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Travelling the BIT Route

Of Waiting Periods, Umbrella Clauses and Forks in the Road

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Travelling the BIT Route

Of Waiting Periods, Umbrella Clauses and Forks in the Road

Christoph SCHREUER*

I. INTRODUCTION

In recent years, the majority of cases in investment arbitration have been based on bilateral investment treaties (BITs). These treaties typically provide for investor–State arbitration by making an offer of consent to arbitration to eligible investors. Consent is perfected upon the acceptance of that offer by the investor, often simply through the institution of proceedings.[1]

The provisions in BITs for investor–State arbitration are by no means uniform. Most of them refer to the International Centre for Settlement of Investment Disputes (ICSID). Often, the ICSID Additional Facility, the United Nations Commission on International Trade Law (UNCITRAL) or other forms of arbitration are offered in the alternative.

The BITs also define the parameters for the activities of tribunals in investor–State arbitration. Jurisdiction may be subject to certain procedural requirements. For instance, a claimant may be required to attempt to reach an amicable settlement for a certain period of time. The competence of arbitral tribunals may depend on proceedings in the host State's domestic courts. For instance, the BIT may require the exhaustion of local remedies; or it may require the investor to choose between domestic courts and international arbitration.

The subject-matter jurisdiction of tribunals also varies. It may be described narrowly or more widely. For instance, jurisdiction may be limited to claims alleging a violation of the BIT itself or it may extend to investment disputes in general.

Three typical BIT clauses relating to the activities of arbitral tribunals in investor–State arbitration will be examined in this article. The first relates to waiting periods that investors must observe before instituting proceedings. The second requires investors to choose between litigation in domestic courts and international arbitration with the effect that once that choice has been made it becomes final. The third relates to clauses in BITs that put undertakings made by host States *vis-à-vis* investors under the BITs' protective umbrella.

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[1] For a description of this process, see J. Paulsson, *Arbitration Without Privity*, 10 ICSID Rev.–F.I.L.J. 232 (1995). This method for establishing jurisdiction was first accepted in *AAPL v. Sri Lanka*, Award, 27 June 1990, 4 ICSID Reports 246, at 250–251. It has since been followed in numerous cases.

II. Waiting Periods

Many if not most BITs provide that the investor may resort to international arbitration only after a certain period has elapsed after the occurrence of events giving rise to the dispute. The purpose, often explicitly stated, is to give the parties to the dispute an opportunity to reach a negotiated settlement. Article 11 of the German Model BIT offers a pertinent example:

> "Article 11
>
> (1) Divergencies concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties in dispute.
> (2) If the divergency cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration. Unless the parties in dispute agree otherwise, the divergency shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States."

The question arises whether failure to comply with a waiting period is a bar to jurisdiction or whether the waiting period is a procedural requirement that may be dispensed with where appropriate. In particular, where there is no real prospect of reaching a negotiated settlement, one may ask whether it makes sense to insist on the observance of the waiting period.

A number of recent decisions by arbitral tribunals have dealt with this question. Before examining these decisions, it is useful to look at a judgment of the International Court of Justice (ICJ) that addressed a similar issue in a dispute between States.

In the *Nicaragua* case before the ICJ,[2] one of the bases for jurisdiction upon which Nicaragua relied was the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 1956. Its Article XXIV(2) contained the following compromissory clause:

> "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means."

The United States argued that an attempt to resolve the dispute by negotiations was a prerequisite for submitting the dispute to the Court. According to the United States, since Nicaragua had never raised the Treaty in its negotiations with the United States, it had failed to satisfy the Treaty's terms for invoking the compromissory clause.[3]

The ICJ rejected this contention. It said:

> "In the view of the Court, it does not necessarily follow that, because a State has not expressly

[2] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Jurisdiction and Admissibility), 26 November 1984, [1984] ICJ Reports 427–429.

[3] Ibid., at pp. 427–428.

> referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty ... It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed,
>
> 'the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned' (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6*, 1925, P.C.I.J., Series A, No. 6, p. 14)."[4]

Therefore, the ICJ found that it had jurisdiction over claims relating to the Treaty of 1956.[5]

The relevance of this judgment is limited by the fact that the clause did not specify a period of time during which a diplomatic settlement was to be attempted. However, it supports the proposition that prior negotiations that amount to no more than a formality will not be insisted upon as a prerequisite for jurisdiction.

In a number of cases in which waiting periods were invoked by respondents, arbitral tribunals found that the parties had, in fact, complied with them. In *AMT v. Zaire*, the consent to jurisdiction of the ICSID in the United States–Zaire BIT was subject to the condition: "If the dispute cannot be resolved through consultation and negotiation ..."[6] The Tribunal found, as a matter of fact, that AMT had seriously attempted to negotiate without success.[7]

In *Salini v. Morocco*, the Italy–Morocco BIT provided for international arbitration "[i]f the disputes cannot be resolved in an amicable manner within six months of the date of the request, presented in writing, ..."[8] The Tribunal examined the communications between the parties prior to the Request for Arbitration and came to the conclusion that the requirement of an attempt to reach an amicable settlement within the time frame of six months had been met.[9]

In *Azurix v. Argentina*, the applicable Argentina–United States BIT provided that the parties to an investment dispute should initially seek a resolution through consultation and negotiation. Provided that six months had elapsed from the date on which the dispute arose, the investor could seek international arbitration.[10]

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[4] Ibid., at pp. 428–429.

[5] Ibid., at p. 429.

[6] *AMT v. Zaire*, Award, 21 February 1997, 36 I.L.M. 1531, at 1545 (1997).

[7] Ibid., at p. 1547. See also *Tradex v. Albania*, Decision on Jurisdiction, 24 December 1996, 14 ICSID Rev.–F.I.L.J. 161, at 174 (1999). In that case, consent to jurisdiction was not based on a BIT but on national legislation. The consent clause in the Albanian law was subject to the condition that the dispute "cannot be settled amicably". The Tribunal noted that Tradex had sent five letters over four months to the competent Albanian Ministry but that none of these was answered or resulted in any relevant action. The Tribunal found these letters to be a sufficient good faith effort to reach an amicable settlement; at pp. 182–184.

[8] *Salini Costruttori SpA et Italstrade SpA c/Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002), 42 I.L.M. 609 (2003), at 612.

[9] Ibid., at pp. 613–614.

[10] Argentina–United States BIT, Article VII(2), (3); see the text of the BIT on the Website of the Organization of American States at: ‹www.sice.oas.org/bits/usaarge2.asp›.

The Tribunal found that it was "satisfied that the Claimant attempted to resolve the dispute through consultation or negotiation and failed".[11]

In *CMS v. Argentina*,[12] the Tribunal also had to apply the Argentina–United States BIT. The Respondent objected to the submission of an additional claim after the institution of the arbitral proceedings. One of the jurisdictional arguments in this context concerned the non-compliance with the six-month consultation and negotiation requirement in respect of the additional claim. The Tribunal rejected Argentina's objection, finding that under the ICSID Arbitration Rules incidental or additional claims do not require either a new request for arbitration or a new six-month period for consultation or negotiation.[13]

These cases demonstrate that the tribunals examined whether the parties had complied with the waiting periods and the attendant obligation to seek a negotiated settlement. In each of the cases above, the tribunals found that they had done so. However, these decisions do not give a clear indication of the tribunals' views of the consequences of non-compliance with that requirement. The mere fact that the waiting period requirements were found to have been satisfied does not mean that they were regarded as a condition for the tribunals' competence.

Cases in which the waiting periods had not been observed give a clearer indication of their legal effect. *Ethyl Corp. v. Canada*,[14] a case dealing with the consequences of non-compliance with a waiting period, was not decided under a BIT but under Chapter Eleven of the North American Free Trade Agreement (NAFTA). Under Article 1118 of the NAFTA: "The disputing parties should first attempt to settle a claim through consultation or negotiation." Under Article 1120 of the NAFTA, an investor may submit a claim to arbitration "provided that six months have elapsed since the events giving rise to a claim".

In the *Ethyl* case, the Notice of Arbitration was delivered five days after the passage of the incriminated piece of legislation. The Tribunal found, however, that there was no prospect of Canada changing its attitude as a consequence of negotiations.[15] The Tribunal said:

> "The Tribunal has been given no reason to believe that any 'consultation or negotiation' pursuant to Article 1118, which Canada confirms the six-month provision in Article 1120 was designed to encourage, was even possible. It is argued, therefore, that no purpose would be served by any further suspension of Claimant's right to proceed. This rule is analogized to the international law requirement of exhaustion of remedies, which is disregarded when

[11] *Azurix v. Argentina*, Decision on Jurisdiction, 8 December 2003, para. 55; available at: ‹www.asil.org/ilib/azurix.pdf›.

[12] *CMS Gas Transmission Company v. The Republic of Argentina*, Decision on Jurisdiction, 17 July 2003, 42 I.L.M. 788 (2003).

[13] Ibid., at pp. 806–807. See also *Metalclad v. Mexico*, Award, 30 August 2000, 5 ICSID Reports 223–225, applying Article 1120 of the North American Free Trade Agreement (NAFTA).

[14] *Ethyl Corp. v. Canada*, Decision on Jurisdiction, 24 June 1998, 38 I.L.M. 708 (1999).

[15] Ibid., at para. 77.

it is demonstrated that in fact no remedy was available and any attempt at exhaustion would have been futile."[16]

It followed that, in the circumstances of this case, non-compliance with Article 1120 was not interpreted as depriving the Tribunal of its jurisdiction.[17] Nevertheless, the Tribunal reprimanded the Claimant for "jumping the gun". Had Ethyl waited for the six months, the Tribunal would not have been required to deal with the issue. Therefore, it awarded costs against the Claimant for the relevant part of the proceedings.[18]

Ronald S. Lauder v. The Czech Republic[19] was an *ad hoc* arbitration under the UNCITRAL Arbitration Rules on the basis of the BIT between the Czech Republic and the United States. Article VI(3)(a) of that BIT provides:

"At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration ..."[20]

The Tribunal found that the waiting period did not run from the date at which the alleged breach occurred but from the date at which the State was advised of the breach.[21] Only seventeen days had elapsed between the notification of the breach and the filing of the Notice of Arbitration. Still, the Tribunal rejected the objection that the waiting period had not been observed.[22] It found that the relevant provision was merely procedural and did not affect jurisdiction. The Tribunal said:

"187. ... the Arbitral Tribunal considers that this requirement of a six-month waiting period of Article VI(3)(a) of the Treaty is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide the merits of the dispute, but a procedural rule that must be satisfied by the Claimant. (*Ethyl Corp. v. Canada*, UNCITRAL June 24, 1998, 38 I.L.M. 708 (1999), paragraphs 74–88). As stated above, the purpose of this rule is to allow the parties to engage in good-faith negotiations before initiating arbitration."[23]

The Tribunal came to the conclusion that there was no evidence that negotiations would have led to a settlement.[24] Under these circumstances, the Tribunal found that insistence on the waiting period would have amounted to excessive formalism. It said:

"190. To insist that the arbitration proceedings cannot be commenced until 6 months after the 19 August 1999 Notice of Arbitration would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties.

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[16] Ibid., para. 84; footnotes omitted.
[17] Ibid., at para. 85.
[18] Ibid., at paras. 87 and 88. For the decision of another NAFTA Tribunal dealing with a related matter under Articles 1119 and 1122(1) of the NAFTA, see also *ADF Group Inc. v. United States of America*, Award, 9 January 2003; available at: ‹www.state.gov/documents/organization/16586.pdf›.
[19] *Ronald S. Lauder v. The Czech Republic*, Final Award, 3 September 2001; available at: ‹www.mfcr.cz/Arbitraz/en/FinalAward.doc›.
[20] Ibid., para. 183.
[21] Ibid., at para. 185.
[22] Ibid., at paras. 181–191.
[23] Ibid., para. 187.
[24] Ibid., at paras. 188–189.

> 191. Therefore, the Arbitral Tribunal holds that the requirement of the six-month waiting period in Article VI(3)(a) of the Treaty does not preclude it from having jurisdiction in the present proceedings."[25]

In *Wena Hotels v. Egypt*,[26] the Egypt–United Kingdom BIT applicable in the case provided for a three-month waiting period for the purpose of reaching an agreement "through pursuit of local remedies, through conciliation or otherwise ..." The Respondent initially objected that Wena had failed to satisfy this procedural requirement, but it subsequently withdrew that objection. The Tribunal accepted the withdrawal, noting that the objection would have served no useful purpose:

> "As Respondent appropriately noted, even if these procedural objections were granted, they could have been easily rectified and would have had little practical effect other than to delay the proceedings. Accordingly, the Tribunal accepts Respondent's offer to forgo these objections."[27]

As the Tribunal observed, the procedural objection could easily be rectified in that, by the time a tribunal would be able to deal with an objection to its jurisdiction, the waiting period would have elapsed. Even if the tribunal were to find that the requirement should have been met at the time of the institution of proceedings, the claimant would simply have had to re-institute the proceedings.

In *SGS v. Pakistan*,[28] the Tribunal had to apply the Pakistan–Switzerland BIT. That BIT provides for a twelve-month consultation period before permitting the investor to go to ICSID arbitration.[29] SGS had filed its request for arbitration only two days after notifying Pakistan of the existence of the dispute. Pakistan objected that failure to comply with the twelve-month rule deprived the Tribunal of jurisdiction.[30] SGS argued that waiting periods were not a prerequisite for jurisdiction but procedural rules that may lead to an avoidance of arbitration. It also argued that negotiations would have been futile.[31]

The Tribunal accepted Claimant's arguments. It said:

> "184. Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction ... there was little indication of any inclination on the part of either party to enter into negotiations or consultations in respect of the unfolding dispute. Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal."[32]

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[25] Ibid., paras. 190–191.
[26] *Wena Hotels v. Egypt*, Decision on Jurisdiction, 25 May 1999, 41 I.L.M. 881 (2002).
[27] Ibid., at p. 891.
[28] *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, 18 ICSID Rev.–F.I.L.J. 307 (2003).
[29] Ibid., at para. 80.
[30] Ibid., at paras. 79–81.
[31] Ibid., at paras. 130 and 131.
[32] Ibid., para. 184; footnote omitted. The Tribunal cited the Decision in *Ethyl*.

Goetz v. Burundi[33] is the only case in which the Tribunal found that non-compliance with a waiting period constituted a bar to part of the claim. The Belgium–Burundi BIT in its Article 8(2) and (3) contains the following, somewhat unusual, provision:

> "2. All disputes relating to investments must be the object of written notification, accompanied by a sufficiently detailed memorandum addressed at the investor's initiative by one of the parties, to the other contracting party.
>
> In the first place such a dispute should be amicably settled by an arrangement between the parties to the dispute and, in the absence of such, by negotiation between the contracting parties, at the diplomatic level.
>
> 3. If the dispute cannot be settled in the three months following the written notification envisaged in paragraph 2, it is submitted, at the request of the investor concerned, to conciliation or arbitration before the International Centre for the Settlement of Investment Disputes (ICSID)."[34]

It will be noted that this provision foresees not only the usual process of amicable settlement between the parties to the dispute but also a process of notification and negotiation through diplomatic channels. It is unclear how all this could be achieved in a period of three months.

The Tribunal found that the waiting period set out in the BIT had been satisfied with respect to the investor's primary claim[35] but not with respect to certain supplementary claims put forward by the Claimant. For the Tribunal, it followed that the supplementary claims were "not in consequence capable of being decided on, and the dispute on which the Tribunal is called to give an award relates exclusively to the [primary claim]".[36]

At first sight, the exclusion of the supplementary claims by the *Goetz* Tribunal appears to contradict the consistent line of decisions in *Ethyl, Lauder, Wena* and *SGS*. However, the procedural requirements under the BIT in *Goetz* went considerably beyond those of the treaties applicable in the other cases. The requirements in *Goetz* were not restricted to consultations between the parties to the dispute but, additionally, required diplomatic negotiations between the host State and the investor's State of nationality.[37] Although the Tribunal did not discuss the issue, the requirement of State-to-State negotiations may explain the significance it accorded to an attempt at amicable settlement as required by the BIT.

Another case, *Enron v. Argentina*,[38] also involved the Argentina–United States BIT, which provided for a six-month period for consultation between the parties to the dispute. The claims, as originally presented, only related to certain Provinces of

[33] *Antoine Goetz and others v. Burundi*, Award, 10 February 1999, paras. 90–93, 15 ICSID Rev.–F.I.L.J. 454 (2000).
[34] Ibid., at para. 90.
[35] Ibid., at paras. 91 and 92.
[36] Ibid., at para. 93.
[37] The Tribunal did not discuss that distinction. Nor did it have the benefit of the other decisions quoted above, most of which were decided only after *Goetz*.
[38] *Enron Corp. and Ponderosa Assets, L.P. v. Argentina*, Decision on Jurisdiction, 14 January 2004; available at: ‹www.asil.org/ilib/Enron.pdf›.

Argentina. Additional claims, substantively identical but relating to other Provinces, were put forward later. The Respondent objected that the six-month period had not been observed with respect to the additional claims.[39]

The Tribunal found that the dispute related in identical terms to various Provinces.[40] The additional claims merely extended the same dispute already registered and did not require a separate procedure. Therefore, in the Tribunal's view, the issue of a waiting period with respect to the additional claims did not arise:

> "87. The issue concerning the observance of the six-month consultation period becomes therefore moot. If the Argentine Republic had the opportunity to consider negotiations with the investors on the occasion of the first claims, and the claims that followed did not involve any new element, the observance of this requirement is evidently fulfilled. This is particularly so in view of the fact that the Argentine Republic did not take advantage of the possibility of defusing the dispute during that start-up period."[41]

Nevertheless, the Tribunal added an *obiter dictum* in which it voiced its disagreement with the suggestion that the waiting period was merely procedural rather that jurisdictional:

> "88. The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction. In the present case, as noted, the requirement was complied with in view of the identical nature and scope of the dispute with the Argentine Provinces; the same holds true if a dispute is ruled to be ancillary or additional to an earlier claim."[42]

It would seem that the decisive criterion for disregarding the waiting periods in the cases in which the claimants had not complied with them was the evident futility of any negotiations. In each of the cases in which the tribunals affirmed their jurisdiction despite the non-compliance with the requirement to seek a negotiated settlement during a specified period of time, they also expressed their conviction that consultations between the parties could not have reached the desired result. There would be no point in requiring negotiations if negotiations were not likely to lead to a settlement. The *Ethyl* Tribunal even referred to the analogous rule that where local remedies are to be exhausted this requirement is dispensed with if the futility of local remedies is evident.[43]

In fact, the term "waiting periods" is something of a misnomer. These are not "cooling off" periods but periods during which the parties are required to take positive steps to seek a resolution that may avert the need for arbitration. This explains why the

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[39] Ibid., at para. 82.
[40] Ibid., at para. 84.
[41] Ibid., para. 87.
[42] Ibid., para. 88; footnote omitted. The Tribunal cited *Lauder* and *Ethyl*.
[43] See especially the *Finnish Shipowners* case, *Finland v. Great Britain*, Award, 9 May 1934, RIAA, Vol. III, p. 1479; C. F. Amerasinghe, *Whither the Local Remedies Rule?* 5 ICSID Rev.–F.I.L.J. 292, at 303 *et seq.* (1990).

provision is not given effect where it is clear from the beginning that there is no chance of reaching a settlement.

The question as to whether a mandatory waiting period is jurisdictional or procedural has limited practical significance. While it is conceivable that a tribunal would find that it lacked jurisdiction because the claim was registered prematurely or because no serious attempt at negotiations had been made during the prescribed time, the initiation of arbitral proceedings normally indicates that other, less costly means of settling the dispute have failed or were seen as likely to fail.

Further consultation between the parties after the institution of arbitration proceedings remains possible, and many disputes are resolved while proceedings are pending.[44] By the time a tribunal is ready to make a decision on jurisdiction, the period prescribed for a negotiated settlement will normally have expired. Strictly speaking, the relevant point in time for determining a tribunal's jurisdiction is the time when proceedings are instituted. However, it would hardly make sense to decline jurisdiction in a situation when the waiting period had passed in the interim. The only consequence of such a finding would be to compel the claimant to start the proceedings anew, which would be a highly uneconomical solution.

It follows that waiting periods may be seen as a bar to the tribunal's competence only in extreme circumstances. These would normally involve procedural bad faith such as starting arbitration prematurely in order to put pressure on the opposing party in negotiations. In other cases, the appropriate response appears to be that of the *Ethyl* Tribunal when it awarded costs against the claimant in respect of the premature proceedings.

III. THE FORK IN THE ROAD

The relationship between international arbitration and adjudication by domestic courts may be subject to a variety of provisions in BITs. Some older BITs require the exhaustion of local remedies before international arbitration may be invoked.[45] Other BITs merely require that efforts be made in domestic courts to resolve the dispute for a certain period of time.[46] Still other BITs grant access to international arbitration, provided no decision has been made at first instance in proceedings in the host State's domestic courts.[47] Finally, some BITs are silent on this question.[48]

A typical clause provides that the investor must choose between the litigation of its claims in the host State's domestic courts or international arbitration and that, once

[44] For references to practice, see C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge, U.K., 2001, p. 811.

[45] See, for example, the Ghana–Romania BIT of 1989, Article 4(3).

[46] See, for example, the Argentina–Spain BIT, Article X(3)(a). On this provision, see *Emilio Augustín Maffezini v. The Kingdom of Spain*, Decision on Jurisdiction, 25 January 2000, 16 ICSID Rev.–F.I.L.J. 203 (2001).

[47] See, for example, the Austria–Macedonia BIT, Article 13(3).

[48] See the comments on this fact with regard to the Pakistan–Switzerland BIT in *SGS v. Pakistan*, *supra*, footnote 28, at paras. 121, 151 and 176.

made, the choice is final. It is this clause that will be examined here. This type of clause is often referred to as a "fork in the road" provision. It is expressed by the Latin maxim of *una via electa non datur recursus ad alteram* ("once one road is chosen, there is no recourse to the other").

The Tribunal in *Maffezini v. Spain*[49] found that such a provision reflected the host State's public policy and, therefore, could not be overridden by the application of a most-favoured-nation (MFN) clause. The Tribunal said:

> "... if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the [MFN] clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy."[50]

An example of a fork in the road provision is contained in Article 8(2) of the Argentina–France BIT:

> "Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final."

Under such a provision, the party initiating the proceedings would have to make a choice between pursuing a claim through the host State's domestic courts and through international arbitration such as the ICSID. Once the investor chooses to settle the dispute in the host State's courts and submits the dispute to those courts, it loses the option to resort to arbitration. Clauses of this kind are a common feature in recent BITs, notably those of the United States.

A typical example of a fork in the road provision in U.S. BITs is contained in Article VII of the Argentina–United States BIT:

> "2. ... If the dispute cannot be settled amicably the national or Company concerned may choose to submit the dispute for resolution:
> (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
> (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
> (c) in accordance with the terms of paragraph 3.
>
> 3.(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) ... the national or Company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration ... "

Under these provisions, the loss of access to international arbitration applies if the same dispute between the same parties is submitted to the domestic courts or to the

[49] *Supra*, footnote 46.
[50] Ibid., at para. 63.

administrative tribunals of the host State.[51] Therefore, before deciding whether the fork in the road provision applies to bar access to international arbitration, the tribunal must determine whether these conditions have been met.

In light of the clear advantages that international arbitration offers to most investors over proceedings in domestic courts, a decision in favour of domestic courts cannot lightly be presumed. Rather, it is likely that investors, if offered the choice, will opt for international arbitration as the preferred instrument of dispute settlement. Therefore, where there is doubt as to the choice an investor has made under a fork in the road clause, a determination that the investor has chosen international arbitration is more plausible than a determination that the investor has chosen litigation in domestic courts.

Situations in which there is doubt about an investor's choice can arise easily. Investors are often drawn into legal disputes of one sort or another in the course of investment activities. Disputes of this kind may involve private law activities such as leases or procurement of raw material. They may also involve public law matters such as government licences or taxation. In the course of disputes of this kind, it will often be necessary for the investor to appear before a court or an administrative tribunal. However, not every appearance before a court or tribunal of the host State will constitute a choice under a fork in the road provision. While such disputes may relate in some way to the investment, they are not necessarily identical to "the dispute" referred to in the BIT's provisions on investor-State dispute settlement. Therefore, the appearance does not necessarily reflect a choice that would preclude international arbitration. Arbitral tribunals have dealt with this issue in a number of recent decisions.

In *Olguín v. Paraguay*,[52] the Respondent invoked the fork in the road provision in the Paraguay–Peru BIT. It argued that the ICSID Tribunal lacked jurisdiction because the Claimant had made a judicial claim before the courts of the Republic of Paraguay. The Tribunal rejected this argument because the domestic proceedings were directed at matters related to but different from those in the ICSID arbitration. The Tribunal said:

> "30. There is nothing in the file of the proceedings to demonstrate that Mr. Olguín submitted a judicial claim against the Republic of Paraguay in order to collect payment in fulfilment of the latter's obligations, which he is seeking to collect in the present arbitration case. The application which he apparently made (proof of which is not conclusive) for a declaratory judgment of bankruptcy and liquidation of a commercial corporation, cannot have the same juridical effect as a claim against the Republic of Paraguay."[53]

In *Compañía de Aguas del Aconquija S.A. & Compagnie Générale des Eaux (Vivendi) v. Argentina*,[54] the Tribunal had to decide whether it had jurisdiction under the

[51] ICSID tribunals have dealt with a similar issue in the context of an invocation of a *lis pendens* before domestic courts; see *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980, 1 ICSID Reports 330, at 340; *Amco Asia Corporation and others v. Republic of Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389, at 409 (1993). See also the Award of 20 November 1984 in this case, 1 ICSID Reports 413, at 453 (1993).

[52] *Eudoro A. Olguín v. Republic of Paraguay*, Decision on Jurisdiction, 8 August 2000, 18 ICSID Rev.–F.I.L.J. 133 (2003).

[53] Ibid., para. 30; translation prepared for ICSID Reports, Vol. 6.

[54] *Compañía de Aguas del Aconquija S.A. & Compagnie Générale des Eaux (Vivendi) v. Argentine Republic*, Award, 21 November 2000, 40 I.L.M. 426 (2001), 5 ICSID Reports 296.

Argentina–France BIT. The relevant portion of the investor-State dispute settlement clause in that Treaty provides as follows:

> "1. Any dispute relating to investments, within the meaning of this agreement, between one of the Contracting Parties and an investor of the other Contracting Party shall, as far as possible, be resolved through amicable consultations between both parties to the dispute.
>
> 2. If such dispute could not be solved within six months from the time it was started by any of the parties concerned, it shall be submitted, at the request of the investor:
>
> – either to the national jurisdictions of the Contracting Party involved in the dispute;
>
> – or to international arbitration in accordance with the terms of paragraph 3 below.
>
> Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final."[55]

Article 16.4 of the concession contract between Claimants (CGE) and Tucumán, a Province of Argentina, provided that, for purposes of interpretation and application of that contract, the parties submitted to the exclusive jurisdiction of the Contentious Administrative Tribunals (CATs) of Tucumán. The Claimants never attempted to challenge any of Tucumán's actions in the CATs of Tucumán, arguing that such a challenge would have constituted a choice under the fork in the road provision of the BIT and a waiver of their rights to have recourse to the ICSID.[56]

The Tribunal rejected the argument that resort to the domestic courts under these circumstances would have amounted to a choice under the fork in the road provision of the BIT. The Tribunal pointed to the different subject matter in the ICSID proceedings and any proceedings before the domestic courts:

> "53. ... the Tribunal holds that Article 16.4 of the Concession Contract does not divest this Tribunal of jurisdiction to hear this case because that provision did not and could not constitute a waiver by CGE of its rights under Article 8 of the BIT to file the pending claims against the Argentine Republic. ... In this case the claims filed by CGE against Respondent are based on violation by the Argentine Republic of the BIT through acts or omissions of that government and acts of the Tucumán authorities that Claimants assert should be attributed to the central government. As formulated, these claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT.
>
> 54. Thus, Article 16.4 of the Concession Contract cannot be deemed to prevent the investor from proceeding under the ICSID Convention against the Argentine Republic on a claim charging the Argentine Republic with a violation of the Argentine–French BIT.
>
> 55. By this same analysis, a suit by Claimants against Tucumán in the administrative courts of Tucumán for violation of the terms of the Concession Contract would not have foreclosed Claimant from subsequently seeking a remedy against the Argentine Republic as

[55] Paragraph 3 provides for arbitration by the ICSID or *ad hoc* arbitration under the UNCITRAL Rules at the investor's choice.

[56] Ibid., at pp. 435–436, paras. 40 and 42.

provided in the BIT and ICSID Convention. That is, submission of claims against Tucumán to the contentious administrative tribunals of Tucumán for breaches of the contract, as Article 16.4 required, would not, contrary to Claimant's position, have been the kind of choice by Claimants of legal action in national jurisdictions (*i.e.* courts) against the Argentine Republic that constitutes the 'fork in the road' under Article 8 of the BIT, thereby foreclosing future claims under the ICSID Convention."[57]

The Tribunal held that under these circumstances it had jurisdiction to hear the claim. In its decision on the merits, however, the Tribunal concluded that it was impossible for it to distinguish violations of the BIT from breaches of the Concession Contract. Therefore, the Claimants had a duty to pursue their rights with respect to such rights against Tucumán in the CATs of Tucumán as required by Article 16.4 of the Concession Contract.

In the subsequent annulment proceedings,[58] the *ad hoc* Committee declined to annul the part of the Tribunal's Award dealing with jurisdiction. It found that the Tribunal had rightly held that it had jurisdiction over the claim. But the *ad hoc* Committee found that the Tribunal had manifestly exceeded its powers by not examining the merits of the claims for acts of the Tucumán authorities under the BIT.

The *ad hoc* Committee analyzed the Tribunal's treatment of the "fork in the road" clause, which it summarized as follows:

"38. ... in the view of the Tribunal, the fork in the road set out in Article 8(2) is limited in its application to claims which explicitly 'allege a cause of action under the BIT' or which '[charge] the Argentine Republic with a violation of the Argentine–French BIT';

...

42. Thus, it seems that the Tribunal's conclusion that the fork in the road was never reached in this case is based on an interpretation of Article 8(2) which limits its application exclusively to claims alleging a breach of the BIT, that is, to treaty claims as such."[59]

The *ad hoc* Committee criticized the Tribunal's finding on the "fork in the road" provision. It pointed out that under the BIT between Argentina and France the definition of "the dispute" applicable to the "fork in the road" clause is extremely wide: it covers "[a]ny dispute relating to investments". That definition does not require an allegation of a violation of the BIT itself. The *ad hoc* Committee contrasted this provision with Article 1116 of the NAFTA, which requires a claim that a breach of one of the NAFTA's substantive provisions has occurred. Under these circumstances, a contract claim brought before the CATs of Tucumán would *prima facie* fall under the BIT's fork in the road provision.[60]

[57] Ibid., at pp. 438–439. See also at p. 444, para. 81.
[58] *Compañía de Aguas del Aconquija S.A. & Compagnie Générale des Eaux (Vivendi) v. Argentine Republic*, Decision on Annulment, 3 July 2002, 41 I.L.M. 1135 (2002).
[59] Ibid., at pp. 1144 and 1145.
[60] Ibid., at pp. 1147–1148, para. 55.

In *Vivendi*, the discussion of the "fork in the road" provision was somewhat theoretical since the investors had not, in fact, resorted to domestic courts. By contrast, in *Genin v. Estonia*,[61] the Tribunal directly addressed the question of whether legal action taken in the host State constituted an exercise of the choice offered by a fork in the road provision. In that case, jurisdiction was based on the Estonia–United States BIT. That treaty contains a fork in the road provision[62] which is substantively identical to the one in the Argentina–United States BIT, quoted above.

The Claimants, United States nationals, were the principal shareholders of EIB, a financial institution incorporated under the laws of Estonia. The claims arose, principally, from the purchase of a branch of "Social Bank" and from the revocation of EIB's licence by the Estonian authorities. EIB sued the "Social Bank" in a local court for losses from the purchase. EIB also instituted proceedings before the Administrative Court challenging the revocation of the licence.[63] Estonia argued that, "by choosing to litigate their disputes with Estonia in the Estonian courts ... Claimants have exhausted their right to choose another forum to relitigate those same disputes."[64]

The Tribunal found that the lawsuits undertaken by EIB in Estonia did not constitute the choice under the BIT's "fork in the road" provision since they did not relate to the "investment dispute" that was the subject-matter of the ICSID proceedings. The Tribunal said:

> "331. ... the Tribunal is of the view that the lawsuits in Estonia relating to the purchase by EIB of the Koidu branch of Social Bank and to the revocation of EIB's license are not identical to Claimants' cause of action in the 'investment dispute' that they seek to arbitrate in the present proceedings. The actions instituted by EIB in Estonia regarding the losses suffered by EIB due to the alleged misconduct of the Bank of Estonia in connection with the auction of the Koidu branch and regarding the revocation of the Bank's license certainly affected the interests of the Claimants, but this in itself did not make them parties to these proceedings.
>
> 332. The distinction between the causes of action brought by EIB, in Estonia, and by the Claimants, here, is perhaps best illustrated by the circumstances of EIB's recourse to the courts in the matter of its license revocation. The effort by EIB to have the Bank of Estonia's decision overturned, and its license restored, was in effect undertaken on behalf of all the Bank's shareholders (including minority shareholders), as well as on behalf of its depositors, borrowers and employees, all of whom were damaged by the cessation of EIB's activities. It is quite obvious that this matter had to be litigated in Estonia; there was no other jurisdiction competent to deal with the restoration of the *status quo*. The 'investment dispute' submitted to ICSID arbitration, on the other hand, relates to the losses allegedly suffered by the Claimants alone, arising from what they claim were breaches of the BIT. Although certain aspects of the facts that gave rise to this dispute were also at issue in the Estonian litigation, the 'investment dispute' itself was not, and the Claimants should not therefore be barred from using the ICSID arbitration mechanism.

[61] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, Award, 25 June 2001, 17 ICSID Rev.–F.I.L.J. 395 (2002).

[62] Article VI of the BIT.

[63] *Genin v. Estonia*, *supra*, footnote 61, at paras. 47 and 58.

[64] Ibid., at para. 321.

333. Estonia also submits that since Article VI(8) of the BIT qualifies EIB as a U.S. 'national or company', its resort to the courts and administrative tribunals of Estonia should preclude the 'parents' from submission of their dispute to an ICSID arbitration. However, as mentioned above, EIB had no choice but to contest the revocation of its license in Estonia, in the interest of all its shareholders, whereas the Claimants submitted to ICSID arbitration an 'investment dispute', as defined by the BIT, seeking compensation for what they claim was a violation of their rights under the BIT."[65]

This case is the clearest explanation to date of the meaning of a fork in the road clause in a BIT. In order to determine whether the choice under such a clause has been taken, it is necessary to establish not only whether the parties to the two lawsuits are identical but also whether the causes of action in the two proceedings are identical. Only if the claims pursued previously before the domestic courts and administrative tribunals are identical to those subsequently raised before the ICSID tribunal is it possible to conclude that the fork in the road has been taken with the consequence of excluding the ICSID's jurisdiction.

In *Lauder v. The Czech Republic*,[66] jurisdiction was based on the Czech Republic–United States BIT. That treaty contains the following fork in the road clause:

"(...) Once the national or company concerned has so consented, either party to the dispute may institute such proceeding provided:

(i) the dispute has not been submitted by the national or the company for resolution in accordance with any applicable previously agreed dispute-settlement procedures; and

(ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute."

The Respondent argued that the fork in the road provision precluded the Arbitral Tribunal from exercising jurisdiction on the ground that the same dispute had been submitted to Czech courts and to another arbitral tribunal. The Tribunal rejected this contention, pointing out that the parties and the causes of action in these proceedings both were different. The Tribunal said:

"162. The resolution of the investment dispute under the Treaty between Mr. Lauder and the Czech Republic was not brought before any other arbitral tribunal or Czech court before—or after—the present proceedings was initiated. All other arbitration or court proceedings referred to by the Respondent involve different parties, and deal with different disputes.

163. In particular, neither Mr. Lauder nor the Czech Republic is a party to any of the numerous proceedings before the Czech courts ... The Respondent has not alleged—let alone shown—that any of these courts would decide the dispute on the basis of the Treaty."[67]

In *Middle East Cement v. Egypt*,[68] jurisdiction was based on the Egypt–Greece BIT. The Claimant's ship had been seized and auctioned by the Egyptian authorities.

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[65] Ibid., paras. 331–333.
[66] *Supra*, footnote 19.
[67] Ibid., paras. 162–163.
[68] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award, 12 April 2002; available at: ‹www.worldbank.org/icsid/cases/me_cement-award.pdf›.

Claimant had resorted to the Egyptian courts alleging the nullity of the auction. The Respondent argued that this amounted to a choice under the fork in the road provision in the BIT. The Tribunal rejected this argument because the dispute before the Egyptian courts and the one before the Tribunal were different. The Tribunal said:

> "71. The Tribunal notes that Art. 10.2 of the BIT provides that the investor may submit the investment dispute 'either to the competent court of the Contracting Party, or to an international arbitration tribunal.' However, this refers to 'such disputes' as are specified in paragraph 1 of Art. 10, i.e., disputes 'between an investor of a Contracting Party and the Other Contracting Party concerning an obligation of the latter under this Agreement.' The case brought by the Claimant before the Egyptian Courts regarding the alleged nullity of the auction, was not and could not be 'concerning' Egypt's obligations under the BIT, but could only be concerning the validity of the auction under national Egyptian law. Therefore, Art. 10.2 of the BIT does not exclude the admissibility of Claimant's objections to the auction of the ship."[69]

In *CMS v. Argentina*,[70] the case was brought under the Argentina–United States BIT. The fork in the road clause in that Treaty has been quoted above. Argentina argued that the investor had taken the fork in the road since the local company, TGN, in which the investor held shares, had appealed a judicial decision to the Federal Supreme Court and had sought other administrative remedies.[71]

The Tribunal rejected Argentina's contention. It pointed out that any remedies had been taken by the local company TGN rather than by the foreign investor. Also, the steps taken consisted only of defensive and reactive actions. Most importantly, the subject-matter in the domestic proceedings was not the same as the one in the ICSID arbitration.[72] The Tribunal said:

> "80. Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration. This Tribunal is persuaded that with even more reason this view applies to the instant dispute, since no submission has been made by CMS to local courts and since, even if TGN had done so—which is not the case—this would not result in triggering the 'fork in the road' provision against CMS. Both the parties and the causes of action under separate instruments are different."[73]

Azurix v. Argentina[74] was also based on the Argentina–United States BIT. Argentina argued that the Claimant had submitted the dispute to the Argentine courts, since ABA, the local company in which Azurix had invested, had lodged administrative appeals and the dispute between ABA and the Province of Buenos Aires over the termination of their Concession Agreement had been submitted to the Court of Justice of the Province.[75]

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[69] Ibid., para. 71.
[70] *Supra*, footnote 12.
[71] Ibid., at para. 77.
[72] Ibid., at paras. 78–82.
[73] Ibid., para. 80; footnote omitted. The Tribunal cited *Vivendi*, *Genin* and *Olguín*.
[74] *Supra*, footnote 11.
[75] Ibid., at paras. 37–41 and 86.

The Tribunal confirmed that the operation of the fork in the road provision would require the identity of the parties and of the object and cause of action in the respective proceedings.[76] It pointed to the consistent line of reasoning of previous tribunals, quoting from the award in *CMS* in particular. The Tribunal stressed the lack of identity of the parties in the case before it:

> "90. Neither of the parties is a party to the proceedings before the local courts. Even if Azurix had joined ABA as a plaintiff in those courts, there would not be party identity since Argentina is not party to any of those proceedings."[77]

The Tribunal added that the administrative appeals had been filed after the submission of the request for arbitration to the ICSID. Moreover, the body hearing the administrative appeals was not equivalent to an administrative tribunal for purposes of the BIT since it did not have a judicial function.[78]

Enron v. Argentina[79] was yet another case under the Argentina–United States BIT. Argentina objected to the Tribunal's jurisdiction on the ground that TGS, the local company in which Enron had invested, had applied to various courts in Argentina seeking remedies against the tax measures that were the object of the dispute. The Tribunal rejected this objection, pointing out that both the causes of action and the parties in the respective proceedings were different:

> "97. This Tribunal is mindful of various decisions of ICSID Tribunals also discussing this very issue, particularly *Compañía de Aguas del Aconquija*, *Genin*, and *Olguín*. In all these cases the difference between the violation of a contract and the violation of a treaty, as well as the different effects that such violations might entail, have been admitted, not ignoring of course that the violation of a legal rule will always have similar negative effects irrespective of its nature. It has accordingly been held that even if there was recourse to local courts for breach of contract this would not prevent resorting to ICSID arbitration for violation of treaty rights, or that in any event, as held in *Benvenuti & Bonfant*, any situation of *lis pendens* would require identity of the parties. Neither will these considerations be repeated here.
>
> 98. The Tribunal notes that in the present case the Claimants have not made submissions before local courts and those made by TGS are separate and distinct. Moreover, the actions by TGS itself have been mainly in the defensive so as to oppose the tax measures imposed, and the decision to do so has been ordered by ENARGAS, the agency entrusted with the regulation of the gas sector. The conditions for the operation of the principle *electa una via* or 'fork in the road' are thus simply not present. The Tribunal accordingly dismisses the objection to jurisdiction on this other ground."[80]

The picture emerging from this consistent case-law is reasonably clear. The fork in the road provision and the consequent loss of access to international arbitration applies only if the same dispute between the same parties has been submitted to domestic courts or administrative tribunals of the host State before the resort to international arbitration.

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[76] Ibid., at para. 88.
[77] Ibid., para. 90.
[78] Ibid., at paras. 91 and 92.
[79] *Supra*, footnote 38.
[80] Ibid., paras. 97–98.

Therefore, a determination that the investor has exercised the choice under the fork in the road in favour of the host State's courts or administrative tribunals and that, consequently, there is no access to international arbitration, requires the following findings:

- The domestic proceedings must have been instituted prior to the choice of international arbitration. Typically, the decisive date will be the date at which arbitration proceedings are instituted. If by that date the investor has submitted the dispute to domestic courts or tribunals, the provision will apply. If by that date, the investor has not done so, the fork in the road provision will not operate against arbitration.
- The dispute before the domestic courts or administrative tribunals must be identical with the dispute in the international proceeding. If the claim before the international tribunal alleges a breach of the BIT, the dispute before the domestic courts or administrative tribunals would also have to concern an alleged breach of a right conferred or created by the BIT. Therefore, if the dispute before the domestic courts or tribunals concerns a different claim, such as a contract claim or an appeal against a decision by a regulatory authority, the fork in the road provision will not apply and the arbitral tribunal will be free to proceed. Complications may arise in cases where several types of claims are brought before the arbitral tribunal—for example, BIT claims and contract claims—and only the contract claims are pending before the domestic courts.
- The parties in the domestic proceedings must be identical with the parties in the international proceedings. The host State that is to be the respondent in the international arbitration must be the defendant in the domestic proceedings. The foreign investor that seeks arbitration must be the party that has submitted the dispute for resolution to the courts or administrative tribunals of the host State.

The conclusion that the fork in the road provision of the BIT does not apply to every legal action taken in domestic courts that relates to the investment dispute before the international tribunal is reinforced by another consideration that has not attracted the attention of tribunals. Many BITs contain provisions that guarantee investors effective remedies under domestic law. For instance, Article II of the Argentina–United States BIT provides:

> "6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements and investment authorizations."[81]

These "effective means" include redress through domestic courts or administrative tribunals. It would create an unreasonable dilemma for the investor if it had to choose between the assertion of its rights through these domestic means or through

[81] See also Article IV(2) of the same BIT, guaranteeing "a right to prompt review by the appropriate judicial or administrative authorities" in case of expropriation.

international arbitration. To see any utilization of domestic courts or administrative tribunals as a choice under the fork in the road provision would put the investor in an intolerable position. The investor would have to sit still and endure any form of injustice passively on pain of losing its access to international arbitration. In particular, the investor would have to forego appeals against administrative action that are subject to preclusive time limits under domestic law. In other words, the investor would have no means of asserting its rights until the situation deteriorates to a point where it can be characterized as a violation of the BIT, thus opening the way to international arbitration. Such an interpretation would be in the interests neither of the investor nor of the host State. It follows that legal action for limited purposes, notably defensive steps to contest administrative action, cannot be tantamount to submitting "the dispute" to the courts or administrative tribunals of the host State.

Therefore, the exercise of domestic procedural rights, as guaranteed in BITs, should not be seen as triggering fork in the road provisions. Any other interpretation would lead to the untenable conclusion that, if the BIT contains a fork in the road provision, guarantees of effective domestic remedies are traps designed to lure an investor into domestic proceedings with the consequence that the door to international arbitration will be closed forever no matter what the outcome of the domestic proceedings may be.

IV. UMBRELLA CLAUSES

The extent of jurisdiction *ratione materiae*, or subject-matter jurisdiction, that BITs confer upon arbitral tribunals in investor–State disputes is not uniform. Some BITs cover only disputes relating to an "obligation ... under this agreement".[82] In other words, jurisdiction exists only for claims of BIT violations.[83] By contrast, other BITs extend the tribunals' jurisdiction to "any dispute relating to investments".[84] On the basis of these wider definitions of arbitrable disputes, the majority of tribunals have found that jurisdiction is not restricted to claims asserting violations of the BITs' substantive provisions.[85]

This issue is important, in particular in the context of jurisdiction over allegations of contract violations by host States. It is generally accepted that not every breach of contract by a State automatically amounts to a violation of international

[82] See, for example, Article 9(1) of the Netherlands–Venezuela BIT.

[83] See also Article X(1) of the Costa Rica–Paraguay BIT which contains an investor–State dispute settlement clause covering only disputes *"respecto a cuestiones reguladas por el presente Acuerdo"* ("in respect of questions regulated by the present Agreement").

[84] See, for example, Article 8(1) of the Argentina–France BIT.

[85] See, for example, *Salini v. Morocco, supra*, footnote 8, at paras. 59–62; *Vivendi*, Decision on Annulment, *supra*, footnote 58, at p. 1147, para. 55; *SGS Société Générale de Surveillance S.A. v. The Republic of the Philippines*, Decision on Jurisdiction, 29 January 2004, paras. 130–135; available at: ‹www.worldbank.org/icsid/cases/SGSvPhil-final.pdf›, with a declaration by arbitrator Crivellaro at: ‹www.worldbank.org/icsid/cases/SGSvPhil-declaration.pdf›. But see *SGS v. Pakistan, supra*, footnote 28, at pp. 360–361, para. 161.

law,[86] although a contract violation may rise to a breach of international law under certain circumstances.[87]

Similarly, not every breach of contract by a host State will automatically constitute a breach of an applicable BIT. However, some treaties specifically protect contractual undertakings made by a State *vis-à-vis* foreign investors and provide for redress through international arbitration in case of a breach. The point is made in *Oppenheim's International Law*:

> "It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes *per se* a breach of an international obligation, unless there is some such additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state's international responsibility. However, either by virtue of a term in the contract itself or of an agreement between the state and the alien, or by virtue of an agreement between the state allegedly in breach of its contractual obligations and the state of which the alien is a national, disputes as to compliance with the terms of contracts may be referred to an internationally composed tribunal, applying, at least in part, international law."[88]

Some BITs offer specific protection for obligations assumed by the host State *vis-à-vis* investors. For instance, Article 2(2), last sentence, of the Egypt–United Kingdom BIT provides:

> "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."

Clauses of this kind have been added to some BITs to provide additional protection to investors beyond the traditional international standards. They are often referred to as umbrella clauses because they put contractual commitments under the BIT's protective umbrella. They add the compliance with investment contracts, or other undertakings of the host State, to the BIT's substantive standards. In this way, a violation of such a contract becomes a violation of the BIT.

Scholarly opinion seems to be settled on the meaning of treaty provisions of this type.[89] The effect of an "umbrella clause" or "*traité de couverture*" was described by Weil already in 1969 in the following terms:

> "There is, in fact, no particular difficulty when there is an 'umbrella treaty' ['*traité de couverture*'] between the contracting State and the national State of the co-contracting party, which turns the obligation to perform the contract into an international obligation at the

[86] See American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States, 1986*, §712, Comment h, Vol. 2, p. 201: "... not every repudiation or breach by a state of a contract with a foreign national constitutes a violation of international law."

[87] See S.M. Schwebel, *On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law*, in *International Law at the Time of its Codification, Essays in Honour of Roberto Ago*, III, Giuffrè, Milan, 1987, p. 401.

[88] Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9th edition, Vol. 1, Longman, London, 1992, p. 927; footnotes omitted.

[89] See also F. Rigaux, *Les situations juridiques individuelles dans un système de relativité générale*, 213 Recueil des Cours I, 1989, pp. 229–230; I.F.I. Shihata, *Applicable Law in International Arbitration: Specific Aspects in the Case of the Involvement of State Parties*, in I.F.I. Shihata (ed.), *The World Bank in a Changing World*, Vol. II, Kluwer Law, 1995, p. 601.

charge of the contracting State *vis-à-vis* the national State of the co-contracting party. The intervention of the umbrella treaty transforms contractual obligations into international obligations thereby ensuring, as it has already been stated, 'the intangibility of contract under threat of violating the treaty';[90] any non-performance of the contract, even if it is legal under the national law of the contracting State, gives rise to the international liability of the latter *vis-à-vis* the national State of the co-contracting party."[91]

Mann also stated that such a clause[92] in a BIT protects the investor against a mere breach of contract:

"The treaties usually contain a further provision guaranteeing the success of the investment: each party 'shall observe any obligation arising from a particular commitment it may have entered into with regard to a specific investment'.

This is a provision of particular importance in that it protects the investor against any interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act, and independently of the question whether or no such interference amounts to expropriation. The variation of the terms of a contract or license by legislative measures, the termination of the contract or the failure to perform any of its terms, for instance, by non-payment, the dissolution of the local company with which the investor may have contracted and the transfer of its assets (with or without the liabilities)—these and similar acts the treaties render wrongful."[93]

The leading work on bilateral investment treaties, by Dolzer and Stevens, states that an umbrella clause in a BIT affords protection against a breach of contract:

"*a. Umbrella Clauses*

These provisions seek to ensure that each Party to the treaty will respect specific undertakings towards nationals of the other Party. The provision is of particular importance because it protects the investor's contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts, and because it is not entirely clear under general international law whether such measures constitute breaches of an international obligation."[94]

Scholarly discussions of United States and German BIT practice reach the same conclusion.[95] Therefore, under the regime of such an umbrella clause, any violation of a contract thus covered becomes a violation of the BIT. The consequence is that the BIT's clause on dispute settlement becomes applicable to a claim arising from the breach of the contract.

Up until recently, case-law on umbrella clauses has been almost non-existent. In *Fedax v. Venezuela*,[96] the Respondent had failed to honour promissory notes issued by

[90] García Amador, 4th report [on State responsibility], para. 98. [Footnote original].

[91] P. Weil, *Problèmes relatifs aux contrats passés entre un État et un particulier*, 128 Recueil des Cours III, 1969, at p. 130; author's translation from the French original.

[92] The example chosen by Mann concerned Article III(3) of the Philippines–United Kingdom BIT.

[93] F. A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 British Yearbook of International Law 241, at p. 246 (1981).

[94] R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, Kluwer Law, 1995, pp. 81–82; footnote omitted.

[95] See K. J. Vandevelde, *United States Investment Treaties: Policy and Practice*, Boston, 1992, at p. 78; J. Karl, *The Promotion and Protection of German Foreign Investment Abroad*, 11 ICSID Rev.–F.I.L.J. 1, at 23 (1996).

[96] *Fedax N.V. v. The Republic of Venezuela*, Award, 9 March 1998, 37 I.L.M. 1391 (1998).

the Venezuelan government. Article 9(1) and (3) of the Netherlands–Venezuela BIT applicable in that case limits investor–State arbitration to disputes concerning obligations under the BIT itself. On the other hand, the BIT contained the following umbrella clause in its Article 3 dealing with standards of treatment:

> "4. Each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals of the other Contracting Party."

The Tribunal did not address the umbrella clause directly, but it found that the non-payment of the contractual obligation to pay amounted to a violation of the BIT. The Tribunal said:

> "... the Republic of Venezuela is under the obligation to honor precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Agreement [i.e. the BIT], as well as to honor the specific payments established in the promissory notes issued, and the Tribunal so finds in the terms of Article 9(3) of the Agreement."

In *SGS v. Pakistan*,[97] the Tribunal was called upon to apply the following umbrella clause in Article 11 of the Pakistan–Switzerland BIT:

> "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."

The Tribunal rejected the Claimant's contention that this clause elevated breaches of contract to a breach of the treaty.[98] As a matter of textual interpretation, the Tribunal found that "the commitments", the observance of which was guaranteed, were not limited to contractual commitments. It said:

> "... the scope of Article 11 of the BIT, while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion. The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically 'elevated' to the level of breaches of international treaty law."[99]

The Tribunal added that the legal consequences attributed by the Claimant to the clause were so far-reaching in scope and so burdensome in their potential impact on the host State that clear and convincing evidence of such an intention of the parties to the BIT would have to be adduced. This, the Tribunal found had not been the case.[100] The Tribunal added that the interpretation put forward by the Claimant "would amount to incorporating by reference an unlimited number of State contracts" the violation of which "would be treated as a breach of the BIT".[101]

The Tribunal also argued that an umbrella clause, as understood by the Claimant, would make the BIT's substantive provisions superfluous:

> "... the Claimant's view of Article 11 tends to make Articles 3 to 7 of the BIT substantially

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[97] *SGS v. Pakistan, supra*, footnote 28, at pp. 361–367, paras. 163–173.
[98] Ibid., at para. 165.
[99] Ibid., para. 166.
[100] Ibid., at paras. 167 and 173.
[101] Ibid., at para. 168.

superfluous. There would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract, or of municipal statute or regulation, by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party."[102]

In addition, the Tribunal considered the location of the clause within the BIT. It noted that Article 11 is not placed together with the BIT's substantive obligations but near the BIT's end, just before its final provisions. The Tribunal said:

"Given the above structure and sequence of the rest of the Treaty, we consider that, had Switzerland and Pakistan intended Article 11 to embody a substantive 'first order' standard obligation, they would logically have placed Article 11 among the substantive 'first order' obligations set out in Articles 3 to 7."[103]

The Tribunal added a methodological remark on the interpretation of the clause:

"The appropriate interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius* ['when in doubt, the milder course is to be followed']."[104]

The Tribunal's reasoning calls for a number of observations.[105] The fact that the reference to "commitments" in Article 11 of the Pakistan–Switzerland BIT is not limited to contractual commitments is no reason to exclude contracts from its meaning. Also, the interpretation suggested by the claimant would not have put an unlimited number of State contracts under the BIT's protective umbrella but only those that relate to an investment as defined by the BIT.

Also, it is not clear why the acceptance of the umbrella clause as covering breaches of contract would have made the BIT's substantive provisions superfluous. The BIT's substantive provisions deal with non-discrimination, fair and equitable treatment, national treatment, MFN treatment, free transfer of payments and protection from expropriation. These issues are not normally covered in contracts. Therefore, extending the BIT's protection to investment contracts would not make the substance of a BIT superfluous.

The argument based on the location of the clause in the BIT is a legitimate supporting argument in the Treaty's interpretation, but it cannot be extended to other BITs containing similar clauses. Umbrella clauses are frequently grouped together with the standards of treatment guaranteed by these treaties.[106] Under the Tribunal's reasoning, that would be an indication that in these BITs the umbrella clause is part of the treaties' "first order" obligations.

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[102] Id.

[103] Ibid., para. 170.

[104] Ibid., para. 171. The Tribunal's statement is accompanied by a footnote containing an extensive quotation from the *The Loewen Group Inc. and Raymond Loewen v. United States of America*, Award, 4 J.W.I. 4, August 2003, pp. 675–731. The relevance of that quotation to the question at issue is unclear.

[105] See also S.A. Alexandrov, *Introductory Note*, 42 I.L.M. 1284 (2003).

[106] See, for example, Article 3(4) of the Netherlands–Venezuela BIT; Article 2(2) of the Egypt–United Kingdom BIT; Article 2(4) of the Italy–Jordan BIT.

The Tribunal's avowed preference for a restrictive interpretation of its competence is at odds with the practice of previous tribunals. The argument that a declaration of consent to arbitration by the host State should be construed restrictively, since it constitutes a limitation of sovereignty, has been put forward repeatedly, but the tribunals have rejected this argument consistently.[107]

Less than half a year later, another Tribunal, in *SGS v. Philippines*,[108] came to a radically different result when interpreting the umbrella clause in the Philippines–Switzerland BIT. Article X(2) of that BIT provides:

> "2. Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."

On the basis of a textual interpretation, the Tribunal decided that the terms of the clause were capable of applying to obligations arising under national law, such as those arising from a contract.[109] This result was confirmed by the BIT's object and purpose which supports an effective interpretation of the clause.[110] Therefore:

> "... if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X(2)."[111]

The Tribunal specifically rejected the Respondent's contention that the effect of the clause was limited to obligations under other international law instruments. That contention would read into the provision words of limitation which are simply not there.[112]

The Tribunal took issue with the reasoning of the Tribunal in *SGS v. Pakistan*, which it described as unconvincing.[113] Although the Tribunal admitted that the umbrella clause in the Pakistan–Switzerland BIT was somewhat vaguer in terms than the clause before it, it still found that the previous Tribunal had given a highly restrictive interpretation to the clause.[114]

The Tribunal went through a detailed and critical analysis of the reasoning in *SGS v. Pakistan*.[115] Specifically, it pointed out that the earlier Tribunal had failed to give any clear meaning to the umbrella clause.[116]

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[107] *Amco v. Indonesia*, *supra*, footnote 51, at pp. 394, 397, 398, 400 and 402; *Cable TV v. St. Kitts and Nevis*, Award, 13 January 1997, 13 ICSID Rev.–F.I.L.J. 328, at 386 (1998); *CSOB v. Slovakia*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Rev.–F.I.L.J. 251, at 263 (1999); *SOABI v. Senegal*, Award, 25 February 1988, 2 ICSID Reports 205, at 205 and 206; *SPP v. Egypt*, Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 143, at 143–144; *Tradex v. Albania*, *supra*, footnote 7, at p. 194. For an analysis of some of these cases, see Schreuer, *supra*, footnote 44, pp. 249–252.

[108] *Supra*, footnote 85.

[109] Ibid., at para. 115.

[110] Ibid., at para. 116.

[111] Ibid., para. 117.

[112] Ibid., at para. 118.

[113] Ibid., at para. 125.

[114] Ibid., at paras. 119 and 120.

[115] Ibid., at paras. 119–126.

[116] Ibid., at para. 125.

The Tribunal added that the umbrella clause did not convert questions of contract law into treaty law nor did it change the proper law of the contract from the host State's domestic law to international law. The clause did not address the scope of the obligations entered into but their performance. It followed that:

> "It is a conceivable function of a provision such as Article X(2) of the Swiss–Philippines BIT to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments—in effect, to help secure the rule of law in relation to investment protection. In the Tribunal's view, this is the proper interpretation of Article X(2)."[117]

This led the Tribunal to the following overall conclusion:

> "To summarize the Tribunal's conclusions on this point, Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law."[118]

It followed that a violation of Article X(2) would fall within the Tribunal's competence.[119]

The reasoning of the Tribunal in *SGS v. Philippines* on the umbrella clause is clearly preferable to the one in *SGS v. Pakistan*. It does justice to a clause that is evidently designed to add extra protection for the investor. Under the operation of an umbrella clause, the claim need not fail if the investor is unable to demonstrate a violation of one of the BIT's substantive provisions. The often difficult proof that there has been a violation of the "fair and equitable" or "full protection and security" standards or that there has been an "indirect expropriation" is no longer decisive, provided a breach of an investment contract can be shown. At the same time, an umbrella clause is not unduly burdensome to the host State. It will provide a remedy only if there has been a breach of the host State's legal obligation towards the investor. The range of remedies is extended from redress for violations of international law to relief for breach of domestic law.

Problems could still arise if investors were to start using umbrella clauses for trivial disputes. It cannot be the function of an umbrella clause to turn every minor disagreement on a detail of contract performance into an issue for which international arbitration is available. For example, a small delay in a payment due to the investor and interest accruing from that delay would hardly justify arbitration under a BIT. Equally, a lease dispute with the host State that is peripheral to the investment will not be an appropriate basis for the institution of arbitral proceedings. It is to be hoped that investors will invoke umbrella clauses with the appropriate restraint. If necessary, the tribunals will have to develop appropriate restraints on their use.

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[117] Ibid., para. 126.

[118] Ibid., para. 128.

[119] In another part of the Decision, the Tribunal found that the claim was inadmissible due to an exclusive jurisdiction clause in the underlying contract pointing to the domestic courts of the Philippines. Rather than dismissing the claim, the Tribunal stayed the proceedings (ibid., at paras. 136–155 and 170–176).

V. Conclusion

This brief survey of the practice on three seemingly straightforward types of provisions in BITs demonstrates that their application can lead to questions of surprising complexity. While the interpretation of clauses providing for waiting periods and forks in the road is reasonably consistent, the invocation of umbrella clauses has led to widely conflicting decisions.

Better communication between the drafters and the appliers of BITs may be able to address some of the problems outlined here. Improvement in the wording of the treaties is not a realistic short-term solution, however. Existing BITs probably still have a considerable life expectancy. Their adjustment to current developments is neither likely nor desirable. Even if the efforts in the drafting of a multilateral agreement were to bear fruit, BITs are not likely to be superseded from one day to another. The experience gathered in the application of existing treaties, however, may well be reflected in the drafting of future ones.

The responsibility for developing a consistent and reasonable practice is likely to remain with the tribunals for some time to come. The goal of consistency is made difficult not only by the variations in language of substantively similar clauses. Adjudication by *ad hoc* tribunals of varying composition is another obstacle to developing a *jurisprudence constante*. The idea of creating a system of appeals for arbitral tribunals may be able to address part of that problem. Even in the absence of an appeals procedure, tribunals have usually endeavoured to rely on the authority of earlier decisions.[120]

The more difficult task is finding a proper balance between the interests of host States and those of foreign investors. The protection of investments is ultimately in the interest of host States since it creates a framework that facilitates the flow of resources needed for economic development. In a particular dispute, however, the interests of the two sides are in sharp conflict. The practice of tribunals will have to develop standards in the interpretation of BITs that do justice to the legitimate expectations of investors in judicial protection and, at the same time, respect the concerns of host States that are faced with onerous and costly arbitration proceedings.

[120] For a discussion of the coherence of case-law under the ICSID Convention, see *SGS v. Philippines*, *supra*, footnote 85, at para. 97.