigation requirements have namely not been taken to imply *exhaustion* of local remedies as traditionally understood under customary international law.[78] Rather, after the lapsing of the stipulated time-frame, the investor has been deemed free to proceed to arbitration, regardless of whether any judicial decision had yet been rendered, and notwithstanding any decision that may have been rendered.[79]

10.3.1. Avoidance of Mandatory Litigation Clauses through Reliance on MFN Clauses

One of the ways for Claimants to avoid mandatory litigation requirements has been by seeking to displace them by reference to more favourable pre-arbitration conditions in third-party treaties, by way of relying on clauses granting most-favoured-nations (MFN) treatment in the basic treaty. The first to allow a claiming investor to rely on an MFN clause to avoid the consequences of non-compliance with a mandatory litigation requirement in the applicable BIT was the Tribunal in *Maffezini v. Spain* (2000).[80] Since then, the clause has been relied upon in several other cases, not only for the purpose of displacing purportedly unfavourable pre-arbitration conditions,[81] but also with a view to broadening the scope of the tribunals' jurisdiction over a class of claims for which arbitration was not otherwise provided in the basic treaty,[82] to importing different arbitration

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[77] *Siemens AG v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/02/8, 3 August 2004) [104]; *Abaclat* (n 74), [581]; *Urbaser* (n 74), [134]. Cf *Telefónica v Argentina (Jurisdiction)* (n 75), fn 55 to [103], considering the clause as 'a mitigated form of the exhaustion of local remedies requirement, to which [Latin American] countries had adhered in accordance with the Calvo doctrine.'

[78] See Maffezini (Jurisdiction) (n 3), [22]-[28]; Siemens v Argentina (Jurisdiction) (n 77) [104]; Gas Natural SDG, SA v The Argentine Republic (Decision of the Tribunal on Preliminary Questions on Jurisdiction) (ICSID Case No ARB/03/10, 17 June 2005), [30]; ICS Inspection (n 74), [261]; or Urbaser (n 74), [108], refusing to construe this type of clauses as imposing the exhaustion of local remedies. But see Wintershall (n 74), [124].

[79] See *Maffezini (Jurisdiction)* (n 3), [25]-[29] (for the holding that an international tribunal will always have the final say on the meaning and scope of the international obligations that are in dispute).

[80] ibid [37]-[64].

[81] See *Siemens v Argentina (Jurisdiction)* (n 77), [94]-[103]; *Gas Natural* (n **Error! Bookmark not defined.**), [24]-[31]; *Telefónica SA v The Argentine Republic (Jurisdiction)* (n 75), [91ff]; *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) [52]-[66]; *National Grid plc v The Argentine Republic (Decision on Jurisdiction)* (UNCITRAL, 20 June 2006) [52]-[94]; *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v The Argentine Republic / AWG Group Ltd v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/03/19; UNCITRAL, 3 August 2006) [52]-[68]; *Impregilo v Argentine Republic* (n 74), [95]-[108]; and *Hochtief (Jurisdiction)* (n 74), [56]-[111], for instances where Claimants were successful in relying on MFN clauses to displace mandatory litigation requirements. In contrast, see *Wintershall* (n 74), [158]-[198]; *ICS Inspection (Jurisdiction)* (n 74); *Daimler Financial Services* (n 74); and *Kiliç v Turkmenistan* (n 74), [7.1.3]- [7.9.1], for instances where Claimants did not succeed to displace mandatory litigation requirements through reliance on MFN clauses.

[82] See *Plama Consortium Limited v Bulgaria (Decision on Jurisdiction)* (ICSID Case No ARB/03/24, 8 February 2005) [204]-[209]; *Berschader v Russia (Award)* (SCC Case No 080/2004, 21 April 2006) [159]-[208]; *Telenor Mobile Communications AS v Republic of Hungary (Award)* (ICSID Case No ARB/04/15, 13 September 2006) [90]-[100]; *Tza Yap Shum v Republic of Peru (Decision on Jurisdiction and Competence)* (ICSID Case No ARB/07/6, 19 June 2009) [199]-[220]; *Renta 4 SVSA et al v Russian Federation*

procedures,[83] or to expanding the scope of protected investments.[84] Admittedly, in the latter types of cases, the putative claimants have generally been less successful in relying on MFN clauses than in relation to mandatory litigation requirements. But even with respect to the latter cases, the jurisprudence of investment tribunals remains unsettled and questions concerning the scope of MFN clauses continue to boggle the minds of academics, just as they trouble the minds of individual arbitrators.[85]

Two issues are central to the current controversies about the application of MFN clauses to dispute settlement provisions in investment arbitration: the scope of the right being accorded under an MFN clause, and the actual operation of the MFN clause in relation to questions of arbitral procedure. The former relates to the fact that MFN clauses apply only to subjects that are *ejusdem generis* – i.e., that belong to the same category of subject as that to which the clause itself relates.[86] Initially, the point of contention has been whether the obligation to provide MFN treatment can only be understood to refer to the material aspects of the treatment granted to investors, or whether it could be deemed applicable to dispute settlement provisions as well. The Tribunal in *Maffezini* proceeded on the premise that the availability of direct arbitration for disputes between the investor and the host State is nowadays "inextricably" linked to the substantive protection of investors' rights and is thus part of the treatment to which investors are entitled and to which the MFN obligation applies.[87] Several tribunals subsequently accepted the premise as valid, according it a determinative role in the construction of the MFN clause.[88] However, others doubted whether dispute settlement provisions are inherently covered by MFN clauses, refusing to proceed on the basis of any interpretative assumptions.[89] Later, the point of contention has shifted from whether dispute settlement can be seen as an inherent part of treatment, to the question whether the obligations granting investors substantive rights as to the material treatment that they and their investment are entitled to receive are not fundamentally different *in nature* from dispute settlement provisions, which grant those same investors the procedural capacity and means to protect those

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(Award on Preliminary Objections) (SCC No 24/2007, 20 March 2009) [80]-[118]; *Austrian Airlines v The Slovak Republic (Final Award)* (UNCITRAL, 9 October 2009) [117]-[140]; and *ST-AD GmbH v Republic of Bulgaria (Award on Jurisdiction)* (UNCITRAL, PCA Case No 2011-06, 18 July 2013) [376]-[406], for instances where Claimants were unsuccessful in relying on MFN clauses to expand narrow dispute settlement provisions of the kind found predominantly of Eastern-European BITs which restrict arbitration to the quantum of compensation. See further *Salini v Jordan (Jurisdiction)* (n 66), [102]-[119], for an example of an unsuccessful attempt to use an MFN clause to circumvent a provision in the applicable dispute-settlement clause that specifically required disputes arising out of contracts to be resolved according to the procedure stipulated in the applicable investment agreement. In contrast, see *RosInvestCo UK Ltd v The Russian Federation (Award on Jurisdiction)* (SCC No V079/2005, 1 October 2007) [124]-[139], for a rare instance where the plea to substitute a narrowly-worded dispute-settlement clause was successful.

[83] See *Garanti Koza LLP v Turkmenistan (Decision on the Objection to Jurisdiction for Lack of Consent)* (ICSID Case No ARB/11/20, 3 July 2013) [40]-[97], for an example of a successful invocation of an MFN clause to replace UNCITRAL arbitration with ICSID arbitration.

[84] See *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, SA v The Dominican Republic (Award on Preliminary Objections to Jurisdiction)* (UNCITRAL, LCIA Case No UN 7927, 19 September 2008) [40]-[41]; and *HICEE BV v The Slovak Republic (Partial Award)* (UNCITRAL, PCA Case No 2009-11, 23 May 2011) [148]-[149], for examples of unsuccessful reliance on an MFN clause to expand the definition of protected investments.

[85] See eg *Impregilo S.p.A. v. Argentine Republic (Concurring and Dissenting Opinion of Professor Brigitte Stern of 21 June 2011)* (ICSID Case No. ARB/07/17, 21 June 2011); *Hochtief (Dissenting Opinion Thomas)* (n 75); or *Daimler Financial Services AG v. Argentine Republic (Dissenting Opinion of Judge Charles N Brower)* (ICSID Case No. ARB/05/1, 15 August 2012) [17]-[38].

[86] cf *The Ambatielos Claim (United Kingdom of Great Britain and Northern Greece and Ireland) (Arbitral Award)* (XII UNRIAA 83, 6 March 1956) 107.

[87] *Maffezini (Jurisdiction)* (n 3), [54].

[88] In *Maffezini,* ibid, the premise was taken into account in interpreting an otherwise broadly-formulated MFN clause, which applied 'in all matters governed by this Agreement'. In other cases, where the applicable MFN clauses were more narrowly formulated, the premise informed the determination whether dispute settlement provisions are part of the 'treatment' (*Siemens*), or a part of the 'use' and 'enjoyment' (*Renta*).

[89] *Plama v Bulgaria (Jurisdiction)* (n 82).

rights.[90] Relying on the distinction between substantive obligations and jurisdictional matters, and the paramount importance that State consent plays in the settlement of international disputes and the absence of any general obligation compelling States to have substantive obligations adjudicated, the tide has now changed to investment tribunals again questioning the application of MFN clauses – even in relation to pre-arbitration conditions on which the jurisprudence after *Maffezini* appeared for some time to be settled.

This change in the jurisprudence is partly attributable to a shift of focus, as claims based on MFN clauses are increasingly addressed as a matter of consent to arbitration. This matter eventually relates to another point of contention, which concerns the actual operation of the MFN clause, and specifically, whether or not the clause can be deemed to operate so as to effectively modify the terms of the standing offer to arbitrate expressed in the treaty's dispute settlement provisions. Some have maintained that an aggrieved investor can only acquire standing to raise an MFN claim before an arbitral tribunal once it satisfies any conditions potentially attached to host State's offer to arbitrate.[91] Others have been more prone to admitting the possibility that the offer could be amended by reference to the terms of a third-party treaty before it is accepted by a putative claimant.[92] This is not the place to resolve theoretical intricacies raised by the application of MFN clauses to dispute settlement provisions. At the end of the day, the outcome depends on the specific language of the MFN clause and the structure of the treaty. Given that some treaties expressly envision the application of MFN treatment to dispute-settlement arrangements,[93] there is nothing inherent to MFN clauses to prevent these from being applicable to dispute settlement matters.[94]

From the point of view of the present inquiry, it is of some significance however that MFN clauses have so far successfully been put to use to avoid mandatory litigation in domestic courts in more than two thirds of the cases.[95] Therefore, it is not far-fetched to argue that MFN clauses have come to perform an important role in the reallocation of adjudicatory authority from domestic courts to investment treaty tribunals.[96] There is no doubt that this comports to the intention of various Claimants that relied on the clauses precisely for such purpose. Yet, giving the clauses such effect did not come without investment tribunals actually undertaking a value judgment as to the usefulness of domestic judicial procedures. After all, it is inherent to MFN clauses that they only apply where the treatment accorded under the basic treaty is less favourable than the treatment accorded under a comparator treaty. In *Maffezini*, the Tribunal's application of the MFN clause was premised on the understanding that third-party treaties allowing submission

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[90] For support for such views in academic writings, see esp. C McLachlan, L Shore and M Weiniger, *International Investment Arbitration* (OUP 2009) [7.168]. For support in practice, see esp. *Impregilo (Separate Opinion Brigitte Stern)* (n85) [44]-[110]; cf also *Berschader* (n 82), where the Tribunal devoted ten paragraphs to the observation that 'all matters' cannot really refer to all matters, since some matters covered in BITs – such as their temporal and territorial application, their provisions on denunciation and renewal, etc – cannot be extended by means of an MFN clause.

[91] See Z Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) Journal of International Dispute Settlement 97 at 107 (maintaining that a claimant can only assert the claim for MFN treatment by accepting the offer of arbitration on the terms stipulated in the basic treaty).

[92] SW Schill, 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas'(2011) 2(2) Journal of International Dispute Settlement 353 at 365.

[93] See eg art 3(3), UK-Burundi BIT (1990).

[94] See ILC, 'Final Report of the Study Group on the Most-Favoured-Nation clause' (2015) ILC Ybk, vol. II (pt. 2), [162]-[163].

[95] See case cited *supra* (n 80 and 81). See, in addition, *Teinver v The Argentine Republic (Jurisdiction)* (n 33), [159]-[186], where the Tribunal expressed the opinion that Claimants could have relied on the MFN clause to avoid mandatory litigation requirements, had they not already been found to have satisfied those requirements in the circumstances of the case.

[96] See on this particularly Schill (n 92), 362, who argues that the question as to whether an MFN clause can confer jurisdiction on an investment treaty tribunal 'is essentially one relating to the allocation of adjudicatory authority between domestic courts and investment treaty tribunals.'

of disputes to arbitration without prior referral to domestic courts contained dispute settlement provisions that were more favourable to the protection of the investor's rights and interests than treaties requiring such referral.[97] The Tribunal noted in this respect how investors "have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts".[98] The Tribunal in *Telefónica* considered it even "undisputable" that it was preferable for an investor not to be obliged to litigate its claim in the courts of the host State before being allowed to submit it to ICSID arbitration, and that being exempted from such a requirement represented a "better treatment".[99] The Tribunal in *Gas Natural*, in contrast, did not rely on the investor's own preferences in determining which treatment was more favourable, but on a general presumption of investment arbitration being actually superior to adjudication by domestic courts. In that Tribunal's view, the provision of independent international arbitration was "a crucial element – indeed perhaps the most crucial element" of investment treaties, insofar as these "offered to investors assurances that disputes that might flow from their investments *would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts*".[100] Access to international arbitration only after an initial resort to domestic courts was thus necessarily seen a less favourable degree of protection than access to arbitration immediately.

These kinds of assumptions have given rise to criticism that it was not possible to actually imply a hierarchy in favour of dispute settlement provisions. McLachlan, Shore, and Weininger, in particular, warned that "it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration."[101] Tribunals responded by arguing that the problem might lie in the way that the issue is articulated. According to the *Renta* Tribunal,

> "Investors who desire access to a neutral international forum are 'necessarily' denigrating national justice. They do no more than make clear that their comfort is greater knowing that the international alternative is open to them. This is a rational concern. Nor is there anything illegitimate about the desideratum of an option to seise a neutral forum. History is replete with examples of investment disputes which have overwhelmed the capacity of national institutions – in countries of all stages of development – for dispassionate judgment."[102]

Recent tribunals therefore preferred not to frame the question as one concerning whether or not resorting to domestic courts is more or less favourable to investors than international arbitration, but simply as one turning on the availability of a choice.[103] Reframing the question in such terms, however, is a bit of a red herring. For, the investor is not deprived of international arbitration because of mandatory litigation requirements; the latter are merely a condition for it to access arbitration. A more important development, however, is the greater comparative scrutiny

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[97] *Maffezini (Jurisdiction)* (n 3), [39]-[40], [56].

[98] ibid [55].

[99] *Telefónica SA v The Argentine Republic (Jurisdiction)* (n 75), [103]. Similar assumptions were made by other investment tribunals. See eg *Suez/Interaguas (Jurisdiction)* (n 81), [55]; *Suez/AWG* (n 81), [55] (concluding that investors receive a more favorable treatment when they do not need to submit to domestic courts first).

[100] *Gas Natural (Jurisdiction)* (n 81), [29].

[101] McLachlan, Shore and Weiniger (n 90), para 7.168.

[102] *Renta v Russia* (n 82), [100].

[103] See eg *Hochtief* (n 74), [100] ('whatever the substantive merits of litigation and of arbitration, it is always more favourable to have the choice as to which to employ than it is not to have that choice.'); or *Impregilo v Argentine Republic* (n 74), [101] ('…what should be considered is whether a choice between domestic proceedings and international arbitration, as in the Argentina-US BIT, is more favorable to the investor than compulsory domestic proceedings before access is opened to arbitration. The answer to this question is in general, and certainly in this case, evident: a system that gives a choice is more favorable to the investor than a system that gives no choice.')

to which dispute settlement clauses in third party treaties are increasingly subjected. As correctly noted by some tribunals, in cases where dispute settlement provisions in third party treaties contain fork-in-the-road clauses, it is certainly disputable whether or not such treatment is more favourable to dispute settlement provisions that solely impose time-bound domestic litigation as a pre-arbitration condition.[104]

10.3.2. Release from Mandatory Litigation due to Futility

Another way for investment tribunals to accept jurisdiction over particular claims, despite the claimants' failure to have recourse to domestic remedies in accordance with treaty-imposed mandatory litigation requirements, has been through a successful demonstration that such recourse would have been futile, or else that it would not have led to an effective resolution of the dispute.

10.3.2.1. The Legal Basis for the Futility Exception

Exceptions grounded in the argument of futility were accepted on a variety of grounds. In most cases, the matter was primarily approached as an issue of treaty interpretation. In *BG v. Argentina* (2008), for example, the futility exception was accepted based on an *a contrario* argument: if the applicable mandatory litigation requirement were construed as an "absolute impediment to arbitration", this would have lead to absurd and unreasonable results (and as such proscribed by Article 32 VCLT) in the event that recourse to domestic courts was "unilaterally prevented or hindered by the host state".[105] In *Abaclat v. Argentina* (2011), instead, the exception was considered to implicitly follow from the object and purpose of the dispute settlement system put in place by the applicable BIT. Insofar as that system was one aimed at providing a "fair and efficient dispute settlement mechanism", the ideas of fairness and efficiency had to be taken into account when interpreting and determining how the system was supposed to work in practice.[106] This required, in turn, the weighing of the interests of the litigating parties – that is, of Argentina's interest in being given the opportunity to address the purportedly wrongful conduct within the framework of its own legal system, and of the investor's interest in being provided with an efficient dispute resolution mechanism. Accordingly, the disregard of the litigation requirement would have been compatible with the treaty's dispute settlement system where it had not "unduly deprived the Host State of a fair opportunity to address the issue through its domestic legal system."[107] A variation of this "balancing" argument was later presented in *Urbaser v. Argentina* (2012). There, the futility exception was held to be applicable on the ground that obligations imposed by the local litigation requirement were "bilateral" in nature, meaning that it was not solely the host State, but equally the investor that it was not supposed to be deprived of a "fair opportunity" to have the dispute addressed through the local courts.[108] In *Ambiente Ufficio v. Argentina* (2013), the exception was instead accepted on the ground that the treaty-imposed mandatory litigation requirement was "sufficiently comparable" to the customary law obligation to exhaust local remedies so as to warrant the latter being "taken into account", pursuant to Article 31(3)(c) VCLT, in the interpretation of the former, and thus to admit the application of the futility exception in the context of the treaty requirement.[109] Finally, in *Giovanni Alemanni v. Argentina* (2014), stronger emphasis was placed on the other elements of the dispute settlement provisions,

[104] *Daimler* (n 74), [240ff]; *ICS v Argentina* (n 7481), [322].

[105] *BG v Argentina* (n 74), [147]. The Tribunal had otherwise difficulties accepting the plea of futility solely on the ground that customary international law recognized such plea as an exception to the rule of exhaustion of local remedies. ibid [146].

[106] *Abaclat v Argentina* (n 74), [579].

[107] ibid [582].

[108] *Urbaser* (n 74), [131].

[109] *Ambiente Ufficio* (n 74), [599]-[607].

and particularly the requirement mandating litigants to settle their dispute through friendly consultation as a first step. Given that such consultations only had to be pursued "insofar as possible", the requirement, when "properly interpreted", had to be seen as incorporating a futility exception. But since potential domestic litigation depended on the outcome of this consultation process, it "logically" followed that a similar analysis pertained to the domestic litigation requirement, which therefore incorporated a futility exception by necessary implication.[110]

Other tribunals, in contrast, were less clear in stipulating the precise legal basis on which futility exceptions could be accepted. In *Kiliç v. Turkmenistan* (2013), the Tribunal seemingly accepted the futility exception merely by way of analogy with the international law rule of exhaustion of local remedies, confining itself to assessing the alleged futility of Claimant's prior recourse to the courts of Turkmenistan.[111] In *Daimler v. Argentina* (2012), on the other hand, futility was accepted as "the requirement for waiving treaty-based jurisdictional pre-requisites in international law".[112] But there were also tribunals which resisted to accept futility exceptions in the absence of explicit language. Such was the case in *ICS v. Argentina (2012)*, where the Tribunal was not willing to "create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question, having no basis in either the treaty text or in any supplementary interpretive source, however desirable such policy considerations might be seen to be in the abstract."[113] In spite of this principled stance, however, the Tribunal proceeded to conclude that futility had at any rate not been demonstrated in the circumstances of that case.[114]

10.3.2.2. The Standard for Assessing Futility

This is not to say that the plea of futility has generally been accepted lightly. In all fairness, most investment tribunals considered that the threshold to be met for such exception to apply was rather high. In particular, to most tribunals, the futility of a particular remedy was not to depend on the "likelihood of success" in domestic judicial proceedings.[115] Indeed, in practically all of the cases where the exemption from the local litigation requirement was accepted on grounds of futility, this was essentially due to the apparent *impossibility, as a matter of law*, to successfully challenge the imputed measures,[116] while in cases where the plea of futility was not accepted, this was largely because claimants failed to demonstrate that domestic judicial relief was actually unavailable.[117] Furthermore, in arriving at these findings, tribunals often deemed it appropriate to evaluate the evidence adduced in support of alleged futility of domestic judicial procedures rather

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[110] *Alemanni* (n 74), [310]-[311]; but the Tribunal also shared the analysis and the conclusions on the futility exception by the *Ambiente Ufficio* Tribunal ([316]).

[111] *Kiliç v Turkmenistan* (n 74), [8.1.1]-[8.1.21].

[112] *Daimler* (n 74), [198].

[113] *ICS v Argentina* (n 74), [267].

[114] ibid [269].

[115] Some tribunals expressly aligned their analysis with the threshold habitually used for determining the futility of a remedy in the context of the customary rules on diplomatic protection – namely, the test of a reasonable prospect of obtaining an effective remedy. See *ICS v Argentina* (n 74), [269] and fn 296.; *Ambiente Ufficio* (n 74), [610]; *Alemanni* (n 74), [316]. The *Ambiente* and *Alemanni* Tribunals also declined to give weight to the trouble and expense that a claimant would have been put to had it made recourse to local courts. *Alemanni* (n 74), [315]-[316]. Other tribunals merely considered the "likelihood of success" not to be "central" to the futility assessment. See eg *Daimler* (n 74), [191]; or *BG v Argentina* (n 74), [156].

[116] See *BG v Argentina* (n 74), [148]-[156]; *Abaclat* (n 74), [585]-[588]; *Ambiente Ufficio* (n 74), [615]-[620].

[117] See eg *Daimler* (n 74), [191] (rejecting the futility argument as Claimant did not asserted that it 'lacked a cause of action before the Argentine courts' or that it was 'in some other way prevented from complying' with the litigation requirement); *ICS v Argentina* (n 7481), [269] (finding that this was 'not a case of obvious futility, where the relief sought is patently unavailable within the Argentine legal system'); or *Kiliç v Turkmenistan* (n 74), [8.1.4], [8.1.6] (holding that Claimant must have demonstrated that recourse to Respondent's courts was not available to the investor under Turkmen law as a matter of principle).

stringently.[118] All in all, the threshold applied to determining the futility exception in the context of local litigation clauses has thus not significantly differed from the standard applied to determining futility in the context of the judicial finality requirement.[119] This, despite the admonition of some tribunals that, in the context of the former, the threshold to be met should arguably have been lower than in the context of the latter.[120]

Not all investment tribunals were equally eager to apply such high threshold for establishing futility, however. In the view of the arbitrators in *Abaclat v. Argentina* (2011), the consequences of the Claimants' noncompliance with the local litigation requirement did not hinge on the potential futility of local remedies, but conversely, turned on the question whether the host State had not been "unduly deprived" of a fair opportunity to address the issue through its domestic legal system.[121] This accordingly shifted the inquiry from the question whether Claimant had a reasonable prospect of obtaining an effective remedy, into the question whether there was a "real chance in practice" – as opposed to only a "theoretical opportunity" – that the Host State, through its courts, would have addressed the issue in a way that could lead to an effective resolution of the dispute.[122] In much the same way, the Tribunal in *Urbaser v. Argentina* (2012) considered the inquiry to turn on the question whether the Host State has "allow[ed] its courts to operate in a manner that the opportunity to reach a suitable remedy is provided in efficient terms."[123] This necessitated determining whether the domestic proceedings were of such a nature that a decision on the substance could possibly be reached within the prescribed period, and not merely that it was not futile; for, "[a] party must be granted an opportunity or a chance to have the court reach an adjudicatory phase, otherwise the entire system would be meaningless."[124]

In some ways, the scope of this redefined inquiry did not materially differ from that applied in the context of the standard of reasonable possibility of an effective remedy – namely, the question of the actually availability of a remedy. In its assessment whether there was a "real chance" that the State would have been able to address the dispute, the *Abaclat* Tribunal put weight on the fact that, if presented in Argentinean courts, a potential claim for compensation would not have been effective in view of the juridical impossibility for the government to pay out any compensation to bondholders that did not participate in the debt restructuring.[125] Furthermore, the Tribunal attached importance to the fact that the Argentine legal system generally did not provide for mass claims mechanisms.[126] In a similar way, the *Urbaser* Tribunal put weight on the fact that Claimants, as shareholders, would have lacked *jus standi* before the competent Argentinean courts to bring derivative claims with respect to the damage suffered by the local company, meaning that their claims would not have been capable of being adjudicated on the merits.[127]

In other ways, however, the standard employed in *Abaclat* and *Urbaser* importantly differed from the customary law standard of futility. While under the latter, the likelihood of success and the

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[118] See eg *Kiliç v Turkmenistan* (n 74), [8.1.10]-[8.1.21] (where a heightened standard of proof was applied in the assessment of Claimant's evidence); or *Daimler* (n 74), [191] (where a lower standard of proof was applied in the assessment of Respondent's rebuttal). The latter approach attracted criticism on the part of the dissenting arbitrator. See *Daimler (Dissenting Opinion Brower)* (85), [15].

[119] cf Chapter 8.

[120] *Ambiente Ufficio* (n 74), [611].

[121] *Abaclat* (n 74), [582].

[122] ibid.

[123] *Urbaser* (n 74), [131].

[124] ibid [135]; cf also [131].

[125] *Abaclat* (n 74), [585].

[126] ibid [587].

[127] *Urbaser* (n 74), [157]-[163], and [202].

plaintiff's trouble and expense in pursuing a remedy would have played no role in the assessment of futility, in dispensing the Claimants from compliance with the local litigation requirement, the *Abaclat* Tribunal treated as relevant the fact that a potential constitutional challenge of the domestic statute that otherwise prevented Claimants from obtaining compensation from the State, would not have succeeded within the 18-months timeframe prescribed by the treaty, and the fact that, in the absence of mass claims mechanisms, Claimants would have needed to initiate separate claims, which would have made domestic litigation burdensome.[128] Furthermore, unlike in the context of the general futility plea, where it is for the Claimant to prove that a remedy was unavailable or ineffective, the *Abaclat* Tribunal reproached the Argentinean Government for not having arranged for an examination of the constitutionality of the emergency legislation, as this "could have brought clarity on the effectiveness of claims before the Argentinean courts".[129] In a similar fashion, the *Urbaser* Tribunal concluded that any potential constitutional challenges (coupled with a potential claim for compensation) that Claimants may have possibly initiated before Argentinean courts would not only have been "highly unlikely", but based upon the operational time frame of ordinary local courts, "actually impossible" to succeed – even if not inconceivable as a matter of principle.[130] Inasmuch as "[a] proceeding that can in no reasonable way be expected to reach that target is useless and unfair to the investor", the Claimants were thus likewise not required to comply with the local litigation rule.[131]

10.3.3. Is There a Proper Approach to the Application of the Mandatory Litigation Requirements?

In terms of regulatory technique, clauses imposing domestic litigation requirements have some obvious advantages over other treaty devices aimed at regulating jurisdictional interactions between domestic courts and investment tribunals. Compared to fork-in-the-road clauses, such requirements do not preclude double-dipping: An investor can try to resolve the dispute in domestic courts first, without losing its right to eventually resort to the international remedy. However, precisely in view of their design – *viz.*, the fact that the prescribed periods may be possibly too short to yield a resolution of the dispute, and that the investor is ultimately not bound to accept the outcome of domestic litigation – many investment tribunals perceived such clauses as "nonsensical",[132] and as constituting nothing but an "obstacle" to international arbitration.[133] In the same vain, many academic commentators proceeded to treat them as "no more than a costly ritual that serves no purpose except to delay arbitration."[134] The question then is what an appropriate approach to their interpretation and application should be.

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[128] *Abaclat* (n 74), [585].

[129] ibid [586].

[130] *Urbaser* (n 74), [156]. For the Tribunal's analysis, see [154]-[156] and [191]-[201].

[131] ibid [202].

[132] See eg *Plama v Bulgaria (Jurisdiction)* (n 82) [224] (considering one such clause as 'nonsensical from a practical point of view'); or *Hochtief* (n 74), [51], [88] (deeming such a clause as 'pointless' and providing 'no necessary benefit, and no necessary result other than the delay of the arbitration proceedings').

[133] *Urbaser* (n 74), [139] (treating such clause as 'an obstacle before access to international arbitration' that does 'not represent the most favourable option with respect to the efficient protection of international investment').

[134] C Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4(1) LPICT 1, at 4-5. See also A Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 LPICT 371, at 399 ('It is doubtful whether such a clause could ever serve the purpose of avoiding arbitration'); G Petrochilos, S Noury and D Kalderimis, 'Article 26' in LA Mistelis (ed), *Concise international arbitration* (Kluwer, 2010), 78 ('the most likely effect of such a provision is delay in the settlement of the dispute'); or GB Born and M Scekic, 'Pre-arbitration Procedural Requirements: a Dismal Swamp' in DD Caron, SW Schill, A Cohen Smutny & EE Triantafilou, *Practising virtue: inside international arbitration* (OUP, 2015), 227-263, at 242-3 (doubting their effectiveness in the absence of the acceptance of a local judgment by the investor).

10.3.3.1. Towards a Balanced Approach to Their Interpretation?

Much of the misgivings that both investment tribunals and commentators have had with local litigation requirements are clearly based on an understanding of domestic courts as inherently capable of effectively resolving investment disputes. This understanding has not only provided the rationale for the application of MFN clauses in relation to dispute settlement provisions, but also the premise on which the scope and effect of the local litigation requirements were defined. Many tribunals thus proceeded to interpret such requirements as not foreclosing access to international arbitration even where a judgment had been rendered on the merits,[135] even where the language used in such provisions could conceivably also be interpreted as limiting recourse to arbitration solely to cases where no judgment has been rendered, or the domestic judgment had not been complied with.[136]

As a matter of principle, there is nothing that would warrant treating prior litigation requirements as necessarily pointless.[137] First, one cannot *a priori* rule out the possibility that domestic courts, if seized of the investment dispute, could not deliver a judgment in the investor's favour and thus render subsequent arbitration moot.[138] What if the host State, for instance, uses its sovereign powers to accelerate domestic judicial proceedings, so that a suitable remedy is nonetheless provided within the requested time frame?[139] Second, even where it does not resolve the dispute as a whole, prior recourse to domestic courts may contribute to the narrowing of contentious issues, and perhaps even induce the host State to settle the dispute out of court.[140] Third, even where the investment dispute eventually ends up going to international arbitration, prior domestic litigation may still be of significance to the international claim. A judgment may thus confirm a contested legal right claimed to exist under domestic law, or it may otherwise provide a valuable factual predicate for the subsequent treaty claim (by establishing, for example, that the impugned measures have violated domestic law).[141] Furthermore, prior domestic litigation may also lead to an expansion of the international claim where the treatment received by the investor in the respondent's courts compounds a (inchoate) treaty breach.[142] Last

[135] See *Urbaser* (n 74), [191] ('Article X(3)(a) provides for bringing the dispute to international arbitration if it "persists" although a decision on the substance had been reached at the domestic level. In other words, a decision rendered by a domestic court has no *res judicata* effect on an arbitral tribunal notwithstanding compliance with the test that would otherwise cause *res judicata* effect to attach under the domestic law of the Host State'); or *Maffezini (Jurisdiction)* (n 3), [27] ('it is to be noted that Article X(3)(a) does not say that a case may not be referred to arbitration if a domestic court has rendered a decision on the merits of the dispute within a period of eighteen months. It provides merely that if such a decision has been rendered and if the dispute continues, the case may be referred to arbitration.').

[136] On cogent arguments on this point, see further Swarabowicz (n 55), 297.

[137] For criticism, see also AS Rau, 'The Allocation of Power between Arbitral Tribunals and State Courts' (2017) 390 Recueil des Cours 9, 242-244, objecting to the treatment of the local litigation requirement in an "unnecessarily reductive and unnuanced fashion", "as little more than an empty, formal ritual without operative significance".

[138] See eg 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 S.A. v. Oriental Republic of Uruguay), [143] (suggesting that, if the challenge before Uruguay's administrative court of the measure claimed to be in violation of the applicable BIT had been successful, the Claimants' treaty claims in the arbitration would have lost their "legal grounds"). See also Maffezini (Jurisdiction) (n 3), [36] (noting that investors are likely to seek international arbitration only if dissatisfied with the domestic judicial decision, and that they will probably desist to do so if convinced that the international tribunal would reach the same decision).

[139] See *Telefónica (Jurisdiction)* (n 75), fn 55 to [103] (observing that '[i]t cannot be excluded from the outset that the host State might be able, if it so wishes, to speed up proceedings and the issuance of a decision by its own courts' in the prescribed period of time).

[140] *BG Group PLC v. Republic of Argentina*, 134 S. CT 1221 (2014) (Roberts, C. J., dissenting).

[141] On this, see *Hochtief (Dissenting Opinion Thomas)* (n 75), [8]-[9].

[142] On this, see *Daimler* (n 74), [247].

but not least, domestic litigation may equally serve other policy goals, such as the strengthening of the domestic rule of law.[143]

On the other hand, it may well be that, in practice, insisting on the investor's pursuit of domestic remedies in circumstances where host State courts are notoriously slow may constitute an excessive burden for the foreign investor. Indeed, in many of the cases involving Argentina, one of the reasons for investment tribunals not have major objections to releasing claimants from mandatory litigation requirements can be also sought in the fact that recourse to such litigation could have been very costly. The Argentinean court fees namely depended on a fixed percentage of the claimed amount, meaning that foreign investors would have potentially been spending millions of USD merely on court fees, for which it was "far from self-evident" that they would be recoverable through subsequent arbitration.[144]

The mere fact that these provisions have been inserted into treaties at the behest of the capital-importing contracting parties is no reason for local litigation requirements to be interpreted solely from the perspective of whether or not they actually provide a benefit to, or constitute a burden for, the investor.[145] Their interpretation cannot thus be based an a priori assessment that the mandatory litigation requirement may lack utility. For, what if domestic courts may actually have a track record of resolving disputes within the given time frame?[146] This begs the question as to what the appropriate test should be, in order to consider an investor exempted from complying with the local litigation requirements: Should *reasonable prospect of success* be sufficient to establish futility for that purpose, or can the more stringent tests of *reasonable possibility of an effective remedy* or even *obvious futility* be better employed to those ends?[147] In the end, such distinctions may be more of a theoretical than practical value: within the very short time frame prescribed for local litigation, what may seem obviously futile may come close to that what may offer no reasonable prospect of success.

10.3.3.2. Towards a Non-Formalistic Approach to Their Application?

Absent conditions in the host State's judicial system making compliance with local litigation requirements futile or demonstrably useless, the question eventually arises as to what the appropriate approach should be to determining whether such preconditions to arbitrations have been met. Interesting, practically none of the tribunals otherwise relieving investors from compliance with those preconditions, invoked the usual problem of identity of actions as a reason for considering such preconditions difficult to be met in practice. On the contrary, most investment tribunals – and especially those giving effect to local litigation requirements – adopted a non-formalistic approach to the assessment whether investors complied with these preconditions. This was above all visible in terms of substance. Hence, the fact that suits brought

[143] See ibid, [197], for the interesting argument that mandatory litigation of investment disputes in domestic courts may contribute to the development of a Host State's judiciary, to the extent that domestic courts could gain experience in deciding matters relating to investor's treaty rights.

[144] *Urbaser* (n 74), [201].

[145] See *Urbaser* (n 74), [137] (convincingly suggesting that the rule's interpretation cannot possibly be based on mere 'theoretical musings' pursuant to which the rule shall be deemed useless merely because of the 'likelihood of a "pointless litigation"'). See also eg *Ambiente Ufficio* (n 74), [614] (observing in the same sense that, since the local litigation requirement cannot be construed as requiring a final disposition of disputes in the prescribed time frame, accepting futility for reason of alleged impossibility or potential incapacity of the local courts to resolving an actual dispute within such time frame would have the effect of rendering the treaty-imposed requirements "nugatory" in most real-life investment disputes); or *ICS v Argentina* (n 74), [267] (considering it "especially dangerous" to admit a futility exception in relation to the local litigation requirement "in the absence of conclusive evidence adduced to support a tribunal's teleological inferences: the same provision may strike some as 'nonsensical' and others as genius").

[146] cf *Daimler* (n 74), [197] (refusing to treat the clause as 'nonsensical', 'particularly in light of the Government's assertions that the Argentine courts can and do frequently resolve disputes in less than 18 months').

[147] cf *supra* 8.5.2.

before domestic courts involved different claimants than those subsequently participating in proceedings before investment tribunals was for example not considered to be a barrier to the fulfilment of the mandatory litigation requirement.[148] Neither were consequences attached to the fact that the legal basis or the cause of action of domestic proceedings was not the same as that invoked in subsequent arbitration.[149] Rather, investment tribunals considered it sufficient that the "subject matter" of both actions was in "substance" the same by sharing the same "goal",[150] or by involving "substantially similar facts",[151] or else that the cause of action at the domestic level be of such nature that permits resolution of the dispute to "the same extent" as if the claim had been brought before an international arbitral tribunal pursuant to an investment treaty.[152] Indeed, the triple identity test habitually applied in the context of fork-in-the-road clauses was deemed to "not merry well" with the purposes of the local litigation requirement.[153] On top of that, also in terms of procedure, many investment tribunals presented themselves nonformalistic by not dismissing claims on account of the fact that the mandatory litigation period had not yet lapsed at the time that the request for arbitration had been filed.[154]

In defending their leniency in assessing the sameness of the dispute litigated in domestic courts, some tribunals sought support in ICJ's own approach to dealing with issues of compliance with the local remedies rule, pursuant to which the "essence of the claim" has been deemed the appropriate basis for comparison.[155] Others found support for their nonformalist approach above all in the language of the applicable investment treaty, where the notion of "dispute" was broadly defined.[156] In the end, what is above all striking, is how strongly this non-

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[148] See eg *Teinver v Argentina (Jurisdiction)* (n 33), [133], where the preceding litigation involving Claimant's subsidiary in Argentina's courts was found to have satisfied the mandatory litigation requirement in the applicable Spain-Argentina BIT, notwithstanding the fact that the subsidiary itself was subsequently not involved in the ICSID arbitration; or *Philip Morris v Uruguay* (n 138), [98]-[114], where the mandatory litigation requirement in the Switzerland-Uruguay BIT was deemed satisfied where only one of the claimants in treaty proceedings was actually involved in domestic proceedings. Of relevance was that the one claimant "clearly acted in the interest also of the other Claimants", as it was wholly-owned by the latter. Ibid, [114].

[149] Tribunals expressly rejected that the action brought before a local court would need to allege a breach of the applicable treaty. See *Urbaser* (n 74), [181], *Ömer Dede* (n 74), [252]. Tribunals also rejected that the relief sought in the domestic courts would have to be the same or similar to the relief sought in international arbitration. *Wintershall* (n 74), [118], [196].

[150] *Teinver v Argentina (Jurisdiction)* (n 33), [132] The domestic proceedings in that case involved the determination of the value of the expropriated assets pursuant to Argentina's local laws, while the ICSID proceedings related to the validity of the expropriation from the perspective of the standards of treatment prescribed by the treaty.

[151] *Philip Morris v Uruguay* (n 138), [113] The remedies sought in domestic administrative courts were different and based on a different cause of action than the remedies before the investment tribunal.

[152] *Urbaser* (n 74), [181]; *Ömer Dede* (n 74), [253]. This was considered to require that the "entire dispute" must be capable of being brought to the competent local court. *Urbaser*, ibid.

[153] *Ömer Dede* (n 74), [249].

[154] See *TSA Spectrum de Argentina SA v Argentine Republic (Award)* (ICSID Case No ARB/05/5, 19 December 2008) [111]-[113], deciding not to decline jurisdiction in spite of the eighteen months mandatory litigation period prescribed by art 10 of the Netherlands-Argentina BIT not yet having lapsed when ICSID proceedings were initiated, since only three out of the eighteen months remained after the Claimant obtained the first decision on its administrative appeal and it was unlikely that the investor would have obtained a court decision to its satisfaction before the expiry of the eighteen months. See also *Teinver v Argentina (Jurisdiction)* (n 33), [135]; or *Philip Morris v Uruguay* (n 138), [130]-[148].

[155] *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, [59] (the local remedies rule does not "require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties"; it is sufficient "if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success."). The precedent was relied upon in *Teinver v Argentina (Jurisdiction)* (n 33), [132]-[133].

[156] *Philip Morris* (n 138), [107]-[113]. But see *Ömer Dede* (n 74), [247]-[253], where the fact that art 6 of the applicable Turkey-Romania BIT defined disputes as those involving "a breach of any right conferred or created by this Agreement with respect to an investment" was not considered a reason to hold that the dispute in domestic courts would have to be articulated in terms of a treaty breach.

formalistic attitude contrasts with the attitude adopted by tribunals in relation to fork-in-the-road clauses, despite the point of comparison in both cases being the sameness of the "dispute".

10.4. Concluding Observations

When it comes to the interpretation and application of treaty provisions specifically aimed at regulating jurisdictional interactions, investment tribunals have thus not constituted their role towards domestic courts any differently than in other contexts of jurisdictional competition. Despite treaty language carving out specific roles for domestic courts in the disposition of investment disputes, tribunals largely refused to abrogate their adjudicatory authority in favour of the domestic judiciary.

Interestingly, when facing such express treaty stipulations, tribunals could not position themselves by reference to the supremacy argument – for the instruments from which they derived their adjudicatory authority themselves envisioned a particular role for domestic courts. Indeed, in the case of fork-in-the-road clauses, the role envisioned is actually one that implies parity between the international and the domestic forum. Rather, in limiting the effects of jurisdiction-regulating treaty devices, investment tribunals primarily capitalized on the substantive shift – the availability of concrete, treaty-prescribed standards of treatment. While in the case of the fork-in-the-road clauses, it was the contract/treaty claim distinction *itself* that was primarily relied upon to uphold the jurisdiction of the international forum, in the case of the mandatory local litigation clauses, it was rather one concrete treaty standard that proved particularly valuable for that purpose – the MFN provision.

As noted in this chapter, it is debatable whether such practice can really be reconciled with the language of applicable treaty provisions. When it comes to fork-in-the-road clauses, there is little in their language that would suggest that the sameness of a "dispute" should be determined by reference to the law on which the claim is grounded. Furthermore, one cannot fail to observe the marked divergence between the formalism applied in determining the sameness of a dispute for the purposes of the fork-in-the-road clauses, and the non-formalism pursued in determining such sameness in the context of mandatory local litigation clauses – a divergence that attests very clearly to the tribunals' general pro-arbitration stance. As to MFN clauses, their application to dispute settlement provisions continues to remain subject of contestation. For the purposes of the present inquiry, there is no need to take a firm stance on whether or not such application is warranted. What is rather of interest is that their extension to dispute settlement clauses was essentially premised on the perception of prior domestic litigation being less favourable than direct recourse to treaty remedies.

Thus, what is rather clear from this overview of existing jurisprudence is that beneath the tribunals' approach to interpretation and application of treaty provisions one finds a fundamental distrust towards domestic courts and disbelief in their ability to achieve a final disposition of investment disputes. Especially in the interpretation and application of mandatory local litigation clauses, the reasoning frequently rested on the presumption that domestic courts are inherently incapable of resolving investment disputes, and that such disputes will necessarily persist even in the event of a positive outcome of domestic litigation. One could equally proceed from the opposite assumption, that mandatory recourse to local judicial remedies may actually decrease the costs of litigation, for where investment disputes are satisfactorily resolved by domestic courts, investors are less likely bring their claims to arbitration. In the end, the question turns on the extent to which one believes that investment disputes are capable of disposition by domestic courts, which is ultimately a question of trust.

As the following chapter will demonstrate, the same fundamental distrust towards domestic courts essentially also permeates the tribunals' approach to determining the effects of contractual stipulations agreed between investors and host States.