11. REGULATING INTERACTIONS AT THE LEVEL OF THE INVESTOR: WAIVERS AND OTHER RENOUNCEMENTS OF TREATY REMEDIES

To complete the analysis, the final chapter in this part considers how successful the regulation of interactions between investment tribunals and domestic courts has been at the level of each individual investor. The analysis builds on the proposition that investment arbitration is neither a mandatory nor an exclusive dispute settlement mechanism but that, at least from the perspective of the investor, the mechanism remains a voluntary one, and that an investor is essentially also free to decide to have its dispute with the host State resolved by other means than through investment (treaty) arbitration.[1] Building on such proposition, the chapter examines the circumstances under which the investor has been taken to have validly opted for a dispute settlement method other than the treaty forum. In particular, it essentially looks at whether investment tribunals were prepared to concede that a choice-of-forum agreement entered into by the investor could have had the effect of precluding, from the outset, the jurisdiction of the treaty forum. Given the focus of the present study, the chapter essentially deals with the possibility that the choice is made in favour of domestic courts; to a large extent, however, the findings may be equally applicable to other dispute settlement mechanisms (such as contractual arbitration, for instance).

The analysis proceeds on the assumption that investor's choice for a particular forum can be undertaken in a variety of ways. For ease of discussion, a distinction will be made between those cases where a choice can be deemed to have been made in the context of an agreement (formal or informal) between the investor and the host State (11.1), and those cases where a choice must be deemed to have arisen as a result of the investor's conduct as such (11.2). Neither the former, nor the latter possibility have attracted much consideration in academic literature. Some of the issues have nonetheless been touched upon by investment tribunals; and though the practice may not be abundant, the few precedents still permit to formulate a few general observations. Namely, the general disinclination of investment tribunals to relinquish their competence over a particular dispute in favour of the jurisdiction of domestic courts.

11.1. Regulating Jurisdictional Conflicts by Means of Agreement between Investor and Host-State

It seems appropriate to begin the analysis by considering first the straightforward possibility of an investor agreeing with the host State that a dispute arising out of a treaty-protected investment be decided by a forum other than the investment treaty tribunal. An agreement to such effect could

[1] A great deal of investment treaties adopt terminology consistent with the proposition that recourse to treaty remedies remains at the discretion of the investor. See eg art 1120(1) NAFTA ('a disputing investor may submit the claim to arbitration'); art 9(2) China BIT (the dispute 'shall be submitted by the choice of the investor'); art 10(2) Germany BIT (the dispute 'shall, at the request of the investor of the other Contracting State, be submitted to arbitration'); art 10(3) Italy BIT ('the investor in question may submit at his choice the dispute for settlement'); art 11(2) Switzerland BIT ('the investor may submit the dispute…'); art 8(2) UK BIT (a dispute shall 'be submitted to international arbitration if the national or company concerned so wishes'); art 14(1) Austrian BITs ('the investor may choose to submit it [a dispute] for resolution'); arts 22(1) and 23(1) Canada BITs (an investor of a Party 'may submit to arbitration'). The proposition is further confirmed by art 36(1) ICSID Convention, which stipulates in the relevant part that 'any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General…' Furthermore, the investor retains the freedom to settle the dispute, or discontinue the proceedings. See eg Rule 43(1) ICSID Arbitration Rules (recognizing the freedom of the disputing parties to agree on a settlement of the dispute or otherwise to discontinue the proceeding before an award is rendered).

potentially take on a variety of forms; though, in practice, it has been mostly in relation to two types of contractual clauses that such possibility has been considered: in relation to exclusive forum selection clauses and in relation to contractual waivers. Hence, the following sections explore the question whether investment treaty tribunals could be deprived of jurisdiction over treaty claims as a result of a contractual stipulation vesting exclusive jurisdiction over such claims with domestic courts (11.1.1.), as well as the question whether a treaty tribunal could lack jurisdiction over a particular treaty claim as a result of an investor renouncing its treaty actions by virtue of a contractual waiver (11.1.2.). Furthermore, the question is explored whether an agreement to have treaty claims decided by a forum other than the treaty tribunal could be entered into after the dispute has arisen (11.1.3).

11.1.1. Forum Selection Clauses

In the context of many commercial transactions having an international element, it is not uncommon for the parties to designate a particular forum to adjudicate disputes arising out of such transactions.[2] Such designation can be made on a non-exclusive basis; very often, however, the selection of a forum is a mandatory one, requiring that litigation be pursued solely in the agreed forum, at the exclusion of other fora that would otherwise also possess jurisdiction. In the context of investment arbitration, the question has thus not infrequently arisen as to whether an exclusive jurisdiction clause in favour of domestic courts of the host State included in a contract that the latter had entered into with the investor could have the effect of depriving a treaty tribunal of jurisdiction over treaty claims potentially arising out of such contract. As explained in 9.2., in the practice of arbitral tribunals, jurisdictional objections based on the presence of such forum selection clauses have rarely been successful. Nevertheless, most investment treaty tribunals conceded the possibility – albeit at the level of principle, and only in an implicit way – that a contractual forum selection clause could affect their jurisdiction.[3] Indeed, as a matter of logic, such possibility cannot be discarded. The jurisdiction of a treaty tribunal is consensual in nature, as it is based on the State's unilateral offer to arbitrate investment disputes and the investor's acceptance of such offer, which together give rise to an agreement to arbitrate. In most cases, such agreement is only perfected once the investor institutes proceedings; and even once perfected, it can be still subject to change by mutual agreement.[4] In view of the importance of party autonomy, there is little reason why the jurisdiction of a treaty tribunal cannot be further affected by contractual stipulations embodying agreements of other kind.

Nonetheless, the effects of contractual forum selection clauses give rise to several conceptual quandaries. In the practice of investment tribunals, the discussion most often turned on the question whether the choice for a particular jurisdiction extended also to treaty claims. In this respect, the inquiry was mostly limited to the material scope of the contractual clause in question (1). Much less attention, on the other hand, was devoted to the question of the extent to which a forum other than that provided for in the applicable investment treaty has competence to pronounce upon claims concerning the treaty's violations (2), or the extent to which a treaty

[2] In the context of (international) commercial arbitration, a distinction is usually made between 'forum selection clauses' (ie clauses designating a particular court in a jurisdiction agreed upon by the parties) and 'arbitration agreements' (ie clauses designating arbitration as a dispute resolution mechanism). See on this GB Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Kluwer Law International 2013), 2. In the context of the present analysis, however, the term 'forum selection clause' will be used more loosely, as a shorthand for indicating any agreement that effects the designation of a particular dispute settlement body, regardless of whether that body is judicial or arbitral in nature.

[3] One of the few instances where such concession has expressly been made is the Annulment decision in *Vivendi v Argentina (Decision on Annulment) (Vivendi I)* (ICSID Case No ARB/97/3, 3 July 2002) [76]. There, the observation was made that, in order for a contractual stipulation to 'exclude the jurisdiction' of an international tribunal arising under a BIT, at the very least, 'a clear indication of an intention to exclude that jurisdiction would be required.'

[4] cf ICSID, art 25(1) (prohibiting only unilateral withdrawals of consent to ICSID arbitration).

tribunal's jurisdiction over treaty claims could actually be shared with any other forum (3). Each of these questions warrants careful consideration.

11.1.1.1. The Question of Material Scope

In practice, several factors have been determinative in the ascertainment whether a particular contractual stipulation was intended to affect the jurisdiction of a treaty tribunal. For a forum selection clause to be capable of displacing the jurisdiction of a treaty tribunal in favour of domestic courts, it was first of all deemed necessary that clause in question actually entailed a mandatory selection. Clauses stipulating that "the parties agree to the jurisdiction" of the local courts, or that the investor "recognizes the jurisdiction and competence" of such courts, were normally not held to amount to a mandatory choice.[5] A further obstacle has been the question of contractual privity. For a contractual forum selection clause to be opposable in proceedings before an investment tribunal, it was required that the clause in question had been executed between the host State and the same legal or natural person that later brought the claim under the relevant investment treaty.[6] The third stumbling block has been the required identity of subject-matter: in order for the forum selection clause to be considered effective vis-à-vis a treaty tribunal, the matters submitted to the contractually-agreed forum had to include treaty claims. This has probably been the most difficult obstacle to overcome: not so much because forum selection clauses were in some cases expressly limited to contractual claims;[7] but especially because investment tribunals have generally not been willing to assume that the contractually-agreed forum had in fact been designated to determine treaty claims in the absence of express language to such effect. Such stance is perhaps defensible in circumstances where the forum selection clause is silent on the matters that are to be submitted to the contractually agreed forum.[8] But it is more difficult to justify in circumstances where the clause in question is formulated broadly enough to be capable of being construed, on an ordinary reading, as encompassing treaty claims. Of relevance here are especially the standard formulae that are frequently used in investor-State contracts and which typically cover "all" or "any" disputes "arising out of", "in connection with", or "relating to" the instrument in question. While in many domestic jurisdictions, such contractual formulae would not uncommonly be construed as capable of encompassing claims other than those based on the contract in question (e.g. statutory or tortious claims),[9] in investment arbitration, there has often been a preference for their narrow construction.[10]

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[5] For an example of the former, see *Lanco International Inc v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/97/6, 8 December 1998) [6] and [26]; for the latter, see *Aguas del Tunari SA v Republic of Bolivia (Decision on Respondent's Objections to Jurisdiction)* (ICSID Case No ARB/02/3, 21 October 2005) [112]. For a similar conclusion, see also *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco (Decision on Jurisdiction)* (ICSID Case No ARB/00/4, [27]).

[6] In the absence of contractual privity, investment tribunals have generally also refused to give effect to contractual forum selection clauses. See eg *Aguas del Tunari,* ibid [114].

[7] See eg *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Award)* (ICSID Case No ARB/97/3, 21 November 2000) [27], where the investor submitted to the exclusive jurisdiction of the local courts 'for purposes of interpretation and application of this Contract'.

[8] See eg *Aguas del Tunari* (n 5), [111]-[114], where the applicable concession contract stipulated that '[The Concessionaire] recognizes the jurisdiction and competence […] of the courts of the Republic of Bolivia, in accordance with the SIRESE law and other applicable Bolivian laws' and the treaty Tribunal was only willing to entertain the assumption that such language amounted to an exclusive forum selection clause for disputes arising under the Concession; treaty claims were not deemed capable of falling under that provision.

[9] For examples, see G Born, *International Commercial Arbitration*, vol 1 (Kluwer 2009), 1099-1107.

[10] 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), where the Tribunal concluded ([96]) that the dispute settlement procedures provided for in the Contract 'could only cover claims based on breaches of the Contract' and 'cannot cover claims based on breaches of the BIT', despite the fact that the procedures in question applied to a 'dispute of any kind whatsoever […] in connection with, or arising out of, the Contract or the execution of the Works' ([71]). There have also been exceptions: See also *Aguas del Tunari* (n 5), fn 90 to [114]: 'An exclusive forum selection clause in a contact is generally regarded as severable from the

11.1.1.2. Competence of Domestic Forum over Treaty Claims

In some cases, investment tribunals refused to uphold contractual forum selection clauses in relation to treaty claims due to considerations external to the actual language of the clause in question. One such obstacle was found in the fact that the contractually designated forum was not competent to pronounce upon treaty claims. In *SGS v. Pakistan* (2003), where the forum selection clause in the Claimant's concession contract appeared broad enough to possibly encompass treaty claims (in that it applied to "[a]ny dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination or invalidity thereof"), the ICSID Tribunal decided not to give effect to it, for among other reasons, because the designated forum would not have been competent, as a matter of Pakistani law (as the law applicable to the contract), to consider potential treaty claims. Furthermore, the contract predated the treaty and could therefore not be presumed that the contractual forum was vested with competence over treaty claims.[11] In a similar way, the Tribunal in *BIVAC v. Paraguay* (2009) decide not to give effect to the contractual forum selection clause in relation to Claimant's treaty claims, in circumstances where the designated local courts, as a matter of Paraguayan law, lacked competence to interpret and apply the treaty. This notwithstanding the Tribunal's finding that the text of the clause (which vested the local courts with exclusive jurisdiction over "any conflict, controversy or claim which arises from or is produced in relation to" the Claimant's contract) was "very broad" and "capable of being interpreted to include not only disputes relating directly to alleged breaches of the Contract but also disputes concerning acts that may be connected with the Contract which may give rise to claims under other instruments, including the BIT."[12]

11.1.1.3. Exclusive Nature of Treaty Tribunal's Jurisdiction

An altogether different question is whether the competence of the treaty tribunal in relation to treaty claims can actually be shared by some other adjudicatory body, or remains vested exclusively with the treaty tribunal. Some tribunals sought an answer to this question in the language of the dispute-settlement provisions in the applicable treaty. The Tribunal in *SGS v. Pakistan* (2003), for example, interpreted the fact that the applicable BIT provided only for recourse to arbitration under the ICSID Convention to warrant the presumption that treaty claims lay exclusively within its own jurisdiction.[13] It thus rejected the argument that treaty claims would have fallen also within the jurisdiction of the contractual forum, which was otherwise competent to decide "[a]ny dispute, controversy or claim arising out of, or relating to" the Claimant's concession contract – a formula which was arguably broad enough the encompass treaty claims. Though, the applicable BIT did not expressly stipulate that the jurisdiction of the ICSID Tribunal was an exclusive one, the Tribunal considered that the treaty's silence on this point warranted the inverse inference, noting that the Contracting Parties to the BIT "have not stated that the jurisdiction of the ICSID–constituted tribunal is not exclusive".[14] The problem with this reasoning is that the jurisdiction of the tribunal under the applicable BIT in that case was not limited to claims concerning violations of the treaty itself, but extended to "disputes with respect to investments".[15] If the exclusivity argument really applied, this would have meant that all disputes with respect to a covered investment – that is, even

contract of which it is a part. And although it is usually the case that such a clause only refers to disputes arising under the contract, it can be broader in scope. For example, some clauses refer not only to disputes "arising under" the contract but also disputes "related to" the contract.'

[11] *SGS v Pakistan (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/01/13, 6 August 2003), [153]-[154].

[12] *Bivac v Paraguay BIVAC v Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/07/9, 29 May 2009), [145].

[13] *SGS v Pakistan* (n 11), [152].

[14] ibid.

[15] cf art 9(1) of the applicable Switzerland-Pakistan BIT.

disputes concerning violations of domestic law – should have been submitted to ICSID arbitration; a conclusion that is difficult to accept.

At the more general level, it is possible to question whether inferences based on the availability of alternative mechanism (or lack thereof) are really justified. Investment treaties are quite divergent in the mechanisms that they set out for the resolution of investment disputes. On the one hand, it is not infrequent for investment treaties to provide for a variety of alternatives: not only can disputes concerning investments be submitted to different types of investment arbitration (e.g. ICSID Arbitration, *ad hoc* arbitration under UNCITRAL rules, or arbitration before the SCC…);[16] sometimes provision is expressly made for the possibility of such disputes being submitted to domestic courts as an alternative to international arbitration.[17] On the other hand, there are also examples of investment treaties which offer the investor no such choice, limiting the available dispute settlement mechanism to procedures provided for under the ICSID Convention only.[18] But at the end of the day, recourse to those mechanisms remains at the choice of the investor. The latter may decide (for instance, out of financial considerations) to attempt to have its investment dispute settled in the courts of the host State and in the context of those proceedings invoke violations of an applicable investment treaty. Even though that investment treaty may solely provide for ICSID arbitration, there is nothing that would prevent the investor from invoking the treaty before domestic courts, and provided that (as a matter of domestic law) the latter are indeed competent to hear claims of alleged violations of international law, there is no general rule of international law that would prohibit the adjudication of such treaty claims by such courts.[19] A matter would, perhaps, be different if the treaty stipulated that the competence to pronounce upon violations of the treaty lies exclusively with the treaty tribunal. But investment treaties do not go thus far. Contrary to the presumption advanced by the *SGS v. Pakistan* Tribunal, the better conclusion would be that, in the absence of an express treaty stipulation to such effect, the treaty forum does not enjoy exclusive jurisdiction over treaty claims.

This finally raises the question of the effects of Article 26 ICSID Convention, which itself stipulates that "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy." The problem is that, in the context of treaty-based arbitrations, the presumption in favour of exclusivity of the ICSID Centre only operates once the investor has accepted the State's offer to arbitrate disputes under the investment treaty. Until the investor has perfected the agreement to arbitrate the dispute by accepting the offer, Article 26 does not prevent the host State and the investor from agreeing that treaty claims be submitted to a forum other than an ICSID tribunal. Furthermore, as the words "unless otherwise stated" make clear, even once consent to ICSID arbitration is perfected, the presumption is subject to modification by agreement of the parties.

11.1.2. Contractual Waiver of Treaty Rights

In practice, the existence of a contractual forum selection clause was not so much used as an argument to the effect that treaty claims should more properly have been decided by another

[16] See eg art 26 ECT, or art 1120 NAFTA.

[17] See eg art 11(2) Switzerland BITs ('the investor may submit the dispute either to the courts or the administrative tribunals of the Contracting Party in whose territory the investment has been made or to international arbitration'); or art 9(1) Netherlands–Paraguay BIT ('any legal dispute arising between a Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party may, at the request of one of the parties concerned, be submitted to the competent tribunal of that Contracting Party').

[18] See eg art 9(2) Switzerland-Pakistan BIT; or Netherlands–Nigeria BIT.

[19] In some contexts, the competence of domestic courts can be limited by way of treaty stipulations. cf Art 267 TFEU recognizing the exclusive competence of the Court of Justice of European Communities to conclusively determine questions relating to the interpretation of the European Treaties, as well as questions concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union.

forum as it was rather advanced as an argument to the effect that treaty remedies had simply been renounced. Consequently, investment tribunals have often been required to consider whether contractual forum selection clauses could be construed as amounting to a waiver of remedies provided for under an applicable investment treaty.

The question of waiver – in the sense of a voluntary renunciation of a right or claim[20] – again gives rise to several conceptual quandaries. In the first place, the question arises as to the actual possibility of a waiver – both, as a question of *disposability*; i.e. the capacity of the investor to renounce available treaty remedies (1), and as a question of *permissibility* of such renouncement (2).[21] If such possibility is accepted, in the second place, the question arises as to the *conditions* under which a waiver can validly be expressed in order to be effective before a treaty tribunal (3).

11.1.2.1. Disposability

Several investment tribunals have focused their analysis on this latter, practical question, while either accepting (even if only implicitly) that individual investors were capable of renouncing remedies available to them under an investment treaty, or at least were working under the assumption that such renouncement was possible.[22] A handful of tribunals nonetheless queried specifically about the actual possibility for an investor to effectively renounce the availability of investment arbitration to resolving disputes with host States. Among those accepting such option was the Tribunal in *Aguas del Tunari v. Bolivia* (2005), which took the view that, if an investor were to expressly waive the right to invoke, or to modify the extent of, ICSID jurisdiction, there was no reason why such agreed waiver could not be given effect:

> "Assuming that Parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective. Given that it appears clear that the Parties to an ICSID arbitration could jointly agree to a different mechanism for the resolution of their disputes other than that of ICSID, it would appear that an investor could also waive its rights to invoke the jurisdiction of ICSID."[23]

A few other tribunals, in contrast, expressed doubts as to whether investors were actually capable of waiving, by means of a contract, rights accruing to them under a treaty between two States. To the Tribunal in *SGS v. Philippines*, for instance, it was "…to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest."[24] In a similar tone, the Tribunal in *SGS v. Paraguay* considered it to be "…a serious question whether individuals are capable of waiving rights conferred upon them by a treaty between two States."[25]

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[20] See eg I Feichtner, 'Waiver' *Max Planck Encyclopedia of Public International Law* (online, October 2016). (waiver 'denotes the renunciation or abandonment of a right or claim').

[21] Cf *Waste Management, Inc. v. United Mexican States (I) (Award)* (ICSID Case No. ARB(AF)/98/2, 2 June 2000), [18] ("The requirement of a waiver in any context implies a voluntary abdication of rights, inasmuch as this act generally leads to a substantial modification of the pre-existing legal situation, namely, the forfeiting or extinguishment of the right. Waiver thus entails exercise of the power of disposal by the holder thereof in order to bring about this legal effect.")

[22] See eg *Crystallex International Corporation v Bolivarian Republic of Venezuela (Award)* (ICSID Case No ARB(AF)/11/2, 4 April 2016) [481] ('…even if it were minded to find that an investor may waive by contract rights contained in a treaty…').

[23] *Aguas del Tunari v Bolivia* (n 5), [118].

[24] *SGS v Philippines (Jurisdiction)* (ICSID Case No ARB/02/6, 29 January 2004) [154].

[25] *SGS v Paraguay (Decision on Jurisdiction)* (ICSID Case No ARB/07/29, 12 February 2010), fn 108 to [178].

In light of the way that those concerns have been expressed by the SGS tribunals, the problem can initially be considered as an issue of disposability:[26] are investors, as private parties, capable of disposing rights provided for under investment treaties; that is, rights provided for under instruments to which they are not actually privy?[27] The question is a doctrinal one and turns broadly on the issue whether one State's obligations under investment treaties are owed to the other State contracting party, or directly to the latter's nationals.[28] If the former is the case, and the investors are thus mere beneficiaries of those obligations, a waiver of rights under investment treaties would essentially be without effect, for the same reason that Calvo clauses were not deemed capable of effectuating a waiver of the right to diplomatic protection – because the right in question does not belong to the national, but to the State.[29] If the obligations are owed directly to the investors, on the other hand, the latter – as actual right holders – would be capable of their disposition. As to the nature of the rights conferred by investment treaties, a nuanced discussion has eventually emerged in academic literature.[30] A distinction is thus made between the substantive protections guaranteed by the treaty – i.e. the standard of treatment that the host State is to accord to the investor and to which the investor is therefore entitled – and the procedural capacity of the investor to enforce those treaty guarantees pursuant to the treaty's dispute settlement mechanism – i.e. the possibility of invoking the State's responsibility under international law as a result of the violations of the specific treaty standards. At least when it comes to the latter, commentators seem to agree that the right to arbitrate an investment dispute is one belonging to the investor, and not to its State of nationality.[31] The practice of investment tribunals, in turn, seems to confirm such distinction. Whereas divergent positions have been taken in arbitral decisions as to whom the obligations concerning the standards of treatment under investment treaties are owed to,[32] there seems to be lesser of a disagreement that the right to enforce the provisions of the investment treaty is one accruing to the investor.[33] If the latter

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[26] It is worth emphasizing that in cases such as *SGS v Paraguay*, ibid, or *Crystallex v Venezuela* (n 22) [481], the issue was not raised beyond the general question as to whether or not treaty rights could be waived.

[27] Under general international law, it has gradually become accepted that inter-State treaties may create individual rights. See eg *Jurisdiction of the Courts of Danzig (Advisory Opinion)* PCIJ (ser B) No 15 (1928),17-19; or *LaGrand Case (Germany v US) (Merits Judgment)* [2001] ICJ Rep 466 (27 June 2001) [77]-[78]. See generally K Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011).

[28] The doctrinal discussion has been articulated in terms of a distinction between the 'derivative right' theory, pursuant to which the foreign investor would be exercising a right derived from its home State's right to bring a claim against another State on behalf of its national, and the 'direct rights' theory, pursuant to which the investor is endowed directly with a right to make a claim in arbitration in its own capacity. The two theories have been coined by Z Douglas in his the seminal article 'Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYBIL 152, particularly 162-64. For a useful overview of the discussions concerning both theories, see E De Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP 2014) 60-70.

[29] See eg *Woodruff* case (IX UNRIAA, 1903) 222.

[30] See eg J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, at 887 who considers it to be 'a matter of interpretation whether the primary obligations (eg, of fair and equitable treatment) created by such [an investment] treaty are owed to qualified investors directly, or only to the other contracting state(s).'

[31] See De Brabandere (n 28), 63; JJ Van Haersolte-Van Hof and AK Hoffmann, 'The Relationship between International Tribunals and Domestic Courts' in P Muchlinski, F Ortino, & C Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP, 2008), 962-1007, at 1002-03; Z Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex' (2006) 22 Arbitration International 37-38; C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2009), 63-65; or H Wehland, *The coordination of multiple proceedings in investment treaty arbitration* (OUP, 2013), 74-83.

[32] See eg *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v The United Mexican States (Award)* (ICSID Case No ARB (AF)/04/05, 21 November 2007) [161]-[180]; and *Corn Products International, Inc v United Mexican States (Award)* (ICSID Case No ARB (AF)/04/01, 15 January 2008) [161]–[179].

[33] See eg *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/3, 14 January 2004) [49] (referring to the '*direct right of action* of foreign shareholders under the Bilateral Investment Treaty for protecting their interests in the qualifying investment'); or *Gas Natural SDG, SA v The Argentine Republic (Decision of the*

position is accepted, then the investor should also be capable of renouncing such right, regardless of the question as to whom the obligations concerning the investor's standard of treatment are owed to.

In relation to waivers, however, the question of disposability has been additionally complicated by investment tribunals' different understandings as to what could possibly be considered to be the object of the waiver. A waiver can namely concern two things: on the one hand, the investor can be considered to be waiving the *claim* that the host State had violated one or more of its obligations concerning the treatment that it was supposed to accord to the investor; on the other hand, the investor can be seen as renouncing the *right* as such to enforce the violation of the treaty guarantees. The former possibility was seemingly contemplated by the Tribunal in *SGS v. Philippines* (2004), when it expressed doubts as to whether "a private party can by contract waive rights or *dispense with the performance of obligations imposed on the States parties to those treaties under international law*".[34] It was then endorsed by the Tribunal in *Eureko v. Poland* (2005), which accepted that "any breaches, contractual or under the Treaty, have been fully and unconditionally waived by both parties" upon execution of an addendum to the original share purchase contract.[35] The Tribunal took the view that the contractual waiver was effective and in accordance with international law inasmuch as the latter "recognizes that an investor may, after a claim against a State has arisen, enter into a settlement agreement with that State and commit to a final waiver of those claims" and, as a result of which, "[t]he State can subsequently rely on that waiver and assert it as a defence against the investor, should such investor attempt to raise those claims again."[36] In *MNSS v. Montenegro* (2016), the contractual waiver was likewise accepted as possible, on the ground that the treaty conferred substantive rights upon the investor, which was thus also claiming on its own behalf.[37] Just as in *Eureko,* the waiver in that case was not considered in relation to the investor's right of recourse to arbitration, but in relation to a claim concerning the violation of a treaty standard; namely, the investor's claims under the umbrella clause of the applicable BIT.[38] Unlike in *Eureko*, however, the contractual waiver did not concern an already existing treaty violation, but was considered to affect all treaty claims grounded on the treaty's umbrella clause that were grounded on breaches of the contract in question. The holdings in *Eureko* and *MNSS* must then be contrasted with the decisions in *Aguas del Tunari v. Bolivia* (2005), *TSA v. Argentina* (2008), and *Occidental v. Ecuador* (2008), where the possibility of a waiver was considered in relation to the right to recourse to investor arbitration as such.[39] At the end of

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Tribunal on Preliminary Questions on Jurisdiction) (ICSID Case No ARB/03/10, 17 June 2005) [34] ('the foreign investor acquires rights under the Convention and Treaty, including in particular the standing to initiate international arbitration'). See also UK Court of Appeal (Civil Division), *Occidental Exploration & Production Company v The Republic of Ecuador (Judgment)* [2005] EWCA Civ 1116 (9 September 2005) [17]-[22]; or *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment, Second Phase)* [1970] ICJ Rep 3 (5 February 1970) [90] ('The instruments in question [i.e. investment protection treaties] contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies *are themselves vested with a direct right* to defend their interests against States through prescribed procedures'). All emphases added.

[34] *SGS v Philippines* (n 24), [154], emphasis added.

[35] *Eureko BV v Republic of Poland (Partial Award)* (19 August 2005) [173] cf also *Toto Costruzioni Generali SpA v The Republic of Lebanon (Award)* (ICSID Case No ARB/07/12, 7 June 2012) [85], where the Tribunal held that, although the Claimant's waiver of its right to invoke the contractual party's liability under the contract to claim contractual damages did not affect its right to invoke Lebanon's breach of the investment treaty, the assessment of damages and of the compensation to be granted for a treaty breach may be affected by a waiver not to claim compensation under the said contract, when both damage claims cover the same harm.

[36] ibid [175]. The Tribunal found support for this proposition in the Second and Third Restatements of Foreign Relations of the United States.

[37] *MNSS BV and Recupero Credito Acciaio NV v Montenegro (Award)* (ICSID Case No ARB(AF)/12/8, 4 May 2016) [163].

[38] ibid [160].

[39] See *Aguas del Tunari v Bolivia* (n 5), [118] (where the waiver was considered to concern solely the Claimant's 'rights to invoke the jurisdiction of ICSID'); *TSA Spectrum de Argentina SA v Argentine Republic (Award)* (ICSID Case No ARB/05/5,

the day, the possibility of waiving a claim relating to a violation of a treaty-imposed standard of treatment is not irreconcilable with the possibility that the standards of treatment might primarily be owed to the other State contracting party to the investment treaty, and not to the investor itself. The law of State Responsibility recognizes that persons or entities other than States may directly be injured by an internationally wrongful act of a State and clearly envisages that those persons or entities may directly be entitled to claim reparation for such act.[40] As explained by Crawford, a breach of international law gives rise to secondary obligations that may be owed directly to the beneficiary of the obligation. In the context of investment treaties, this beneficiary is the investor who, according to Crawford then, "…effectively opts in to the situation as a secondary right holder by commencing arbitral proceedings under the treaty", and thus "[a] new legal relation, directly between the investor and the responsible state, is thereby formed, if it did not already exist."[41] Thus, if secondary rights created as a result of the breach, among which also the obligation of reparation, could be owed directly to the beneficiary of the primary obligation in question, it is conceptually not impossible for the beneficiary to waive such right, even where the primary obligation in itself may be owed to another State.[42] On either understanding of the object of a waiver, there is therefore no reason why an investor could not effectively renounce the rights in question.

11.1.2.2. Permissibility of Waivers

Granted, an altogether different question is whether a disposition of rights accruing to an investor under a treaty can be considered permissible. An answer to this question may, of course, be sought in the text of the applicable investment treaty, and in general international law. Investment treaties typically stipulate that investor-State arbitration remains at the option of the investor,[43] without otherwise stipulating that such option may not be derogated from. The ICSID Convention, likewise, does not prohibit claimants from foregoing arbitration before the ICSID Centre, but merely requires that, once consent to such arbitration had been given, "no party may withdraw its consent unilaterally."[44] Nor do the general rules of the law of responsibility suggest that the right to invoke the responsibility could not be waived.[45] In the absence of a clear

19 December 2008) [62] (where the query turned on whether the investor intended to relinquish 'any right to a remedy under the BIT'); or *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador (Decision on Jurisdiction)* (ICSID Case No ARB/06/11, 9 September 2008) [73] (where the matter was discussed as 'an exception or waiver to ICSID jurisdiction').

[40] cf ILC Draft Articles on State Responsibility, art 33(2), which stipulates that the articles are 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.' See generally J Crawford, *State Responsibility: The General Part* (CUP 2013), 548-49.

[41] Crawford, 'The ILC's Articles' (n 30), at 887-888. Conceptually, the situation can be compared to the situation of a third-party beneficiary in the law of contracts, where a person may have the right to sue on a contract, despite not having originally been an active party to the contract.

[42] Such secondary right of reparation resulting out of a breach of a State's international obligation materializes only after the breach; it is questionable whether an investor could renounce such a right prospectively, in the absence of an actual breach. See Z Douglas, *The International Law of Investment Claims* (CUP 2009), 36 (apparently ruling out the possibility of waiver in such circumstances).

[43] See eg art 1120(1) NAFTA ('a disputing investor may submit the claim to arbitration'); art 9(2) China BIT (the dispute 'shall be submitted by the choice of the investor'); art 10(2) Germany BIT (the dispute 'shall, at the request of the investor of the other Contracting State, be submitted to arbitration'); art 10(3) Italy BIT ('the investor in question may submit at his choice the dispute for settlement'); art 11(2) Switzerland BIT ('the investor may submit the dispute…'); art 8(2) UK BIT (a dispute shall 'be submitted to international arbitration if the national or company concerned so wishes'); art 14(1) Austrian BITs ('the investor may choose to submit it [a dispute] for resolution'); arts 22(1) and 23(1) Canada BITs (An investor of a Party 'may submit to arbitration').

[44] ICSID Convention, art 25(1).

[45] cf ARSIWA, art 45, providing that '[t]he responsibility of a State may not be invoked if: […] the injured State has validly waived the claim'.

prohibition of waivers, the answer may further be sought in considerations of public policy – as, after all, was seemingly also suggested by the Tribunal in *SGS v. Philippines* when noting that treaties will normally confer rights on individuals "in order to achieve some public interest."[46]

The analogy can surely be made with the arrangements in many domestic legal systems where waivers of certain rights will be considered unenforceable, or with human rights law, where waivers are considered inapplicable to the inalienability of human rights as such. Though the human rights analogy has generally been rejected in relation to waivers of investment protection standards,[47] some have nonetheless advanced the idea that public policy considerations should affect the possibility of disposing rights provided for under investment treaties. Adhering to such proposition is Schreuer, who maintains that "the idea of a public order function of treaties that provide for an agreed minimum standard and which should not be susceptible to abrogation is also applicable to the investment field."[48] This, in his view, is not because of the special nature of investment treaty standards, but because of the function that investor-State arbitration purportedly has in ensuring that international conflicts do not escalate between the investor's home State and the State of its investment. Were the investor to waive access to a remedy granted by treaty in relation to future uncertain events, the investor's home States would most probably resume diplomatic protection in situations the investor's rights have been violated – a situation which Schreuer appears not to consider to be desirable.[49] Similar concerns have been expressed by Salacuse, who argues that investor-State arbitration "is not only a means to protect individual investor rights but also to assure respect of the reciprocal treaty obligations and rights by the states concerned" and ultimately serves as a mechanism to assure the preservation of the treaty structure; should investors be allowed to permanently waive their rights, this would risk undermining the international legal structure between the contracting states.[50] Salacuse's views were found "appealing" to some other commentators.[51]

Others, in contrast, oppose the idea that a public order function could relate, in one way or another, to the interests of the investor's home State. Spiermann for example argues that, precisely because the home State's right to diplomatic protection revives in the event that the investor has waived its consent to ICSID arbitration (and is thus able to intervene in favour of the well-being of the investor), the interests of the home State are not relevant to the permissibility of waivers.[52] This is not to say that Spiermann discounts altogether the relevance of extra-legal considerations from the assessment of a waiver's permissibility. Building on the jurisprudence of the European Court of Human Rights where waivers of human rights have under circumstances been accepted, Spiermann advances two factors that should eventually be taken into account in determining the acceptability of a waiver: the absence of constraints in how the waiver has been effected; and the availability of minimum guarantees that are commensurate to the waiver's importance.[53] On the basis of these factors, Spiermann considers that serious

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[46] *SGS v Philippines* (n 24), [154].

[47] Douglas (n 31), 27-52, at 37; C Schreuer, 'Investment Protection and International Relations' in A Reinisch and U Kriebaum (eds), *The Law of International Relations–Liber Amicorum Hanspeter Neuhold* (Eleven Publishing 2007) 345-58, at 357. It needs to be noted, however, that even when it comes to human rights, waivers can under circumstances be permitted. This has been the case with the right to a fair trial guaranteed under art 6 ECHR, with respect to which the European Court of Human Rights accepted the possibility of a waiver. See eg *Deewer v Belgium (Judgment)* [1980] ECHR 1 (27 February 1980) [49].

[48] Schreuer, ibid 357.

[49] ibid.

[50] J Salacuse, *The Law of Investment Treaties* (OUP 2010), [391].

[51] See De Brabandere (n 28), 69.

[52] O Spiermann 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under bilateral Investment Treaties' (2004) 20 Arbitration International 179, 201-02.

[53] ibid 208.

inequality in bargaining power between the investor and the home State could be ground for rendering a waiver ineffective; in general, however, he remains of the view that proceedings in national courts accompanied by the home state's right of diplomatic protection should be deemed to provide sufficient guarantees making a waiver acceptable. In Spiermann's view, "unless the bilateral investment treaty contains an explicit provision to the contrary, there is a presumption that the investor has the power to waive international arbitration."[54] Similar arguments have been advanced in defence of the possibility of waivers by some other commentators.[55]

The question of permissibility of a waiver has not attracted much attention in the practice of investment tribunals – with the notable exception of the recent award in *MNSS v. Montenegro* (2016). Apart from examining whether the contractual waiver was "freely entered into by investors",[56] the Tribunal in that case examined whether the waiver was also not contrary to public policy. Specifically, the Tribunal took the view that the public interest "may not be ignored", insofar as Investor-State arbitration "has an important function in the public interest for the relations between the States concerned".[57] Accordingly, the question was "not whether the rights may or may not be waived, but to what extent, if they have been waived, the waiver is in detriment of the public purpose pursued by the State parties to the BIT."[58] In the circumstances of that case, no detriment of such kind has been found to have arisen: though the pertinent contract included a waiver of contractual claims that was found to be effective in relation to claims arising under a treaty's umbrella clause, it also provided for the possibility of ad hoc UNCITRAL arbitration in relation to contractual claims as such. In the view of the Tribunal, the investor's ability to settle contractual disputes with the State by arbitration was thus "evidently congruent with the public purpose pursued by the State parties to the BIT".[59] The public purpose in this case was apparently the need to provide the investor with the possibility to pursue, if need be, its contract claims outside the judicial system of the host State.

The question eventually boils down to what one considers to be the public interest that is to be safeguarded through the prohibition of a waiver: is it to avoid the interference of the investor's home State in an investment dispute (Schreuer's view), is it the preservation of the treaty structure (Salacuse's view), or is it perhaps specifically to avoid litigation in domestic courts (the *MNSS* tribunal's position)? Or is it, instead, merely the need to ensure to investors the availability of an adequate mechanism for the settlement of their disputes with the host State? Related to these is the secondary question whether a prohibition of waivers is actually an appropriate means for safeguarding such public interest. If at issue is solely the preservation of the treaty structure, there is no reason why the investor's home State could not assure respect of reciprocal treaty obligations by resort to arbitration that is available under most investment treaties. Besides, as pointed out by Spiermann, the home State remains free to resort to the mechanism of diplomatic protection in order to safeguard any public interest which it considers at stake. At the end of the day, not all contractual waivers are the same. Instead of scrutinizing the arrangements entered into between investors and home States by reference to presumed public policy concerns that are not traceable to actual treaty provisions, what is perhaps more important for determining the validity of a contractual renouncement of treaty remedies is the

[54] ibid.

[55] See eg Van Haersolte-Van Hof and Hoffmann who accept the possibility of a waiver by similarly relying on the jurisprudence of human rights courts, and who similarly discount the relevance of home State's interests to the ascertainment of a waiver's permissibility. Van Haersolte-Van Hof and Hoffman (n 31), 1004-05. See further Wehland (n 31), 82-3.

[56] *MNSS v Montenegro* (n 37), [163].

[57] ibid.

[58] ibid.

[59] ibid [164].

actuals scope of the waiver and the process through which the waiver had been effected. A more limited contractual waiver, entered into with respect to a specific, existing treaty violation, and without any elements of coercion, will probably be easier to accept than a blanket waiver, entered into with respect to all prospective disputes – let alone waivers that have not even been freely entered into.[60]

11.1.2.3. Conditions for Waivers to be Effective

Building on the assumption that, subject to certain conditions, waivers of treaty remedies could be possible, the inquiry can now turn to the circumstances under which a contractual stipulation can be considered to amount to a renouncement of treaty remedies on the part of the investor. The standard applicable to assessing the effects of contractual stipulations has been set out by the Tribunal in *Aguas del Tunari v. Bolivia* (2005). In the view of the latter, the question whether a contractual clause could affect the jurisdiction of an ICSID tribunal was a "question of the intent" of the parties in concluding the contract, which was a matter that turned on the facts of each specific case. Nevertheless, in ascertaining such intent, a distinction was to be made, on the one hand, between the situation where the contract expressly waived the right to invoke, or modified the extent of, ICSID jurisdiction; and on the other hand, the situation where the contract only contained an exclusive forum selection clause designating a forum other than ICSID.[61] In the case of the latter, the Tribunal cautioned against implying a waiver of treaty remedies from the mere existence of such clause. In the view of the arbitrators,

> "an ICSID tribunal has a duty to exercise its jurisdiction in such instances absent any indication that the Parties specifically intended that the conflicting clause act as a waiver or modification of an otherwise existing grant of jurisdiction to ICSID. A separate conflicting document should be held to affect the jurisdiction of an ICSID tribunal only if it clearly is intended to modify the jurisdiction otherwise granted to ICSID. […] [A]n explicit waiver by an investor of its rights to invoke the jurisdiction of ICSID pursuant to a BIT could affect the jurisdiction of an ICSID tribunal. However, the Tribunal will not imply a waiver or modification of ICSID jurisdiction without specific indications of the common intention of the Parties."[62]

In line with the approach developed in *Aguas del Tunari*, other investment tribunals likewise considered that clear and unequivocal language was required in order for a contractual forum selection clause to be construed as a waiver of treaty remedies.[63] Though some decisions suggested that a waiver could only be effective if made expressly,[64] others have appeared to accept that a waiver could also be implicit – provided specific indications of the common intention of the Parties, as potentially inferable from the circumstances of the contract's

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[60] See Van Haersolte-Van Hof and Hoffmann (n 31), fn 207 at 1004, who similarly draw a distinction between a waiver of the investor's rights after a dispute has arisen, in full knowledge of the situation, and a blanket waiver for any dispute that might possibly arise in the future, which they found more difficult to accept.

[61] *Aguas del Tunari v Bolivia* (n 5), [115].

[62] ibid [119].

[63] See eg *Occidental v Ecuador* (n 39), [71] ('[b]ased on elementary principles of contract interpretation, any exception to the availability of ICSID arbitration for the resolution of disputes arising under the Participation Contract […] requires clear language to this effect'); *TSA Spectrum* (n 39), [62] (for the clause to amount to a waiver of treaty remedies, it was 'incumbent on Argentina to indicate this in a clear manner in the Contract or in connection with the conclusion of the Contract'); or *Crystallex v Venezuela* (n 22), [481] ('even if it were minded to find that an investor may waive by contract rights contained in a treaty, any such waiver would have to be formulated in clear and specific terms').

[64] See eg *SGS v Philippines* (n 24), [154] ('unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract'); *SGS v Paraguay* (n 25), [179] ('[a]t least in the absence of an express waiver, a contractual forum selection clause should not be permitted to override the jurisdiction to hear Treaty claims of a tribunal constituted under that Treaty'); or *MNSS v Montenegro* (n 37), [163] ('investors may waive the rights conferred to them by treaty provided waivers are explicit').

conclusion.[65] The latter proposition seems probably the correct one: since international law does not prescribe any particular form for a legal act (except for requiring that such act clearly evinces a party's intention),[66] there is no reason why a waiver could not be made by implication.[67]

Investment tribunals have generally advanced two policy rationales for adopting a strict approach to appreciating the effects of contractual forum selection clauses. For some, a cautious approach was warranted in light of the special protection provided for by investment treaties. According to the Tribunal in *TSA v. Argentina* (2008), an interpretation permitting contractual clauses to be construed as implicit waivers

> "if generally applied, would make it possible for governments to avoid their treaty obligations as regards important matters such as expropriation by the simple expedient of inserting clauses in their contracts that vitiated the right to international arbitration, thereby effectively rendering the arbitration provisions of a bilateral investment treaty a nullity. This would seem inconsistent with a state's basic obligation under international law to implement its treaty obligations in good faith."[68]

A similar view was taken by the Tribunal in *SGS v. Paraguay* (2010), which argued that, "[g]iven the significance of investors' rights under the Treaty, and of the international law 'safety net' of protections that they are meant to provide separate from and supplementary to domestic law regimes, they should not lightly be assumed to have been waived".[69] Others sought support for a stringent approach to interpretation in the essential nature of the waiver as a legal concept. According to the Tribunal in *Crystallex v. Venezuela* (2016), "a waiver, if and when admissible at all, is never to be lightly admitted as it requires knowledge and intent of forgoing a right, a conduct rather unusual in economic transactions."[70] The argument reflects the approach taken with respect to the construction of waivers in many domestic jurisdictions, where a strong and clear showing of intent to waive is typically required on the ground that a waiver entails a relinquishment of a right that is an *intentional* one.[71]

Considering the stringency by which the effects of contractual forum selection clauses were to be assessed, it is perhaps not surprising that arguments based on contractual waivers have in practice not been particularly successful. The requirement that a waiver be expressed in clear language has typically been taken to require that the contractual stipulation in question makes specific reference to ICSID or other type of investment treaty arbitration. According to the

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[65] See eg *TSA Spectrum* (n 39), [62], where the Tribunal was not willing to assume 'without convincing evidence' that the investor intended to relinquish the right to treaty arbitration by merely concluding the contract; for the clause to have such 'far-reaching effect', it was 'incumbent on Argentina to indicate this in a clear manner in the Contract or in connection with the conclusion of the Contract.'

[66] cf *Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Preliminary Objections)* [1961] ICJ Rep 17, 31.

[67] See art 45 ARSIWA ('The responsibility of a State may not be invoked if: […] (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.'). The possibility of implied waiver has been accepted by the ICJ itself in *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168 [293] ('waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right').

[68] *TSA Spectrum* (n 39), [63].

[69] *SGS v Paraguay* (n 25), [178].

[70] *Crystallex v Venezuela* (n 22), [481].

[71] Thus, the US Courts, for example, decide the issue of waiver under the 'clear and convincing' standard of proof (see eg *Moss v Minor Properties, Inc* (1968) 262 Cal.App.2d 847, 857 [69 Cal.Rptr. 341]; *City of Ukiah v Fones* (1966) 64 Cal.2d 104, 107–108 [48 Cal.Rptr. 865, 410 P.2d 369]; *Florence Western Medical Clinic v Bonta* (2000) 77 Cal.App.4th 493, 504 [91 Cal.Rptr.2d 609]; or *Brooklyn Fed Saving Bank v 9096 Meserole St. Realty LLC*, NYLJ, Nov 22, 2010, No. 3012/10, 2010 NY Misc LEXIS 5450 (Kings Co Nov 5, 2010) (Miller, J)).

Tribunal in *Aguas del Tunari*, "silence as to the question is not sufficient";[72] nor can – as one can possibly infer from decisions of other tribunals – generic references to arbitration be considered satisfactory.[73] For a waiver to be effective, it is furthermore necessary for there to be subject matter-identity. In *Azurix v. Argentina* (2003), the contractual clause stipulating that the investor "waives" any other potentially applicable "forum or jurisdiction" was not considered capable of affecting claims under the treaty because the jurisdiction of the contractual forum was limited to "any dispute regarding the construction and execution" of the contract, and therefore did not encompass treaty claims.[74] Indeed, as in relation to the dispute settlement mechanism, specificity was also required with regard to the subject-matter of the disputes that were subject of the waiver: in the absence of express language, investment tribunals did not seem prepared to assume that the contractual choice of forum extended to treaty claims, even in circumstances where the jurisdiction of the relevant forum was broadly formulated. Thus, in *TSA Spectrum v. Argentina* (2008), the Tribunal considered the wording of the contractual forum selection clause not to be such as to exclude recourse to a treaty remedy in relation to disputes arising out of about acts that might constitute breaches of both the Concession Contract and the BIT, in spite of the clause applying not only to "all the issues arising from the application or interpretation of the rules governing the bidding process" but also to "any other issue directly or indirectly related to the object and effects of the bidding process".[75] Similarly, the Tribunal in *Crystallex v. Venezula* considered that, in the absence of any mention being made of the Claimant's rights under the BIT, and any reference to the BIT in general terms, the contractual exclusive jurisdiction clause was not to be construed as a waiver of Claimant's right to a treaty remedy, notwithstanding the fact that the clause in question appeared not to be limitative, as it applied to all disputes "arising from the execution" of the concession contract.[76] Conversely, in *MNSS v. Montenegro* (2016), though the relevant contract contained a stipulation that the investor "waives on behalf of itself any right which it might otherwise have under international law to assert claims against […] [the State] other than pursuant to the express terms of this Agreement", the Tribunal concluded that the scope of the waiver encompassed only contract claims, and was not capable of capturing claims for breach of the BIT, insofar as the waiver had to be read in conjunction with the contractual dispute settlement clause, which only applied in turn to "[a]ny dispute or difference arising out of this Agreement, or the breach, termination or invalidity thereof".[77] Thought the Tribunal conceded that "arising out" meant "originating" or "resulting from", it did not consider that the clause could apply to disputes beyond the confines of the contract.[78] Last but not least, for a waiver to be opposable, it is furthermore necessary that the renouncement of the treaty remedy has actually been made by the Claimant itself, or at least on its behalf. In the above-mentioned *Azurix* case, for example, the waiver was not considered effective, insofar as the Respondent was not a party to any of the relevant contractual arrangements, and the purported waiver was thus not considered to have been made in favour of the Respondent.[79]

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[72] *Aguas del Tunari* (n 5), [122]. See also *Crystallex v Venezuela* (n 22), [482] (noting that the clause in question 'makes […] no reference […] to the Claimant's right to seek recourse in arbitration for the alleged violation of those rights').

[73] See eg *Occidental v Ecuador* (n 39), [63], [73] (where the contractual stipulation that the contractor 'expressly waives its right […] to have recourse to any national or foreign jurisdictional body not provided for in this Participation Contract, or to arbitration not recognized by Ecuadorian law or provided for in this Participation Contract' was not considered sufficiently precise to be possibly construed as an exception or waiver to ICSID jurisdiction).

[74] *Azurix Corp v The Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/01/12, 8 December 2003) [79]-[81].

[75] *TSA Spectrum v Argentina* (n 39), [62], [59].

[76] *Crystallex v Venezula* (n 22), [482].

[77] *MNSS v Montenegro* (n 37), [149]-[159].

[78] ibid [156], [158].

[79] *Azurix v Argentina* (n 74) [85].

11.1.3. Agreements Post-Dating the Emergence of an Investment Dispute

If the proposition is accepted that an investor can agree beforehand, by means of contractual stipulations, to the exclusive determination of any potential disputes concerning the applicable investment treaty by a forum other than the treaty tribunal, the question arises whether the investor can also effect such a choice after the emergence of such dispute.

As a matter of principle, there is nothing to suggest that such choice would not be possible. Insofar as ICSID arbitrations are concerned, the irrevocability of consent as provided for under Article 25(1) of the ICSID Convention applies solely to unilateral attempts at withdrawal, permitting the parties to amend or terminate consent to ICSID arbitration by mutual agreement, even after the institution of proceedings.[80] Furthermore, some investment treaties expressly envision the possibility that an investment dispute, once arisen, be resolved by other means than those provided for under the treaty. Though not particularly common, an example of such stipulations can be found in Article 8(2) of the Austria-Czech & Slovak Republic BIT, which was subject of consideration in *European American Investment Bank v. Slovakia* (2014). In the circumstances of that case, the Tribunal had no misgivings about giving effect to the ordinary meaning of the clause – which provided that investment disputes be submitted to arbitration, unless "otherwise agreed" – and thus accepted the possibility that it could relinquish jurisdiction over the treaty dispute submitted to it in the event that the parties had indeed agreed to have their dispute determined by the Slovak courts.[81] Apart from requiring that there be a meeting of minds between the litigating parties, the Tribunal was otherwise not willing to construe the clause as imposing any particular requirements as to the form in which such agreement is made.[82] In the circumstances of that case, the Tribunal thus readily inquired whether an agreement of that kind could be deemed to have come into existence, by virtue of the submissions made by the same parties in proceedings relating to the same dispute that were pending before domestic courts. Such proposition could not be sustained on the facts of the case: though finding that in the course of its domestic litigation, Claimant claimed for the breaches of the same provisions of the BIT as in the treaty arbitration, the Tribunal did not consider that an agreement to have the treaty claims decided by domestic courts had actually come into existence, given that Claimant's petition expressly that the primary forum was arbitration and requested suspension of domestic judicial proceedings pending the decision of the treaty tribunal, and on the other hand, the Respondent did not clearly accept the jurisdiction of the Slovak courts in relation to the treaty dispute.[83] As a matter of principle, however, the possibility was clearly accepted that, even after the emergence of a dispute, an investor could validly agree to the determination of treaty claims by a forum other than the treaty tribunal.

11.2. Resolution of Jurisdictional Conflicts as a Result of the Litigants' Conduct

The discussion has thus far focused on the means of regulating jurisdictional interactions between domestic courts and investment tribunals on the basis of an agreement between the litigating parties. Yet, an investor may be relinquishing its right to have a particular dispute arbitrated before an investment tribunal, not only as a result of contractual stipulations it may have expressly or implicitly entered into, but also as a result of other conduct. Depending on the circumstances, an

[80] The discretion of the parties in this respect is confirmed by Rule 43 of the ICSID Arbitration Rules which provides for the possibility that arbitration proceedings are discontinued as a result of an agreed settlement between the parties.

[81] *European American Investment Bank v Slovakia (Second Award on Jurisdiction)* (UNCITRAL, 4 June 2014) [167].

[82] ibid [167]-[169].

[83] ibid [172]-[188].

investor's acts or omissions can give rise to specific legal consequences as a result of which an investment tribunal may possibly have to relinquish its competence over a particular dispute in favour of the jurisdiction of domestic courts. The remainder of this chapter looks at two particular grounds pursuant to which this can happen: the possibility that the investor's conduct amounts to a waiver of the investor's right to treaty remedies (11.2.1.), and the possibility that an investor may be precluded from pursuing a treaty claim as a result of estoppel (11.2.2.).

11.2.1. Waiver by Conduct

Expanding on the assumption that, under given circumstances, an investor can validly renounce its right to arbitrate a dispute before a treaty tribunal, the question arises whether such renouncement can only be effected by means of contractual stipulations, or whether an investor can also relinquish its right in other circumstances. As already noted above, some investment tribunals have seemingly accepted the possibility that a waiver could also be an implicit one, provided that the intent on the part of the investor to relinquish the right to arbitrate has been clearly expressed. Yet, if intent can be inferred from the circumstances of the conclusion of a contract, there is of course little reason why it could not be inferred from the investor's other conduct, including the latter's attitude in pursuing its treaty claim.

The possibility for a waiver to occur as a result of the investor's conduct in domestic litigation has only occasionally been considered by investment tribunals. In *SGS v. Pakistan*, the argument of waiver by conduct was eventually rejected on the circumstances of that case. But a similar argument was later efficaciously used in *Eurom v. Slovakia*. Though initially finding that the Claimant's initiation of local litigation, coupled with the State's response in that litigation, did not give rise to an agreement to have the treaty dispute determined otherwise than by arbitration, the Tribunal nevertheless concluded that the investor's conduct before domestic courts as a whole was such that it eventually amounted to a waiver of the right to arbitrate its treaty claims before the investment tribunal. In the circumstances of that case, the Claimant commenced proceedings before the Courts of Bratislava in which it advanced claims that were substantially the same as those advanced in the arbitration it commenced pursuant to the applicable Austria-Czech and Slovak Republic BIT.[84] The Claimant maintained that the legal action in domestic courts was necessary to prevent its claims from becoming statute-barred under Slovak law in the event the treaty tribunal would deny jurisdiction over the treaty claims. And indeed, insofar as the local proceedings were originally commenced as a precautionary measure, the Tribunal was not prepared to treat the mere filing of the petition in the local courts as amounting to a waiver of itself.[85] The Tribunal concluded, however, that the procedural steps that the Claimant had taken in domestic courts after the filing of the petition went beyond what was necessary to protect the Claimant's position pending the outcome of the jurisdictional challenges in the arbitral proceedings. The Tribunal took issue, in particular, with the fact that Claimant failed to take steps to have the local proceedings stayed pending the outcome of the arbitration, that Claimant actually requested in its submissions before the local courts that a judgment be delivered on the merits of the treaty claims, and that Claimant failed to properly inform the local court as to the status of the arbitration proceedings.[86] In the view of the Tribunal, the "overall pattern of

[84] *Euram v Slovakia* (n 81), [238]. That is, in its Petition for the commencement of domestic legal proceedings against the National Council of the Slovak Republic in the District Court Bratislava I, the Claimant alleged violations of the same provisions of the BIT as it alleged in the treaty proceedings that it commenced a year earlier. Additionally, the Petition alleged that the impugned acts of the Slovak Republic (ie, the changes in the law on health insurance) also breached the provisions of the Constitution of the Slovak Republic and the European Convention on Human Rights. ibid [32].

[85] ibid [239].

[86] ibid [258]-[261].

conduct"[87] displayed by the Claimant in relation to the litigation in the Slovak courts "was such that a reasonable person would have concluded that it was no longer treating that litigation as a mere safeguard but was actively pursuing it with a view to obtaining a judgment in its favour irrespective of whatever might happen in the arbitration."[88] The conduct was therefore held to amount to a waiver of the right to arbitrate, with the consequence that the Tribunal was without jurisdiction over the outstanding treaty claims.

The Tribunal's findings were, to a certain extent, context-specific; for, it does not frequently happen that claims advanced in proceedings before domestic courts would include "the entirety of the claim in the arbitration proceedings" as in the *Eurom* case.[89] In this respect, the case can be contrasted with the earlier award in *SGS v. Pakistan*, where the waiver argument appeared to have been rejected precisely because the Claimant did not present "claims expressly based on alleged violations of the BIT before any other court or tribunal"[90]. Namely, in the proceedings that SGS brought against Pakistan before the courts of Switzerland, the claims were clearly contractual ones, with SGS claiming payment of amounts that were still due under its concession contract and seeking a declaration that the contract was wrongfully terminated by Pakistan.[91] Ostensibly contractual were also the counterclaims presented by SGS in the arbitration that Pakistan had in the meanwhile commenced in accordance with the contractual dispute settlement provisions (this, notwithstanding the fact that in six of seven heads, the contractual relief sought was actually identical to that later claimed in the treaty-based proceeding).[92] In the absence of express references to treaty violations, the Tribunal was not willing to imply a waiver from the pursuit of contractual claims in Swiss courts, or from the mere filing of the counterclaim setting out substantive claims in the contractual arbitration (especially considering that in the context of the latter, SGS also reserved its rights without prejudice to rights under international law).[93] Nor was the Tribunal prepared to accept that, by submitting its contractual counterclaims, SGS was precluded from claiming compensation with respect to treaty violations. In the view of the arbitrators, "[s]ince the BIT does not contain a provision that requires a would be claimant to refrain from pursuing claims for damages in other fora in order to invoke ICSID jurisdiction, the Tribunal cannot read such a requirement into the BIT."[94]

Notwithstanding its outcome, at the level of principle, the *SGS v. Pakistan* decision supports the proposition that the right to arbitrate treaty claims can possibly be waived as a result of a claimant's conduct. The only difference worth noting between the *SGS* and *Eurom* awards is perhaps the legal basis on which the waiver argument was considered. The *Euram* Tribunal approached the question of waiver on the basis that the law applicable to determining whether or not there has been a waiver was Swedish law – being the law that governed the arbitration in that case –, though also taking account of Slovak law – as the law that governed the procedure before the local courts. As a matter of law, the Tribunal did not have reservations in accepting the waiver-by-conduct argument. According to Swedish law, the right to arbitrate could be lost by waiver, and the commencement of court proceedings in a State other than the seat of the

[87] ibid [254]. The Tribunal put emphasis on the fact that it was evaluating 'the cumulative effect' of the steps taken by the Claimant in local court proceedings ([240]) and that its conclusions had been reached 'on the basis of the Claimant's conduct taken as a whole and not on the basis that any one incident is decisive in and of itself' ([265]).

[88] ibid [264].

[89] ibid [238].

[90] *SGS v Pakistan* (n 11), [181].

[91] ibid [20]-[25].

[92] ibid [181].

[93] ibid [179]-[180].

[94] ibid [180].

arbitration was also capable of constituting a waiver.[95] The *SGS* Tribunal, in contrast, seemingly considered the waiver argument as a matter of international law.

11.2.2. Estoppel

A final matter that needs to be considered is the possibility of the investor being precluded from pursuing treaty remedies as a result of the principle of estoppel – a general principle of law recognized and applied also by investment tribunals,[96] just as by international courts in general.[97] Similarly to a waiver, the principle of estoppel can serve to foreclose the exercise of a party's right based upon the party's representations or conduct in general.[98] Though the element of conduct is thus relevant to both the question of waiver and that of estoppel – which is why both principles can also be applied in the same breath[99] –, there is nonetheless a fundamental difference in the way that both principles operate: whereas the issue of waiver turns on the ascertainment of a party's intention to relinquish a particular right, the issue of estoppel turns upon the detriment suffered by another party in relying on a party's conduct. Under international law, estoppel is namely considered to be subject to the requirements that (1) there is a clear statement of fact by one party, (2) that such statement is voluntary, unconditional and authorized, and (3) that there is reliance in good faith by another party on such statement to that party's detriment or to the advantage of the first party.[100] Conceivably, if an investor were to clearly and consistently act in a way suggesting that it would not be pursuing remedies available under an investment treaty, the principle of estoppel could operate to prevent that investor from subsequently retracting from its previous representations – provided that the Respondent State was entitled to rely, and in fact did rely on those representations, and as a consequence of such reliance has suffered prejudice, or else the investor has secured for itself some benefit or advantage.

Interestingly, in the practice of investment tribunals, it has not been uncommon for States acting as respondents to mount jurisdictional objections based on estoppel whilst relying on representations that the investor had made in judicial proceedings before local courts. Thus far, such arguments have not been particularly successful – though, mostly for factual reasons. In *SGS v. Pakistan*, the Respondent argued that Claimant's conduct in proceedings before Swiss courts and in the contract-based arbitration had given rise to estoppel, with the consequence that SGS was prevented to seek relief under the ICSID Convention. But the argument was quickly

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[95] *Euram v Slovakia* (n 81), [223]-[224], [229].

[96] See eg *Pope & Talbot Inc v The Government of Canada (Interim Award)* (UNCITRAL, 26 June 2000) [111]; *or 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) [159].

[97] Though originating in common law systems, the principle of estoppel has gradually become accepted in international law. The plea of estoppel was accepted by the ICJ in the *Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Merits Judgment)* [1962] ICJ Rep 6 (15 June 1962) 32. But the Court considered pleas based on estoppel in several other cases, including in *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark) (Judgment)* [1969] ICJ Rep 3 (20 February 1969) [30]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility, Judgment)* [1984] ICJ Rep 392 (26 November 1984) [51]; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (Judgment, Application by Nicaragua for Permission to Intervene)* [1990] ICJ Rep 92 (13 September 1990) [63]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) (Judgment, Preliminary Objections)* [1998] ICJ Rep 275 (11 June 1998) [57].

[98] For a comparison of how the two principles operate, see eg G Bundy Smith and TJ Hall 'Critical Distinctions between Waiver and Estoppel' (2010) 244(117) New York Law Journal (17 December 2010).

[99] cf eg *SGS v Pakistan* (n 11), [175]-[181], where Pakistan's plea of estoppel was considered against the same factual background as the plea that SGS waived its right to seek relief under the ICSID Convention.

[100] See generally on this requirements DW Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence' (1957) 33 British Year Book of International Law 176. The requirements have been cited with approval in *Pope & Talbot* (n 96), [111]; *Pan American Energy* (n 96), 160; and *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and others (Award on Jurisdiction)* (ICSID Case No ARB/07/3, 28 December 2009) [211]-[212].

dismissed: "[G]iven the general purpose of the ICSID Convention and the object and purpose of the BIT," the arbitrators were "hesitant to imply estoppel (or waiver for that matter) with respect to BIT claims that have not in fact been alleged in another forum."[101] The reasoning raises the question whether the Tribunal took properly into account the fact that estoppel operates differently than waiver, and that as a consequence, the absence of any allegations as to the breach of the applicable BIT on the part of the SGS in either of the prior proceedings might not have been in itself determinative to the question of estoppel. It seems that the proper inquiry should have been (1) whether the investor, by pursuing the contractual remedies route, and as a result of its representations in general, evinced an intention not to pursue treaty remedies, and (2) whether the Respondent relied on those representations to its detriment. The question of detrimental reliance was curiously absent from the Tribunal's consideration, just as were the other requirements of estoppel – though, this may probably have to do with the way that the argument was pleaded in the circumstances of that case.[102]

A jurisdictional objection based on estoppel was advanced in a similar way in *Pan American Energy v. Argentina* (2006). There, the Respondent argued that Claimants were estopped from resorting to dispute settlement under the applicable BIT, on account of them having brought, through their local company, a private dispute before the Argentine courts and having mentioned in those proceedings the BIT and the ICSID Convention. On the facts of the case, the estoppel argument seemed rather far-fetched: the local claim involved only private parties, with Argentina appearing only as an *amicus curiae*; the legal action was not in any way related to a dispute of any kind whatsoever with Argentina or any of its organs; and the issues before the domestic courts concerned questions of Argentinean domestic law, with the BIT having only been mentioned in passing, with a view to show to the defendant party in the local proceedings that it should have turned to investment arbitration if it had a claim for unfair treatment of its investment. Against this backdrop, it was not surprising that the Tribunal also rapidly dismissed the estoppel argument. The Tribunal was of the view that, in the circumstances where the BIT and the ICSID Convention were only mentioned in the domestic proceedings in passing and not in relation to the possibility of the Claimant actually resorting to treaty remedies, one could "scarcely speak" of a clear statement of fact (if a statement was made at all by the Claimant, considering that it was only its subsidiary that participated in the local proceedings) and that Argentina, insofar as it was not even a party to the local dispute, could not be said to have relied on the references that had been made to the BIT and, even less, to have suffered a disadvantage from those references.[103] As a matter of principle, the decision in *Pan American Energy v. Argentina* nevertheless suggests that, depending on the position taken in domestic courts, estoppel could operate in such a way as to preclude an investor from subsequently bringing a claim before an investment tribunal.

In essence, there is nothing to suggest that estoppel could not operate in such way. Investment tribunals have seemingly accepted the possibility that estoppel could be determinative for the jurisdiction of an investment tribunal. Estoppel was seemingly capable of creating consent to arbitrate where the offer to arbitrate might otherwise not have been effective,[104] of allowing a party to

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[101] *SGS v Pakistan* (n 11), [177].

[102] See [175], where note is made that the estoppel argument had been advanced by the Respondent 'on a general basis'.

[103] *Pan American Energy v Argentina* (n 96), [159]-[160].

[104] See in particular *Ceskoslovenska Obchodni Banka, AS v The Slovak Republic* (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Case No ARB/97/4, 24 May 1999) [44]-[47], where an ICSID Tribunal was prepared to give effect to an estoppel argument based on the fact that Respondent announced in its Official Gazette that the BIT had entered into force, whereas in reality it has not, was it not for the fact that the claimant failed to demonstrate that it had relied on that position to its own detriment.

bring ICSID arbitration pursuant to a contract to which it otherwise was not privy,[105] or even of precluding a claim altogether on the ground that the investor acquiesced in the implementation of the measure that was the object of the actual complaint before the treaty tribunal.[106] Due to the specific requirements of estoppel, which set a rather high threshold before a party may be precluded from pursuing treaty remedies, it is not very realistic for estoppel to be often successfully applied in regulating jurisdictional conflicts between domestic courts and treaty tribunals.

11.3. Concluding Observations

Also when it comes to the interpretation and application of instruments entered into between the investor and the host State, or the appreciation of the investors' conduct in relation to local litigation more generally, investment tribunals were not particularly prone to relinquishing their competence over a particular dispute in favour of the jurisdiction of domestic courts. Though accepting, at the level of principle, the proposition that investors were capable of agreeing to the exclusive disposition of their treaty-related investment disputes in domestic courts, they rarely upheld such possibility in practice. Similarly to the situations described in chapters 9 and 10, they relied for that purpose on a number of commonly used techniques: the conceptual distinctions between contract and treaty claims, and a formalistic approach to the interpretation and application of applicable instruments, and the assessment of the investors' conduct more generally.

Contractual forum selection clauses were thus not deemed capable of having preclusive effect on the investment tribunals' own jurisdiction in the absence of contractual privity and identity of subject matters. It was particularly the distinction between contract and treaty claims that was again recurrently relied upon in denying such clauses effects on the international plane. The distinction between contract- and treaty-based causes of action was either relevant to circumscribing the material scope of the clauses in question, or was used to undermining the designated courts' competence to actually consider particular claims. In practice, forum selection clauses were only deemed capable of having effect where they made specific reference to ICSID or other type of investment treaty arbitration. Investment tribunals namely insisted on their narrow construction, even in circumstances where the contractual language employed would in other contexts have been possibly capable of being construed as encompassing claims other than those based on the contract in question.

A similar kind of formalism was adopted in determining whether contractual clauses amounted to a renunciation of treaty procedures. In determining whether contractual stipulations could be construed as amounting to a waiver of remedies available under an applicable investment treaty, tribunals thus either required that such waiver be expressed in clear language, or – to the extent that they accepted that a waiver could also be implicit – adopted a strict approach to appreciating the effects of contractual stipulations. Much in the same way, tribunals proceeded to stringently assess the investors' acts or omissions more generally. The investors' pursuit of local litigation was not accepted to amount to an implied waiver of treaty remedies in the absence of express references to treaty rights in the context of such litigation; nor was such pursuit in itself deemed capable of giving rise to an estoppel. The formalism and pedantry on

[105] See eg *East Kalimantan* (n 100), [211]-[216], where the estoppel argument was considered in relation to the possibility that the Indonesian Province of East Kalimantan had the right to bring ICSID arbitration pursuant to a contract to which it otherwise was not a party. The argument was premised on statements made by the Respondent during the domestic legal proceedings, which purportedly affirmed the Province's right. The argument eventually failed because those statements were not entirely clear and unambiguous, while the Province also failed to prove detrimental reliance.

[106] See *Pope & Talbot* (n 96), [106]-[112] (the estoppel argument failed because no representation of any sort was found to have been made by the investor to Canada, and insofar as a representation made to a different party could have been regarded as a representation made to Canada on which Canada could rely, there was no evidence showing that Canada changed its position in any way by reason of reliance on such representation).

these issues was often defended by reference to the idea that the right to recourse to the international remedy was not one to be easily renounced. Indeed, some tribunals expressed doubts whether such right was capable of being renounced at all.

All in all, whilst formally accepting domestic courts as competitors with a potentially equal jurisdictional entitlement to the resolution of investment disputes, investment tribunals thus again exploited argumentative devices, such as the contract claims/treaty claims distinction in order to position themselves as superiors to domestic courts.

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Reflecting more broadly on situations in which domestic courts performed the roles of *competitors*, what one can find is thus a general predisposition of investment tribunals to favour the path to arbitration and accord no deference to domestic courts. On account of the substantive shift, tribunals have been provided with independent standards to be applied in the adjustment of investment disputes, whereas due to the procedural shift, there is also procedurally no reason for investment tribunals to have to give way to domestic courts.