NOTES AND COMMENTS

CONTRACT CLAIMS VS. TREATY CLAIMS: MAPPING CONFLICTS BETWEEN ICSID DECISIONS ON MULTISOURCED INVESTMENT CLAIMS

By Yuval Shany[*]

Three recent cases decided under the auspices of the International Centre for Settlement of Investment Disputes (ICSID)[1] —*Vivendi*,[2] *SGS v. Pakistan*,[3] and *SGS v. Philippines*[4]—have exposed some of the more difficult theoretical and practical uncertainties underlying modern international investment law. Specifically, the trilogy of cases reveals inconsistent approaches by international arbitrators to delineating the relationship between the two principal constituent elements of international investment law—private investment contracts (which usually derive their validity from the domestic law of the host state) and international investment agreements (in most cases, bilateral investment treaties or BITs). These differences are hardly academic in nature. To the contrary, there are significant discrepancies in the operative parts of the three awards—that is, different holdings on whether ICSID arbitral panels are competent to review contract claims, whether contractual obligations normally fall within the scope of BIT protection, the effect that should be accorded to exclusive jurisdiction clauses found in private investment contracts, and the implications of the pendency of parallel proceedings before national and international dispute settlement procedures. Two additional ICSID awards, rendered in the second half of 2004 (*Joy Mining*[5] and *Salini*[6]), do little to resolve these difficult issues.

Thus, confusion now surrounds fundamental aspects of law and procedure governing international investment disputes. If this uncertainty persists, then the long-term stability and workability of international investment law might arguably be threatened.[7] Since overlaps between contract and treaty claims are expected to arise with increased frequency (as a result of the ever-increasing scope of BIT coverage[8] and the growing propensity of investors to

[*] Hersch Lauterpacht Chair in Public International Law, Faculty of Law, The Hebrew University of Jerusalem; and Visiting Researcher at the Pioneer Project, Amsterdam Center for International Law, University of Amsterdam (2004). The author wishes to thank Dr. Moshe Hirsch for his useful comments.

[1] The International Centre for Settlement of Investment Disputes was established pursuant to the 1965 Washington Convention. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 UST 1270, 575 UNTS 159 [hereinafter ICSID Convention].

[2] Compañía de Aquas del Aconquija, S.A. v. Argentina, Decision on Annulment, ICSID No. ARB/97/3, 41 ILM 1135, 1154 (2002) (ad hoc comm. July 3, 2002) [hereinafter *Vivendi II*]. Unless another Web site is listed, the ICSID decisions and awards discussed below are available online at <http://www.worldbank.org/icsid/cases/cases.htm>.

[3] SGS Société Générale de Surveillance S.A. v. Pakistan, Decision on Jurisdiction, ICSID No. ARB/01/13 (Aug. 6, 2003), 18 ICSID REV. 301 (2003), 42 ILM 1290 (2003) [hereinafter *SGS v. Pakistan*].

[4] SGS Société Générale de Surveillance S.A. v. Philippines, Decision on Jurisdiction, ICSID No. ARB/02/6 (Jan. 29, 2004) [hereinafter *SGS v. Philippines*].

[5] Joy Mining Machinery Ltd. v. Egypt, ICSID No. ARB/03/11 (Aug. 6, 2004) [hereinafter *Joy Mining*].

[6] Salini Costruttori S.p.A. v. Jordan, Decision on Jurisdiction, ICSID No. ARB/02/13 (Nov. 29, 2004) [hereinafter *Salini*].

[7] *Cf.* Kalypso Nicolaidis & Joyce L. Tong, *Diversity or Cacophony? The Continuing Debate over New Sources of International Law*, 25 MICH. J. INT'L L. 1349, 1351 (2004) (identifying inefficiency, loss of predictability, and delegitimacy as risks associated with the fragmentation of international law).

[8] According to ICSID, by 1996 there were some 1100 BITs, and more than 70% of them were concluded after 1987. *See* List of Parties to Bilateral Investment Treaties, *at* <http://www.worldbank.org/icsid/treaties/intro.htm>.

resort to ICSID and comparable investment protection procedures[9]), resolution of the relations between these two categories of claims is crucial to the world of investment law.

At a deeper level, the three ICSID cases raise important theoretical questions pertaining to the makeup of international investment law. For example, the positions espoused by arbitrators and tribunals in the surveyed cases uncover competing visions of BITs as either "self-contained" or more "open-textured" instruments that should be harmonized with other investment-regulating norms (e.g., investment contracts). The methodology underlying these positions thus alternates between disintegrative strategies, which dissociate specific BITs from other potentially applicable norms of investment protection, and resort to more integrative modalities of normative coexistence or coapplication.

Identifying these competing strategies can help us predict and assess specific interpretive maneuvers that ICSID tribunals will employ. It can also aid in clarifying the policy implications of alternative treaty interpretations for the systemic welfare of the treaty regime in question, on the one hand, and the entire complex of multilayered investment protection norms, on the other hand. Furthermore, analogous tensions between integrative and disintegrative approaches to treaty interpretation can be identified in the work of other international dispute settlement mechanisms operating in the context of specific treaty regimes outside international investment law. Hence, it may be argued that the specific debate taking place in the surveyed ICSID cases on how BITs should be construed can be contextualized as part of a wider debate on the methodology of construing international law instruments establishing specific treaty regimes, and should be informed by that wider debate.

Part I of this Comment lays out the facts and holdings of the three principal ICSID cases on the relations between contract and treaty claims, and also mentions other, more recent ICSID awards touching upon these matters. Part II maps the legal questions raised by the surveyed decisions and discusses the various integrationist and disintegrationist methodologies they employ to regulate the interplay between contract and treaty claims. Part III tries to link the debate over the relations between contract and treaty claims to other debates taking place in the world of international investment law and in other areas of international law. The concluding section offers some pragmatic tools—the principles of judicial comity and *abus de droit* (abuse of right)—capable of alleviating some of the tensions between contract and treaty claims without committing lawyers to a specific vision of their relations.

I. Recent ICSID Decisions on Competing Contract and Treaty Claims

Several recent ICSID cases have underlined the growing difficulty of reconciling parallel contract and treaty claims arising from the same investment dispute. Before we examine the specific facts and holdings of the three most notable ICSID decisions on the matter, some preliminary explanatory remarks regarding the two types of investment claims, as well as the normative and procedural complexities that they entail, may be useful.

International investment transactions[10] normally engage several bodies of norms that introduce distinct substantive as well as procedural rights and obligations for the transacting parties: First, the terms of most foreign investments are laid out in a contract (or a series of contracts) between the foreign investor and a local party (often, a government agency),

A more recent note asserts that the number of BITs now exceeds 2000. José E. Alvarez, *The Regulation of Foreign Direct Investment: Introduction,* 42 Colum. J. Transnat'l L. 1, 2 (2003).

[9] Between 1972 and 2003, ICSID settled eighty-eight cases. Still, almost the same number of cases—eighty-five—is currently pending before ICSID panels. This explosive increase is arguably indicative of the growing accessibility and appeal of ICSID dispute settlement procedures.

[10] The term "international investment" has been construed very broadly in international practice, as encompassing a variety of cross-border transactions, involving transfer of money or effort from one state to the other, in exchange for an asset, with the expectation of returns or profits obtained in the territory of the host state. *See, e.g.,* North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., Art. 1139, 107 Stat. 2066, 32 ILM 289, 605 (1993) [hereinafter NAFTA]; *Joy Mining, supra* note 5, para. 53; Tokios Tokelés v. Ukraine, Decision on Jurisdiction, ICSID No. ARB/02/18, para. 75 (Apr. 29, 2004).

which typically introduces a host of private law rights and obligations. Second, foreign investments are also protected by the domestic laws of the host state. Such laws, which may include specific provisions on the protection of foreign investments, usually apply to contract claims at least as residual sources of law, and may fill normative gaps and inspire contract interpretation. Third, many contemporary foreign investment transactions are also governed by interstate agreements—BITs or multilateral investment treaties that require the host state to adhere to a more or less fixed set of international standards. These standards provide, inter alia, for the prohibition of discrimination against and between foreign investors (i.e., "national treatment" and "most-favored-nation" clauses); fair and equitable treatment, and full protection and security of foreign investments; guarantees for market value compensation in the event of expropriation; and the free transfer of investment returns or profits out of the host country.[11] Finally, general international law often introduces additional safeguards upon which parties to investment transactions can rely.[12]

Despite the conceptually discrete legal foundation of these sources, several normative and procedural overlaps can occur: The substantive standards of conduct enumerated in the contract or domestic law may be analogous to the substantive standards provided under international law. In particular, the domestic laws of some host states may incorporate international law instruments (including BITs). At the same time, many BITs include "umbrella clauses," that is, clauses that require state parties to respect all obligations incurred with respect to the covered investments.[13] As will be explained below, the precise meaning of these umbrella clauses—i.e., whether they encompass contractual obligations—is among the most contentious aspects of the recent ICSID cases.

The complexity stemming from the multiplicity of legal sources that govern international investment transactions—and their potential for conflict or overlap—is further compounded by their sometimes incompatible dispute settlement provisions. While investment contracts often refer contract claims to the exclusive jurisdiction of domestic courts or arbitral panels, many international investment protection treaties include compromissory provisions that entitle investors to bring treaty claims before international arbitration mechanisms such as ICSID[14] (normally, dispensing with the need to exhaust local remedies).[15] In addition, a few ICSID opinions have suggested that at least some formulations of the most-favored-nation clause found in some BITs may enable investors to rely upon more favorable compromissory clauses in other investment treaties, considerably extending the potential accessibility of international arbitration to foreign investors.[16]

[11] *See, e.g.*, NAFTA, *supra* note 10, Arts. 1102–1110; Agreement for the Promotion and Protection of Investments, May 16, 1997, Japan-H.K., Arts. 3–7, 36 ILM 1423 (1997); Agreement for the Promotion and Reciprocal Protection of Investments, July 4, 1989, Fr.-USSR, Arts. 3–5, 29 ILM 320 (1990); 2004 U.S. Model Bilateral Investment Treaty, Arts. 3–6, *available at* <http://www.ustr.gov> [hereinafter U.S. Model BIT].

[12] *See, e.g.*, Universal Declaration of Human Rights, Art. 17(2), GA Res. 217A(III), UN Doc. A/810, at 71 (1948); Francesco Francioni, *Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity*, 24 INT'L & COMP. L.Q. 255, 263 (1975).

[13] *See, e.g.*, Agreement for the Promotion and Protection of Investments, Apr. 14, 1994, India-UK, Art. 3(3), 34 ILM 935 (1995); Treaty Concerning the Encouragement and Reciprocal Protection of Investment, June 17, 1992, Russ.-U.S., Art. 2(2)(c), 31 ILM 794 (1992).

[14] *See, e.g.*, NAFTA, *supra* note 10, Art. 1120; U.S. Model BIT, *supra* note 11, Art. 24(3). Some international instruments allow the investor to choose between several dispute settlement alternatives, which typically include both national and international judicial or arbitral procedures. *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, July 2, 1997, Jordan-U.S., Art. IX, S. TREATY DOC. NO. 106-30, 36 ILM 1498 (1997); European Energy Charter, Dec. 12, 1994, Art. 26, 1994 O.J. (L 380) 24, 33 ILM 360 (1995). Finally, one should also note that numerous aspects of investment disputes might fall under the compulsory jurisdiction of domestic and international courts or tribunals (e.g., the ICJ in cases involving "optional clause" countries or those brought on the basis of a general compromissory clause). *See, e.g.*, Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 ICJ REP.15 (July 20) [hereinafter *ELSI*]. This adds another potential avenue of jurisdictional competition between different investment courts and tribunals.

[15] *See, e.g.*, ICSID Convention, *supra* note 1, Art. 26; NAFTA, *supra* note 10, Art. 1121(2)(b).

[16] Maffezini v. Spain, Decision on Jurisdiction, ICSID No. ARB/97/7 (Jan. 25, 2000), 16 ICSID REV. 212 (2001), 40 ILM 1129, 1138 (2001); *see also* Gas Natural SDG S.A. v. Argentina, Decision on Jurisdiction, ICSID No. ARB/

The applicability of multiple jurisdictional clauses presents a significant practical problem. The combined effect of the normative overlap between investment claims brought under national and international law, and the availability of several competent forums for their resolution, is that claimants may enjoy wide discretion in choosing how to present their claims so as to bring them under the jurisdiction of the forum perceived most sympathetic to their interests.[17] Such a situation encourages forum shopping, which might detract from the predictability of international investment transactions.[18] Worse still, the multiplicity of available forums could lead to multiple proceedings—litigation of the same investment dispute or related disputes involving the same parties before different judicial bodies. This state of affairs not only might seriously inconvenience some of the litigating parties and unnecessarily tax their material resources, but also could encourage conflicting judicial decisions, with all the legal havoc that would ensue.[19] The following survey of leading ICSID cases involving competing contract and treaty claims demonstrates the nonhypothetical nature of the threats posed by these complex scenarios.

The Vivendi *Case*

The proceedings in *Vivendi* arose from a dispute over the terms of a concession contract between an Argentine corporation, Compañía de Aguas del Aconquija, S.A. (CAA)—which was controlled at the relevant period by a French corporation, Compagnie Générale des Eaux (CGE, and subsequently Vivendi Universal)—on the one hand, and the Argentine Province of Tucumán, on the other hand. Under the 1995 investment contract, CAA was to operate the province's water and sewage systems. Significantly, Article 16(4) of the contract referred future contractual disputes to the exclusive jurisdiction of Tucumán's administrative tribunals.

Still, in late 1996, CAA and CGE chose to bring their case against Argentina not to the local administrative tribunals but to ICSID. In doing so, they relied upon Article 8 of the 1991 Argentina-France BIT,[20] which provides foreign investors with the choice of bringing international investment disputes before either national courts or international arbitration (under ICSID or UNCITRAL auspices; this type of provision is sometimes referred to as a "fork in the road" or *electa una via* provision).

In the ICSID proceedings, CAA and CGE raised two principal claims: (1) that various branches of the provincial government (for whose conduct Argentina was internationally responsible) were acting to destroy the concession contract (the Tucumán claim); and (2) that the Argentine state had independently failed to protect the investment adequately, as required by the BIT (the federal claim). Since the first claim invoked the parties' contractual obligations, the arbitral panel had to determine whether a foreign investor could bring a case to ICSID on the basis of events governed by a contract containing an exclusive jurisdictional clause.

03/10, paras. 30–31 (June 17, 2005), *available at* <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>; Siemens A.G. v. Argentina, Decision on Jurisdiction, ICSID No. ARB/02/8, para. 103 (Aug. 3, 2004); Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID No. ARB(AF)/00/2, para. 69 (May 29, 2003) (unofficial trans.) (citing *Maffezini* with approval). The *Maffezini* holding, however, was criticized and distinguished in some subsequent ICSID cases. Plama Consortium Ltd. v. Bulgaria, Decision on Jurisdiction, ICSID No. ARB/03/24, paras. 183–227 (Feb. 8, 2005); *Salini, supra* note 6, paras. 115–19.

[17] According to ICSID's decision in *SGS v. Pakistan,* the claimant is normally free to characterize his claims as either national or international law claims. SGS v. Pakistan, *supra* note 3, 42 ILM at 1313, para. 145; *see also Salini, supra* note 6, para. 136.

[18] Still, some degree of forum shopping might be healthy, as it increases the likelihood that the parties will find a proper and competent forum to adjudicate their dispute, and places competitive pressures on courts to improve their procedures. For discussion, see YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 144–45 (2003).

[19] *See, e.g., id.* at 80.

[20] Agreement for the Promotion and Reciprocal Protection of Investments, July 3, 1991, Arg.-Fr., 1728 UNTS 298.

In its 2000 award, the ICSID arbitral tribunal rejected CAA and CGE's claims, holding that the Tucumán claim under the BIT was "crucially connected" with their contract claim.[21] As a result, the Tucumán claim, by virtue of the contractual compromissory clause, should have been litigated before the local Tucumán courts. Recourse to ICSID would have been allowed only if it were alleged that proceedings before local courts had failed to meet international standards.[22] At the same time, the tribunal held that it had not been proved that Argentina had violated any of its independent obligations under the BIT with regard to this foreign investment.[23] Hence, it rejected the claimants' federal claim as well.

The foreign investor challenged the validity of the award before an ad hoc ICSID annulment committee. In 2002 the committee accepted the investor's contention that the first-in-time tribunal's refusal to review the Tucumán claim under the BIT constituted an excess of power, which entails nullification of the award. In reaching this conclusion, the committee emphasized the independent existence of the contract and the treaty claims:

> [W]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán.[24]

As a result, the committee was of the view that Argentina "cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty."[25] Still, the decision left the door open for reliance on contractual compromissory clauses in cases "where the *essential basis* of a claim brought before an international tribunal is a breach of contract."[26] Apparently, the committee believed that this caveat was not applicable to the case at hand; hence, the tribunal should have addressed the Tucumán claim under the BIT.

SGS v. Pakistan

The second case in the trilogy, *SGS v. Pakistan,* revealed an even more pronounced conflict between contract and treaty claims, as it also involved multiple proceedings before national and international adjudicatory bodies, together with a related battle of injunctions. The subject of the dispute was a 1994 contract between SGS, a Swiss corporation, and the government of Pakistan, whose terms called for SGS to perform preshipment inspections of goods imported to Pakistan from several countries and to recommend appropriate customs classifications. The compromissory clause stipulated that disputes over the contract were to be exclusively arbitrated in Pakistan, under the Pakistani Arbitration Act.

[21] Compañía de Aquas del Aconquija, S.A. v. Argentina, ICSID No. ARB/97/3, 40 ILM 426, 443, para. 78 (2001) (Nov. 21, 2000) [hereinafter *Vivendi I*].

[22] *Id.*, para. 80; *cf. ELSI,* 1989 ICJ REP. at 42–43 (the exhaustion-of-local-remedies rule cannot be tacitly dispensed with and it can block interstate claims that are bound up with the investment claims it covers).

[23] *Vivendi I,* 40 ILM at 446, para. 92.

[24] *Vivendi II, supra* note 2, 41 ILM at 1154, para. 96; *cf.* CMS Gas Transmission Co. v. Argentina, Decision on Jurisdiction, ICSID No. ARB/01/08, 42 ILM 788, 800 (2003) (July 17, 2003), *available at* <http://www.asil.org/ilib/cms-argentina.pdf>.

[25] *Vivendi II,* 41 ILM at 1156, para. 103.

[26] *Id.* at 1155, para. 98 (emphasis added). The tribunal noted, however, that

> where "the fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.

Id. at 1156, para. 101.

For other applications of the "essential basis" test, see Eureko BV v. Poland, Partial Award, paras. 112–13 (ad hoc arb. trib. Aug. 19, 2005), *available at* <http://www.eureko.net/press/eureko/archives/2005-09-05.asp>; Occidental Exploration & Prod. Co. v. Ecuador, para. 57 (UNCITRAL July 1, 2004), *available at* <http://www.asil.org/ilib/OEPC-Ecuador.pdf > [hereinafter *Occidental*]; *Joy Mining, supra* note 5, paras. 90–91; *Siemens, supra* note 16, para. 180.

In December 1996, Pakistan unilaterally terminated the contract and withheld payment of some of the outstanding sums demanded by SGS. The investor consequently brought judicial proceedings against Pakistan before the Swiss courts, which ultimately dismissed the case by reason of Pakistan's sovereign immunity.[27] Then, in 2000, before the final decision of the Swiss courts, Pakistan initiated arbitration proceedings in Pakistan pursuant to the contractual compromissory clause. Although SGS objected to the proceedings, it brought a counterclaim against Pakistan (without prejudice to its jurisdictional objections) before the Pakistani arbitrator. Furthermore, SGS initiated another set of arbitral proceedings against Pakistan on October 12, 2001, this time before an ICSID tribunal on the basis of the Pakistani-Swiss BIT.[28] Pakistan reacted by requesting and obtaining from its Supreme Court, on March 15, 2002, an injunction against SGS, barring continuation of the ICSID arbitral proceedings. Shortly thereafter, SGS requested a parallel order against the Pakistani arbitration proceedings from the ICSID arbitral tribunal, and on October 16, 2002, the tribunal recommended that the proceedings in Pakistan be stayed.[29] This preliminary jurisdictional skirmish was eventually decided in favor of ICSID, and on November 12, 2002, the Pakistani arbitrator decided to stay the domestic arbitral proceedings temporarily.

During the jurisdictional stage of the ICSID proceedings, Pakistan raised several objections to the tribunal's jurisdiction, arguing mainly that (1) the contractual compromissory clause constituted an exclusive jurisdiction arrangement that barred ICSID from adjudicating the dispute; (2) the essential basis of the ICSID proceedings was the contract claim (relying on the caveat to ICSID jurisdiction introduced by the *Vivendi* tribunal), so that no separate treaty claim existed; and (3) the ICSID tribunal should defer to the domestic proceedings by virtue of the *lis pendens* rule. SGS retorted by pointing out the separate legal foundations of the contract and treaty claims (notwithstanding their similar factual core). Thus, it claimed that proceedings conducted on the basis of the contractual compromissory clause could not deprive ICSID of jurisdiction over treaty claims.[30] In addition, it maintained that in the event of jurisdictional overlap between the two proceedings, international dispute settlement procedures should prevail over their domestic counterparts.

On August 6, 2003, the tribunal decided to reject Pakistan's objections and accept jurisdiction over SGS's treaty claims. In doing so, it reaffirmed the dicta of the *Vivendi* ad hoc committee on the separate existence of contract and treaty claims.[31] At the same time, the tribunal refused to entertain any of SGS's contract claims: It held that, notwithstanding its open-ended text, the BIT compromissory clause (Article 9) was intended only to cover disputes over application of BIT standards, whereas contract claims were governed by the contractual compromissory clause.[32] Similarly, it held that the BIT umbrella clause (Article 11) could not be reasonably construed to encompass contract claims despite its broad language.[33] Consequently, the tribunal asserted exclusive jurisdiction over the treaty claims and

[27] As it happened, the first-instance Swiss court dismissed the case on the basis of the contractual compromissory clause. Still, the appeals of SGS were rejected on the basis of state immunity arguments.

[28] Agreement on the Promotion and Reciprocal Protection of Investments, July 11, 1995, Pak.-Switz., Art. 9, *quoted in* SGS v. Pakistan, *supra* note 3, 42 ILM at 1303, para. 80.

[29] SGS v. Pakistan, *supra* note 3, Procedural Order No. 2 (Oct. 16, 2002). Some controversy surrounds the authority of ICSID tribunals to issue binding and enforceable provisional measures. CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 757–62 (2001). Still, it may be argued that the comparable language used in Article 47 of the ICSID Convention and Article 41 of the ICJ Statute might render the ICJ's *LaGrand* Judgment relevant for the purpose of ICSID as well. LaGrand (Ger. v. U.S.), Merits, 2001 ICJ REP. 466, 506, para. 109 (June 27).

[30] It may be noted that SGS argued, and the ICSID tribunal accepted, that it would not be able to bring its treaty claims in the context of the Pakistani proceedings. SGS v. Pakistan, 42 ILM at 1308, para. 119, & 1316, para. 154.

[31] *Id.* at 1315–16, paras. 146–55.

[32] *Id.* at 1316–18, paras. 156–62. Article 9 authorized ICSID to settle disputes "with respect to investments between a Contracting Party and an investor of the other Contracting Party." *See* note 28 *supra.*

[33] SGS v. Pakistan, *supra* note 3, 42 ILM at 1319–21, paras. 166–74. Article 11 provides: "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." *Id.* at 1318, para. 163. However, the tribunal held that the expansive construction advocated by SGS—incorporating within the BIT the fulfillment of contractual obligations—would

upheld the Pakistani arbitrator's exclusive jurisdiction over the contract claims. Since the tribunal regarded the two claims as separate, it denied the need to coordinate between the national and international proceedings that were adjudicating the different claims.

SGS v. Philippines

The third case in the trilogy stems from circumstances generally comparable to those of *SGS v. Pakistan*. However, the conclusions of the ICSID arbitral tribunal in *SGS v. Philippines* were radically different from those of its predecessor. As a result, considerable uncertainty now shrouds the law governing parallel contract and treaty claims.

This ICSID case grew out of a dispute over the implementation of another SGS preshipment inspection contract, this time with the government of the Philippines. The original contract was signed in 1991, although its terms were extended on several occasions until its final expiration in 2000. Notably, the 1991 contract contained a compromissory clause referring disputes to the exclusive jurisdiction of the local Philippine courts. Still, in 2002, SGS chose to bring its dispute with the host government over the balance of payments due to it under the expired contract before an ICSID tribunal on the basis of Article VIII of the Philippines-Swiss BIT (the BIT compromissory clause).[34] The tribunal was thus faced with jurisdictional issues similar to the ones presented before the *Vivendi* and *SGS v. Pakistan* tribunals: it had to determine the scope of its jurisdiction in light of the contractual compromissory clause and BIT provisions (which were generally similar in their content to the parallel Pakistani-Swiss BIT provisions).

The Philippines objected to the tribunal's jurisdiction on several grounds, its main argument being that SGS's claim was purely contractual (hence satisfying the *Vivendi* "essential basis" test). In consequence, pursuant to the contractual compromissory clause, the claim should have been directed to the local Philippine courts (which, arguably, are better situated to adjudicate contract claims).[35] SGS responded by asserting the independent existence of its treaty claims notwithstanding their contractual origins.[36] Furthermore, it contended that the BIT umbrella clause (Article X(2)) had the effect of elevating SGS's contract claims to the international plane.[37] At the same time, SGS also argued that the BIT compromissory clause should be broadly construed so as to authorize the ICSID tribunal to address contract, as well as treaty, claims.[38] Finally, SGS argued that even if there were a jurisdictional overlap between national and international proceedings, the jurisdiction of ICSID tribunals should supersede that of domestic courts.[39]

Unlike its *SGS v. Pakistan* counterpart, the *SGS v. Philippines* tribunal accepted the investor's broad construction of the umbrella clause as encompassing an obligation to fulfill contractual obligations.[40] Such an interpretation was supported in the eyes of the tribunal by the plain language of Article X(2) and the investment protection purpose of the BIT. Significantly, the *SGS v. Philippines* tribunal explicitly rejected as "unconvincing" the interpretive construction of the umbrella clause offered by the *SGS v. Pakistan* tribunal.[41] Hence, it

result in the imposition of unreasonable procedural and substantive burdens on host states. The tribunal was not willing to assume, without clearer textual guidance, that this was the meaning intended by the drafters.

[34] Agreement on the Promotion and Reciprocal Protection of Investments, Mar. 31, 1997, Phil.-Switz., Art. VIII, *quoted in* SGS v. Philippines, *supra* note 4, para. 34. Article VIII provides the investor with a choice between three dispute settlement procedures: national courts, an ICSID tribunal, and an ad hoc UNCITRAL arbitral tribunal.

[35] SGS v. Philippines, *supra* note 4, paras. 52–56, 73–75.

[36] *Id.*, paras. 64, 85.

[37] *Id.*, paras. 65, 86. Article X(2) provides: "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." *Id.*, para. 34.

[38] *Id.*, paras. 66, 87. The chapeau to Article VIII covers disputes "with respect to investments between a Contracting Party and an investor of the other Contracting Party."

[39] *Id.*, para. 60.

[40] *Id.*, paras. 116–28.

[41] *Id.*, paras. 125–26.

seemed to have attributed little weight to the minor differences between the texts of the two umbrella clauses.[42]

Furthermore, the tribunal held that the BIT compromissory clause (Article VIII) was sufficiently broad to encompass both contract and treaty claims.[43] Since excluding contract claims per se from the jurisdiction of ICSID would lead to unnecessary claim splitting and jurisdictional uncertainties, the tribunal opined that a broad construction of the BIT compromissory clause would be preferable. Here, too, the *SGS v. Philippines* tribunal explicitly rejected the conclusions of the *SGS v. Pakistan* tribunal on the scope of the Swiss-Pakistani compromissory clause (which contained virtually identical language to that of the Swiss-Philippine BIT).[44]

After asserting its broad jurisdiction over both contract and treaty claims, the tribunal moved to address the effects of the contractual compromissory clause—a question it regarded as one of admissibility.[45] Here a split occurred between the tribunal's members: The majority held that a contractual compromissory clause constitutes *lex specialis* and overrides interstate jurisdictional arrangements.[46] As a result, it ruled that the tribunal "should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively."[47] Given the strong links between the contract claim and the treaty claim (whose independent existence it doubted), the majority held that it would be "inappropriate and premature" to address the treaty claim before the contract claim had been adjudicated by the contractually designated courts.[48] It therefore decided to stay the ICSID arbitral proceedings until the contract claim was sorted out.[49]

The dissenting arbitrator, Antonio Crivellaro, maintained that the BIT compromissory clause, being *lex posteriori,* was designed to expand the range of jurisdictional options that the investor could seize in the event of a dispute.[50] The BIT thus had transformed the contractual compromissory clause and entitled investors to bring their contract claims before ICSID. In addition, he criticized the majority's refusal to address SGS's treaty claims until the contract claims were resolved.[51] Hence, Professor Crivellaro took the view that staying the proceedings was unnecessary and that the tribunal should instead review the merits of all claims presented by SGS.

The Joy Mining *and* Salini *Cases*

Two recent cases, issued after the *SGS v. Philippines* decision, leave intact the divergence in ICSID jurisprudence, given their distinctive circumstances and limited theoretical

[42] *Id.*, para. 121 (referring in passing to some textual differences between the two clauses). *Compare* Swiss-Pakistani BIT, Art. 11, *supra* note 33, *with* Swiss-Philippine BIT, Art. X(2), *supra* note 37. The minor variations in the texts of the two clauses hardly explain the radically divergent outcomes of the two cases.

[43] SGS v. Philippines, *supra* note 4, paras. 130–35. For a similar holding, see Salini Costruttori S.p.A. v. Morocco, Decision on Jurisdiction, ICSID No. ARB/00/4, 6 ICSID Rep. 400 (2004), 42 ILM 609, 623 (2003) (July 31, 2001).

[44] SGS v. Philippines, *supra* note 4, para. 134. Both clauses invested the ICSID tribunal with jurisdiction over "disputes with respect to investments."

[45] *Id.*, para. 154.

[46] *Id.*, paras. 139–43. It might also have been argued that the contractual compromissory clause constituted a valid choice of procedure on the part of the investor under Article VIII of the BIT.

[47] *Id.*, para. 155.

[48] *Id.*, paras. 162–63.

[49] *Id.*, para. 175. The majority grounded its decision to stay proceedings in its general powers under the ICSID Arbitration Rules and the Washington Convention to "make orders required for the conduct of the proceeding." *Id.*, para. 173.

[50] SGS v. Philippines, *supra* note 4, Declaration of Antonio Crivellaro, paras. 2–7. Professor Crivellaro opined that differences in the identities of the parties to the BIT and the contract rendered the *lex specialis* principle inapplicable. Still, the third-party rights conferred by the BIT upon SGS enabled it to invoke the *lex posteriori* argument. *Id.*, paras. 9–10. The *lex posteriori* argument, however, is problematic, given the renewal of the contract after the conclusion of the BIT. *Cf.* Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903, 908 (2004) (the *lex posteriori* argument does not always work in international law).

[51] SGS v. Philippines, Declaration of Prof. Crivellaro, *supra* note 50, para. 11.

discussion. In *Joy Mining*, an ICSID tribunal, presented with a BIT claim in the face of an incompatible contractual clause on exclusive jurisdiction (ultimately referring contractual disputes to UNCITRAL arbitration in Cairo), decided to reject the claim on other grounds, primarily the noninvestment nature of the original transaction, which excluded the dispute from the purview of both the BIT compromissory clause and ICSID's constitutive treaty.[52] Still, the tribunal opined in obiter dicta that the dispute at hand, which involved the post-transaction release of bank guarantees, was purely contractual and did not fall under the scope of the BIT. The tribunal adopted, to that end, *SGS v. Pakistan*'s restrictive view on the scope of umbrella clauses.[53] On that basis, it held that the contractual compromissory clause would have overridden the BIT compromissory clause in any event.[54]

In *Salini v. Jordan,* a case involving similar circumstances to those discussed in *SGS v. Philippines* (a dispute over post-transaction outstanding debts), an ICSID panel once again upheld the overriding nature of a contractual compromissory clause that provided for the exclusive jurisdiction of domestic Jordanian courts over contract claims.[55] The tribunal opined that it was unnecessary in these circumstances to determine whether the BIT compromissory clause, which provided the investor with a choice between national and ICSID proceedings, also encompassed contract claims.[56] Furthermore, it held that the narrow language of the umbrella clause found in the Italian-Jordanian BIT distinguished it from the clause reviewed in *SGS v. Philippines*.[57] Thus, the tribunal held itself incompetent to address contract claims but retained competence with respect to the investor's few remaining treaty claims.[58]

II. Contextualizing the Tensions Between Contract and Treaty Claims

Mapping the Differences

The surveyed contract claims versus treaty claims cases reveal major differences of opinion between ICSID arbitrators over the role of BITs, the functions of ICSID tribunals, and the relationship between national and international dispute settlement procedures.

Specifically, three issues remain unsettled:

(1) *The scope of umbrella clauses.* Whereas *SGS v. Pakistan* and *Joy Mining* applied, in effect, an interpretive presumption against the incorporation of contract claims within the substantive scope of protection offered by the respective BIT umbrella clauses, *SGS v. Philippines* resorted to an alternative presumption and held that compliance with contractual obligations (but not the very formulation of these obligations) may be governed by the BIT's umbrella clause.

(2) *The jurisdiction of ICSID tribunals over contract claims.* Whereas *SGS v. Pakistan* stands for a restrictive reading of ICSID's jurisdiction over non-BIT claims, *SGS v. Philippines*

[52] *Joy Mining, supra* note 5, para. 63.

[53] *Id.*, paras. 77–82 (adopting the dicta of the *SGS v. Pakistan* tribunal on the importance of the nonprominent location of the umbrella clause in the BIT and on the illogicality of a construction transforming all contract claims into treaty claims). Notably, the language of the umbrella clause in the UK-Egypt BIT addressed in *Joy Mining* is virtually identical to that of the umbrella clause in the Swiss-Philippine BIT discussed in *SGS v. Philippines*. Agreement for the Promotion and Protection of Investments, June 11, 1975, Egypt-UK, Art. 2(2), Cmnd. 6141, 14 ILM 1470, 1471 (1975) ("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."). Hence, again, the difference in outcome must be explained in legal policy terms.

[54] *Joy Mining, supra* note 5, paras. 89–91.

[55] *Salini, supra* note 6, paras. 93–96.

[56] *Id.*, paras. 97–101.

[57] *Id.*, paras. 126–27. Indeed, Article 2(4) of the Italian-Jordanian BIT uses different language from that of the comparable provisions in the umbrella clauses of the Swiss-Philippine and Swiss-Pakistani BITs. Agreement on the Promotion and Protection of Investments, July 21, 1999, Italy-Jordan, Art. 2(4), *quoted in id.*, para. 66 ("Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor."). For the text of the provisions in the umbrella clauses of the Swiss-Philippine and Swiss-Pakistani BITs, see *supra* notes 37 and 33, respectively.

[58] *Salini, supra* note 6, para. 166.

embraced a broad reading of the relevant BIT compromissory clause in a way that encompasses both contract and treaty claims.

(3) *The division of labor between national and international proceedings.* The *Vivendi, SGS v. Pakistan*, and *Salini* decisions accepted the parallel pendency of contract and treaty claims before national and international judicial forums. Nonetheless, the majority in *SGS v. Philippines* decided to stay the arbitration proceedings with respect to the treaty claim until the related contract claim was settled, thus opting for greater interforum coordination.

Integrationist vs. Disintegrationist Methodologies

Arguably, these variations in outcome are hardly coincidental or circumstance dependent. In particular, they cannot be attributed to the minor textual differences between the relevant legal instruments—a point underscored by the explicit rejection by the *SGS v. Philippines* tribunal of the legal analysis offered by its predecessor in *SGS v. Pakistan* (although, obviously, such differences might come into play in some cases). Rather, these differences derive, to my mind, from an ideological divide between international judges and arbitrators over how best to address problems created by the multiplicity of legal sources and procedures implicated in contemporary investment disputes. One approach, epitomized by the *SGS v. Pakistan* decision, may be described as *disintegrationist.* This approach seeks to resolve tensions between overlapping norms and procedures through rules of exclusion that draw lines of separation between legal regimes and judicial proceedings. Thus, it supports the construction of BITs as self-contained instruments, providing a closed list of rights and obligations, and entailing discrete dispute settlement procedures whose jurisdiction remains limited to BIT claims. By emphasizing the conceptual differences between contract and treaty claims stemming from their separate legal foundations,[59] the disintegrationist position downplays practical problems arising from normative conflicts and parallel judicial proceedings.

One may note the link between the disintegrationist approach, as applied to contract and treaty claims, and legal dualism, which also utilizes rules of exclusion to separate national law from international law. In fact, the proposition that national and international courts operate on distinct legal levels facilitates the separation of contract from treaty claims,[60] and negates the conditions for jurisdictional competition.[61] This obviates, in turn, the need to apply rules that regulate jurisdictional competition, such as *lis alibi pendens* and *res judicata,* to judicial proceedings taking place concurrently at the national and international levels.

By contrast, the *SGS v. Philippines* decision seems to stand for the diametric *integrationist* methodology. This approach, which can be characterized as pragmatic or problem solving in nature, seeks to harmonize overlapping norms and procedures. It acknowledges the effective relationships between contract and treaty claims, as well as the undesirability—even impossibility at times—of addressing them separately. The integrationist approach thus supports a flexible or open-textured reading of BITs as encompassing a broad range of rights and obligations (including obligations to respect contracts), and advocates expanding the jurisdiction of ICSID tribunals in a way that would authorize them to resolve the entire gamut

[59] *See* Azurix Corp. v. Mexico, Decision on Jurisdiction, No. ARB/01/12, 43 ILM 262, 277 (2004) (Dec. 28, 2003); Loewen Group, Inc. v. United States, ICSID No. ARB(AF)/98/3, 42 ILM 811, 819, 833 (2003) (June 26, 2003); Wena Hotels Ltd v. Egypt, Annulment Proceeding, ICSID No. ARB/98/4, 41 ILM 933, 940 (2002) (Jan. 28, 2002) (not available on the ICSID Web site); *cf. Eureko, supra* note 26, paras. 112–13; *Occidental, supra* note 26, paras. 50–52; CME Czech Republic B.V. v. Czech Republic, Partial Award, para. 410 (UNCITRAL Sept. 13, 2001), *available at* <http://www2004.mfcr.cz/static/Arbitraz/en/PartialAward.pdf>; Anaconda-Iran, Inc. v. Iran, 13 Iran-U.S. Cl. Trib. Rep. 199, 224 (1988).

[60] *Cf.* Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 PCIJ (ser. A) No. 7, at 19 ("From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.").

[61] *Cf.* Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Jurisdiction, 1925 PCIJ (ser. A) No. 6, at 20 (PCIJ and the mixed arbitral tribunals, as well as the Polish Civil Tribunal, "are not courts of the same character").

of grievances relating to a specific investment. Thus, integrationism may be described as cognizant of legal pluralism[62]—the reality in which natural and legal persons are subject to a range of multisourced rights and obligations—and the possibility of jurisdictional competition between national and international courts over related claims. In light of this perspective, it is not surprising that the *SGS v. Philippines* tribunal was willing to exercise judicial comity—a principle that alleviates jurisdictional competition—vis-à-vis the domestic Philippine courts.

I would offer two additional observations on the trilogy of ICSID cases at this stage: First, even the *SGS v. Philippines* tribunal upheld the separate legal existence of contract and treaty claims, viewing them as nonidentical in nature. Hence, in the eyes of all ICSID tribunals parallel contract and treaty claims do not meet the "same issues" standard of similarity between competing claims that would mandate the introduction of strict jurisdictional rules regulating competition, such as *lis alibi pendens* and *res judicata*.[63] Second, there are certain similarities between the debate on the interplay between contract and treaty claims and discussions on the effects of international investments instruments on the traditional doctrine of exhaustion of local remedies. Whereas some tribunals have held that a presumption exists in favor of the continued need to seize domestic courts first—thus facilitating some interforum coordination[64]—other tribunals have tended to dispense with this requirement altogether, emphasizing the self-contained nature of international investment dispute settlement procedures.[65] Furthermore, it has been alleged that upholding a contractual clause referring disputes to domestic courts might be analogous in its effects to reintroducing an exhaustion-of-local-remedies rule into some investment protection regimes.[66]

III. Identifying Comparable Tensions

Arguably, the differences of opinion over substantive law and jurisdictional overlap revealed in the ICSID contract claim vs. treaty claim cases are not unique to investment disputes involving competing claims under national and international law, and comparable tensions might also arise in cases involving competing *international* investment claims. For example, in *Lauder/CME*, two separate claims based on virtually identical facts were instituted against the Czech Republic by Ronald Lauder, an American investor, and a Lauder-controlled Dutch company.[67] The first claim, brought on the basis of a Czech-U.S. BIT, was arbitrated by an UNCITRAL tribunal in London, while the second claim, brought on the basis of a Dutch-Czech BIT, was arbitrated in parallel by an UNCITRAL tribunal in Stockholm. Despite the close factual and legal links between the two claims, both tribunals embraced a disintegrationist view of the ostensible normative and procedural overlaps: they asserted the distinctive nature of their proceedings, relying on formal differences in the identities of the claimants and the legal bases of the claims (which invoked two separate, though similarly

[62] *See* Gunther Teubner, *'Global Bukowina': Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 3, 11–15 (Gunther Teubner ed., 1997); Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149, 157 (1997); Klaus Günther, Legal Pluralism and the Universal Code of Legality: Globalisation as a Problem of Legal Theory (2003), *at* <http://www.law.nyu.edu/clppt/program2003/readings/gunther.pdf>.

[63] *See* SHANY, *supra* note 18, at 23–28.

[64] *See Loewen*, *supra* note 59, 42 ILM at 837, paras. 160–62. According to the ICJ, too, waiver of the requirement to exhaust local remedies cannot be presumed. *ELSI*, 1989 ICJ REP. at 42.

[65] For example, the Iran-U.S. Claims Tribunal has construed the silence of the Algiers Declaration on the Settlement of Claims on the matter as indicative of the absence of an exhaustion-of-local-remedies requirement. Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 197 (1987); *see also* William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and* Res Judicata *Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 357, 373–76 (2000).

[66] *See, e.g., Vivendi I*, *supra* note 21, 40 ILM at 444, para. 81.

[67] In addition, a third set of proceedings was initiated by a local firm, controlled by Lauder and CME, before the domestic courts of the Czech Republic.

worded, BITs).[68] They therefore allowed both sets of proceedings to go forward simultaneously, leading to two contradictory awards, rendered days apart, on the liability of the Czech government under the respective BITs.[69]

Furthermore, one can perhaps identify analogous tensions between competing claims brought on the basis of parallel international legal instruments in cases arising entirely outside the field of international investment law. Since international tribunals dealing with such cases must also contend with parallel legal regimes and dispute settlement procedures, their job might involve choices between disintegrationist and integrationist strategies of coordination, which resemble the choices made by the surveyed ICSID tribunals. Thus, although the ICSID cases are normally characterized by a unique configuration of legal relations—e.g., the parallel coexistence of interstate and state-investor legal arrangements—and the availability of domestic forums, which might serve as a jurisdictional alternative to international tribunals, some policy considerations underlying the choice of methodology might be similar (e.g., promoting the welfare of a specific treaty regime or coordinating between the parties' entire gamut of legal interests). In fact, the willingness of the *SGS v. Philippines* tribunal to cite with approval a decision of an arbitral tribunal under the UN Convention on the Law of the Sea (LOS Convention) in the *MOX Plant* case[70]—a prime example of a multifaceted international dispute, involving multiple interstate proceedings, which is discussed immediately below—may be indicative of the comparable nature of some interpretive challenges that widely different international courts and tribunals face.

The *MOX Plant* litigation derived from Ireland's objections to the approval and operation by the United Kingdom of a mixed oxide (MOX) fuel-processing plant at Sellafield, England. The objections were eventually formulated as legal claims based on a regional environmental convention (the Convention for the Protection of the Marine Environment of the North-East Atlantic, or OSPAR),[71] the LOS Convention, European Union law,[72] and English law.[73] These claims were then presented before a variety of international forums: an arbitration tribunal under the OSPAR Convention, the International Tribunal for the Law of the Sea (ITLOS) (request for provisional remedies), an LOS Convention arbitral tribunal, and the European Court of Justice (ECJ) (cases brought or expected to be brought against Ireland and the United Kingdom by the European Commission).[74]

The international proceedings directly brought by Ireland against the United Kingdom relate specifically to our subject, as they reveal inconsistent integrationist and disintegrationist choices analogous to the choices made by the surveyed ICSID tribunals. The OSPAR arbitration tribunal, which addressed Ireland's request for access to environmental information,

[68] *See CME Czech Republic, supra* note 59, para. 412 ("There is also no abuse of the Treaty regime by Mr. Lauder in bringing *virtually identical claims* under two separate Treaties.") (emphasis added). For a concise statement of the two BIT claims, see *id.*, para. 24; Lauder v. Czech Republic, para. 193 (UNCITRAL Sept. 3, 2001), *available at* <http://www2004.mfcr.cz/static/Arbitraz/en/FinalAward.pdf>.

[69] *Lauder, supra* note 68; *CME Czech Republic, supra* note 59. The separate nature of the two proceedings was confirmed by the Swedish courts, which rejected a motion for annulment of the Stockholm award. Czech Republic v. CME Czech Republic B.V., 42 ILM 919 (2003) (Svea Ct. App. May 15, 2003).

[70] SGS v. Philippines, *supra* note 4, para. 171. The case it cited is MOX Plant (Ir. v. UK), Order No. 3, 42 ILM 1187, 1190 (2003) (Perm. Ct. Arb. June 24, 2003) [hereinafter LOS Convention *MOX Plant* Order].

[71] Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 32 ILM 1069 (1992) [hereinafter OSPAR].

[72] In particular, Directive 90/313/EEC on the Freedom of Access to Information on the Environment, 1990 O.J. (L 158) 56, since repealed by Directive 2003/4/EC on Public Access to Environmental Information, 2003 O.J. (L 41) 26.

[73] The claim in England relied in particular upon the Environmental Information Regulations (1992), SI 1992/3240, 1999 ENVT'L L. REP. 447. On January 1, 2005, the 1992 regulations were replaced by Environmental Information Regulations (2004), SI 2004/3391, *available at* <http://www.opsi.gov.uk/si/si2004/draft/20040331.htm>.

[74] Case C–469/03, Commission v. Ireland, Notice of Action (Nov. 30, 2003), 2004 O.J. (C 7) 24 (the case is still pending before the ECJ); Honor Mahony, *UK Could Face Legal Action over Nuclear Site*, EUOBSERVER.COM, Sept. 3, 2004, *available in* LEXIS, News Library, EU News File. Greenpeace brought another case against the British government before the domestic English courts.

confirmed the separate existence of OSPAR and parallel EU law standards.[75] Furthermore, the tribunal held that its jurisdiction encompassed only claims under OSPAR and that it could apply only OSPAR law, despite the reference in Article 32(6)(a) of the Convention—the OSPAR compromissory clause—to the tribunal's duty to decide disputes according to the "rules of international law" *and* the OSPAR Convention.[76] Consequently, it saw no impediment to the pursuit of multiple proceedings before OSPAR and non-OSPAR forums (on the basis of non-OSPAR law).[77]

I believe that some parallels can be drawn between the *OSPAR* award and the *SGS v. Pakistan* decision: in both cases, the tribunal adopted a restrictive construction of its jurisdiction and applicable law (notwithstanding the broad language used in some of the relevant clauses), excluding, in effect, the parties' ability to invoke parallel international instruments that did not form part of the governing treaty regime; multiple proceedings were also not viewed as a legal problem in both cases, given the conceptual differences between their underlying legal bases.

In advancing the self-contained characteristics of the OSPAR Convention, the OSPAR arbitral tribunal relied upon an ITLOS decision issued pursuant to Ireland's request for provisional measures in the proceedings Ireland had initiated under the LOS Convention regarding alleged deficiencies in the establishment and operation of the Sellafield plant.[78] The ITLOS decision rejected the UK objection to the jurisdiction of bodies set up under the LOS Convention, an objection that invoked compromissory clauses contained in other international instruments (i.e., OSPAR[79] and the EC Treaty[80]), which the tribunal dismissed as irrelevant.[81] In doing so, ITLOS employed a disintegrationist methodology, emphasizing the conceptual separation between legal instruments belonging to distinct legal regimes:

> [T]he dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation or application of those agreements, and not with disputes arising under the [LOS] Convention.

[75] Access to Information Under Article 9 of the OSPAR Convention (Ir. v. UK), para. 142, *available at* <http://www.pca-cpa.org> (Perm. Ct. Arb. July 2, 2003) [hereinafter *OSPAR* Award]; *see* Ted L. McDorman, Case Report: Access to Information Under Article 9 of the OSPAR Convention (Ireland v. United Kingdom), *in* 98 AJIL 330 (2004). In actuality, the tribunal displayed reluctance to utilize non-OSPAR sources, even as interpretive aids. *See* Yuval Shany, *The First* MOX Plant *Award: Coordinating Between Competing Environmental Regimes and Dispute Settlement Procedures*, 17 LEIDEN J. INT'L L. 815, 822 (2004).

[76] *OSPAR* Award, *supra* note 75, paras. 85, 143. *But see id.*, Dissenting Opinion of Gavan Griffith, QC, para. 2. Interestingly, the tribunal did not explicitly address the significance of the OSPAR jurisdictional clause. OSPAR, *supra* note 71, Art. 32(1) ("Any disputes between Contracting Parties relating to the interpretation or application of the Convention, which cannot be settled otherwise by the Contracting Parties concerned, . . . shall at the request of any of those Contracting Parties, be submitted to arbitration under the conditions laid down in this Article."). For a discussion of the difference between jurisdiction and applicable law in the context of the WTO dispute settlement mechanism, see JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003).

[77] *OSPAR* Award, *supra* note 75, para. 143.

[78] MOX Plant (Ir. v. UK), Provisional Measures Order, Case No. 10 (ITLOS Dec. 3, 2001), *available at* <http://www.itlos.org> [hereinafter ITLOS *MOX Plant*]. The case was cited by the OSPAR tribunal in *OSPAR* Award, *supra* note 75, para. 141.

[79] OSPAR Art. 32(1), *supra* note 76.

[80] TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 UNTS 11, *as amended by* TREATY OF NICE, Feb. 26, 2001, 2001 O.J. (C 80) 1, consolidated version, Dec. 24, 2002, 2002 O.J. (C 325) 33, Art. 292 [hereinafter EC TREATY] ("Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.").

[81] The United Nations Convention on the Law of the Sea provides that law of the sea disputes should be adjudicated, as a rule, by the ICJ, ITLOS, an arbitration tribunal, or a special arbitration tribunal. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Art. 287, 1833 UNTS 397 [hereinafter LOS Convention]. Still, Articles 281–82 of the LOS Convention provide that the dispute settlement bodies operating under the Convention retain only residual jurisdiction, which is subject to other arrangements entered into by the parties. For discussion of the nature of these jurisdictional provisions, see SHANY, *supra* note 18, at 201–08; Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AJIL 277 (2001).

> . . . [E]ven if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention.[82]

Still, a radically different approach was adopted by an arbitral tribunal in the next stage of the LOS Convention *MOX Plant* proceedings: although the arbitral tribunal opined that some provisions of the LOS Convention might not be regulated by parallel EU law provisions (since EU law might incorporate only part of the LOS Convention's provisions),[83] it held that "there is no certainty that any such provisions would in fact give rise to a self-contained and distinct dispute capable of being resolved by the Tribunal."[84] That is, separate LOS Convention and EU claims may not exist.[85] Since the EU claims were subject to the exclusive jurisdiction of the ECJ,[86] the tribunal decided to stay proceedings over any remaining claims under the LOS Convention until the ECJ proceedings were sorted out, citing considerations of mutual respect, comity, propriety, and effectiveness.[87]

There seem to be significant points of similarity between this decision and the *SGS v. Philippines* decision: In both cases, the tribunal accepted the possibility of substantive overlaps between separate legal proceedings notwithstanding the reliance upon different instruments, and adopted a strategy to regulate jurisdictional competition, i.e., discretionary stay of proceedings, designed to mitigate possible jurisdictional conflicts.

IV. Conclusion

Recent ICSID cases on the relations between contract and treaty claims have introduced considerable confusion into the world of investment law. Consequently, it is less than clear at present whether BITs typically cover contract-performance claims or, alternatively, authorize international arbitration tribunals to review contract claims. The relations between jurisdictional clauses governing contract and treaty claims and the judicial proceedings that they entail are also uncertain.

To my mind, the conflicting jurisprudence of ICSID tribunals over these issues cannot be attributed to the relatively minor textual differences between the BITs applicable to those cases but, rather, to an ideological chasm between integrationist and disintegrationist approaches to normative and procedural overlaps. While these conflicts seem particularly conspicuous in the field of international investment law—given the almost inevitable multilayered makeup of investment protection instruments and the propensity of the parties

[82] ITLOS *MOX Plant*, *supra* note 78, paras. 49–50. Note, however, that jurisdictional decisions rendered in the context of provisional measures requests are not final, and are subject to a rather flexible standard of prima facie jurisdiction. LOS Convention, *supra* note 81, Art. 290(1). For a comparable decision on provisional measures, see Southern Bluefin Tuna (Austl. v. Japan; N.Z. v. Japan), Provisional Measures Order, Case Nos. 3, 4, 38 ILM 1624, 1632 (1999) (ITLOS Aug. 27, 1999).

[83] LOS Convention *MOX Plant* Order, *supra* note 70, 42 ILM at 1190, paras. 20–22. For a discussion of the status of the LOS Convention under EU law, see Robin Churchill & Joanne Scott, *The* MOX Plant *Litigation: The First Half-Life,* 53 Int'l & Comp. L.Q. 643 (2004).

[84] LOS Convention *MOX Plant* Order, 42 ILM at 1191, para. 26.

[85] In contradistinction, the arbitral tribunal held that the LOS Convention and OSPAR claims are clearly separable. *Id.* at 1189–90, para. 19. For another example of an integrationist view that seeks to coordinate between the LOS Convention and regional fisheries instruments, see Southern Bluefin Tuna (Austl. v. Japan; N.Z. v. Japan), Jurisdiction and Admissibility, 39 ILM 1359, 1388, para. 54 (2000) (LOS Convention arb. trib. Aug. 4, 2000) ("To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial."); *see* Barbara Kwiatkowska, Case Report: Southern Bluefin Tuna (Australia and New Zealand v. Japan), Jurisdiction and Admissibility, *in* 95 AJIL 162 (2001).

[86] EC Treaty Art. 292; *see also* Treaty Establishing the European Atomic Energy Community (Euratom), Mar. 25, 1957, Art. 193, 298 UNTS 167.

[87] LOS Convention *MOX Plant* Order, 42 ILM at 1191, para. 29.

to bring their contract and treaty claims before both national and international dispute settlement mechanisms—somewhat analogous conflicts might occur in other areas of international law. In fact, contemporary debates over the "fragmentation of international law"[88] bring to light what might be described as comparable tensions between promotion of the systemic features of general international law and the coherence of specific treaty regimes. There, too, a choice emerges between the pragmatic need to reconcile multi-sourced norms and competing procedures, and the doctrinal convenience of excluding "external" norms, that is, norms originating outside the relevant treaty regime.[89]

This ideological choice involves difficult trade-offs. Striving for interregime integration and harmony helps protect and promote the coherence and effectiveness of the entire array of multifaceted investment protection norms. But, to sustain the long-term workability and legitimacy of the overall "system," integrationists might have to sacrifice the full attainment of the goals of specific treaty regimes (e.g., BITs). At the same time, the disintegrationist approach may be understood as expressing a preference for the optimal attainment of the specific objectives of a particular regime over the indefinite objectives of the incoherent "system" of investment protection norms. A strong, unified body of norms, applied by an effective procedure (unencumbered by the need to apply unfamiliar norms and regulate its relationships to parallel procedures), may thus be preferable to an unrealistically comprehensive approach to international investment law.

This ideological choice also entails institutional repercussions. Even if we accept the proposition that the coherence of international investment law has an important pragmatic value, the question arises: Who should fix the problems associated with interregime normative and jurisdictional overlaps, adjudicators or lawmakers? While integrationism encourages arbitrators (or judges) to harmonize overlapping texts, disintegrationism might suggest that states, international organizations, or parties to investment contracts are better situated to reconcile normative and jurisdictional conflicts. Clearly, distinct theoretical and practical advantages and disadvantages could be associated with each of these alternatives (e.g., the ability of adjudicators to resolve conflicts in real time, fears that adjudicators might exceed their mandate and resort to judicial legislation, the superior capabilities of treaty makers to consider future developments, etc.).

It is beyond the scope of this Comment to evaluate fully, and certainly to settle, the ideological dispute between the integrationist and disintegrationist camps, and their numerous implications. However, I would propose that two general principles of law—comity and *abus de droit*—could apply to all international judicial proceedings, including international investment law cases. These principles may assist in mitigating the tensions between competing legal claims without requiring international judges or arbitrators to renounce their basic positions on the self-contained or open-textured nature of the governing treaty regime. In fact, these principles can be viewed as "soft" integrationist tools that serve a pragmatic need for coordination between different regimes without necessarily renouncing the primacy of the governing regime's objectives. Specifically, they could help ICSID tribunals to coordinate contract and treaty claims, yet preserve their allegiance to the objectives of the ICSID Convention and relevant BITs.

The principle of judicial comity, which some ICSID arbitrators regard as inherent in the exercise of judicial powers,[90] can authorize international courts to regulate their procedures

[88] See, for example, the work of the ILC on the topic. International Law Commission, Report on the Work of Its Fifty-sixth Session, ch. X, UN GAOR, 59th Sess., Supp. No. 10, at 281, UN Doc. A/59/10 (2004). See also a recent special edition of a leading international law journal, which was dedicated to the topic. Symposium, *Diversity or Cacophony?: New Sources of Norms in International Law,* 25 MICH. J. INT'L L. 845 (2004).

[89] *See generally* Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849 (2004); *see also* Pauwelyn, *supra* note 50, at 904.

[90] S. Pacific Props. (Middle East) v. Egypt, ICSID ARB/84/3, Decision on Jurisdiction, 3 ICSID Rep. 112, 129 (1995) (Nov. 27, 1985); SGS v. Philippines, *supra* note 4, para. 171 ("[I]nternational tribunals have a certain flexibility in

in ways conducive to the consideration of parallel proceedings before national judicial bodies or other international tribunals. Courts may thus stay their proceedings if they deem it to be just and expedient so as to reduce the parties' procedural burdens (e.g., the need to conduct two simultaneous litigations) or to facilitate coordination between multiple judicial decisions. By relying upon the discretionary doctrine of comity, tribunals can evade determining the precise nature of the relationships between the related proceedings and whether to apply rigid rules governing jurisdictional competition (e.g., *lis alibi pendens* or *res judicata*). The decisions to stay proceedings in *SGS v. Philippines* and the Convention *MOX Plant* arbitrations until the conclusion of the parallel litigation seem to be compatible with this principle.

Furthermore, judicial comity may encourage courts to consider the factual and legal findings of other courts that have addressed related matters, involving the same parties. The principle thus encourages, but does not compel, interregime harmonization. The decisions in *SGS v. Philippines* and the LOS Convention *MOX Plant* arbitrations, which envision reliance upon the decisions of parallel procedures (the Philippine courts and the ECJ, respectively), are consistent with this notion, too.[91]

Another useful standard may be *abus de droit*, a well-recognized principle of international law[92] that can enable courts to restrict bad faith maneuvering among overlapping jurisdictions. Hence, for example, certain recourses to international arbitration in breach of a contractual compromissory clause might be deemed illegitimate even if, formally speaking, the international tribunal is competent to adjudicate the claim.[93] I suggest that the allusion to

dealing with questions of competing forums."). It is also possible to rely upon "general powers" provisions found in the constitutive instruments of several international courts and tribunals. ICSID Convention, *supra* note 1, Art. 44; LOS Convention, *supra* note 81, Annex VII, Art. 5 (Arbitration Rules); Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Art. 12.1, 33 ILM 1226 (1994); ICSID Rules of Procedure for Arbitration Proceedings, *as amended* Sept. 29, 2002, Art. 19, *available at* <http://www.worldbank.org/icsid/index.html>; *see also* SHANY, *supra* note 18, at 260–66.

[91] *See* Administration of Prince von Pless (Ger. v. Pol.), Preliminary Objection, 1933 PCIJ (ser. A/B) No. 52, at 16 (Feb. 4) ("[I]t will certainly be an advantage to the Court . . . to be acquainted with the final decisions of the Supreme Polish Administrative Tribunal upon the appeals brought by the Prince von Pless and now pending before that Tribunal; . . . the Court must therefore arrange its procedure so as to ensure that this will be possible.").

[92] *See, e.g.*, Fisheries (UK v. Nor.), 1951 ICJ REP. 116, 142 (Dec. 18); Corfu Channel (UK v. Alb.), 1949 ICJ REP. 4, 46 (Dec. 15) (Alvarez, J., sep. op.); Oscar Chinn (UK/Belg.), 1934 PCIJ (ser. A/B) No. 63, at 86 (Dec. 12); Free Zones of Upper Savoy and the District of Gex (Fr./Switz.), 1932 PCIJ (ser. A/B) No. 46, at 167 (June 7); Certain German Interests in Polish Upper Silesia, 1926 PCIJ (ser. A) No. 7, at 30 (May 25); Fur Seal Deal (Gr. Brit. v. U.S.), 1 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 755, 889–90 (1898); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 121 (1987).

[93] Compare 'Camouco' (Pan. v. Fr.), Prompt Release, Case No. 5, 39 ILM 666, 690 (2000) (ITLOS Feb. 7, 2000) (Anderson, J., dissenting), stating:

> It must be unprecedented for the same issue to be submitted in quick succession first to a national court of appeal and then to an international tribunal, and for the issue to be actually pending before the two instances at the same time. This situation is surely undesirable and not to be encouraged. It smacks of "forum hopping" and hardly makes for the efficient administration of justice.

See also id. at 696 (Vukas, J., dissenting).

The prompt-release-of-vessels provisions of the LOS Convention, however, seem to encourage intervention by ITLOS in domestic proceedings, as they introduce a strict time frame for resort to that tribunal and use language suggestive of its authority to review domestic decisions. Article 292 of the LOS Convention, *supra* note 81, provides in pertinent part:

> 1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement *within 10 days* from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.
>
> . . . .
>
> 3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, *without prejudice to the merits of any case before the appropriate domestic forum* against the vessel, its owner or its crew. (emphasis added)

admissibility in *SGS v. Philippines* as the proper framework for discussing the relevance of the contractual compromissory clause can also be understood in this light.

Although these pragmatic jurisdiction-regulating principles cannot be viewed as panaceas for the problems associated with international investment disputes presenting parallel contract and treaty claims, they can serve to bypass some of the intractable ideological differences that characterize these cases. Hence, they may constitute modest building blocks in future attempts to bring order into the increasingly disorganized world of international investment law and dispute settlement procedures.

Indeed, in a few prompt-release-of-vessels cases, the majority in ITLOS upheld its jurisdiction to address the claim regardless of the state or outcome of the domestic proceedings. 'Volga' (Russ. v. Austl.), Prompt Release, Case No. 11, 42 ILM 159 (2003) (ITLOS Dec. 23, 2002); 'Monte Confurco' (Sey. v. Fr.), Prompt Release, Case No. 6 (ITLOS Dec. 18, 2000), *available at* <http://www.itlos.org>; 'Camouco,' *supra*; *see also* Bernard H. Oxman & Vincent P. Bantz, Case Report: The "Camouco" (Panama v. France) (Judgment), *in* 94 AJIL 713 (2000).