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Umbrella Clauses: a Different Perspective

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Abstract

A considerable number of currently in force investment treaties houses what investment tribunals and academics call an 'umbrella clause' provision. The umbrella clause is a provision in investment protection treaties whereby the investment hosting State is bound to respect the undertakings it has assumed with a foreign investor and/or with regard to its investments. This clause, and in particular how its function is interpreted, is the subject-matter of this thesis. Function is best described as the purpose that the clause fulfils within the treaty structure, viz *enhancing the protection of commitments voluntarily undertaken in relation to foreign investors or their investments. After the first introductory chapter, which accounts for the many inconsistencies in the interpretation of the clause, as well as for the interpretive criteria tribunals have employed, the second chapter gathers some punctual data on the topicality of the umbrella clause debate. It pictures how the clause has been interpreted thus far, highlighting areas of consensus, and also dissensus, in investment decisions. In particular, around the issue of function consensus has failed to materialise. Conversely, around jurisdictional precedence, an interpretive concern which looks at the interference between dispute settlement* fora *designated in the contract and in the treaty respectively, tribunals seem to allow for parallel proceedings. Further, it is underscored how the decline in popularity of the clause in newly signed investment agreements is yet to translate in a waning relevance of the umbrella clause debate. Chapter 3 avers that out of the four known interpretations of the function of the umbrella clause, only two are* prima facie *compatible with the VCLT rules and are, for this reason, retained in the debate. Jurisdictional internationalisation (or third camp) and full internationalisation (or fourth camp) are identified as the most plausible interpretations of the clause's function. Tribunals, pursuant to the former, have argued that it was a conceivable interpretation of the umbrella clause to turn the failure to observe a protected commitment into a breach of treaty, thereby allowing for the claim to be heard before an international tribunal. Compared to the forth camp, however, the assumption that the law applicable to the claim would be international law, as opposed to the proper law of the contract, was rejected. In an effort to discern between the two interpretations, chapters 4 and 5 advance the argument that the third camp interpretation would not allow for the jurisdictional precedence concern to be interpreted in a fashion which is compatible with the VCLT rules. In particular, it would cause commonly formulated contractual forum selection clauses to waive the offer to bring treaty disputes for the violation of the umbrella clause before an investment treaty tribunal. Additionally, compatibility problems might arise between fork-*

in-the-road provisions and choice of forum clauses in the contract. Even in the event of parallel treaty and contract proceedings issues of compatibility might arise. The lis pendens *and* res judicata *principles, the applicability of article 53 of the ICSID Convention, as well as the frequent recourse of investment tribunals to comity in order to halt treaty proceedings pending the decision of the forum designated in the contract, all contribute to create uncertainty and arbitrariness. Arguably, the fourth camp interpretation, by allowing the umbrella clause claim to be decided in accordance with international law, not the law applicable to the contract, erects a separation between contract and treaty proceedings which renders parallel proceedings unproblematic. It is argued that this is the only solution compatible with the purpose of the treaty, the principle of good faith interpretation as well as with the consequent practice of the treaty Parties pursuant to article 31 of the VCLT.*

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LIST OF ABBREVIATIONS

- AAA: *American Arbitration Association*
- AB: *Appellate Body*
- ASEAN: *Association of South-East Asian Nations*
- BIT: *Bilateral Investment Treaties*
- CCSBT: *Convention for the Conservation of Southern Bluefin Tuna*
- CPTPP: *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*
- DSU: *Dispute Settlement Understanding*
- EC: *European Communities*
- ECHR: *European Convention of Human Rights*
- ECtHR: *European Court of Human Rights*
- ECJ: *European Court of Justice*
- ECT: *Energy Charter Treaty*
- EU: *European Union*
- FCN: *Friendship, Commerce and Navigation Treaties*
- FET: *Fair Equitable Treatment*
- FIPA: *Foreign Investment Promotion and Protection Agreement*
- FTA: *Free Trade Agreement*
- GATS: *General Agreement on Trade in Services*
- GATT: *General Agreement on Tariffs and Trade*
- IA: *Investment Arbitration*
- IBA: *International Bar Association*
- IBRD: *International Bank for Reconstruction and Development*
- ICC: *International Chamber of Commerce*
- ICJ: *International Court of Justice*

- ICSID: *International Centre for the Settlement of Investment Dispute*
- IIA: *International Investment Agreements*
- ILA: *International Law Association*
- ILC: *International Law Commission*
- ISDS: *Investor-State Dispute System*
- ITLOS: *International Tribunal for the Law of the Sea*
- LCIA*: London Court of International Arbitration*
- MFN: *Most Favoured Nation*
- NAFTA: *North American Free Trade Agreement*
- NGO: *Non-governmental organisation*
- OECD: *Organisation for Economic Co-operation and Development*
- PCIJ: *Permanent Court of International Justice*
- SCC: *Stockholm Chamber of Commerce*
- TEU: *Treaty on the European Union*
- TFEU: *Treaty on the Functioning of the European Union*
- TPP: *Trans-Pacific Partnership*
- TTIP: *Transatlantic Trade and Investment Partnership*
- UN: *United Nations*
- UNCITRAL: *United Nations Commission for International Trade Law*
- UNCLOS: *United Nations Convention on the Law of the Sea*
- UNCTAD: *United Nations Convention on Trade and Development*
- UNIDROIT: *International Institute for the Unification of Private Law*
- USMCA: *United States-Mexico-Canada Agreement*
- VCLT: *Vienna Convention on the Law of Treaties*
- WTO: *World Trade Organization*

INTRODUCTION

A considerable, though decreasing, number of currently in force investment treaties houses what investment tribunals and academics have become accustomed at calling an 'umbrella clause' provision. This clause, and in particular some aspects of its interpretation, are the subject-matter of this thesis.

Briefly, though the first chapter will revisit and expand upon this definition, the umbrella clause is a provision in investment protection treaties whereby the investment hosting State is bound to respect the undertakings it has assumed with a foreign investor and/or with regard to its investments. An example of the 'classical' formulation of the clause can be found at article X (2) of the Switzerland-Philippines treaty of 1997:

> 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.

Umbrella clauses have represented, since the first attempts at interpretation about 2 decades ago, a real pain in the neck for international investment tribunals. Early decisions on the matter struggled to interpret it with any degree of consistency. Relatively common, simple-worded provisions, umbrella clauses hide a number of complex issues behind their deceivingly plain wording.

Later tribunals have continued to disagree on the interpretation of four main concerns, *viz* 'function', 'jurisdictional precedence', 'privity (or 'attribution')' and 'scope'. Only concerning 'jurisdictional precedence' tribunals have thus far managed some degree of consistency.

This thesis attempts to shed some light regarding one of these interpretive concerns, *viz* 'function'. This latter is best described as the purpose that the clause fulfils within the treaty structure, *i.e.* adding an extra layer of protection to commitments voluntarily undertaken by investment hosting States in relation to foreign investors or their investments.

The longing to address this topic comes as a consequence of the inability of current theories and decisions to agree upon, or at very least to justify in a clear manner, an interpretation that is not only in line with the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT) regarding the ordinary meaning, the object and purpose of the treaty and good faith, but also produces reasonable and coherent results.

At the first attempt at interpreting the clause, the *SGS v Pakistan* tribunal averred that its function should be considered as that of an 'aspirational statement', some sort of exhortation to perform one's undertakings which does not hold any cogent value. After quickly abandoning this route as a viable alternative, subsequent tribunals have proven unable to reach consensus on how to interpret the clause.

Early signs of convergence pointed towards third camp interpretation, also known as jurisdictional internalisation, gaining the upper hand. Pursuant to jurisdictional internalisation, a breach of contract violates *ipso facto* both the contract and the treaty, regardless of the fact that obligations under the contract are not being reproduced at treaty level. The international investment tribunal vested with jurisdiction may adjudicate the matter based on whether the umbrella clause has been breached. The assessment, however, will be carried out under the municipal law governing the contract since the nature of the obligations specified therein remains contractual. Pursuant to third camp interpretation, umbrella clauses' function is essentially jurisdictional.

A reappraisal of decisions rendered over the past decade suggests that the budding signs of agreement over this interpretive camp have not grown into consensus on the matter. Whereas a slim majority of tribunals still stays loyal to jurisdictional internationalisation, consensus seems out of reach.

A considerable number of tribunals argued that in order for the clause to be operational the protected commitment should have been entered into, or breached, in the exercise of sovereign capacity (or *iure imperii*) as opposed to ordinary commercial capacity (or *iure gestionis*). This interpretation has been referred to as '*iure imperii* internationalisation'.

Lastly, other tribunals adhered to the so-called internationalisation effect of umbrella clauses. Pursuant to this interpretation, known as fourth camp or full internationalisation, contractual or other domestic law obligations are 'elevated' to the level of treaty commitments directly cognizable under international law. Under this camp, the violation of a protected commitment would entail a breach of treaty, *i.e.* a breach of the umbrella clause, which would be discussed before an international investment tribunal, and adjudicated according to international law, rather than the law applicable to the contract.

This thesis's argument in favour of full internationalisation as the correct interpretation of the clause's function leans in on another interpretive concern, *viz* 'jurisdictional precedence'. Jurisdictional preference is defined as the interference between forum selection clauses in

contractual instruments, or the forum selected by the parties to those very instruments, and the jurisdiction of the investment tribunal to hear the umbrella clause claim. The issue, however, has sometimes been described as relating to the admissibility of the claim before an investment tribunal.

On jurisdictional internationalisation, tribunals have been able, over time, to reach a position resembling consensus. The quasi totality of investment tribunals tasked with adjudicating on this matter have allowed parallel proceedings to proceed undisturbed before the forum designated in the treaty and in the contract respectively.

The crux of the argument advanced herein consists of proving that only one of the interpretations of function which would *prima facie* seem plausible pursuant to the VCLT standards can, in turn, deliver an interpretation of the jurisdictional precedence concern which is compatible with the object and purpose of the treaty, good faith as well as with the subsequent practice of the treaty Parties.

Before developing this argument, it is first necessary to devote the first chapters of the thesis to answer a few preliminary questions. The overall structure of the thesis is therefore split into two main parts.

The first two chapters address some preliminary questions on the clause in general as well as on the way tribunals have thus far approached its interpretation. Additionally, they provide a justification for excluding, or otherwise including, certain interpretive concerns from the arguments advanced in the second part of this work. Chapters 3 to 6 develop the main argument of this thesis in an attempt to define the interpretation of the clause's 'function'.

This introduction briefly recounts the content of each chapter as it strives to guide the reader through the thesis. It maps both the structure of this work and the main topics addressed within each section. The intent is to introduce the reader to the logic that animates the thesis' internal development.

Chapter 1 defines the clause and describes the interpretive issues encountered with its interpretation. 'Function', 'scope', 'jurisdictional precedence' and 'privity (or attribution)' are introduced as the main interpretive concerns faced by tribunals which have been tasked with interpreting the clause. The different interpretations tribunals have given of each concern are also acknowledged and itemised, though their plausibility is not questioned at this stage.

Chapter 1 also details the interpretive tools deployed by investment tribunals when appraising the meaning of the clause. Interpretive instruments utilised to this end include, most commonly, elements of the general rule of interpretation from the VCLT, such as the 'ordinary meaning', 'object and purpose', 'good faith', and 'context'.

Tribunals have also frequently summoned the supplementary means of interpretation from the VCLT rules to assist them with the job at hand. The role of preparatory work and of the circumstances surrounding the conclusion of the treaty, thereby including the historical background and prior decisions rendered on the matter, is accounted for. Recourse to the 'conciliatory meaning', in the event of multilingual treaties, is also discussed.

The use of interpretive means that fall outside those expressly listed in the VCLT is also mentioned. Criteria such as *in dubio pars mitior est sequenda* and the restrictive interpretation of exceptions, are in turn examined.

Chapter 1 does not limit itself to listing the interpretive tools employed by investment tribunals. It provides concrete examples of how tribunals have utilised these instruments in their decisions.

Avowing that the first part of the thesis is essentially descriptive of the state of the art concerning umbrella clause interpretations, does not rule out that it can still carve out for itself a role in advancing its main argument on the interpretation of function. To this end, the last part of chapter 1 strives to identify what interpretive concerns shall be retained in the debate in order to assist with the interpretation of function.

The lesser impact of differences in the wording of the clause and the link between the interpretation of the 'function' and 'jurisdictional precedence', lead to the conclusion that only 'jurisdictional precedence' shall be retained in the debate to aid in the interpretation of the clause's 'function'.

Other interpretive concerns, such as 'scope' or 'privity (or 'attribution')', on the other hand, bear feeble implications on how 'function' is interpreted. For this reason, they will not be mentioned in the arguments advanced in the second part of the thesis.

Having given the reader an overview of the main positions taken in the debate on the interpretation of umbrella clauses is not enough to photograph the state of the art on that same debate, or even to prove that said debate is still active. In other words, recounting what interpretations have been deemed plausible by tribunals over time gives no indication of how

common or current a given interpretation is. In fact, it does not even give reliable information on whether the umbrella clause itself is still the subject-matter of so much discussions to date. Chapter 2 is devoted to filling this gap.

The first part of chapter 2 summarises the purpose, methodology and results of a previous study which was conducted on the interpretation of umbrella clauses about a decade ago. For each interpretive concern, and for each interpretation of that concern, the original study detailed how frequently it was adopted in publicly available investment decisions. These results are summarised in the first section of chapter 2. The summary of this earlier study also highlights whether consensus, or a trend towards it, had been established.

The second part of chapter 2 houses the 'replication' study, conducted on cases law rendered approximately over the decade that followed the original study's own conclusions. After disclosing the methodology utilised, in particular in order to underscore differences with the original study, the new study identifies consequential decisions. 'Consequential' are those decisions which are relevant to determine the prevalence of the interpretation proposed for at least one interpretive concern.

Once identified 'consequential' decisions, chapter 2 proceeds to examine each decision. For each interpretive concern the study discloses both what interpretation was adopted and how many tribunals whose decisions are publicly available adhered to that same interpretation.

The last part of Chapter 2 identifies for each interpretive concern what trends, or lack thereof, from the original study have been confirmed, as well as what patterns have dissipated over time. The main conclusion to carry forward consists in the recognition that umbrella clauses still remain an issue and tribunals have yet to achieve consistency over how 'function' is interpreted. Furthermore, it is somewhat confirmed that tribunals have attained a high level of convergence over the interpretation of 'jurisdictional precedence', thereby reaffirming a trend first spotted in the original study.

Furthermore, the study also draws a few inferences concerning more generally the entirety of the debate on umbrella clause interpretation. The debate is still current despite the clause experiencing a decline in popularity, having being ousted from the majority of recently negotiated investment treaties. Tribunals have similarly found ways to circumvent debating a contentious topic.

Shifting the focus from general observations about the clause, and from all four of the interpretive concerns, to the main topic of this thesis, *viz* the interpretation of 'function', chapter 3 begins the somewhat long journey in this direction.

The first part of chapter 3 assessed the merits of two of the interpretations proposed in investment case law in order to rule them out as the correct interpretation of 'function'. First camp interpretation (or 'aspirational statement' interpretation) is challenged on several grounds. The compatibility of this interpretation with the interpretive standards set out in the VCLT, in particular 'ordinary meaning' and 'context' is called into question.

Similarly, the preoccupation expressed by the first SGS tribunal about the 'far reaching consequences' of taking a different approach is explored in detail. The argument that interpreting the clause differently could have led to every other treaty standard becoming redundant, as well as the idea that non-contractual breaches of statutes and regulations could violate the umbrella clause are, in turn, examined and discounted.

In a similar fashion, chapter 3 looks into the arguments advanced by tribunals in favour of *iure imperii* internationalisation, according to which the clause is only operational when the State exercised sovereign powers. As per with first camp interpretation, the first challenges brought against this interpretation concern its compatibility with the VCLT rules. In particular, it is questioned whether 'ordinary meaning' of the umbrella clause's wording was correctly identified. Further, it is averred that this interpretation could potentially violate the 'good faith' requirement. The fashion in which tribunals have utilised supplementary interpretive tools is also scrutinised. Lastly, the chapter laments the absence of a clear test to tell apart *acta iure imperii* and *acta iure gestionis*.

The final part of Chapter 3 addressed the interpretations that, in reason of their apparent plausibility, shall be retained and further debated moving forward. In particular, it is argued that the third and fourth camp interpretations are *prima facie* compatible with the VCLT criteria on treaty interpretation.

Additional arguments advanced to refute either position have not been decisive. Historical research on the reasons for developing such clause, as well as policy arguments against the implications of full internationalisation, fail to conclusively tip the scale in either direction. Moving against this backdrop, chapters 4 and 5 are in charge of developing the arguments that will allow to dispel the apparent plausibility of the third camp interpretation of the function of the umbrella clause.

Chapter 4 develops the crux of the argument advanced in this thesis. It tries to demonstrate that third camp interpretation would indeed lead to an interpretation of jurisdictional precedence which is incompatible with the VCLT rules of interpretation.

Chapter 4 seeks to demonstrate two main points. Firstly, the jurisdiction of investment tribunals to hear umbrella clause claims would, when certain conditions are met, be precluded. The preclusion would materialise if the host State and the investor agreed to an exclusive, broad and subsequent choice of forum clause in an investment contract. Exercising a choice of forum pursuant to the fork-in-the-road clause in the treaty could similarly stand in the way of the formation of international investment jurisdiction. Secondly, barring jurisdiction would have consequences which are incompatible with the rules of interpretation.

This argument is, for the time being, developed in relation to admissibility. Chapter 4 strives to show that lack of jurisdiction, with the adverse consequences it entails, is a logically more coherent alternative than lack of admissibility.

Chapter 4 is divided up into four parts. Firstly, the chapter preliminarily accounts for the differences between jurisdiction and admissibility in the context of international investment proceedings.

The second part of chapter 4 examines the several preconditions necessary for investors to be able to waive the right to accept the offer to bring an investment claim before an international investment tribunal. Additionally, the chapter explores whether a forum selection clause in an investment contract could potentially waive said right.

Chapter 4 argues that the investor is the bearer, or at least the beneficiary, of the investment rights within the treaty. The 'delegated' and 'contingent' rights paradigms are inadequate to explain the rights enjoyed by investors in the course of the proceedings.

Furthermore, after briefly recalling the characteristics of a valid international law waiver, a case is made that contractual forum selection clauses could, under certain conditions, meet these criteria. In particular, it is averred that broadly worded, subsequent and exclusive choice of forum clauses would indeed possess these characteristics.

Additionally, the argument that a waiver of treaty rights would be inappropriate over public interest concerns is also addressed. Reference is made to other areas of international law, especially human rights law, where despite the presence of stronger public interest concerns, waivers are nevertheless permitted.

Lastly, before shifting the focus on fork-in-the-road provisions and their implications, a few examples are brought up of how choice of forum clauses could interfere with the offer to arbitrate, thereby preventing the formation of investment treaty jurisdiction. Emphasis is placed on their language.

The third part of chapter 4 focuses on fork-in-the-road provisions and their potential impact on jurisdiction. Consent to submit claims to international investment arbitration is often presented as just one of the commonly available options under investment treaties for settling investment disputes between State Parties and their respective investors. Commonly, treaties list among the alternative *fora* the host State's domestic courts or tribunals. Oftentimes investment *fora* are mutually exclusive and filing a claim before one forum would come at the loss of the other previously available options.

Chapter 4 devotes some attention to explaining the functioning and effects of fork-in-the-road provisions. Interference between contractual claims and choice of forum could only happen provided that both *fora* are indeed set to rule on 'the same' dispute. The criterion of 'sameness' is explained in its functioning, as are the tests for determining whether 'sameness' indeed exists. Further issues, such as whether the clause's preclusive effects are triggered by consent or submission, whether the initiative of filing could only be seized by investors, potential complications involving waiting periods, as well as whether the mechanism of preclusions requires the contract to still be subsequent to the treaty's entry into force, are also explored.

The last part of chapter 4 identifies the reasons behind the enquiry. A decision wherein the tribunal finds it lacks jurisdiction rather than admissibility has several implications. Fewer grounds could be available under the ICSID Convention to challenge the decision. Additionally, the State Party, it is argued, could have violated the obligation owed to the other treaty Party to keep an offer open for the investor to accept.

This latter argument does not hold up in relation to preclusions that are a consequence of fork-in-the-road provisions. Even in this instance, however, the arbitrariness of the elements determining whether the tribunal would retain jurisdiction could call into question the reasonableness of the interpretation.

Chapter 5 is a continuation on the line of reasoning advanced in the previous chapter. Third camp interpretation is still the main subject matter of the enquiry. Chapter 5 tries to show how decisions upholding parallel jurisdiction are oftentimes less plausible than a decision rejecting jurisdiction. Additionally, it demonstrates that problems with arbitrariness and reasonableness

of the decision, and therefore with the legitimacy of the interpretation of the clause that would lead to such outcome, could also arise even when parallel proceedings are allowed to continue on their respective paths.

The first part of chapter 5 accounts for the arguments brought forward by tribunals which have recognised the possibility of parallel proceedings. The second part of the chapter challenges those arguments. Counterarguments are built mainly around the reasoning and arguments imported from chapter 4. A further attempt is, however, made at understanding how prevalent is the formulation of exclusive and broad forum selection clauses that could potentially serve as waivers.

Moving from contractual waivers to fork-in-the-road provisions, the chapter concludes that parallel proceedings would indeed be a possibility. The arbitrariness over how the assessment would be conducted, especially in relation to waiting periods, is nevertheless highlighted as undesirable.

Furthermore, chapter 5 assesses whether parallel proceedings could be avoided. In particular, it questions whether the *lis pendens* principle would be applicable to disputes arising from the investment contract on the one hand, and disputes arising from the investment treaty on the other hand. The viability of article 26 of the ICSID Convention as a means to prevent contractual proceedings from arising is also looked into.

The last part of the chapter 5's reasoning concerns problems of coexistence between international and domestic proceedings. In particular, the chapter questions whether the special status of ICSID awards would be compatible with proceedings over the same subject-matter pursuant to article 53 of the ICSID Convention. It is averred that proceedings, or even enforcement procedures, taking place after the rendering of an ICSID award, could fit the definition of 'remedies'.

Moreover, the chapter questions whether, and under what conditions the *res judicata* principle would be applicable. In other words, the chapter tries to determine whether, once a non-ICSID award under the treaty for violation of the umbrella clause, or a decision under the contract for breach of the obligations therein has been issued, said decision could have the effect of preventing other decisions on what is, at essence, the same matter.

Lastly, after concluding that *lis pendens* and *res judicata* would, at best, have to rely on the benevolent discretion of the relevant court or tribunal in order to find application, the chapter

discusses 'comity'. Courts and tribunals have, at their discretion, decided to stay their proceedings waiting for other *fora* to adjudicate on a related issue.

The last chapter of this thesis draws some conclusions from the findings reached in previous chapters. Third camp interpretation, it is argued, could force the parties to reshape the choice of forum clauses in investment contracts. The act of concluding broadly worded and exclusive forum selection clauses after the entry into force of an investment treaty which contains an umbrella clause, could be viewed as an *ipso facto* treaty violation. Chapter 6 enumerates the implications of this scenario from the perspective of treaty interpretation. This implication could, it is argued, be incompatible with the purpose of the treaty.

Furthermore, the principle of good faith, placing a duty on interpreters to reach an interpretation of the treaty which is not absurd or unreasonable, stands as a further obstacle to the plausibility of the third camp interpretation. It is questioned whether the good faith principle would be upheld if between two valid alternatives, one that could cause the respondent State to breach an international law obligation over an ordinary contractual clause and one that does not, the interpreter could, in good faith, select the former.

Additionally, the mere fact that investors and host States have consistently concluded contracts wherein a choice of forum was included, coupled with the knowledge that investors' home States have thus far not questioned this practice, could be considered as 'consistent practice' under the letter of article 31(3)(b) of the VCLT.

Lastly, fork-in-the-road clauses and the complex system of preclusions and go-aheads that would surface if third camp interpretation were to be adopted also raises questions on its compatibility with the good faith criterion. Both the arbitrary fashion in which claims would be granted, or barred, access to international investment arbitration, as well as the different consequences in terms of liability for internationally wrongful acts that would descend from the preclusion of investment treaty jurisdiction would be of dubious reasonableness.

Chapter 6 makes an effort to list potential remedies available for resolving the inconsistencies within the third camp interpretation of function as identified in the course of previous chapters. The first issue to be addressed is the potential treaty violation that would be caused by the host State's withdrawal of the offer to arbitrate.

Inter-State proceedings are considered, and subsequently rejected, as a potential remedy. Treaty Parties may indeed agree on the fact that the conclusion of investment contracts which

include broad and exclusive choice of forum clauses shall be considered as a standard and accepted practice, and not as a treaty violation.

Other indirect remedies are also contemplated. Investment tribunals could retain jurisdiction in reason that, by not doing so, they would uphold a treaty violation. Similarly, by bringing forward the same argument, contractually designated tribunals could reject jurisdiction. Ultimately, however, it is concluded that those remedies would be incompatible with the object and purpose of the treaty, *viz* to supplement without replacing the advantages and guarantees that the contracting parties were able to secure for themselves.

The second part of chapter 6 makes a case in favour of the greater plausibility of fourth camp interpretation. Under full internationalisation, the problem of 'sameness', or of the 'relation' or 'connection' between treaty and contract claims would have been avoided.

The fundamental basis of the contract and treaty claim would differ under fourth camp interpretation. The arguments advanced in this respect by the many tribunals which upheld their jurisdiction while interpreting function according to the fourth camp are examined.

Chapter 6 also affirms that a difference in the applicable law is what has allowed tribunals examining other treaty standards, such as for instance fair and equitable treatment (FET), to keep in place a distinction between a breach of treaty and the underlying contractual violation. The reasonable interpretation of the umbrella clause is the one that by way of maintaining this distinction in place prevents treaty and contract jurisdiction from coming into conflict with each other.

CHAPTER 1

UMBRELLA CLAUSE: INTRODUCING THE TOPIC AND THE ARGUMENT

INTRODUCTION

'Umbrella clauses' are provisions in investment protection treaties whereby the host State is bound to observe the obligations or commitments it has entered into (or assumed) with a foreign investor and/or with regard to its investments.[1] The clause owes its most commonly used epithet[2] to Elihu Lauterpacht who, advising the Anglo-Iranian Oil Company, suggested to protect its settlement agreement with Iran through an umbrella treaty between the Persian State and the United Kingdom, as well as to the comments of Seidl-Hohenveldern on a clause in the Abs-Shawcross Convention as dragging concession contracts under the ''umbrella of protection' of an investment treaty'.[3]

Despite being a fairly common provision,[4] it became part of the investment law debate at the turn of the century. An umbrella clause was first applied in the *Fedax v Venezuela* 1998

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[1] Benjamin Samson 'Umbrella Clauses' [2021] Max Planck Encyclopedias of International Law; August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (CUP Cambridge 2020) 855. Definitions of the umbrella clause which place the accent on the level of protection afforded to the investor, rather than to the obligations on the investment hosting State, are also common. See for instance, Leng Lim Chin, 'Umbrella Clauses' in Lim Leng Chin, Martins Paparinskis and Jean Ho (eds), *International Investment Law and Arbitration* (CUP 2021) 332, the author defines the umbrella clause as 'treaty clause which extends the independent protection of the treaty to breaches of contractual or other commitments made by the host State in relation to the foreign investor's investment'. Jeswald W Salacuse *The Law of Investment Treaties* (3rd edn, OUP 2021) 370: 'One of the most common formulations of the umbrella clause in investment treaties is the following: 'Each party shall observe any obligation it may have entered into with regard to investments in its territory by investors of the other contracting Party.'' David Foster, 'Umbrella Clauses: A Retreat from the Philippines?' [2006] International Arbitration Law Review 100.

[2] Other less frequent terminology has also been employed to refer to the clause, such as ''observance of undertakings', 'commitment observation', 'elevator', 'mirror effect', 'incorporation', 'parallel effect', 'sanctity of contract' or '*pacta sunt servanda*''. Treaties enshrining 'umbrella clauses' are occasionally referred to as 'traités de couverture'. See Reinisch and Schreuer (n 1) 859.

[3] Reinisch and Schreuer (n 1) 858. See also Thomas W Wälde and Hobér Kaj, 'The First Energy Charter Treaty Arbitral Award' [2005] Journal of International Arbitration 83, 93 at footnote 29.

[4] The clause was present in the first modern BIT between Germany and Pakistan. See Reinisch and Schreuer (n 1) 859, 866. It was also found that out of the about 3300 BITs or investment treaties with investment protection provisions concluded since 1959, about 1/3 enshrines an umbrella clause. James Crawford, 'Treaty and contract

arbitration,[5] but as the parties settled that part of the claim, the turning point came with the inconsistent interpretations that tribunals in *SGS v Pakistan,*[6] and subsequently in *SGS v Philippines,*[7] gave of the clause's function.[8] It also introduced other interpretive issues to the debate, namely the 'jurisdictional precedence', 'privity' and 'scope' of the clause.

This thesis main concern is identifying the function to be attributed to umbrella clauses which remains, to this day, an open question.[9] The main tenet is that incorrect interpretations of function, even when plausible based on the letter of the treaty, would lead to other interpretive concerns, jurisdictional precedence in particular, being interpreted in a way which would defeat the purpose of the treaty and be contrary to the principle of good faith interpretation.

In order to develop this argument throughout this thesis, a few preliminary issues shall first be addressed. Chapter 1 mainly fulfils this purpose. The first section defines not only 'function', but all four main interpretive issues, or concerns, which have been associated to the interpretation of umbrella clauses. These concerns have been subject to inconsistent interpretations, which are also itemised. The second section defines the interpretive criteria utilised on umbrella clauses, while providing examples on how they have been employed by investment tribunals when interpreting the umbrella clause. The third section states the aim of the research, *viz* the identification of 'function' and points to the methodology employed to that end. The last part of the section justifies the choice of retaining 'jurisdictional precedence', over other interpretive concerns, to assist with the task of interpreting 'function'. It

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in investment arbitration' [2008] Arbitration International 351, 367. According to Crawford about 40% of treaties contained an umbrella clause.

[5] *Fedax NVv Venezuela*, Award, 9 March 1998, ICSID Case No ARB/96/3, paras 29-32.

[6] *SGS Société Générale de Surveillance S.A.v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) (6 August 2003) (Decision on Jurisdiction).

[7] *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No ARB/02/) (29 January 2004) (Decision of the Tribunal on Objections to Jurisdiction) 6.

[8] Anthony Sinclair, 'Standards of Protection: Umbrella clause' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), International Investment Law (Bloomsbury T&T Clark 2015) 891 paras 9-10.

[9] See the following Chapter. A previous study by Jude Anthony suggested that a growing consensus had surfaced on 'function'. The vast majority of tribunals expressing the view on the effect of an umbrella clause favoured the interpretation attributing the clause an essentially jurisdictional function. It was also highlighted how other interpretations were relegated to early decisions. (See Anthony Jude, 'Umbrella Clauses since SGS v Pakistan and SGS v Philippines' [2013] Arbitration International 607, 638.) Over the last decade, however, debate around function appears to have reignited. While jurisdictional internationalisation appears to still be popular, other interpretations have gained a foothold. Four tribunals argued that the clause was only operational when the state exercised its sovereign powers, but not when it acted in a commercial capacity. In 4 other instances tribunals argued that umbrella clause violations are to be decided in accordance with international law. Lastly, in 6 decisions tribunals ruled that the purpose of umbrella clauses is essentially jurisdictional and it does not affect the law applicable to a dispute by internationalising it.

distinguishes between interpretive concerns based on whether they can be useful at identifying 'function' and provides arguments underpinning this distinction.

INTERPRETIVE CONCERNS AND UMBRELLA CLAUSES

Umbrella clauses came to the spotlight due to having been subject to inconsistent interpretations by investment tribunals. Itemising these inconsistencies into categories is to some extent arbitrary and, as it will be highlighted in the course of the exposition, runs the risk of oversimplifying the debate. Nevertheless, in an attempt to shed some light on the discussion surrounding umbrella clauses, and later allow for a better understanding of how interpretation has evolved, this thesis identifies 4 main interpretational concerns, *viz* function, jurisdictional precedence, scope and privity (or attribution from the perspective of the investment receiving State).[10]

The aim is not, at present, to advance arguments on any interpretive concern, but to identify interpretive questions answered inconsistently, as well as to classify such answers in an attempt to paint a clearer picture of the issues surrounding umbrella clause interpretation. All four concerns had already appeared in *SGS v Pakistan*,[11] the first case where a substantive discussion of the umbrella clause was undertaken. The case is used hereinafter as a point of departure for furthering the debate. The main interpretive concerns will be itemized and defined in this section.

FUNCTION

Function is the effect, notwithstanding other interpretational considerations, to be attributed to an umbrella clause.[12] Function is best described as the purpose that the clause fulfils within the treaty structure, *viz* enhancing the protection of commitments voluntarily undertaken in relation to foreign investors or their investments.[13] In the paragraph below, the *SGS v Pakistan* tribunal examines the claimant's reading of the function of article 11 of the BIT:

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[10] This is done in the wake of Jude Anthony's study. See Jude (n 9), 613-614.
[11] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 168.
[12] Jude (n 9), 613.
[13] Schill Sthephen 'Enabling Private Ordering- Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' IILJ Working Paper 2008/9, 26-27, available at https://iilj.org/wp-content/uploads/2016/08/Schill-Enabling-Private-Ordering-Function-Scope-and-Effect-of-Umbrella-Clauses-in-International-Investment-Treaties-2008-1.pdf, accessed on 5 May 2022;

> […] [C]ounsel for the Claimant characterized this clause as an "elevator" or "mirror effect" clause that takes breaches of contract under municipal law and elevates them immediately to the level of a breach of an international treaty. […][14]

In this excerpt the *SGS v Pakistan* tribunal refers to, and subsequently rejects, the so-called internationalisation effect of umbrella clauses. Pursuant to this interpretation, contractual or other domestic law obligations are 'elevated' to the level of commitments directly cognizable under international law. Under this camp, known as fourth camp or full internationalisation, the violation of a protected commitment would entail a breach of treaty, *i.e.* a breach of the umbrella clause, which would be discussed before an international investment tribunal, and adjudicated according to international law, not the law applicable to the contract.[15]

As an alternative to this vision, Crawford in the subsequent *SGS case* elaborated what is known as jurisdictional internationalisation:

> [The umbrella clause] 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. That issue […] is still governed by the investment agreement […] the proper law of the CISS Agreement is the law of the Philippines.[16]

The tribunal in this case argued that it was a conceivable interpretation of the umbrella clause to turn the failure to observe a protected commitment into a breach of treaty, thereby allowing for the claim to be heard before an international tribunal. Compared to the forth camp, however, the assumption that the law applicable to the claim would be international law, as opposed to the proper law of the contract, was rejected. The sobriquet 'jurisdictional internationalisation', derives from the main purpose assigned to the clause under this camp, e.g. to allow the claim to be heard before an international tribunal.[17]

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[14] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 163.
[15] Crawford (n 4) 367-368.
[16] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction)* (n 7) paras 128-126.
[17] Crawford (n 4) 368, 370.

Other tribunals have argued that for the clause to be effective the protected commitment should have been entered into or breached in the exercise of sovereign capacity (or *iure imperii*) [18] as opposed to ordinary commercial capacity (or *iure gestionis*).[19] This study considers both interpretations as instances of the broader requirement that the State shall act in its sovereign capacity in order for the umbrella clause to be operational. As it will be shown in chapter 3, tribunals have given similar supporting arguments for both interpretations, which have in turn also been criticised for similar reasons. The *Sempra v Argentina* decision is an instance of a tribunal requiring the breach of a protected commitment to be committed in a sovereign capacity for the umbrella clause to be effective:

> […] [O]rdinary commercial breaches of a contract are not the same as Treaty breaches […]. So too, the Tribunal can only agree with the view adopted in *SGS v Pakistan* that such a distinction is necessary so as to avoid an indefinite and unjustified extension of the umbrella clause. The decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.[20]

An instance of a tribunal requiring for the protected commitment to have been entered into in a sovereign, not merchant, capacity can be found in *El Paso v Argentina*:

> In view of the necessity to distinguish the State as a merchant, especially when it acts through instrumentalities, from the State as a sovereign, the Tribunal considers that the "umbrella clause" in the Argentine-US BIT, which prescribes that "[e]ach Party shall observe any obligation it may have entered into with regard to investments", can be interpreted in the light of Article VII (1), which clearly includes among the investment disputes under the Treaty all disputes resulting from a violation of a commitment given

[18] Reinisch and Schreuer (n 1) 934-944. The author distinguishes between tribunals that have held that only commitments of a sovereign nature can lead to a breach of the umbrella clause, and tribunals that considered the key element to determine whether an umbrella clause has been violated to be whether the breach was carried out in sovereign or commercial capacity.
[19] Jude (n 9) 615-616.
[20] *International* v *Argentine Republic* (ICSID Case No. ARB/02/16) (28 September 2007) (Award) para 310.

by the State as a sovereign State, either through an agreement, an authorisation, or the BIT:

> "an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Parties foreign investment authority (if any such authorization exists); or, (c) an alleged breach of any right conferred and created by this Treaty with respect to an investment".

Interpreted in this way, the umbrella clause in Article II of the BIT, read in conjunction with Article VII, will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign -- such as a stabilization clause -- inserted in an investment agreement.[21]

Lastly, the first tribunal charged with interpreting the clause interpreted it as a mere confirmation of the general principle of *pacta sunt servanda*:

> We believe, for the foregoing considerations, that Article 11 of the BIT would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant. 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.*[22]
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> […] We are not persuaded that rejecting SGS's reading of Article 11 would necessarily reduce that Article to "pure exhortation", that is, to a non-normative statement. At least two points may be usefully made in this connection. Firstly, we do not consider that confirmation in a treaty that a Contracting Party is bound under and pursuant to a contract, or a statute or other municipal law issuance is devoid of appreciable normative value, either in the municipal or in the international legal sphere. That confirmation

[21] *El Paso Energy International Company v The Argentine Republic* (ICSID Case No. ARB/03/15) (27 April 2006) (Decision on Jurisdiction) para 81.
[22] Anthony Sinclair (n 8) 893 paras 15-16.

> could, for instance, signal an implied affirmative commitment to enact implementing rules and regulations necessary or appropriate to give effect to a contractual or statutory undertaking in favor of investors of another Contracting Party that would otherwise be a dead letter. Secondly, we do not preclude the possibility that under exceptional circumstances, a violation of certain provisions of a State contract with an investor of another State might constitute violation of a treaty provision (like Article 11 of the BIT) enjoining a Contracting Party constantly to guarantee the observance of contracts with investors of another Contracting Party. […][23]

The above categorisation has not been endorsed by all authors,[24] and in some academic works the third and fourth camp have been collectively defined as decisions giving 'full effect'[25] or 'extensive interpretation'[26] to umbrella clauses.

SCOPE

The *SGS v Pakistan* tribunal appears concerned that the 'scope' of the umbrella clause, *i.e.* what instruments (contracts, legislation or unilateral undertakings) can produce the 'obligations', 'commitments' or 'undertakings' which would be protected under it, could be stretched indefinitely:

> […] Article 11 would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments to an investor of the other Contracting Party. Any alleged violation of those contracts and other instruments would be treated as a breach of the BIT. […]

Arbitral practice and academic scholarship are balkanised regarding the scope of potential commitments that may be covered under an umbrella clause. In particular, the question consists

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[23] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 171-172.

[24] For authors that have adopted this distinction see Crawford (n 4) 368. Alexandrov Stanamir, 'Breaches of Contract and Breaches of Treaty - The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v Pakistan and SGS v Philippines' [2004] Journal of World Investment & Trade 555, 566; Jude (n 9) 617-619; Jean Ho, *State responsibility for breaches of investment contracts* (Cambridge University Press 2018) 196-204.

[25] Reinisch and Schreuer (n 1) 928-951.

[26] Reinisch and Schreuer (n 1) 929. See also Jacomijn J Van Haersolte-Van Hof, Anne K Hoffmann, 'The Relationship between International Tribunals and Domestic Courts' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 979-980.

of whether umbrella clause protection may reach beyond contracts so as to include unilateral commitments expressed either in the form of unilateral assurances, or as domestic legislation and regulations.[27]

The following chapter will go into more detail into what interpretation, if any, has been prevalent. What matters at present, aside from defining this interpretive concern, is underscoring how tribunals have deemed the answer to be dependent on the specific language of the clause at hand. Expressions such as, *inter alia*, 'any obligations',[28] 'entered into'[29] or 'specific agreements'[30] have been leveraged to suggest restrictive (*i.e.* limited to contractual obligations), or expansive, (*i.e.* including legislative or otherwise unilateral commitments), interpretations of 'scope'. Interpretations could therefore shift considerably depending on the specific language of the umbrella clause at hand.

JURISDICTIONAL PRECEDENCE

The first SGS tribunal raised a concern around jurisdictional preference, which is defined as the interference between forum selection clauses in contractual instruments, or the *fora* designated therein, and the jurisdiction of the investment treaty tribunal to hear the umbrella clause claim. The issue has also been described as relating to the admissibility of the claim before an investment tribunal.

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[27] Reinisch and Schreuer (n 1) 898.

[28] In *Micula v Romania*, for instance, the tribunal stressed how the expression 'any obligations' was capacious enough to encompass obligations of any nature regardless their source. See *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.v Romania* (*Micula v Romania*), ICSID Case No. ARB/05/20 (Award) (11 December 2013) para 415.

[29] See for instance *RREEF Infrastructure v* Spain, where the tribunal argued that the 'scope' of umbrella clause protection was narrowed down from 'any obligations' to those obligations that had been 'entered into', *viz* contracts. *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l.v Kingdom of Spain (RREEF v Spain)*, ICSID Case No. ARB/13/30 (30 November 2018) (Decision on Responsibility and on the Principles of Quantum) para 284. See also *RWE Innogy GmbH and RWE Innogy Aersa S.A.U.v Kingdom of Spain* (*RWE Innogyv Spain)*, ICSID Case No. ARB/14/34 (30 December 2019) (Decision on Jurisdiction, Liability and certain issues of quantum) paras 677-680; *9REN Holding S.a.r.l v Kingdom of Spain* (ICSID Case No. ARB/15/15) (Award) (31 May 2019) para 342; *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Spain (BayWa r.e.v Spain)*, ICSID Case No. ARB/15/16 (2 December 2019) (Decision on Jurisdiction, Liability and Directions on Quantum) para 442; *Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain* (*Stadtwerke München v Spain)*, ICSID Case No. ARB/15/1 (2 December 2019) (Award) para 380.

[30] *A11Y LTD.v Czech Republic* (ICSID Case No. UNCT/15/1) (Decision on Jurisdiction) (9 February 2017) paras 72-82.

In the following excerpt the *SGSv Pakistan* tribunal questions whether the validly agreed upon forum selection clause could be nullified by the umbrella clause:

> […] [A]n investor may, at will, nullify any freely negotiated dispute settlement clause in a State contract. On the reading of Article 11 urged by the Claimant, the benefits of the dispute settlement provisions of a contract with a State also a party to a BIT, would flow only to the investor. For that investor could always defeat the State's invocation of the contractually specified forum, and render any mutually agreed procedure of dispute settlement, other than BIT-specified ICSID arbitration, a dead-letter, at the investor's choice. The investor would remain free to go to arbitration either under the contract or under the BIT. But the State party to the contract would be effectively precluded from proceeding to the arbitral forum specified in the contract unless the investor was minded to agree. […]

Having interpreted the umbrella clause not as substantive treaty standard, but as little more than an aspirational statement, its alleged breach could not give rise to an independent cause of action for the treaty claim. The *SGS v Pakistan* tribunal ultimately grounded its decision on the dispute settlement clause in the BIT. The jurisdictional clause covered 'disputes with respect to investment'. It was argued that while detailing the 'factual subject-matter of the claim', *i.e.* investments, the jurisdictional clause did not indicate that the legal subject-matter (or cause of action) also covered 'purely contractual claims'.[31]

Subsequent tribunals based their decisions to proceed to the merits phase on the relationship between the contractual forum selection clause on the one hand, and the combination of umbrella and jurisdictional clauses, giving investors the option to arbitrate 'any obligation' before an international investment tribunal, on the other hand. Some have held that the claim before the investment treaty tribunal, in the event of an exclusive forum selection clause, was

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[31] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 161: 'We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as 'disputes with respect to investments,' the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the factual subject matter of the disputes, does not relate to the legal basis of the claims, or the cause of action asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9.'

barred from proceeding into the merits phase due to admissibility concerns. This view was first expressed in *SGS v Philippines*:

> […] [T]he question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract. The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as force majeure, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction.

Other tribunals, such as *Toto v Lebanon*, averred that the issue was one of jurisdiction in the proper sense. Considering that both the treaty and contract claim were based on an identical cause of action, *viz* the contract, the tribunal averred that a clause attributing exclusive jurisdiction to a forum prevented the treaty tribunal from acquiring jurisdiction on the same matter:

> The Treaty may be used as a mechanism for the enforcement of claims, it does not elevate pure contractual claims into treaty claims. The contractual claims remain based upon the contract; they are governed by the law of the contract and may be affected by the other provisions of the contract. In the case at hand that implies that they remain subject to the contractual jurisdiction clause and have to be submitted exclusively to the Lebanese courts for settlement. Because of this jurisdiction clause in favour of Lebanese courts, the Tribunal has no jurisdiction over the contractual claims arising from the contract referring disputes to Lebanese courts. […] [32]

Lastly, the majority of tribunals have held parallel claims to be unproblematic. The main tenet of these decisions was that the distinction between claims based on a breach of contract and

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[32] *Toto Costruzioni Generali S.p.A.v The Republic of Lebanon* (ICSID Case No. ARB/07/12) (11 September 2009) (Decision on Jurisdiction) para 202.

claims brought for breach of treaty prevented any interference between jurisdictions. *SGS v Paraguay* summarises this point:

> Given that the Tribunal does not adopt Respondent's characterization of Claimant's claims as contractual rather than treaty claims, the Contract's forum selection clause is readily disposed of. That is, if Claimant had not advanced claims for breach of the Treaty and had brought forward only claims for breach of the Contract, we would be faced with different questions, including die relationship between Article 9 of the Contract (providing for dispute resolution of contract claims in the courts of the City of Asuncion) and Article 9 of the BIT (providing for resolution of 'disputes with respect to investments'). Here, however, we accept that Claimant has stated claims under the Treaty, so the question before us is simply whether a contractual forum selection clause can divest this Tribunal of its jurisdiction to hear claims for breach of the Treaty. The answer to that question is undoubtedly negative.
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> […]
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> […] It has been argued that, if the umbrella clause violation is premised on a failure to observe a contractual commitment, one cannot say (in the *Vivendi I* annulment committee's words) that 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' - because, for that type of umbrella clause claim, the treaty applies no legal standard that is independent of the contract. But that argument ignores the source in the treaty of the State's claimed obligation to abide by its commitments, contractual or otherwise. […] [T]he source of the obligation cited by the Claimant, and hence the source of the claim, remains the treaty itself.[33]

It is important to underscore, as it will become relevant later in this chapter, that tribunals drew a connection between 'function' and 'jurisdictional precedence'. The latter interpretive concern was framed in *SGS v Pakistan* as a consequence 'of accepting the Claimant's reading of Article 11 of the BIT', *i.e.* full internationalisation. In *Toto v Lebanon* the tribunal's decision to deny jurisdiction was also linked to the fact that the 'contractual claim remained based on a contract'

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[33] *SGS Société Générale de Surveillance S.A.v Republic of Paraguay* (ICSID Case No. ARB/07/29) (10 February 2012) (Decision on jurisdiction) paras 138-142.

and governed by the law of that contract. Adhering to the camp of jurisdictional internationalisation, and therefore recognising that both treaty and contract claims shared the same cause of action, constituted the premise of the decision. The *SGS v Paraguay* tribunal seemingly drew a similar connection, although it reached the opposite conclusion when it argued that the tribunal had to apply a legal standard independent of the underlying contract.

PRIVITY AND ATTRIBUTION

Lastly, the tribunal in *SGS v Pakistan* was concerned with the issue of attribution. Attribution is the 'operation or process aimed at identifying and circumscribing the conduct of individuals which is properly to be treated as constituting that of the State.'[34] Attribution, also known as 'imputability', exists to bridge the gap between otherwise incompatible realities. First of all, 'States can act only by and through their agents and representatives'.[35] Secondly, it is beyond doubt that the State is present in the international legal system as 'a real organized entity, a legal person with full authority to act under international law'.[36] In the context of the *SGS v Pakistan* arbitration the tribunal was to establish whether a commitment entered into with sub-State entities or autonomous bodies can be attributed to the State:[37]

> '"[C]ommitments" subject matter of Article 11 may, without imposing excessive violence on the text itself, be commitments of the State itself as a legal person, or of any office, entity or subdivision (local government units) or legal representative thereof whose acts are, under the law on state responsibility, attributable to the State itself.'[38]

Attribution is the flip side of privity. The issue of privity arises when the commitments in question had been entered into not by the investor itself, but by a subsidiary or another related entity.[39]

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[34] Simon Olleson, 'Attribution in Investment Treaty Arbitration' [2016] ICSID Review 457.
[35] *German Settlers in Poland* (Advisory Opinion) [1923] PCIJ Rep Series B No 6, 22.
[36] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 82. Olleson (n 34) 458.
[37] Reinisch and Schreuer (n 1) 905.
[38] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 166.
[39] Reinisch and Schreuer (n 1) 905.

Reasonings in investment decisions have differed from privity to attribution.[40] However, some connecting tissue is undeniably present. When tribunals are unable to establish either privity or attribution this translates in the inability to identify the underlying commitment on which the umbrella clause operates, thereby causing the claim to be dismissed.

PRIVITY

Concerning privity, if a Claimant is not party to the contract relied on, or the promisee in the case of unilateral undertakings, it is owed no obligation and there is no commitment for the umbrella clause to operate on. This perspective was adopted, *inter alia,* in *Burlington v Ecuador*:[41]

> […] [T]he Tribunal relies primarily on two elements which in its view inform the ordinary meaning of "obligation." First, in its ordinary meaning, the obligation of one subject is generally seen in correlation with the right of another. […] An obligation entails a party bound by it and another one benefiting from it, in other words, entails an obligor and an obligee. Second, an obligation does not exist in a vacuum. It is subject to a governing law. Although the notion of obligation is used in an international treaty, the court or tribunal interpreting the treaty may have to look to municipal law to give it content. […] [42]

The tribunal concluded that Burlington, which was a non-signatory party to the contract, could not enforce the subsidiary's rights. Context also confirmed this conclusion: the expressions 'entered into' and 'with regard to investments' represent a 'link between the obligation and the investment', which according to the tribunal does not 'replace' but 'qualifies' the term 'obligation'. The ultimate conclusion was that, lacking the underlying obligation, there was nothing to qualify.[43]

As an alternative perspective, provided that the obligation was entered into in relation to the claimant's investment, one does not need to be concerned with whether it was entered into

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[40] For this reason, this thesis prefers to adopt the distinction between the two in the wake of Jude Anthony's work, rather than the perspective chosen by Professor Reinisch to consider both as instances of privity. See Reinisch and Schreuer (n 1) 906; Jude (n 9) 628.
[41] *Burlingtonv Ecuador* (ICSID Case No. ARB/08/5) (14 December 2012) (Decision on Liability).
[42] *Ibidem* para 214.
[43] *Ibidem* para 216.

directly with the claimant.[44] The tribunal in *Continental Casualty v Argentina*, where the clause identically worded to that of *Burlington*, rejected the argument that the text of the umbrella clause required privity:

> For the purpose of determining the type of obligations that Argentina must observe under this umbrella clause, it is necessary to begin with the analysis of the text of Art. II (2)(c). The covered obligations must have been entered 'with regard to' investments. […] [P]rovided that these obligations have been entered 'with regard' to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary such as CNA is not in principle excluded.[45]

ATTRIBUTION

On the State side things are more complex. Analytically, the issue of attribution can apply at 2 moments in time. First of all, at the conclusion of the relevant contract. Secondly, when the State's conduct allegedly violated the obligation. In the light of the text of umbrella clauses which often refer to 'commitments or obligations undertaken' or 'entered into' by 'it', *viz* by the State, tribunals and academics displayed a tendency to focus on the first issue.[46]

The preliminary question in assessing an alleged violation of an umbrella clause is whether the word 'it' in the clause itself refers merely to the State as such or whether it also includes State-owned entities whose conduct can be attributed to the State. This issue of contract privity has been referred to in legal writing as the 'it' problem.[47]

Three positions have been adopted with respect to this problem. The first position maintains the applicability of the ILC Articles on State responsibility (4-11) to ascertain whether the State is a party to the contract. The second position avers that, despite the issue remaining one of international law, the rules applicable to the problem are those of representation, apparent

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[44] Jude (n 9) 628.
[45] *Continental Casualty Company v The Argentine Republic* (ICSID Case No. ARB/03/9) (5 September 2008) (Award) para 297.
[46] James Crawford and Paul Mertenskötter, 'The Use of ILC Attribution Rules in Investment Arbitration' in Meg Kinnear, Geraldine Fischer, Jara Minguez Almeida, Luisa Fernanda Torres and Mairée Uran Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 160-193, 165.
[47] Csaba Kovács, *Attribution in International Investment Law* (Kluwer Law International 2018) 37.

authority or veil piercing. The final position holds that the law applicable to the issue is identical to the law applicable to the contract.[48]

In support of the first argument,[49] academics have argued that since umbrella clauses are an international law standard, not a domestic law one, the reasoning put forth by the ILC in 1974 would apply:

> 'if there was a rule of international law imposing upon a State the duty to ensure the observance of a particular contract, the international responsibility of the State in case of non-observance of the contract would result from the breach of the rule in question and not from the contract per se'.[50]

The second approach also finds its basis in the ILC Commentary on State responsibility. The ILC explains that '[t]he question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State.'[51] The Commentary recalls the rules allowing for the Head of State, Government or the minister of foreign affairs to represent the State without the need to produce full powers. Such rules have nothing to do with attribution for the purposes of State responsibility. The State's responsibility for internationally wrongful acts is engaged *via* a conduct incompatible with its international commitments, regardless at what level of the administration or government such conduct occurred.[52]

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[48] Crawford and Mertenskötter (n 46) 160-193, 165-166. See generally Michael Feit, 'Attribution and the Umbrella Clause – Is there a Way out of the Deadlock?' [2012] Minnesota Law Journal 21. Carlo De Stefano, *Attribution in International law and Arbitration* (OUP 2020) 127-129.
[49] See generally, Nick Gallus, 'An Umbrella just for Two? BIT Obligations Observance Clauses and the Parties to the Contract' [2008] Arbitration International 157-170, 162-169.
[50] Georgios Petrochilos, 'Case Comment: Bosh International, Inc and B&P Ltd Foreign Investment Enterprise v Ukraine – When is Conduct by a University Attributable to the State' [2013] ICSID Review Foreign Investment Law Journal 262, 272.
[51] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in volume II (part 2) (2001) Yearbook of the International Law Commission 31, 39 para 5.
[52] *Ibidem*.

Decisions on the matter have often been confusing. A recent survey has brought to light how more recent tribunals, and at a closer look also earlier decisions, do not clearly support the applicability of the ILC Articles on attribution and have been hesitant in deciding the issue.[53]

The view proposed by some academics is, therefore, to look at the representational link in order to determine whether the conduct could be attributed to the State. The question is therefore whether the State has authorised the entity to represent it and enter into an obligation on its behalf,[54] and in what way it can be found to have done so.

Aside from instances of explicit authorisation,[55] several theories have been advanced to determine when the obligation was entered into on the State's behalf. Some point to 'objective elements' to determine the State's intention to be a party in the agreement but do not put forth general rules to identify them.[56] Others indicate as a possible general principle of law 'the concept of apparent authority from agency law and implied consent as well as "deemed consent" from contract law'.[57] Another interpretation is that the 'veil-piercing remedy' could be used as a special form of attribution.[58]

The third approach suggests that attribution to the State is a matter to be decided according to the proper law of the contract which will in turn depend on any choice of law clause in the contract or domestic conflict of law decisions.[59] Neither the ILC Articles on State

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[53] Shotaro Hamamoto, 'Parties to the "Obligations" in the Obligations Observance ("Umbrella") Clause, Clause' [2015] ICSID Review Foreign Investment Law Journal 449, 460-462.
[54] *Ibidem* 463.
[55] *Burlington v Ecuador (Decision on Liability*) (n 41) paras 132 and 206.
[56] Hamamoto (n 53) 463.
[57] Feit (n 48) 38-40; Crawford and Mertenskötter (n 46) 160-193, 170;
[58] Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (Kluwer Law International 2014) 203: 'Sovereigns are not ruled by private laws, but corporations are. So, if modern states avail themselves of corporations to carry out business, then they must abide by the same rules and exceptions that are applicable to non-state actors, and this includes full observance of the veil-piercing remedy.'
[59] Csaba Kovács (n 47) 40. Olleson (n 34), 465-466: 'Whether or not the State is to be regarded as a party to a contract and therefore bound by it for the purposes of the umbrella clause, however, is not a question calling for the application of the rules of attribution under the international law of responsibility. That is so for the simple reason that the act of the relevant entity in entering into the contract will not normally be relied upon as constituting an internationally wrongful act. Rather, and despite suggestions that the issue is one of whether the separate entity is to be regarded as having represented the State under international law (itself a different issue of attribution), in principle the question falls to be decided in accordance with the relevant applicable domestic law governing the contract, in particular the rules relating to privity of contract or their analogue.'(Footnotes omitted).Crawford and Mertenskötter (n 46) 160-193, 172;

Responsibility nor other international law rules, unless specifically chosen as the applicable law, would apply. The *ad hoc* Committee in *CMS v Argentina* held this view:

> 'The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.'[60]

INTERPRETING UMBRELLA CLAUSES: DIVERGING INTERPRETATIONS, SAME RULES

Inconsistent interpretations of the clause on the main interpretive concerns have ironically been reached by employing fairly consistent criteria. Tribunals have regularly confirmed that articles 31 to 33 of the Vienna Convention on the Law of Treaties ('VCLT'), which are generally considered a codification of international customary law,[61] shall be employed to interpret treaty provisions.[62] As it will be shown in this section, although tribunals stressed different aspects of article 31(1), *viz* the 'ordinary meaning', 'object and purpose' or 'context', they confirmed that the provision provides the most important guidelines for interpreting the clause:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Further, article 32, although often in a non-explicit fashion, has also contributed 'supplementary' instruments to the toolbox of interpretive criteria which equips investment tribunals:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to

[60] *CMS Gas Transmission Company v The Argentine Republic* (ICSID Case No. ARB/01/8) (25 September 2007) (Annulment) para 95(c).
[61] Reinisch and Schreuer (n 1) 878. On the fact that article 31-33 of the VCLT constitute customary international law, see Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 163, 185.
[62] Salacuse (n 1) 185. Rudolf Dolzer 'Interpretation and Intertemporal Application of Investment Treaties' in Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer (eds), Principles of International Investment Law (3rd edn OUP 2022) 37-38.

confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

> (*a*) leaves the meaning ambiguous or obscure; or
>
> (*b*) leads to a result which is manifestly absurd or unreasonable.

Additionally, article 33 of the VCLT, which goes under the heading 'Interpretation of treaties authenticated in two or more languages', has also been used, especially in recent decisions, to find the 'conciliatory' meaning for treaties authenticated in more than one language:

> 1.When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
>
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
>
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Before looking into how tribunals have used the elements of article 31(1), 32 and 33 in interpreting umbrella clauses, it is important to pre-empt that the purpose of this section is not to account for all means of interpretation under the VCLT. The aim is to define the most frequently utilised interpretation criteria and illustrate how they have been concretely applied by tribunals seeking to interpret umbrella clauses.

ORDINARY MEANING

The first duty of any tribunal called upon to determine the meaning of an international law provision is to interpret and apply the words before it.[63] In accordance with the general rule on interpretation, the aim of interpretation is the attribution to the terms of the treaty of their ordinary meaning. The challenge in this approach consists in the multiplicity of meanings that is carried by almost any word. The term 'meaning' itself, has no fewer than 16 meanings.

The ordinary meaning of a term shall not be determined in the abstract or in isolation from the other elements of the general rule, but in the context of the treaty and in the light of its object and purpose.[64] For ease of exposition, however, and because several decisions stressed the importance of attaining the 'ordinary meaning' above other aspects of the general rule, the notion of ordinary meaning is looked into separately.

The definition of 'ordinary meaning' of the 'terms' is the natural starting point for understanding this criterion. First of all, the expression 'terms' does not refer, as some suggested, to the bargain struck between the Parties at the time of stipulation, but is rather a reference to the 'meaning of words and phrases' of the treaty.[65] Further, the adjective 'ordinary' is synonym to 'customary', 'regular' or 'normal', although this is not to say that the 'special' meaning of a word could not be considered as the 'natural one' if the context so demanded.[66]

When recalling the ordinary meaning in umbrella clause interpretations, tribunals appear to have focused on the 'literal meaning' of the terms. First of all, this interpretation excludes that treaty terms could be implied by silence. In this sense, 'literal' means 'present in the letter', or in the 'text', of the treaty. Secondly, it prevents the language of the treaty from being stretched beyond the boundaries of its natural meaning. In the remainder of this subsection, several examples of tribunals' reasoning concerning ordinary meaning interpretations around each of

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[63] *Opinion on the Competence of the General Assembly in the Admission of a State to the United Nations*, ICJ Rep. 1950, 4, 8: the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter'. The ILC (Humphrey Waldock, Special Rapporteur), *Third Report on the Law of Treaties* (1964) 2 YBILC 5, 56 (UN Doc. A/CN. 4/167 and Add.1–3) also issued a similar statement: 'the text must be presumed to be the authentic expression of the par- ties; and in consequence the starting point of interpretation is the elucidation of the meaning of the text, not to investigate *ab initio* into the intentions of the parties.'

[64] Gardiner (n 61) 181.

[65] Ibidem 183.

[66] Ibidem 184.

the four main interpretive concerns are itemised. As it will become apparent, their reference to the 'ordinary meaning' has not kept at bay inconsistent interpretations of similar terms.

Some tribunals reference the 'ordinary meaning' to argue for a literal interpretation of the terms of the treaty, thereby including umbrella clauses. For instance, concerning 'function', the *Strabag SE v Libya* investment tribunal rejected the argument that the umbrella clause could only operate on acts involving some kind of *puissance publique*, because the ordinary meaning of the terms did not support this interpretation:

> '[…] Respondent argues that Article 8(1) of the Treaty can operate only where the State acts in a sovereign capacity involving some exercise of sovereign authority - puissance publique - or that it can only apply to conduct involving breaches of international law. Hence, Article 8(1) of the Treaty cannot apply to ordinary commercial acts. The difficulty is that such arguments in effect call for the Tribunal to introduce limits or conditions to Article 8(1) that do not appear in its language or necessarily follow from its ordinary meaning. Respondent's contention that Article 8(1) of the Treaty only covers contractual disputes involving some exercise of puissance publique, for example, has no foundation in the text of the article. […].'[67]

The *SGS v Philippines* case reaffirmed both aspects of a literal interpretation in its critique of the *SGS v Pakistan* decision.[68] It stated that the previous SGS tribunal had 'read into that provision words of limitation which are simply not there.'[69] Further, it stressed that the umbrella clause 'means what it says'.[70] The *SGS v Pakistan* tribunal indeed did consider the text of the umbrella clause,[71] but in the tribunal's view the consequences would be so far reaching in scope, that the parties would need to present evidence of their clear intent in order to confirm such meaning.[72]

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[67] *Strabag SE v Libya*, ICSID Case No. ARB(AF)/15/1 (29 June 2020) (Award) para 164.
[68] Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 169-173.
[69] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 7)* para 118.
[70] *Ibidem* para 119.
[71] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 166.
[72] *Ibidem* para 167.

The 'ordinary meaning' has been expressly summoned also in decisions concerning the 'scope' of the clause. For instance, in *RWE v Spain's*[73] decision on jurisdiction looked at the 'ordinary meaning' in order to determine whether umbrella clause protection could only be accessed in the case of 'specific consensual obligations':

> The key issue for the Tribunal is whether this protection requires some form of specific consensual obligation in order to be engaged. The Tribunal considers that it does, as follows from the ordinary meaning of the words "*obligations it has entered into with an Investor or an Investment* ..."

In *Micula v Romania*[74] , an analysis of the 'ordinary meaning' in relation to 'scope' led the tribunal in a different direction. The tribunal emphasised the capacious nature of the terms 'any obligations', capable of encompassing all types of commitments, including unilateral promises, in so far as they are specifically entered into with a particular investor:

> The first step in the Tribunal's analysis is thus to determine whether the EGO 24 framework gave rise to an "obligation" in the meaning of Article 2(4) of the BIT. Pursuant to Article 31(1) of the VCLT, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Tribunal sees no reason to deviate from this rule. Accordingly, the Tribunal must first turn to the ordinary meaning of the term "obligation".
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> […]

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[73] *RWE Innogy v Spain (Decision on Jurisdiction, Liability and certain issues of quantum) (n 29)* paras 677, 678-680. This view, reached through the application of the 'ordinary meaning' criterion under the VCLT, was also shared by other investment tribunals. Without the pretence to make an exhaustive list, in *Stadtwerke München v Spain (Award) (n 29)* at paragraph 380 the tribunal argued that: 'A literal reading of this sentence, and particularly of the words "entered into with an Investor," leads one to conclude that the ECT negotiators intended the umbrella clause to cover only contractual obligations or contractual-like arrangements, that is to say obligations assumed specifically in respect of a particular individual or legal person. The words "enter into" are normally used to refer to the process of making contracts with other persons. They would not usually be used to refer to non-contractual like obligations assumed by governments in their regulations or legislators in respect of their laws with effect either *erga omnes* or in respect of an objectively defined group of beneficiaries. In those latter situations, one would be more likely to refer to the government or legislature "assuming" a general obligation in respect of a beneficiary, rather than "entering into" an obligation with someone.'

[74] *Micula v Romania (Award) (n 28)* paras 412 and 415.

> The […] term "'[a]ny' obligations is capacious; it means not only obligations of a certain type, but 'any' – that is to say, all – obligations entered into with regard to investments of investors of the other Contracting Party." In addition, the BIT specifies that these obligations must also be "entered into with an investor [...] with regard to his or her investment". This language suggests that the state must have committed with respect to a particular investor with regard to his or her investments. […] Thus, the umbrella clause in this BIT covers obligations of any nature, regardless of their source, provided that they are indeed "obligations" entered into with a particular investor with regard to his or her investment.

In, *inter alia*, *Eureko v Poland*,[75] *Plama v Bulgaria*,[76] *Greentech Energy v Italy*[77] *and OI European Group v Venezuela,*[78] the tribunals followed a similar reasoning.

In relation to privity tribunals also relied on the 'ordinary meaning'. For instance, in *EDF v Argentina* the tribunal, after pre-empting that treaty interpretation would be conducted in conformity with the VCLT,[79] employed this criterion in order to determine whether the clause could cover exclusively obligations 'in relation to investors', or also 'undertaken in connection with the investments':

> The "umbrella clauses" in question are broadly worded. A clear and ordinary reading of these dispositions covers commitments undertaken with respect to investors, or

[75] *Eureko B. V v Republic of Poland* (19 August 2005) (Partial Award) para 246, the tribunal held: '[t]he plain meaning – the 'ordinary meaning' – of a provision prescribing that a State 'shall observe any obligation it may have entered into' with regard to certain foreign investments is not obscure. The phrase 'shall observe' is imperative and categorical. 'Any' obligation is capacious; it means not only obligations of a certain type, but 'any' – that is to say, all – obligations entered into with regard to investments of investors of the other Contracting Party.'

[76] *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No. ARB/03/24) (27 August 2008) (Award) para 186: '[…] [T]he wording of this clause in Article 10(1) of the ECT is wide in scope since it refers to '*any obligation*'. An analysis of the ordinary meaning of the term suggests that it refers to any obligation regardless of its nature, *i.e*., whether it be contractual or statutory.'

[77] *Greentech Energy Systems A/S, et al v Italian Republic* (*Greentech Energy v Italy)*, SCC Case No. V 2015/095 (23 December 2018) (Final Award) para 464: '[…] [T]he Tribunal majority is inclined to interpret "obligations" referred to in the ECT's umbrella clause as sufficiently broad to encompass not only contractual duties but also certain legislative and regulatory instruments that are specific enough to qualify as commitments to identifiable investments or investors.'

[78] *OI European Group B.V.v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25) (Award) (10 March 2015) para 589: 'The Tribunal agrees with the Claimant that the Clause of Incorporation is broadly worded. As previous tribunals have reflected the term "any obligation" includes obligations entered into by law. Consequently, Venezuela has accepted the commitment to fulfil all of the legal obligations established in the Venezuelan legal system."

[79] *Ibidem* paras 891-893.

undertaken in connection with investments. The Tribunal notes that Article 10(2) of the Argentina-Luxemburg BIT covers commitments undertaken with respect to investors while Article 7(2) of the German BIT, even broader in scope, covers "*commitment undertaken in connection with the investments*."

'OBJECT AND PURPOSE' AND 'GOOD FAITH'

Investment tribunals have often focused on 'effectiveness' when applying these interpretive criteria. The principle of effectiveness has two prongs, one relates to the fulfilling of the 'object and purpose' of the treaty. The other is enshrined in the notion of 'good faith' in article 31(1).[80] This subsection begins by addressing the former aspect.

The final words of article 31(1) introduce a teleological aspect to the general rule.[81] Pursuant to the VCLT rules, object and purpose is a means of elucidating the ordinary meaning, rather than indicating a general approach to treaty interpretation. This view is arguably supported by context: the heading to the article reads 'general rule'. The singular of the word 'rule', as opposed, for instance, to the plural in 'supplementary means of interpretation', indicates that 'object and purpose' shall be understood as one aspect of the one rule of interpretation.[82] This element does not allow for the general purpose of a treaty to overshadow the text, but rather for the ordinary meaning to be identified in their light of, *inter alia*, the objectives pursued by the treaty.[83]

This criterion has been especially relevant to tribunals seeking to determine the 'function', or effect, of the umbrella clause. The first two SGS tribunals both based their conclusions largely

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[80] The second limb of the principle of effectiveness relates to the notion of 'good faith'. Although 'good faith' is a particularly elusive term to interpret in itself, and has often been considered as meaning 'reasonableness' or preventing 'abuse of rights.' See Robert Kolb, *Good Faith in International Law* (OUP 2017) 22. Here, the focus is on 'good faith' as *effet utile*. In the words of the WTO Appellate Body, the principle of effectiveness compels a treaty interpreter to 'give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.' *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, p 24, paras 80-81(1999) (emphasis in original, footnotes omitted). Gardiner (n 61) 180-181.

[81] Gardiner (n 61) 211.

[82] *Ibidem* 201.

[83] Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing 2016) 157: 'As pointed out by Sinclair, '[t]he initial search is for the "ordinary meaning" to be given to the terms of the treaty in their "context"; it is in the light of the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified'.'

on the 'object and purpose' of the treaty. The *SGS v Pakistan* tribunal, after pointing to the general criteria of article 31(1) as some sort of guidebook for interpreting article 11 of the BIT,[84] stressed the importance of the teleological aspect of treaty interpretation to rule out the possibility that any violation of a commitment between the host State and the investor could be 'elevated' to the standing of an international law violation:

> The consequences of accepting the Claimant's reading of Article 11 of the BIT should be spelled out in some detail. Firstly, Article 11 would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments to an investor of the other Contracting Party. Any alleged violation of those contracts and other instruments would be treated as a breach of the BIT. Secondly, the Claimant's view of Article 11 tends to make Articles 3 to 7 of the BIT substantially 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. A third consequence would be that an investor may, at will, nullify any freely negotiated dispute settlement clause in a State contract. […].[85]

The tribunal held that these implications were incompatible with the purpose of the investment treaty. Similarly, the *SGS v Philippines* tribunal relies on the object and purpose of the treaty to give the clause an effectual interpretation of its function:

> The object and purpose of the BIT supports an effective interpretation of Article X (2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is

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[84] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 164: 'It appears that this is the first international arbitral tribunal that has had to examine the legal effect of a clause such as Article 11 of the BIT.' […] We begin, as we commonly do, by examining the words actually used in Article 11 of the BIT, ascribing to them their ordinary meaning in their context and in the light of the object and purpose of Article 11 of the Swiss-Pakistan Treaty and of that Treaty as a whole.'
[85] *Ibidem* para 168.

> legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments. [86]

It is now time to turn to second limb of the principle of effectiveness, *viz* the notion of 'good faith'.[87] The justification for looking into this aspect of the general rule[88] is not found in the letter of investment decisions. Nonetheless, this criterion is part of the argument advanced in this thesis and for this reason it is hereinafter afforded independent attention.

'Good faith', despite its inherent indeterminacy,[89] introduces an element of reasonableness[90] mitigating the dogmatism that can result from purely black letter analysis. As mentioned, it has been recognised that the principle of *effet utile* is part of the good faith requirement.[91] The principle, summarised by the Latin maxim *ut res magis valeat quam pereat,* favours the interpretation which gives a term some meaning rather than none:

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.[92]

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[86] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 7)* para 116.
[87] Jean-Marc Sorel and Valérie Boré Eveno, 'Art.31 1969 Vienna Convention' in Olivier Corten, Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) para 27: '[…] Effectiveness is not mentioned as it is considered implicit in good faith, as well as in the statement on interpretation in the light of the object and purpose of the treaty—an absence that leaves the possibility open for an interpretation with a teleological leaning.[…]' See also para 29.
[88] Sanja Djajić, 'Good faith in International Investment Law and Policy' in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore 2020) 122-123, 145.
[89] See, *inter alia*, Emily Sipiorski, 'Interpretation in Good Faith and Its Relevance in International Investment Law: Additions to Justice or Ensuring Justice?' [2021] International Community Law Review 57, 65: 'While few would deny the value and necessity of including an element of good faith in the interpretation of international law, there is a lack of definition and clear direction for its application.' See also Filip Černý, 'Short Flight of the Phoenix: A Few Thoughts on Good Faith, the Abuse of Rights and Legality in Investment Arbitration' in Alexander J Bělohlávek and Naděžda Rozehnalová (eds), *Czech Yearbook of International Law-Public Policy and Ordre Public* (Juris 2012) para 10.01: 'Not only can *good faith* not be generally defined – but the concept as an added value *must be* vague and one that can adapt and materialize only in each given case, because the very act of framing the concept into a general definition would create a normative rule of limited applicability.'
[90] Eric De Brabandere and Isabelle Van Damme, 'Good Faith in Treaty Interpretation' in Andrew D Mitchell, M Sornarajah, and Tania Voon (eds), *Good Faith and International Economic Law* (OUP 2015) 39: 'The principle of good faith is difficult to define in positive terms. It is easier to explain what might not be a good faith interpretation of a treaty: an interpretation that is arbitrary, unreasonable, illogical, unfair, dishonest, deceptive, abusive or excessive.'
[91] Gardiner (n 61) 151. De Brabandere and Van Damme (n 90) 44-45. See also Gazzini (n 83) 170.
[92] ILC, 'Commentary on Draft Articles' (1966) 2 UNY ILC 187, 219 para 6, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf accessed on 6 May 2022.

The Appellate Body of the WTO has also deemed the principle *ut res* to be part of the general rule for treaty interpretation. In the words of the tribunal *effet utile* is a 'fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31[…]'.[93] Looking at the letter of the general rule, good faith interpretation applies to the entire treaty. The WTO Appellate Body, however, interprets the criterion as being applicable to treaty clauses or portions thereof:

> '[The interpreter] must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.'[94]

CONTEXT

Article 31(1) VCLT requires for the words to be interpreted 'in their context'. There are two sides to 'context' in the VCLT rules. First of all, context 'as an immediate qualifier of the ordinary meaning of terms used in the treaty, and hence context is an aid to selection of the ordinary meaning and a modifier of any over-literal approach to interpretation.'[95] Secondly, the Vienna rules identify what material shall be considered as forming context.[96] The word 'context' itself has a peculiar signification in the VCLT and means 'the text that comes with'. Context includes the entire text of the treaty as well as its preamble and annexes.[97]

Investment tribunals regularly stress the importance of context,[98] however, concerning umbrella clause interpretation, they employ a specific instance of contextual interpretation. According to a wide definition of context, tribunals have relied on 'the structure or scheme underlying a provision or the whole treaty' to underpin their interpretation of the umbrella

[93] *Japan-Taxes on Alcoholic Beverages*, AB-1996-2, WT/DS8,10 &11/AB/R (1996).
[94] United States - Standards for Reformulated and Conventional Gasoline AB-1996-1, WT/DS2/AB/R (1996) 23, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/2ABR.pdf&Open=True; Gardiner (n 61) 160-161.
[95] Gardiner (n 61) 197.
[96] *Ibidem*.
[97] Article 31(2) of the VCLT.
[98] See for instance, *Plama Consortium Limited v Republic of Bulgaria* ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, para 147. The tribunal referenced the heading to Part III of the Energy Charter Treaty to confirm its interpretation that, pursuant to article 17, denial of protection would affect solely the advantages under Part III. It would not, however, preclude its jurisdiction under Part V to ascertain whether article 17 had been properly invoked. See Gardiner (n 61) 202.

clause.[99] In particular, tribunals looked at the structure of the entire treaty, for instance at whether procedural and substantive treaty standards were kept separate, to determine whether, on the basis of its positioning, the umbrella clause could be considered as having substantive value. For instance, in *SGS v Pakistan* this reasoning was employed to assess the clauses' function:

> 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. The separation of Article 11 from those obligations by the subrogation article and the two dispute settlement provisions (Articles 9 and 10), indicates to our mind that Article 11 was *not* meant to project a substantive obligation like those set out in Articles 3 to 7, let alone one that could, when read as SGS asks us to read it, supersede and render largely redundant the substantive obligations provided for in Articles 3 to 7.[100]

A similar reasoning, although different conclusions were reached, was undertaken by the tribunal in *SGS v Paraguay*[101] and *Eureko v Poland*.[102] In either instance, however, tribunals stressed how the positioning of the clause had, in their view, limited (if any) implications.

SUPPLEMENTARY MEANS OF INTERPRETATION

As a further interpretive tool, especially in relation to the 'function' or 'effect' of umbrella clauses tribunals have sometimes resorted to the supplementary means of interpretation under article 32. In order to confirm or determine the meaning as identified under the general rule,[103]

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[99] Gardiner (n 61) 202.

[100] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 170.

[101] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC v Republic of Paraguay* (ICSID Case No. ARB/07/9) (29 May 2009) (Decision on Jurisdiction) para 141: 'The umbrella clause also appears early on in the BIT, in the same provision as that imposing an obligation to provide fair and equitable treatment, and it is located before the obligation on expropriation: this might distinguish this BIT from that in issue in *SGS v Pakistan* (even assuming the tribunal's point on the location within a treaty of any particular text to have force).'

[102] *Eureko v Poland (*Partial *Award*) *(n 75)* paras 259: 'Moreover, insofar as the placement of the umbrella clause in the BIT – among the substantive obligations or with the final clauses – is of any significance (in this Tribunal's view, little), it should be noted that Article 3.5 of the BIT between the Netherlands and Poland places its umbrella clause amidst the rendering of the parties' substantive obligations.'

[103] Ulf Linderfalk, 'Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation' [2007] Netherlands International Law Review133, 136: 'Supplementary means of interpretation shall be used to determine the correct meaning of a treaty provision at a second stage of

article 32 itemises a non-exclusive list of supplementary interpretive tools, *inter alia*, the preparatory work of the treaty and the circumstances of its conclusion.[104]

The role of preparatory works has historically been rather marginal in relation to umbrella clauses.[105] Access to the preparatory work may be difficult or impossible. Even when available, documentation or record of discussions are often incomplete or insufficiently detailed thereby not allowing to infer well-founded conclusions.[106] Many States which are Parties to investment treaties, especially developing nations, lack the resources to document the preparatory work in relation to treaties they enter.[107]

The circumstances surrounding the conclusion of the treaty fared better. The ordinary meaning of the 'circumstances of' in the context of article 32 of the VCLT shall be understood as 'the general conditions under which a treaty was concluded; the states-of-affairs by which the conclusion of a treaty was affected or influenced.'[108]

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the interpretation process, when it has become evident that the correct meaning of the interpreted treaty provision cannot be clarified using the primary means only. To put it in the words of the Vienna Convention: supplementary means of interpretation can be used when the interpretation according to Article 31 'leaves the meaning ambiguous or obscure', or 'leads to a result which is manifestly absurd or unreasonable'.'

[104] See generally Gazzini (n 83) 245-246.

[105] Jean Ho (n 24) 203.

[106] Gazzini (n 83) 256: 'With regard to BITs, preparatory work is available only occasionally and rarely of great assistance for the interpreter.'

[107] Wälde likewise commented on the dearth of preparatory work relating to BITs: 'Different from the fiction of the quid-pro-quo deal reached in a treaty, BITs tend to be largely copied from earlier practice, primarily from the model of the State pushing for negotiation of a BIT. Governments with limited BIT practice will often not appreciate the details nor does it make sense to invest the resources to develop high-level BIT expertise. They will—or at least [they] did in the past—sign or not sign the draft model treaty proposed to them by, say, the US, Germany, or the UK. So, there is often little point in digging up the negotiating history where no substantive negotiations have taken place. The true history of such BITs is in the emergence of models, starting with the two 1960s OECD conventions and the ensuing development of country- specific models [. . .]. These models, their use in repeated practice, commentary, explanation, and adjudication provide more light on the meaning of treaty terms than the 'negotiations' between, say, the US and Bolivia at the time.' See Thomas W Wälde, 'Interpreting Investment Treaties: experiences and examples', in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 777–8. See also Weeramantry (n 68) 108. See also Jean Ho (n 24) 203.

[108] Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 246.

For a state-of-affairs to be part of the circumstances of the treaty's conclusion, it shall be connected to the treaty's conclusion in some fashion.[109] The historical background of the treaty has been included by several authors within the perimeter of 'relevant circumstances.'[110]

An appraisal of the *de facto* and *de jure* circumstances existing at the time of the conclusion of the treaty enables the interpreter to better seize the common intent of the Parties.[111] Intent is, to some extent, the product of the influence of the historical context in which it emerged.[112] The ILC reflected this consensus in its approach to codification. No objection was cast against the proposal draft by Special Rapporteur Waldock when he declared that article 71 paragraph 2 'also makes special reference to the circumstances surrounding the conclusion of the treaty. This broad phrase is intended to cover both the contemporary circumstances and the historical context in which the treaty was concluded.'[113]

Investment tribunals have sometimes turned to treaty's historical background in order to interpret given provisions. *Eureka v Poland* offers an example of historical circumstances being taken into account for treaty interpretation in the context of umbrella clauses. Although, it shall be noted that the tribunal did not fully disclose the interpretive purpose of its long historical digression:

> The provenance of "umbrella clauses" has been traced to proposals of Elihu Lauterpacht in connection with […] the Iranian Consortium Agreement, described in

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[109] Linderfalk (n 108) 246. See also Gazzini (n 83) 261-262.

[110] Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester: MUP 1984) 141. Bela Vitányi, 'Treaty Interpretation in the Legal Theory of Grotius and Its Influence on Modern Doctrine' [1983] Netherlands Yearbook of International Law 41, 67. Linderfalk (n 108) 246. Dörr Oliver and Schmalenbach Kirsten, *Vienna Convention on the Law of Treaties: a Commentary* (2nd edn, Springer 2018) 624-625. Gazzini (n 83) 261

[111] *Report of the WTO Appellate Body European Communities – Chicken Cuts* (WT/DS269/AB/R) (12 September 2005) para 289: '[…] An "event, act or instrument" may be relevant as supplementary means of interpretation not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a "circumstance of the conclusion" when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision. […]'

[112] Luigi Sbolci, 'Supplementary means of interpretation' in Enzo Cannizaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 157.

[113] Yearbook of the International Law Commission 'Third Report on the Law of Treaties', (1964), vol. II, (A/CN.4/SER A/1964/ADD.1) 59, para 22, available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1964_v2.pdf, accessed on 17 July 2022. No significant debate took place over the Special Rapporteur's proposal when the Draft Articles were definitively adopted by the ILC in 1966. At the Vienna Conference the national delegations rarely, and superficially, mentioned the circumstances in which a treaty had been concluded, and did so in conformity with the ILC's proposal. See Sbolci (n 112) 157. Weeramantry (n 68) 109.

> detail in an article in *Arbitration International* by Anthony C. Sinclair. It found expression in Article II of a draft Convention on Investments Abroad ("the Abs-Shawcross Draft") of 1959, which provided: "Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other party." It was officially espoused in Article 2 of the OECD draft Convention on the Protection of Foreign Property of 1967, in whose preparation, Lauterpacht, as a representative of the United Kingdom, played a part. […] The commentary to the draft Convention stated that, "Article 2 represents an application of the general principle of *pacta sunt servanda* - the maintenance of the pledged word" which "also applies to agreements between States and foreign nationals". Commenting on this article in his Hague Academy lectures in 1969, Professor Prosper Weil concluded that: "The intervention of the umbrella treaty transforms contractual obligations into international obligations..." *("Prob!emes relatifs aux contrats passes entre un Etat et un particulier.)".* The late Dr. F. A. Mann described the umbrella clause as "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...". […][114]

On an end note, there is another issue to which the circumstances of the treaty's conclusion, or more generally the supplementary means of interpretation, could apply, *viz* prior investment decisions on the same subject-matter. Hereinafter, they are improperly referred to as 'precedents.'

[114] *Eureko v Poland (*Partial *Award*) *(n 75)* para 251, footnotes omitted.

Despite tribunals[115] and academics[116] underscoring non-applicability of the *stare decisis* rule to the domain of international law, thereby including the sub-genre of investment law,[117] precedent still plays a non-negligible role.[118] Tribunals, expressing the longing for 'consistent rule creation' to enhance the 'predictability' and 'credibility' of the dispute settlement system,[119] make ubiquitous references to decisions of other investment tribunals confronted with a similar issue.[120] Umbrella clauses are no exception and tribunals have extensively

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[115] See, *inter alia*, *AES Corporation v The Argentine Republic*, ICSID Case No. ARB/02/17 (26 April 2005) (Decision on Jurisdiction) paras 30-31. *Methanex Corporation v United States of America*, UNCITRAL (Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae) (15 January 2001) para 51: '[…] This Tribunal can set no legal precedent, in general or at all. It has no power to determine for other arbitration tribunals how to interpret Article 15(1); and in a later arbitration, there may be other circumstances leading that tribunal to exercise its discretion differently. […].' See also *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 7)* para 97 footnote 30.

[116] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or excuse; the 2006 Freshfields Lecture' [2006] Arbitration International 357, 360-361, 368.The ICJ Statute at article 59 explains that decisions of the Court hold 'no binding force except between the parties and in respect of that particular case'. Similarly, Article 1136(1) of NAFTA states that decisions of investment arbitral tribunals under Chapter 11 do not constitute a binding precedent for future cases: 'An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.' The USMCA, NAFTA's successor, displays identical language thereby restricting the precedential effect of arbitral awards. See Annex 14-D.13(7) governing investor–State arbitrations initiated by US and Mexican investors. Despite not containing language to this effect, neither the ICSID Convention nor individual investment treaties recognise that investment arbitration awards constitute precedent. Article 53 of the ICSID Convention though clarifies that 'the award shall be binding on the parties', thereby implying that other parties and or tribunals may be bound by it. Salacuse (n 1) 201-202. Emily F Ariz, 'Does the Lack of Binding Precedent in International Arbitration Affect Transparency in Arbitral Proceedings?' [2021] University of Miami International and Comparative Law Review 356, 357-358.

[117] Gazzini (n 83) 292: '[…] [I]n general—there is no doctrine of *stare decisis*. It would indeed be rather illogical to hold that arbitral tribunals are legally bound by previous decisions when such an obligation does not exist even for permanent international tribunals and most prominently the ICJ.' The author also points to the largely confidential nature of investment arbitration as being one of the reasons excluding the applicability of this principle. See also on this last point August Reinisch, 'Chapter VI: Investment Arbitration - The Role of Precedent in ICSID Arbitration' in Christian Klausegger, Peter Klein, et al (eds), *Austrian Arbitration Yearbook 2008* (Manz'sche Verlags- und Universitätsbuchhandlung 2008) 496.

[118] See for instance Jeffery P Commission, 'Precedent in Investment Treaty Arbitration' [2007] Journal of International Arbitration 129, 134-135. Lucy Reed, 'The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management' [2010] ICSID Review–Foreign Investment Law Journal 95. Zachary Douglas, 'Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?' [2010] ICSID-Review Foreign Investment Law Journal 104; Martins Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules', in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De)Fragmentation of International Law* (Oxford: Hart 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835, accessed on 10 June 2022.

[119] Kaufmann-Kohler (n 116). Although as it has been right pointed out the 'practice of precedent aims to improve the predictability of the ITA system, yet the absence of any framework to govern how precedent is used makes that goal impossible to achieve'. See Richard C Chen, 'Precedent and Dialogue in Investment Treaty Arbitration' [2019] Harvard International Law Journal 47, 49. Reinisch (n 117) 495. See also cf Douglas (n 118) 107-110. Gazzini (n 83) 293-294.

[120] Julian Arato and Andreas Kulick, 'Final Report on International Investment Tribunals', ILA Study Group on the Content and Evolution of the Rules of Interpretation (29 November–13 December 2020) 21: 'Case law and scholarly commentaries feature prominently in ISDS approaches to treaty interpretation' available at https://ila.vettoreweb.com:442/Storage/Download.aspx?DbStorageId=24289&StorageFileGuid=40e8911b-e15f-40b1-8d68-0979e33d4a56, accessed on 17 July 2022. See also Gazzini (n 83) 292. Dolzer Rudolf (n 62) 45-46.

resorted to precedents. The *OperaFund v Spain* tribunal, *inter alia*, looked at precedents in order to determine 'scope' in the context of umbrella clause claims:

> […] The present Tribunal finds the interpretation of most Spanish RE cases more convincing and notes in this context that the tribunal in Isolux was of the view that the ECT's umbrella clause, although speaking of "an obligations" because it referred to "entered into" was limited to contractual obligations and that the tribunal in Novenergia held that "Article 10(1) of the ECT does indeed provide for a duty of each Contracting Party to 'observe any obligations it has entered into with an Investor', a provision that recalls the 'umbrella clause' contained in several investment treaties. However, the application of the umbrella clauses requires that the host State either concluded with the investor a specific contract or made to the investor a specific personal promise."[121]

Tribunals often fall shy of explaining the reasons for considering such decisions. Recent scholarship has suggested, predicating this argument on a few international decisions, that previous case law could fall within the perimeter of the supplementary means of interpretation pursuant to article 32 of the VCLT.[122]

Two options are potentially viable. First of all, cases law could qualify as circumstances of the treaty's conclusion. The *EC – Chicken Cuts* WTO Panel[123] and Appellate Body[124] adjudicated that ECJ judgments fell within the scope of supplementary interpretive means, specifically as 'circumstances of conclusion' of a treaty. This option would be limited to treaties concluded after said decisions had been rendered.

To the extent that prior decisions are to be treated as 'circumstances of conclusion', it would likely happen in instances of recently signed BITs. Hypothetically, it could be of particular

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[121] *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID Case No. ARB/15/36 (6 September 2019) (Award) para 569.

[122] Esmé Shirlow and Michael Waibel, 'Article 32 of the VCLT and Precedent in Investor-State Arbitration: A Sliding Scale Approach to Interpretation' in Esmé Shirlow and Kiran Nasir Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future* (Kluwer 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4120361.

[123] *European Communities - Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts)* Panel Report (30 May 2005) (WTO Doc WT/DS269/R, WT/DS286/R) paras 7.391-7.394. See Shirlow and Waibel (n 122).

[124] *EC – Chicken Cuts (Report of the Appellate Body) (n 111)* para 309: '[…] [J]udgments of domestic courts are not, in principle, excluded from consideration as "circumstances of the conclusion" of a treaty if they would be of assistance in ascertaining the common intentions of the parties for purposes of interpretation under Article 32.[…]'

interest to see how the 'circumstance' that is the considerable body of decisions already rendered on umbrella clauses could influence its interpretation.

Some of the newly signed treaties that have included the clause have substantially reformulated it. Arguably, the Parties' intent was to take into account investment decisions (and their inconsistent interpretations) on the matter. This is the case, for instance, of the Austria-Kyrgyzstan BIT[125] and of the EU-Singapore[126] and EU-Vietnam[127] FTAs.

The second option exploits the open-worded nature of article 32. As the list of what can constitute a supplementary mean of interpretation is not a closed one[128] some tribunals have argued that room could be found therein to include previous decisions.[129] The Annulment Committee in *Enron v Argentina* held that the term 'including' in Article 32 of the VCLT signified that 'amongst other supplementary means of interpretation are jurisprudence, including decisions and awards of ICSID tribunals and *ad hoc* committees, and doctrine'.[130] Other cases such as *Canadian Cattlemen v United States*[131] and *Chevron v Ecuador*[132] displayed a similar reasoning.[133]

To summarise, the supplementary interpretive means under article 32 of the VCLT, in particular the historical background to the umbrella clause, as well as the precedents on the same topic, could be of aid in the interpretation of the clause. Assuming the reality that is the widespread use of previous decisions under the heading of article 32 could provide a theoretical justification to the copious resort to precedents by investment tribunals tasked with interpreting umbrella clauses.

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[125] Article 11(1).
[126] Article 2.4, subsection 6.
[127] Article 14.
[128] See *inter alia* Yves Le Bouthillier, 'Article 32 1969 Vienna Convention' in Olivier Corten, Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) paras 42-46.
[129] Shirlow and Waibel (n 122).
[130] *Enron Corporation and Ponderosa Assets L.P.v Argentine Republic*, (Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award*)* (Rule 54 of the ICSID Arbitration Rules) (7 October 2008) (ICSID Case No. ARB/01/3) para 32.
[131] *The Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL (Award on Jurisdiction) (28 January 2008) paras 49-50.
[132] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (Interim Award) (1 December 2008, PCA Case No. 34877) paras 119-121.
[133] Gazzini (n 83) 299.

OTHER CONSIDERATIONS: CONCILIATORY MEANING

Tribunals have also applied article 33 of the VCLT to determine the 'interpretation of treaties authenticated in two or more languages.'[134] In particular, assuming that both versions had the same legal authority (lacking any indication to the contrary)[135], and with the intent to attribute the same meaning to both texts,[136] tribunals strived to interpret umbrella clauses in a fashion which best reconciled both versions.[137]

In *Ortiz v Algeria* the tribunal, after assuming that the terms had the same meaning in both treaties, argued that the interpretation that best reconciled both versions of the treaty should be preferred:

> According to the letter of article 33(3) of the VCLT, it shall be assumed that the terms « obligations contractées » and « *obligaciones contraídas* » have the same meaning. Subsequently, it is appropriate to clarify the meaning of these terms which best reconciles the two versions. In this regard, the Tribunal is inclined to follow the position of the Defendant when it explains that the only way to reconcile the two versions is to select a meaning that is shared by both. In this instance, the common denominator to both versions is the host State's obligation to respect its contractual engagements.[138]

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[134] Laurence Boisson de Chazournes, 'Rules of Interpretation and Investment Arbitration' in Meg Kinnear, Geraldine Fischer, Jara Minguez Almeida, Luisa. Fernanda Torres and Mairée Uran Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015)132-159, 135-136.

[135] In accordance with article 33(3) which states that '[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.'

[136] In accordance with article 33(3) which states that '[t]he terms of the treaty are presumed to have the same meaning in each authentic text.'

[137] In accordance with article 33(4) which states that '[e]xcept where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.' Salacuse (n 1) 189-190. See Gazzini (n 83) 273.

[138] Translated by the author. *Ortiz Construcciones y Proyectos S.A.v People's Democratic Republic of Algeria* (ICSID Case No. ARB/17/1) (29 April 2020) (Award) para 423: 'Aux termes de l'article 33(3) de la CVDT, il faut présumer que les « termes obligations contractées » et « *obligaciones contraídas* » ont le même sens. Il convient dès lors d'élucider le sens de ces termes qui concilie le mieux les deux textes. À cet égard, le Tribunal est plutôt enclin à suivre la position de la Défenderesse lorsqu'elle explique que seul le sens commun aux deux termes permet de concilier les deux textes. En l'espèce, le dénominateur commun aux deux textes est que l'État hôte est tenu de respecter ses engagements contractuels.'

In *RREEF v Spain* [139] the tribunal also followed a similar reasoning. In other instances, the tribunal did not look for the conciliatory meaning of the 2 versions, but held that as their meaning was identical, this was a further confirmation of the interpretation reached through the general rule. This is the case, *inter alia*, in *Stadtwerke v Spain*.[140]

OTHER CONSIDERATIONS: BEYOND THE VCLT INTERPRETATION CRITERIA

Tribunals, on rare instances, have also stepped outside the rut dug by the general rule on interpretation and applied different criteria.[141] In the words of the Appellate Body '[t]he principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.'[142] Although in the same footnote the Appellate Body qualifies this principle as a supplementary mean of interpretation widely recognized in international law, the statement, as it will be shown in the next chapter, is not uncontroversial.[143]

In *SGS v Pakistan* the tribunal adopted the *in dubio pars mitior est sequenda* as an interpretive criterion:

> We believe, for the foregoing considerations, that Article 11 of the BIT would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant. The appropriate

[139] In *RREEF v Spain (Decision on Responsibility and on the Principles of Quantum) (n 29)* the tribunal followed a similar reasoning. At paragraph 284, after expressing doubts on how to interpret the 'ordinary meaning' of the terms, recalled the Spanish and French version of the cause to find the meaning that could best reconcile all versions: '[…][T]he expression "any obligations" calls for a broad interpretation but, on the other hand, the phrase "it has entered into" seems to refer exclusively to bilateral relationships existing between the Respondent and the Claimants, to the exclusion of general rules; and the Spanish (*"las obligaciones que haya contraído con los inversores"*) or French (*"les obligations qu'elle a contractées vis-à-vis d'un investisseur"*) lead to the conclusion that the last sentence of Article 10(1) ECT only applies to contractual obligations.'

[140] *Stadtwerke München v Spain (Award)* (n 29) para 382: 'The use of the words "*contraído*" in the Spanish version and "*contractées"* in the French version, both of which mean "contracted," confirm that the obligations governed by the umbrella clause, under Article 10(1) of the ECT, are only those arising from contracts or contract-like relationships. […]'. See Salacuse (n 1) 191.

[141] De Brabandere and Van Damme (n 90) 45.

[142] *Report of the WTO Appellate Body, EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Docs WT/DS26/AB/R, WT/DS48/AB/R (13 February 1998) para 165, footnote 154.

[143] De Brabandere and Van Damme (n 90) 45-47. See also Wälde (n 107) 733-735.

> interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda,* or more tersely, *in dubio mitius.*[144]

Lastly, as a similar but not identical interpretive consideration tribunals have sometimes held that certain provisions have to be interpreted restrictively. Though often referred to as interchangeable with the *in dubio mitius* principle[145] the 2 criteria do not completely overlap: the principle of restrictive interpretation has sometimes been used to argue that exceptions to obligations assumed under a treaty shall be interpreted strictly.[146] This criterion was mentioned in *Noble Venture v Romania*[147] in relation to 'function':

> Thus, an umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of States obligations under municipal and under international law. In consequence, as with any other exception to established general rules of law, the identification of a provision as an "umbrella clause" can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms […].

The characterization of restrictive interpretation as a 'stand-alone principle' has, however, not been exempt from criticism. Some authors have qualified this principle as an iteration of the general rule according to which an exception cannot be presumed in the absence of a clear and unambiguous provision.[148]

IDENTIFYING FUNCTION: USEFUL INTERPRETIVE CONCERNS

The foregoing sections, after giving a general definition of the umbrella clause, sketched the main areas of debate around it, as well as the interpretations advanced in relation to each area. The second section of the chapter has provided an overview of the tools employed by tribunals when interpreting umbrella clauses. The synopsis was necessary in order to supply the reader with the main coordinates of the debate and provide the tools to participate in it.

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[144] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 171, footnotes omitted.
[145] See, for instance, Dörr and Schmalenbach (n 110) 577.
[146] De Brabandere and Van Damme (n 90) 48.
[147] *Noble Ventures, Inc.v Romania* (ICSID Case No. ARB/01/11) (12 October 2005) (Award) para 55.
[148] De Brabandere and Van Damme (n 90) 49.

This second part of the chapter has a different aim, *viz* to draw the perimeter of the interpretive concerns which will be brought forward in the second part of the thesis and justify this choice in relation to the research question. The second part of the chapter is likewise split into two sections. The first section, after defining the research question, shows how 'jurisdictional precedence' could have an impact on the way in which tribunals interpret the 'function', or effect, of umbrella clauses. The second section justifies the choice of topics to retain in the debate. In other words, it explains the reasoning behind the decision not to include concerns of 'scope' or 'privity' and, in doing so, it addresses another issue, *viz* the multitude of formulations the clause has assumed in different treaties.

THE LINK BETWEEN 'FUNCTION' AND 'JURISDICTIONAL PRECEDENCE'

First of all, this subsection avers that investment tribunals and academics[149] found a downstream link between the fashion in which tribunals have interpreted 'function' and the way whereby they addressed the ensuing issue of 'jurisdictional precedence'. Secondly, the subsection introduces the main tenet of the thesis, *viz* that it is possible to 'reverse the flow' and infer from 'jurisdictional precedence' useful elements to interpret 'function'.

The first tribunal to address umbrella clauses in an organic manner, was also the first to draw a connection between 'function' and 'jurisdictional precedence'. The *SGS v Pakistan* tribunal argued that the jurisdictional clause of the Swiss-Pakistan BIT, when using the expression 'disputes with respect to investments', allowed for treaty standards to be arbitrated before investment tribunals. As a consequence of the tribunal's interpretation of the umbrella clause's 'function' as an aspirational statement, serving as little other than a reinforcement to the general principle of *pacta sunt servanda*, the provision was considered as a non-substantive treaty standard. This finding led the tribunal to conclude that it had no jurisdiction to hear the claim:

> '[…] [T]he Tribunal has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT.'[150]

[149] Jacomijn J Van Haersolte-Van Hof, Anne K Hoffmann (n 26) 974-976.
[150] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 162.

Similarly, the *SGS v Philippines* tribunal relied on its previous arguments concerning 'function' in order to make a determination on 'jurisdictional precedence'. The exclusive jurisdictional clause in article 12 of the contract, a contract which represented the obligation protected under the umbrella, is a binding commitment incumbent on both parties to resolve any dispute '"in connection with the obligations of either party to this Agreement"' before the designated regional *fora*.[151] From this standpoint, the tribunal held that the jurisdiction (or in this case the admissibility) of the umbrella clause claim would be affected by the exclusive jurisdictional clause only if the two claims relied on the same cause of action, *viz* the pursuit of contractual claims:

> […] [F]aced with an exclusive jurisdiction clause in these terms, the first question must be whether the BIT or the ICSID Convention purport to confer upon investors the right to pursue contractual claims under the BIT disregarding the contractually chosen forum.[152]

The tribunal adjudicated that the two *fora* entered in conflict because 'the substance of SGS's claim, viz., a claim to payment for services supplied under the Agreement, falls within the scope of Article 12.'[153] This argument is in line with, and descends from, the tribunal's assessment of the clause's 'function', *i.e.* to have disputes for breaches of specific investment commitments heard before an international tribunal according to the proper law governing that commitment.[154]

The same line of reasoning establishing a link between 'function' and 'jurisdictional precedence' has been followed in later decisions. One of the clearest examples is *Supervision v Costa Rica*. The tribunal shared the interpretation of the *SGS v Philippines* tribunal concerning the jurisdictional function of the umbrella clause:

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[151] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 7)* para 137.
[152] *Ibidem* para 139.
[153] *Ibidem* para 137.
[154] *Ibidem* para 126: '[…] Article X(2) of the Swiss- Philippines Treaty […] does not convert non-binding domestic blandishments into binding international obligations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law of the Philippines to international law. Article X(2) addresses not the scope of the commitments entered into with regard to specific investments but the performance of these obligations, once they are ascertained. 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.'

> Since the claims were all based on the violation of the Contract and share the same normative source […] one can conclude that the claims presented before local tribunals are the same as the ones presented before this Tribunal. […].[155]

In the previously mentioned cases law, tribunals relied on 'function' in order to decide how and whether the exclusive forum selection clause in investment contracts, or the act of filing to a different forum, could impact the treaty tribunal's jurisdiction, or the admissibility of the claim. Tribunals have sometimes refused to hear the merits on the ground that the same dispute, with an identical subject matter and applicable law, had been referred to the exclusive jurisdiction of another tribunal as part of a binding contract. In other words, tribunals first identified the 'function' of the clause and held that the legal bases of the claim pursuant to both the contract and the treaty were indistinguishable. As their subsequent step, they ruled on whether jurisdiction could be affected by the contractual forum selection clause, or by the submission of the same claim to a different forum, and grounded the decision on the results obtained from the first step.

This sub-section asserts that the reasoning could be reversed. It is possible to reach a meaningful conclusion on 'function' using the determination on 'jurisdictional precedence' as a footing and applying the general and supplementary rules on interpretation. Both early *SGS cases* seem to hint to this possibility. The *SGS v Pakistan* tribunal adjudicated that if the claimant's interpretation of the umbrella clause was to be upheld, its effects on 'jurisdictional precedence' would defeat the purpose of the treaty. Eluding the validly agreed upon dispute settlement clause in the contract would create an imbalance of benefits in favour of the investor rather than 'enhance the mutuality and balance of benefits' between the investor and the host State in harmony with the purpose of the treaty:

> […] A […] consequence [of the Claimant's reading] would be that an investor may, at will, nullify any freely negotiated dispute settlement clause in a State contract. On the reading of Article 11 urged by the Claimant, the benefits of the dispute settlement provisions of a contract with a State also a party to a BIT, would flow only to the investor. For that investor could always defeat the State's invocation of the

[155] *Supervision y Control S.A.v Republic of Costa Rica* (*Supervision v Costa Rica*), ICSID Case No. ARB/12/4 (Award) (18 January 2017) paras 315-316.

> contractually specified forum, and render any mutually agreed procedure of dispute settlement, other than BIT-specified ICSID arbitration, a dead-letter, at the investor's choice. The investor would remain free to go to arbitration either under the contract or under the BIT. But the State party to the contract would be effectively precluded from proceeding to the arbitral forum specified in the contract unless the investor was minded to agree. The Tribunal considers that Article 11 of the BIT should be read in such a way as to enhance mutuality and balance of benefits in the inter-relation of different agreements located in differing legal orders.[156]

The tribunal in *SGS v Philippines* also expresses a similar concern on the voiding of the validly selected forum for the settlement of contractual disputes:

> The present Tribunal agrees with the concern that the general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself. On the view put forward by SGS it will have become impossible for investors validly to agree to an exclusive jurisdiction clause in their contracts; they will always have the hidden capacity to bring contractual claims to BIT arbitration, even in breach of the contract, and it is hard to believe that this result was contemplated by States in concluding generic investment protection agreements. […][157]

This significance of these affirmations for the purposes of this thesis stands in the fact that the 'jurisdictional precedence' concern is, in itself, considered sufficient to affect the interpretation of the entire clause because the fulfilment of the treaty's purpose depends on it. 'Purpose' is one of the criteria of the general rule of interpretation under article 31(1) of the VCLT mentioned above. It would not be unreasonable to argue that the correct interpretation of 'function' is one which would lead to an interpretation of the inter-relation between treaty and contract jurisdictions which upholds the purpose of the treaty.

The crux of the argument advanced in this thesis is that the interpretive camp known as jurisdictional internalisation, which used to be the majoritarian view and still remains

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[156] *SGS v Pakistan (Decision on Jurisdiction) (n 6)* para 168. See also para 161 of the same decision.
[157] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 7)* para 134.

popular,[158] causes to interpret 'jurisdictional precedence' in a way which defeats the purpose of the treaty. Whereas other interpretive views, such as the first and second camp, are excluded on different grounds, [159] it is argued that full-internationalisation is a more plausible interpretation. Full internationalisation allows to approach the problem of 'jurisdictional precedence' in a manner which is compatible with the treaty's purpose.

NARROWING THE PERIMETER OF DEBATE: A JUSTIFICATION

At the outset of this chapter, when drafting up a first illustration of the interpretive concerns associated with the umbrella clause, four main concerns were itemised. It is therefore legitimate to question why 'scope' or 'privity' are not being used to draw inferences on 'function'. Three main reasons lie behind this choice. First of all, tribunals addressing the 'scope' of umbrella clauses have relied heavily on specific, often inconsistent, treaty terminology. It is therefore harder to produce arguments that hold general validity independently of the specific wording.

'Function' and 'jurisdictional precedence' are examined from a similar standpoint. Although varying language is a factor, especially around 'function', it does not constitute a key argument for explaining the differences in the interpretation of these concerns. Secondly, even though certain interpretations of 'privity (or attribution)' and 'scope' seriously limit the perimeter of application of the clause, none would deprive it of its *effet utile* or run counter the purpose of the treaty. Lastly, it is contended that arguments concerning 'privity (or attribution)' and 'scope' are relatively self-contained and unlikely have repercussions on the interpretation of 'function'.

DIFFERENCES IN WORDING

In order to draw generally valid conclusions on 'function' based on another interpretive concern, both the latter and former concerns shall be susceptible of generalisation. In other words, by looking at the clause it should be possible to draw conclusions that are also applicable to other clauses presenting the same interpretive issue. This is possible when the clause at hand is formulated in a stable manner, or the differences in its formulation are marginal to its interpretation. This is the case, for instance, when synonyms are used. It is hereinafter argued

[158] See the next chapter on the prevalence of this interpretive camp in contemporary and past jurisprudence.
[159] See Chapter 3.

that while the interpretation of 'scope' is difficult to generalise, wording has a negligible impact on the interpretation of 'function' or 'jurisdictional precedence'.

'Scope' is ill adapted to generalisations because its interpretation is markedly impacted by the differences in the language of the clause. Furthermore, language variations susceptible of affecting interpretation are fairly common. First of all, often the clause refers to obligations that a contracting State has 'entered into' with regard to investments of nationals of the other State party. The expression 'entered into' is rather common: it can be found, *inter alia*,[160] in the last sentence of Article 10(1) of the Energy Charter Treaty ('ECT')[161] as well as in the Argentina-US BIT.[162] Both treaties applied to a considerable number of arbitrations.[163] The wording has been interpreted, although the issue remains controversial, as limiting the scope of the clause to contractual commitments.

Secondly, another variation consists in a specification that the commitments covered under the clause are not just those 'with regard to investments' of nationals of the other State party, but those concerning 'specific investments.' This terminology has been interpreted as potentially shrinking the reach of the clause to contractual obligations, or unilateral acts (such as legislation and/or regulation) that are sufficiently specific to a given investment.

Thirdly, in a few treaties, umbrella clauses expressly call for the observance of 'any obligations, whether general or specific'.[164] This wording could support the view that the scope of the clause also covers legislation of general applicability.

Fourthly, some treaties contain broad language referring to any commitments or obligations 'assumed' by host States 'with regard to' investments by investors of the other party. [165] The

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[160] For instance, the phrase is also present in the very first known BIT. Article 7 Germany-Pakistan BIT (1959) reads as follows: 'Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party.'
[161] Article 10(1) ECT (1994) reads as follows: 'Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.'
[162] Article II(2)(c) Argentina-US BIT (1991) reads as follows: 'Each Party shall observe any obligation it may have entered into with regard to investments.'
[163] Reinisch and Schreuer (n 1) 868-869.
[164] Article 3 China-New Zealand BIT (1988) ('Each Contracting Party shall observe any obligations, whether general or specific, it may have entered into with regard to investments of nationals or companies of the other Contracting Party.' Reinisch and Schreuer (n 1) 869.
[165] The umbrella clause of the Switzerland-Philippines BIT, at Article X(2), is an example: '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.'

protection afforded under the clause has sometimes been considered as broader than in clauses protecting obligations which had been 'entered into' rather than 'assumed'.[166]

Lastly, in a few instances, treaty drafters have specified rather precisely the scope of the clause. The 2008 Austrian Model BIT at article 11 second sentence specifies that a breach of contract, not of generic commitments, between the investor and the host State constitutes a violation of the treaty.

Although differences in terminology are not an issue exclusive to 'scope', they are less pre-eminent for other interpretive concerns. Language variations are also susceptible of affecting the interpretation of 'function'. The first two *SGS cases* exemplify this fact. The Switzerland-Pakistan BIT requires the treaty Parties to 'constantly guarantee the observance of the commitments.'[167] In the letter of article X (2) of the Switzerland-Philippines treaty, the host State shall 'observe any obligation it has assumed with regard to investments'.[168] Tribunals as well as commentators,[169] however, have been sceptical on whether linguistical variation are responsible for the diverging interpretations. Surely, the *SGS v Philippines* tribunal noticed the difference in language between the umbrella clause in the Switzerland-Pakistan treaty and the one in the present treaty:

> […] It should be noted that the "umbrella clause" in the Swiss- Pakistan BIT was formulated in different and rather vaguer terms than Article X(2) of the Swiss-Philippines BIT. Article 11 of the Swiss-Pakistan BIT provides that:

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[166] *Stadtwerke München v Spain (Award) (n 29)* para 380: ''A literal reading of this sentence, and particularly of the words "entered into with an Investor," leads one to conclude that the ECT negotiators intended the umbrella clause to cover only contractual obligations or contractual-like arrangements, that is to say obligations assumed specifically in respect of a particular individual or legal person. The words "enter into" are normally used to refer to the process of making contracts with other persons. They would not usually be used to refer to non-contractual like obligations assumed by governments in their regulations or legislators in respect of their laws with effect either *erga omnes* or in respect of an objectively defined group of beneficiaries. In those latter situations, one would be more likely to refer to the government or legislature "assuming" a general obligation in respect of a beneficiary, rather than "entering into" an obligation with someone.'

[167] Article 11 of the Switzerland-Pakistan BIT (1995).

[168] Article X (2) of the Switzerland-Philippines (1997).

[169] Reinisch and Schreuer (n 1) 868: 'Nevertheless, it seems that independent of the specific differences in wording, there is a deep divergence in views as to the precise effect of the underlying concept of an umbrella clause […] The following overview shows textual variations found in IIA practice.'

> "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."
>
> Apart from the phrase "shall constantly guarantee" (what could an inconstant guarantee amount to?), the phrase "the commitments it has entered into with respect to the investments" is likewise less clear and categorical than the phrase "any obligation it has assumed with regard to specific investments in its territory" in Article X(2) of the Swiss-Philippines BIT.[170]

In the words of the *Bureau Veritas v Paraguay* tribunal, however, the two decisions reflect different approaches concerning the effect of an umbrella clause in the framework of a BIT,[171]more than a difference in language.[172] Crawford, who penned the *SGS v Philippines* decision, also appears to confirm this view in a later article where he discusses the 'disturbing' level of dissensus on 'core questions'. Although the difference in terminology is acknowledged[173] the focus of the analysis rests on the differences in reasoning.[174]

Some clauses, through the specificity of the language utilised, give useful information to the interpreter in relation to the 'function' of the umbrella clause by clarifying the applicable law. These instances are nevertheless confined to a very limited number of recent treaties with little impact on how tribunals have interpreted the clause thus far. One example can be found at Article 18 (2) of the Austrian Model BIT (2008):

> 'Issues in dispute under Article 11 shall be decided, absent other agreement, in accordance with the law of the Contracting Party, party to the dispute, the law governing the authorisation or agreement and such rules of international law as may be applicable.'

Concerning 'jurisdictional precedence', the clauses (both the umbrella clause and the jurisdictional clause) in the BIT that determine the relation between the exclusive forum

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[170] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 7)* para 119.
[171] *BIVAC v Paraguay (Decision on Jurisdiction) (n 101)* para 138.
[172] Reinisch and Schreuer (n 1) 928.
[173] Crawford (n 4), 367.
[174] *Ibidem* 353.

selection clause in the contract and the jurisdiction of the BIT tribunal are relatively stable in their formulation. Jurisdiction of the treaty tribunal is determined, generally,[175] by combining three distinct elements: the umbrella clause containing the treaty standard which has allegedly been breached, the jurisdictional clause in the treaty and the acceptance of the investor expressed by way of filing an investment claim. The first two of these elements define the perimeter of the State Parties' offer to arbitrate with the consequence that claims for breaches of standards not contemplated in the offer fall outside the boundaries of the tribunal's jurisdiction.

The umbrella clause being the first element, it is subject to the differences in wording that have already been mentioned above. However, what truly matters in instances of jurisdiction (or admissibility) is that investment contracts are covered regardless the specific wording of the umbrella clause at hand. Terms such as 'entered into', 'assumed' or 'specific investments' all appear to include, at least, contractual commitments.

Other differences in terminology also do not appears susceptible of changing this reality. Expressions such as 'obligations deriving from a written agreement', [176] the terms 'commitments'[177] or 'undertakings'[178] utilised instead of 'obligations' are all sufficiently broad to encompass at least contracts.

The second treaty element is rather stable in terms of its wording. Treaty language appears consistent in the way State 'consent' has been shaped across different international law instruments.[179] For instance, article 25(1) of the US 2012 BIT Model provides that '[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with

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[175] This topic will further be discussed in the following chapters. Here it is sufficient to mention that under article 25 of the ICSID Convention 'the arbitrating parties' (i.e. the investor and the Host State) that submit a dispute to the Centre. The jurisdiction of the investment tribunal is not therefore determined by the treaty alone. The jurisdictional clause in the treaty constitutes merely an offer to arbitrate eventual future breaches of the treaty's substantive standards. Jurisdiction arises when the offer is eventually perfected by the investor by way of filing a claim. Although this is the most common way in which jurisdiction is established it is not the only method. Sometimes the Host State enacts investment legislation which constitutes a valid offer, or even less frequently a direct agreement is reached between the parties to litigate their dispute before an investment tribunal.
[176] See for instance Article 10(2) of the Columbia-Switzerland BIT 2006.
[177] See for instance Article 11 of the Pakistan-Switzerland BIT 1995.
[178] See for instance Article 10 of the Austria-Poland BIT 1991 and Article 2(4) of the Italy-Jordan BIT 1996, although doubts have been rightfully cast on whether these clauses are indeed umbrella clauses. See Reinisch and Schreuer (n 1) 855, 872-873.
[179] For further examples of the obligation to consent enshrined in treaties see Christoph H Schreuer and others, The ICSID Convention (2nd edn, CUP 2009) 206-208, paras 431-435.

this Treaty.' Article VII (4) of the US-Argentina BIT, which has constituted the basis of consent in several arbitrations following the South American State's debt crisis, employs a similar terminology:

> Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3.[180]

The wording of the treaties can reasonably be interpreted as committing the treaty Parties to consent to the submission of future treaty claims to arbitration. The common thread tying together all examples is the sentence '[e]ach Contracting Party consents to the submission of a claim to arbitration'. Nothing in the text suggests that umbrella clause claims should be excluded from the perimeter of the State's consent to investment arbitration.

The combination of the first two elements of jurisdiction confirms that there is indeed an offer from the host State to the investor to settle disputes with regard to the observance of contractual commitments. Crucially, the offer does not vary in its essential traits based of the differences in terminology.

Acceptance by the investor, *viz* the third, and final, element of the agreement to arbitrate, is not enshrined in the treaty and will be extensively discussed in Chapters 4 and 5.

THE MISSING LINK

The analysis' aim is to identify the correct interpretation of 'function' based on the argument that any other interpretation would lead to other interpretive concerns, *viz* 'jurisdictional precedence', being interpreted in a fashion which is incompatible with, *inter alia*, the purpose of the treaty. This subsection provides further justification for the choice to utilise 'jurisdictional precedence' instead of other interpretive concerns such as 'privity (or attribution)' or 'scope'.

An element that prevents a connection between 'function' on the one hand and 'scope' or 'privity and attribution' on the other hand from being established is the relative self-

[180] Argentina-US BIT (1991).

containment of the last two interpretive concerns. The interpretation of the 'scope' of the clause is not linked to 'function'. Tribunals centred their analysis around specific treaty terminology, such as 'entered into', 'assumed', 'specific investments' or 'any obligation', which is relatively independent of 'function'. In a similar fashion, tribunals assessing 'privity' have looked at whether 'obligations entered into with regard to investments', even if not concluded directly with a foreign investor, would be covered under the clause.

Additionally, the interpretation of 'attribution' likewise is not linked to how 'function' is subsequently interpreted. On the surface, the connection could be that both interpretive concerns try to determine what law, municipal or international, applies to the problem. In the case of 'function', two of the most credited interpretive camps agree that pursuant to the umbrella clause a breach of contract would cause a breach of the treaty (*i.e.* a breach of the umbrella clause). Interpreters disagree, however, on whether the law applicable to decide such treaty violation would be the municipal law applicable to the contract or international law. Regarding 'attribution' tribunals struggle on whether to apply the Articles on the Responsibility of States for Internationally Wrongful Acts, other relevant rules of international law or the municipal law of the contract in order to determine whether the State validly entered into the relevant commitment.[181]

It appears, however, that the two questions remain separate. 'Attribution' focuses on establishing what rules determine whether a municipal law obligation was validly entered into (or assumed) by the State. 'Attribution' is a preliminary question to 'function' in most instances.[182] If the obligation purportedly breached could not be attributed to the State, the ensuing issue of determining the 'function' of the umbrella clause would simply not arise because there would be no obligation for the umbrella clause to protect. Despite this fact, the determination that international law decides whether the action of entering into a municipal law contract can be attributed to the State, seemingly has no impact on whether international law will apply to assess the breach of the umbrella clause.

EFFECTIVE INTERPRETATION

[181] See generally Crawford and Mertenskötter (n 46) 160-193.
[182] 'Attribution' could however be irrelevant if the underlying obligation is non-consensual, e.g. in the case of legislative or otherwise unilateral commitments.

As a further argument, despite the fact that certain interpretations of 'privity (or attribution)' and 'scope' considerably limit the perimeter of application of the clause, none runs counter the purpose of the treaty. As a consequence, even if a link between the interpretation of 'function' and 'privity' or 'scope' was established, it would not foster the conclusion that a correct interpretation of 'function' allows for other concerns to be interpreted in a fashion which is respectful of the treaty's purpose. All mentioned interpretations of these concerns indeed potentially comply with the treaty's purpose.

Concerning both 'privity (or attribution)' and 'scope' it is doubtful whether even the more restrictive interpretation on either concern would be incompatible with article 31(1) of the VCLT. In particular, the requirement that interpretation shall be carried out in a fashion that enhances the 'object and purpose' of the treaty would arguably be respected.[183] Regarding 'scope' it is reasonable to affirm that even the most restrictive interpretation, which includes exclusively consensual commitments, would fulfil the treaty's purpose.

The treaty strives to widen the stream of foreign direct investments by increasing the level of protection offered to investment undertakings. Even if the clause only covers contractual commitments, ordinary contractual breaches are not, generally speaking, a violation of any other treaty standard.[184] It is therefore reasonable to conclude that even the most restrictive view would be coherent with the purpose of the treaty, *viz* to garner foreign investments by offering through the clause greater protection to investors. The *effet utile* is likewise protected because the clause still enhances, however slightly, the protection of foreign investors. The letter of the treaty is therefore not hollowed of its meaning.

Similarly, concerning 'privity' and 'attribution', if the clause only included commitments directly entered into by the foreign investor or by the State, this would severely limit the

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[183] Preambles to investment treaties seem to be fairly consistent in indicating that States pursue their own prosperity through an increase in the flow of foreign direct investments which shall therefore be protected and encouraged. See for instance the Preamble to the Switzerland-Philippines BIT of 1997; that to the Switzerland-Pakistan BIT of 1995; or that between the United States and Argentina of 1991.

[184] See, *inter alia*. Reinisch and Schreuer (n 1) 855, 860-865. Srikanth Hariharan, 'Distinction between Treaty and Contract: The Principle of Proportionality in State Contractual Actions in Investment Arbitration' [2013] Journal of World Investment & Trade 1019, 1021-1022. Christoph Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered, in Todd Weiler (ed), *International Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 287 available at https://investmentlaw.univie.ac.at/fileadmin/user_upload/p_investmentlaw/Writings/A012.pdf , accessed on 10 June 2022.

applicability of the clause. It is nevertheless less clear if this would signify non-compliance with the treaty's purpose. Even with the limitations a restrictive approach would entail, the clause's *effet utile* would be to some extent guarded. The protection afforded to investors would indeed be marginally improved. Directly undertaken contractual commitments, which would not have been protected pursuant to other treaty standards, e.g. fair and equitable treatment or indirect expropriation,[185] could be 'shielded under the umbrella'.

Additionally, a restrictive interpretation would also be compatible with the purpose of the treaty, *viz* to increase the flow of foreign investment by creating a favourable normative environment for its protection. An increase, however fractional, in the protection of foreign investments is in line with the purpose of the treaty.

CONCLUSIONS

Four main interpretive concerns surround umbrella clauses, namely 'function', 'jurisdictional precedence', 'scope' and 'privity (or attribution)'. They have all been interpreted inconsistently despite the fact that seemingly all investment tribunals charged with the task employed the VCTL interpretation rules.

The declared objective of this thesis is to identify 'function' through its link with another interpretive concern, *viz* 'jurisdictional precedence'. Whereas tribunals, generally speaking, focused on the influence of 'function' over how 'jurisdictional precedence' is being interpreted, the reverse could also be plausible. The crux of the argument is that the correct interpretation of 'function' is the one that logically leads to 'jurisdictional precedence' being interpreted in a fashion which is compatible with the purpose of the treaty. The fact that some interpretations of 'jurisdictional precedence' are susceptible of interfering with the purpose of the treaty, coupled with the link between 'function' and 'jurisdictional precedence', reinforces the argument that a correct interpretation of the 'jurisdictional precedence' concern would suggest the correct interpretation of 'function'.

This argument relies on the relative stability of the clause's formulation and the fact that its incorrect interpretation is susceptible of affecting the purpose of the treaty. Stability of

[185] Schill (n 13).

formulation, in tandem with the relative irrelevance for our purposes of eventual textual differences, allow us to draw inferences that hold general validity.

'Scope' or 'privity' have not been considered as concerns whose correct interpretation could lead to a correct identification of 'function'. First of all, the interpretation of 'scope' is highly language specific and can hardly be generalised.[186] Secondly, however restrictive, the interpretation of either concern would not hollow the clause of its purpose or *effet utile*. Lastly, a connection between the way in which 'privity', 'attribution' or 'scope' is interpreted and the interpretation of 'function' is missing.

Before moving to address the key argument that has been foreshadowed in this chapter, it is first necessary to have a clearer understanding not only of the various interpretive concerns and of the solutions tribunals have proposed, but also of their prevalence in the current debate. This analysis would in turn make it easier to identify connections, or lack thereof, drawn by tribunals between how concerns are interpreted.

Further, a study on the prevalence, or disappearance, of an interpretive solution around a given concern will provide data on whether consensus on a topic has been reached. This is not to say that areas where consensus has been achieved, or is close to having been achieved, cannot be challenged herein. Consensus can, and to some extent will, be challenged. The effectiveness of a purported challenge, however, rests on being aware that consensus had indeed been attained in that area, as well as on the foundations of said consensus.

The last analytical study on the interpretations of the umbrella clause was run about 10 years ago. It suggested that discrepancies in the way 'function' and 'jurisdictional precedence' was being interpreted had either disappeared or trended towards disappearance.[187] The next chapter will show how recent decisions have rekindled the debate surrounding 'function' whereas the

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[186] María Cristina Gritón Salias, 'Part V Substantive Investment Law, Do Umbrella Clauses Apply to Unilateral Undertakings?', in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 492-496. The author in her 2009 study found that despite the overwhelming majority of tribunals recognised that unilateral commitments could indeed be protected under the clause, the outcome was vastly language dependent. Expressions such as 'entered into' or 'specific investments' could be susceptible of either restricting the scope of the clause to contractual commitments or to exclude general undertakings from the perimeter of unilateral commitments protected under the clause.

[187] Jude (n 9) 638-639.

issue 'jurisdictional precedence' has, generally, been resolved in favour of allowing parallel proceedings.

CHAPTER 2

PATTERNS IN THE INTERPRETIVE CONCERNS REGARDING UMBRELLA CLAUSES

INTRODUCTION

The umbrella clause has garnered the imagination of much academic literature in reason of the patchy fashion in which tribunals have interpreted it at the time of the early SGS tribunals. This debate still fills the pages of most recent scholarly endeavours.[1] The last comprehensive work classifying decisions on the basis of the interpretations of its 4 main controversial aspects was nevertheless published about 10 years ago. Prior to advancing any argument on the interpretation of umbrella clauses, and in order to foster a debate which looks at the full picture of the trends in the field, it is appropriate to understand how the clause has been interpreted thus far.

It is nevertheless important to pre-empt from the outset that despite the non-applicability of the *stare decisis* rule to the domain of international law,[2] thereby including the sub-genre of

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[1] For some recent academic literature on the interpretation of umbrella clauses Afşin Gözlügöl Alperen, 'The Effects of Umbrella Clauses: Their Relevance in Interpretation and in Practice' [2020] Journal of World Investment & Trade 558; Stephen Donnelly, 'Conflicting Forum Selection Agreements in Treaty and Contract' [2020] International and Comparative Law Quarterly 759; Jean Ho, *State responsibility for breaches of investment contracts* (CUP 2018); Anthony Sinclair & Hafsa Zayyan 'The investment treaty arbitration review: observance of obligations'(18 June 2021), available at https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/observance-of-obligations#footnote-043-backlink; Samantha J Rowe and Svetlana Portman 'Current trends in 'umbrella clause' claims arising from breaches of contractual obligations' (3 June 2021) available at https://www.ibanet.org/current-trends-umbrella-clause-claims, accessed on 08 February 2022.

[2] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or excuse; the 2006 Freshfields Lecture' [2006] Arbitration International 357, 360-361, 368. The ICJ Statute at article 59 explains that decisions of the Court hold 'no binding force except between the parties and in respect of that particular case'. Similarly, Article 1136(1) of NAFTA states that decisions of investment arbitral tribunals under Chapter 11 do not constitute a binding precedent for future cases: 'An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.' The USMCA, NAFTA's successor, displays identical language thereby restricting the precedential effect of arbitral awards. See Annex 14-D.13(7) governing investor–State arbitrations initiated by US and Mexican investors. Despite not containing language to this effect, neither the ICSID Convention nor individual investment treaties recognise that investment arbitration awards constitute precedent.[2] Article 53 of the ICSID Convention though clarifies that 'the award shall be binding on the parties', thereby implying that other parties and or tribunals may be bound by it. See Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, OUP 2021) 201-202.See also specifically in a reasoning involving umbrella clauses

investment law, precedent has still played a non-negligible role.[3] Tribunals, not unlike investors and States,[4] have expressed the longing for 'consistent rule creation' to enhance the 'predictability' and 'credibility' of the dispute settlement system.[5] It is therefore interesting to look into whether this objective has been attained. Additionally, as already recounted in the previous chapter, prior decisions could, if the stride of some to recent scholarship is to be followed, be part of the supplementary interpretive means pursuant to article 32 of the VCLT.[6]

The purpose of the first section of this chapter is to report the findings of Jude Anthony's research on umbrella clauses. His study ('the original study') was conducted over a decade ago and aimed at identifying recurring interpretive patterns in investment decisions around four areas which had caused most of the controversy regarding umbrella clause interpretation, *viz* 'function', 'scope', 'jurisdictional precedence' and 'privity (or attribution)'.

This study ('the follow up study')'s purpose is to verify whether the conclusions drawn by the original study concerning emerging interpretive patterns, as well as areas where consensus was yet to form, hold true to this day. Furthermore, this study looks at whether new patterns are surfacing.

The original study was selected from the broad literature on the topic due to its methodology, its inclusion of not only all cases concerning umbrella clauses, but also of all the issues touched

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SGS Société Générale de Surveillance S.A. v Republic of the Philippines (ICSID Case No. ARB/02/6) (29 January 2004) (Decision on Jurisdiction) para 97: '[…] Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. […].'

[3] See, for instance, Jeffery P Commission, 'Precedent in Investment Treaty Arbitration' [2007] Journal of International Arbitration 129, 134-135.

[4] Olga Boltenko, 'The Umbrella Revolution: State Contracts and Umbrella Clauses in Contemporary Investment Law' in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore 2020) 400.

[5] Kaufmann-Kohler (n 2) 376. See Commission (n 3) 149. Richard C Chen, 'Precedent and Dialogue in Investment Treaty Arbitration' [2019] Harvard International Law Journal 47, 49: The author argues that 'tribunals should decide in each case which course will best promote the several values that a system of precedent is supposed to serve: predictability, accuracy, and legitimacy'.

[6] Julian Arato and Andreas Kulick, 'Final Report on International Investment Tribunals', ILA Study Group on the Content and Evolution of the Rules of Interpretation (29 November–13 December 2020) 21: 'Case law and scholarly commentaries feature prominently in ISDS approaches to treaty interpretation' available at https://ila.vettoreweb.com:442/Storage/Download.aspx?DbStorageId=24289&StorageFileGuid=40e8911b-e15f-40b1-8d68-0979e33d4a56, accessed on 17 July 2022.

upon in those cases. Further, the author is very specific about the time intervals of the study compared to the otherwise available literature.

This chapter has a threefold structure. In the first section, it summarises the methodology and findings of the original study. The first part of the first section explains the aim of the original study and the methodology it followed. The section details how cases discussing the umbrella clause were selected. Moreover, it looks into how the original study extrapolated relevant decisions among umbrella clause cases, *viz* decisions wherein at least one of the four interpretational concerns had been addressed.

The second part of the first section summarises the results of the original study for each of the four interpretational considerations. The original study's findings regarding the number of tribunals adopting a given interpretation, and the interpretive patterns identified as a result, have been itemised. Additionally, the section also summarises the findings of the original study in relation to 3 cases published after the cut-off date.

To the follow-up study is devoted the second section, which is in turn also subdivided in two main parts. The first part identifies the methodology followed for gathering decisions concerning umbrella clauses. Additionally, the process by which decisions that are relevant to the four interpretive concerns have been identified is explained. Differences in methodology between this study and the original study, especially when their comparability could be impaired, are also highlighted.

The second part of the section is centred around the 4 interpretive concerns. Each subsection summarises the overall findings regarding each concern. Lastly, the reasonings outlined by tribunals for each concern are examined directly.

The last section draws some conclusions from comparing the findings of the original study with those of this study. The study finds that while some patterns have been confirmed over the last decade, certain lines of jurisprudence have died out while other trends became less prevalent. The study shows how, despite becoming less popular in recent treaties, umbrella clause claims have retained, if not increased, their popularity in investment claims. By contrast, tribunals have become increasingly likely to avoid in-depth discussions of the umbrella clause standard, especially if no additional compensation could be awarded with respect to other treaty standards already decided on, e.g. the FET or expropriation.

THE ORIGINAL STUDY

PURPOSE AND METHODOLOGY OF THE ORIGINAL STUDY

Approximately a decade ago Jude Anthony's study reviewed publicly available international arbitral decisions wherein umbrella clauses had been discussed. He identified four areas around which most of the controversy surrounding the operation of umbrella clauses revolved, namely 'function', 'scope', 'jurisdictional precedence', and 'privity'. The purpose was to draw conclusions from case studies available on whether any degree of consensus had emerged around these four controversial aspects and, if so, the extent and nature of such consensus.[7]

Concerning the methodological aspect, Jude utilised all publicly available English language investor-State arbitral decisions rendered by 1 May 2012. His research selected decisions discussing umbrella clauses by text searching for words such as 'umbrella' or other terms that commonly refer to the clause such as 'mirror', 'parallel', 'elevator', '*pacta sunt servanda*', 'sanctity of contract', 'observance of commitments', and 'observance of obligations'.[8]

When one of these terms was found, the case was further scrutinised. The study reviewed 225 cases, 68 of which were found to discuss umbrella clauses. In 32 cases the tribunal merely noted that matter before it did not concern an umbrella clause (11 cases)[9], or the reference to the umbrella clause was in the Notice of Arbitration and no decision on the merits or jurisdiction was rendered (3 cases)[10], or the tribunal's decision was grounded on other

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[7] Anthony Jude, 'Umbrella Clauses since SGS v Pakistan and SGS v Philippines' [2013] Arbitration International 607, 608, 611.

[8] Jude (n 7) 611-612.

[9] *Ibidem* 613 footnote 24 provides a list of such cases also reported below. *Aguas del Tunari SA. v Republic of Bolivia (*ICSID Case no. ARB/02/3); *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (ICSID Case no. ARB/05/22); *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (I)* (PCA Case No. 2007-02/AA277); *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (II)* (PCA Case No. 2009-23); *Gemplus SA. and Tahud SA. v UnitedMexican States* (ICSID Case no. ARB(AF)/04/3 and ARB(AF)/04/4); *Ioannis Kardassopoulos v The Republic of Georgia* (ICSID Case no. ARB/05/18); *Ron Fuchs v The Republic of Georgia* (ICSID Case no. ARB/07/15); *Occidental Exploration and Production Company v The Republic of Ecuador* (LCIA Case no. UN3467); *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case no. ARB/05/8); *Trans-Global Petroleum,Inc. v Jordan* (ICSID Case no. ARB/07/25); *Waste Management, Inc. v United Mexican States (II)* (ICSID Case no. ARB(AF)/00/3).

[10] Jude (n 7) 613 footnote 25 provides a list of such cases also reported below. *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12); *Caratube International Oil Company LLP v Republic of Kazakhstan* (ICSID Case No. ARB/08/12); *The Renco Group, Inc. v Republic of Peru (I)* (ICSID Case No. UNCT/13/1).

arguments and a substantial discussion on umbrella clauses was not undertaken (18 cases)[11]. These 32 decisions were categorised as non-consequential.

The 36 remaining decisions were classified as consequential. The consequential category includes cases where the discussion on umbrella clauses was limited by the fact that the tribunal held that no obligations were owed by the respondent State to the claimant.[12]

The rationale followed by tribunals in consequential cases was further examined for extrapolating emerging patterns around the 4 controversial aspects mentioned above. In the next part, after defining each of these aspects the findings of the original study will be summarised.

SUMMARY OF THE RESULTS OF THE ORIGINAL STUDY

In this section the patterns emerging in relation to the four interpretational considerations analysed in the original study will be summarised. The original study's findings in relation to the number of tribunals adopting a given interpretation will also be accounted for.

FUNCTION

The first part of Jude's work concerned the 'function' or effect of umbrella clauses. The study showed that umbrella clauses had been interpreted by tribunals in a manner that fit into four specific functions. Namely, umbrella clauses had been interpreted as aspirational statements,

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[11] Jude (n 7) 613 footnote 26 provides a list of such cases also reported below. *Fedax N.V v The Republic of Venezuela* (ICSID Case No. ARB/96/3); *Abaclat and Others v Argentine Republic* (ICSID Case No. ARB/07/5); *AES Summit Generation Limited and AES-Tisza Erbmii Kft v The Republic of Hungary (II)* (ICSID Case No. ARB/07/22); *Austrian Airlines v Slovak Republic*; *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe* (ICSID Case No. ARB/05/6; *Camuzzi International S.A. v Argentine Republic (II)* (ICSID Case No. ARB/03/7)*; GEA Group Aktiengesellschaft v Ukraine* (ICSID Case no. ARB/08/16); *ICS Inspection and Control Services Limited (United Kingdom) v Republic of Argentina* (I) (PCA Case No. 2010-9); *Malaysian Historical Salvors, SDN, BHD v Malaysia* (ICSID Case No. ARB/05/10); *Murphy Exploration and Production Company International v Republic of Ecuador (I)* (ICSID Case No. ARB/08/4); *Noble Energy, Inc. and Machalapower CIA. LTDA v Ecuador and Consejo National de Electricidad* (ICSID Case No. ARB/05/12); *OKO Pankki Oyj and others v Republic of Estonia* (ICSID Case No. ARB/04/6); *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v Republic of Turkey* (ICSID Case No. ARB/02/5); *Romak SA. v The Republic of Uzbekistan* (PCA Case No. 2007-07/AA280); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Mongolia*; *Telefonica SA. v The Argentine Republic* (ICSID Case No. ARB/03/20); *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* (ICSID Case No. ARB/05/15); *M.C.I. Power Group L.C. and New Turbine, Inc. v Republic of Ecuador* (ICSID Case No. ARB/03/6).

[12] Jude (n 7) 612-613.

as being operational merely when the State exercised sovereign powers, as internationalising domestic law obligations or as having an essentially jurisdictional function.[13]

In 2 instances[14] the umbrella clause was interpreted as an aspirational statement. According to tribunals the clause expressed a generic intent to respect the obligation undertaken more than an enforceable commitment to honour those obligations under the treaty.[15]

In 6 of the cases reviewed,[16] tribunals found that the function of the umbrella clause was to allow claims to be founded on a breach by the State of domestic law obligations, but only when an obligation was violated in the exercise of State sovereignty. No breach would occur if the violation took place in the exercise of the State's ordinary commercial capacity. Tribunals espousing this interpretation have also stated that actions would likely only be deemed as taken in the exercise of State sovereignty when they could trigger BIT claims for the violation of other treaty standards.[17] In 2 investment decisions[18] this interpretation was discussed and subsequently rejected.

Jude found that in 3 instances[19] tribunals adjudicated that umbrella clauses transform municipal law obligations into obligations directly cognisable in international law. An umbrella clause breach is therefore a treaty violation to be adjudicated in accordance with international law.

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[13] *Ibidem* 613.

[14] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) (6 August 2003) (Decision on Jurisdiction) para172; *Salini Costruttori S.p.A. and Italstrade S.p.A. v Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13) (9 November 2004) (Decision on Jurisdiction) para 126.

[15] Jude (n 7) 615.

[16] *Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No. ARB/03/11) (Award on Jurisdiction) paras 72 and 82; *El Paso Energy International Company v The Argentine Republic* (ICSID Case No. ARB/03/15) (27 April 2006) (Decision on Jurisdiction) paras 81 and 84; *Pan American v Argentine Republic* (ICSID Case No. ARB/03/13) (27 July 2006) (Decision on Preliminary Objections) para 112; *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16) (28 September 2007) (Award) para 310; *Malicorp v Arab Republic of Egypt* (ICSID Case No. ARB/08/18) (7 February 2011) (Award) para 126; *CMS v Argentine Republic* (ICSID Case No. ARB/01/8) (12 May 2005) (Award), para 299, later partially annulled, including the part mentioned herein, for failure to state reasons.

[17] Jude (n 7) 615.

[18] *Burlington Resources, Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5) (2 June 2010) (Decision on Jurisdiction) para 190; *Societe Generale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29) (12 February 2010) (Decision on jurisdiction) para 135.

[19] *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11) (12 October 2005) (Award) paras 53-54; *Siemens v The Argentine Republic* (ICSID Case No. ARB/02/8) (6 February 2007) (Award) para 204; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC v Republic of Paraguay* (ICSID Case No. ARB/07/9) (29 May 2009) (Decision on Jurisdiction) paras141-142.

In 9 cases,[20] starting from *SGS v Philippines*, tribunals interpreted the umbrella clause as having essentially a jurisdictional function. According to this line of reasoning, the obligation is not changed in any way, as its nature, scope, and applicable law remain the same.[21] The function of the umbrella clause is to provide a separate cause of action under the BIT in order to have municipal law claims heard before investment tribunals.[22]

SCOPE

Out of the 36 consequential decisions, 19 addressed the type of obligations umbrella clauses operate on.[23] Decisions wherein an opinion was expressed on the scope of the operation of the umbrella clause are divided into three categories. In the first, the scope of the umbrella clause includes all obligations entered into through 'consensual agreement' thereby explicitly excluding unilateral obligations. Tribunals followed this approach in 2 cases.[24] In the second category, the scope of the umbrella clause extends to contractual obligations but the issues of whether it includes unilateral commitment was either not debated, or, when debated, no decision was reached. This approach was adopted in 12 decisions.[25] The final category is composed of cases where the scope of the umbrella clause was deemed to extend to 'any' obligation entered into by the contracting State in relation to an investment of an investor which is a national of the other contracting State. Pursuant to this interpretation, the scope of operation

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[20] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 2)* para 126; *CMS v The Argentine Republic* (ICSID Case No. ARB/01/8) (25 September 2007) (Annulment) para 95; *Joseph Charles Lemire v Ukraine (II)* (ICSID Case No. ARB/06/18) (14 January 2010) (Decision on Jurisdiction and Liability) para 498; *Burlington v Ecuador (Decision on Jurisdiction) (n 18)* para 189; *Continental Casualty Company v The Argentine Republic* (ICSID Case No. ARB/03/9) (5 September 2008) (Award) para 298; *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon* (ICSID Case No. ARB/07/12) (11 September 2009) (Decision on Jurisdiction) para 202; *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Republic of Chile* (ICSID Case No. ARB/01/7) (25 May 2004) (Award) para 187; *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29) (12 February 2012) (Decision on Jurisdiction) para 174 and *Eureko B. V v Republic of Poland* (19 August 2005) (Partial Award) paras 256-257.

[21] Jude (n 7) 614.

[22] *Ibidem* 618-619.

[23] *Ibidem* 620.

[24] *CMS v Argentina (Annulment) (n 20)* paras 89-99. *Noble Ventures v Romania (Award) (n 19)* para 51.

[25] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 2)* para 115. *Eureko v Poland (Partial Award) (n 20)* para 250. *MTD Equity v Chile (Award) (n 20)* para 187. *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No. ARB/03/24) (27 August 2008) (Award) para 186-187. *Duke Energy Electroquil Partners and Electroquil S.A. v Republic of Ecuador* (ICSID Case No. ARB/04/19) (18 August 2008) (Award) para 321. *BIVAC v Paraguay (Decision on Jurisdiction) (n 19)* para 141. *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan* (SCC Case No. 064/2008) (2 September 2009) (Partial Award on Jurisdiction and Liability) para 257. *Lemire v Ukraine (II) (Decision on Jurisdiction and Liability) (n 20)* para 498; *Toto v Lebanon (Decision on Jurisdiction) (n 20)* para 202. *Limited Liability Company Amto v Ukraine* (SCC Case No. 080/2005) (26 March 2008) (Final Award) para 110. *Burlington v Ecuador (Decision on Jurisdiction) (n 18)* para 190. *Malicorp v Egypt (Award) (n 16)* para 103.

of umbrella clauses includes undertakings arising under the statutory framework.[26] This category counts 5 cases.[27]

JURISDICTIONAL PRECEDENCE

The third interpretational variable examined in Jude's study is the so-called 'jurisdictional precedence'. In umbrella clause claims when the underlying commitment is contractual, such contract often incorporates an exclusive forum selection clause selecting a venue for settling disputes pertaining to the contract. In such instances, investment tribunals are called upon to determine the effect, if any, that contractual forum selection clauses have on their jurisdiction.[28] Further, they also discussed the impact of contractually designated *fora* on fork-in-the-road provisions and on the preclusive effects they could entail.

Out of the cases where a substantive discussion of the umbrella clause was undertaken, 13 discussed jurisdictional precedence. Decision wherein such discussion was held can be divided in three categories. In the first category, the tribunal denied it had jurisdiction on the matter. This approach was adopted in just 1 case.[29] In the second category the tribunal upheld its own jurisdiction but declined to exercise it on inadmissibility grounds. Two decisions followed this line of reasoning.[30] In the final category, tribunals found that their jurisdiction was unaffected by the forum selection clause or by the operation of the fork-in-the-road provision. This approach was adopted in 10 decisions.[31]

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[26] See *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic* (ICSID Case No. ARB/02/1) (3 October 2006) (Decision on Liability) para 174. This was the case for instance with the Gas Law and related regulations enacted by Argentina. Due to these regulations specifically targeting foreign investment and having being advertised to potential foreign investors, from the Tribunal's perspective the Gas Law and related regulations had become obligations entered into with regard to investments.

[27] *LG&E v Argentina (Decision on Liability) (n 26)* paras 174-175. *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic* (ICSID Case No. ARB/01/3) (22 May 2007) (Award) paras 274-275. *Continental Casualty v Argentina (Award) (n 20)* para 301; *Siemens v Argentina (Award) (n 19)* paras 205-206. *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29) (10 February 2012) (Award) para 77. See Jude (n 7) 624.

[28] Jude (n 7) 625.

[29] *Toto v Lebanon (Decision on Jurisdiction) (n 20)* para 202.

[30] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 2)* para 154. *BIVAC v Paraguay (Decision on Jurisdiction) (n 19)* para 159.

[31] *SGS v Paraguay (Award) (n 27)* paras 138 and 142. *CMS Gas Transmission Company v The Argentine Republic* (ICSID Case No. ARB/01/8) (17 July 2003) (Decision on Jurisdiction) para 76; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic* (ICSID Case No. ARB/01/3) (2 August 2004) (Decision on Jurisdiction on Ancillary Claim) para 50; *LG&E v Argentina (Decision on Liability) (n 26)* para 61; *Siemens A.G. v The Argentine Republic* (ICSID Case No. ARB/02/8) (3 August 2004) (Decision on Jurisdiction) para 180; *Salini v Jordan (Decision on Jurisdiction) (n 14)* para 96; *Impregilo S.p.A. v*

PRIVITY

'Privity' issues arise when the original obligation the umbrella clause operates on was not directly entered into by State to the claimant.[32] Generally, this situation occurs in relation to contractual obligations when the State, the investor, or sometimes both, are not directly a party to the contract in question. From the investor's perspective, it is not infrequent to be a shareholder in a locally incorporated entity which is, in turn, party to the investment contract. From the host State's perspective, it is common for sub-state entities with separate legal personality, not the State itself, to enter into contracts.[33]

Out of the decisions which undertook a substantive discussion about umbrella clauses, 14 debated instances in which the claimant, was not a party to the contract creating the obligation on which the umbrella clause claim was grounded. Two approaches have been followed. On the one hand, tribunals held that an investor, not being party to the relevant contract, was owed no obligation and therefore there was nothing for the umbrella clause to operate on. In 6 cases[34] tribunals held that a claimant investor was not entitled to rely on a contract to which it was not a party. On the other hand, tribunals found that so long as the obligations were entered into in connection to the claimant's investment, it was then irrelevant whether the claimant entered into it directly. In 8[35] cases it was considered sufficient for an obligation to be entered into with regard to the claimant's investment.[36]

Islamic Republic of Pakistan (II) (ICSID Case No. ARB/03/3) (22 April 2005) (Decision on Jurisdiction) paras 286-290; *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16) (11 May 2005) (Decision on Jurisdiction) para 121; *Eureko v Poland (Partial Award) (n 20)* para 113; *Mohammad Ammar v Tajikistan (Partial Award on Jurisdiction and Liability) (n 25)* paras 158-159.

[32] Jude (n 7) 628.

[33] *Ibidem*.

[34] *Azurix Corp. v The Argentine Republic (I)* (ICSID Case No. ARB/01/12) (14 July 2006) (Award) para 384; *Impregilo S.p.A. v Argentine Republic (I)* (ICSID Case No. ARB/07/17) (21 June 2011) (Award) paras 185-186; *Siemens v Argentina (Award) (n 19)* para 205. *El Paso Energy International Company v Argentine Republic* (ICSID Case No. ARB/03/15) (31 October 2011) (Award) para 533; *BG Group Plc v The Republic of Argentina* (24 December 2007) (Final Award) para 217; *CMS v Argentina (Annulment) (n 20)* para 96.

[35] *Continental Casualty v Argentina (Award) (n 20)* para 297; *Duke Energy v Ecuador (Award) (n 25)* para 324; *Impregilo v Pakistan (II) (Decision on Jurisdiction) (n 31)* para 123; *Amto v Ukraine (Final Award) (n 25)* para 110; *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8 (12 May 2005) (Award) (part of tribunal's decision later annulled by the *ad hoc* Committee); *Enron Creditors v Argentina (Decision on Jurisdiction on Ancillary Claim) (n 31)* para 56; *LG&E v Argentina (Decision on Liability) (n 26)* para 175; *Sempra Energy v Argentina (Award) (n 16)* para 312.

[36] Jude (n 7) 628-629.

From the perspective of respondent States, in 13 instances tribunals have discussed the situation in which the State was not a party to the contract creating the obligation on which the umbrella clause claim was grounded.[37] On the one hand, in relation to commercial contracts, tribunals held that the State was not responsible for the actions of legal entities with separate legal personality regardless of whether they are fully owned by the State itself, or perform a public function.[38] This approach was adopted in 7 decisions.[39] On the other hand, tribunals adjudicated that there is nothing in principle preventing commercial actions from being attributed to the State and whether or not they are in any given instance is a matter of fact which shall be decided pursuant to the relevant rules of international law. This approach was adopted in 6 decisions.[40]

CASES ANALYSED POST CUT OFF POINT

A separate section of the paper discusses three decisions which had come out between the cut-off point and the publication date, but are deemed worthy of mention, *i.e. Burlington v Ecuador*[41]*, Bosh v Ukraine*[42]*, Occidental v Ecuador*[43]. The practical issues involved with reviewing the entire body of investment decisions between the publication date and the cut-off date, or otherwise risk creating inconsistencies in the study,[44] have made it so that no systematic analysis of all decisions involving umbrella clauses in that period has been conducted.

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[37] *Ibidem* 631.
[38] It is, however, worth mentioning that in a few instances, namely *Alpha v Ukraine, EDF v Romania,* and *Amto v Ukraine,* while tribunals held that entering into a contract could not be attributed to the State, actions by a sub-state entity violating a contract could entail the responsibility of the State, provided that the conditions established by the ILC Draft Articles for attribution were met. Jude (n 7) 633.
[39] *Impregilo v Pakistan (II) (Decision on Jurisdiction) (n 31)* para 210; *Alpha Projektholding GmbH v Ukraine* (ICSID Case No. ARB/07/16) (8 November 2010) (Award) para 424; *Amto v Ukraine (Final Award) (n 25)* para 110; *EDF (Services) Limited v Republic of Romania* (ICSID Case No. ARB/05/13) (8 October 2009) (Award) para 190; *William Nagel v The Czech Republic* (SCC Case No. 049/2002) (9 September 2003) (Award) para 321; *Azurix v Argentina (I) (Award) (n 34)* para 384; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* (ICSID Case No. ARB/07/24) (18 June 2010) (Award) para 347.
[40] *Noble Ventures v Romania (Award) (n 19)* paras 82 and 86; *Eureko v Poland (Partial Award) (n 20)* para 134; *Mohammad Ammar v Tajikistan (Partial Award on Jurisdiction and Liability) (n 25)* para 169; *Toto v Lebanon (Decision on Jurisdiction) (n 20)* para 53; *Impregilo v Argentina (Award) (n 34)* para 185; *SGS v Pakistan (Decision on Jurisdiction) (n 14)* para 166.
[41] *Burlington v Ecuador* (ICSID Case No. ARB/08/5) (14 December 2012) (Decision on Liability).
[42] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine* (ICSID Case No. ARB/08/11) (25 October 2012) (Award).
[43] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador* (ICSID Case No. ARB/06/11) (5 October 2012) (Award).
[44] Jude (n 7) 634.

In *Burlington v Ecuador,* the function of an umbrella clause was deemed to be essentially jurisdictional in that it established a separate cause of action under the BIT independent of the underlying claim under municipal law for violation of contractual obligations.[45] Secondly, regarding scope, the tribunal held that the contractual commitment fell within the scope of the clause, but the inclusion of unilateral obligations was left an open question. Thirdly, although no jurisdictional clause was found in the contract, the tribunal held that it would not have affected its jurisdiction. Lastly, on the issue of privity, the tribunal argued that privity of contract was a necessary precondition under Ecuadorian law for a contractual obligation to be established with Burlington. Given that the relevant contracts were entered into by Ecuador with Burlington's subsidiaries, no privity was found and, therefore, the umbrella clause had no obligation to operate on.[46]

In *Bosh v Ukraine* the function of an umbrella clause was deemed to be essentially jurisdictional. It created a separate cause of action under the BIT independent of the underlying claim under municipal law for violating contractual undertakings.[47] Secondly, the tribunal held that contractual commitments fall within the scope of the umbrella clause and there was no need to investigate whether it would also include other types of commitments.[48] Thirdly, on the category of jurisdictional precedence, the tribunal prioritized the contractual forum selection clause, stating that the claimant was to respect any provision within that contract, including those concerning dispute settlement. The tribunal considered this to be an issue of admissibility rather than jurisdiction.[49] Lastly, regarding privity the contact was entered into between the claimant investor and Taras Shevchenko National University of Kiev, a Ukrainian University. Although the tribunal held that some of the University's actions were attributable to the Ukrainian State, specifically when elements of governmental authority were exercised, the decision to enter into and subsequently terminate the contract was a commercial activity.[50] Therefore, actions carried out by the University in a private and commercial capacity could not be attributed to Ukraine.

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[45] *Burlington v Ecuador (Decision on Liability) (n 41)* para 199.
[46] Jude (n 7) 634-635. *Burlington v Ecuador* (ICSID Case No. ARB/08/5) (14 December 2012) (Decision on Liability) paras 212-215.
[47] *Bosh v Ukraine (Award) (n 42)* paras 247.
[48] *Ibidem* paras 247-248.
[49] *Ibidem* para 252.
[50] *Ibidem* paras 176-177.

In *Occidental v Ecuador*, the tribunal did not engage in an in-depth discussion on the function and scope of the umbrella clause. Privity was also not discussed. The tribunal had determined that the FET clause had been breached and no consequence was to be had on the amount of damages awarded by adjudicating on the alleged umbrella clause violation. The tribunal, however, considered the issue of jurisdictional precedence. It held that if clearly formulated to have that effect, the clause could theoretically prevent jurisdiction.[51]

PATTERNS IDENTIFIED IN THE ORIGINAL STUDY

The purpose of the original study was to find common patterns in investment decisions on four issues that had caused most of the controversy surrounding umbrella clauses, namely 'function', 'scope', 'jurisdictional precedence' and 'privity'.

The study found that consistent patterns were emerging around 'function' and 'jurisdictional precedence'. The majority of tribunals had expressed the opinion that the umbrella clause bears essentially jurisdictional function. Furthermore, this interpretation had become increasingly accepted in later decisions. This finding prompted the author to conclude that consensus had built around this interpretive concern after a few 'uncertain steps' in earlier decisions.

The compatibility of international investment proceedings for breach of the umbrella clause under the treaty with contractual forum selection clauses, or more generally with proceedings for breach of contract, also appeared to have found increasing acceptance. However, a few recent decisions siding against this interpretation meant that no consensus had yet stabilised around the issue.

Concerning the 'scope' of the clause, general consensus seems to have been reached that at least contractual obligations fall under the umbrella, so to speak. More uncertainty remains in relation to unilateral commitments and obligations under general domestic law.

Lastly, on the topic of 'privity' tribunals had shown to be evenly split. From the investor's point of view, tribunals could not agree on whether the underlying commitment had to be entered into directly by the foreign investor, or it was sufficient for the obligation to be entered

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[51] Jude (n 7) 637. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador (II)* (ICSID Case No. ARB/06/11) (9 September 2008) (Decision on jurisdiction) para 39.

into with regard to the investment. From the State perspective, decisions were also inconsistent on whether the commercial agreements concluded by sub-state entities could be attributed to the State.

FOLLOW-UP STUDY

The purpose of this study is to update the conclusions of Jude's work so as to include cases law that have been decided after the cut-off date. The aim of this follow-up study is to understand whether the areas of consensus highlighted by Jude are still valid today. On the other hand, this study also looks at whether consensus has shifted to a different interpretation among those identified in the original study, to an interpretation not mentioned therein, or has simply dissipated. To this end, the first part of this section is devoted to the methodology for selecting relevant decisions as well as to foregrounding the limitations of the study. The last part of the section looks into the decisions with the intent to determine whether they fall into existing or new interpretive patterns around the 4 main interpretive concerns.

METHODOLOGY OF THE FOLLOW-UP STUDY

This study tries to replicate closely the methodology of the original study. Behind this choice lies the intent to make the results of the follow up study comparable with those of the original study. To this end, the four categories employed in the original study, *viz* 'function', 'scope', 'jurisdictional preference' and 'privity', are also utilised here.

Despite the close resemblance between the methodology employed in the 2 studies, some differences shall nevertheless be underscored. Some variations are ingrained in the nature of the study. First of all, the time period considered had to be selected so as to include decisions rendered after the original study's cut-off date, *i.e.* 1 May 2012. The 3 cases Jude included in its publication after the cut-off date were also excluded from the relevant decisions for this work.

Secondly, cases were further screened, in order to avoid 'double counting' the same decisions. Cases found in this study have been checked against decisions examined in the original study.[52]

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[52] Jude (n 7) 612.

If a case was found to have been 'double counted', for instance because a further decision concerning compensation or costs had come out after the award had been rendered, the decision was scrutinised to check whether the further documentation available added anything substantial to, or somehow modified, the original study's analysis. When, and if, such differences were found they are highlighted in this work. If no material changes could be identified, the case is simply highlighted as an instance of 'double counting'.

Other differences pertain to the websites and research tools employed for narrowing cases. Jude sourced cases from the website www.italaw.com.[53] By contrast, this study has relied on the UNCTAD Investment Dispute Settlement Navigator ('the Navigator')[54] for sourcing investment cases. It further examined the primary sources cited in recent scholarly works concerning the clause and confronted it with the list provided by the tool to further reduce the chance that relevant cases could slip through the net.[55]

Arguably, however, these differences are inconsequential to the final outcome. The Navigator, similarly to the italaw website, contains information about all known international arbitration cases commenced by investors against States pursuant to international investment agreements.[56] Consultation of recent scholarly works and the cases quoted therein further reduces potential inconsistencies.

An additional difference consists of not using the word-search method to identify cases discussing umbrella clauses. Jude narrowed cases involving umbrella clause claims by text searching all publicly available English language investment decisions for some key terms such as 'umbrella' or words that have been utilised as proxies for 'umbrella', such as 'mirror',

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[53] *Ibidem* 612, footnote 21.
[54] UNCTAD, Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement, accessed on 13 October 2021.
[55] August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (CUP 2020) 859; Benjamin Samson 'Umbrella Clauses' [2021] Max Planck Encyclopedias of International Law; Ho (n 1) 196-204; Donnelly (n 1); Leng Lim Chin, 'Umbrella Clauses' in Lim Leng Chin, Martins Paparinskis and Jean Ho (eds), *International Investment Law and Arbitration* (CUP 2021); Rowe and Portman (n 1). Julien Chaisse, 'C*ase Comment:* Consutel Group SpA in liquidazione v People's Democratic Republic of Algeria: Algeria: Umbrella Clauses and Breaches of Contract by Public Entities [2022] ICSID Review 1. Boltenko (n 4). Salacuse (n 2).
[56] UNCTAD, 'ISDS Navigator: About and Methodology', available at https://investmentpolicy.unctad.org/pages/1057/isds-navigator-about-and-methodology, accessed on 8 October 2021.

‘parallel’, ‘elevator’, ‘*pacta sunt servanda*’, ‘sanctity of contract’, ‘observance of commitments’ and ‘observance of obligations.’[57]

In this study, relevant cases have been narrowed by using the ‘advanced search tool’ available in the Navigator to look for decision where an umbrella clause violation was alleged. The narrowing process appears equally comprehensive. The tool sources information about alleged violations primarily from the claimant’s arbitration request, the claimant’s memorials and/or arbitral decisions. When documentation is not publicly available, information may be obtained from other public sources that are deemed reliable.[58]

Moreover, while the original study focuses on English Language decisions, this study also includes decisions issued in Spanish[59] and French. The English language version was nevertheless preferred when French or Spanish versions of that same decision were also available.

Further, while the original study only utilises publicly available decisions, this study also includes decisions which although not public, have been recounted in sufficient detail by media specialising in reporting investment arbitration (e.g. IA Reporter).

Despite the efforts to include and classify all decisions on this topic, it shall be underscored that a not insignificant number of decisions are not disclosed to the public.[60] This could impact the accuracy of the results as there is no way of guaranteeing that they are inclusive of all decisions. Arguably, however, the study is still instructive because there is nothing suggesting that undisclosed pronouncements have been decided differently than public ones. Trends shown in public decisions, whether dissipating or emerging, should not be particularly affected.

There is also an additional aspect which shall be underscored. Different interpretations could be the result of a difference in the language of the clause. The previous chapter has shown how this is likely to be a concern especially concerning ‘scope’. The study, however, aggregates all umbrella clause decisions, regardless of their wording for essentially two reasons. The first reason pertains to its comparability with the original study, which also does not draw

[57] Jude (n 7) 611.
[58] UNCTAD ISDS Navigator (n 56).
[59] I thank [***] for the support in analysing Spanish language material.
[60] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 2)* para 97 footnote 30.

distinctions on this basis. The second reason is the difficulty in attributing differences in interpretation to differences in the language. Although tribunals ground their reasoning on the language utilised, identical clauses sometimes led to different interpretive outcomes. If a further classification based on the clauses' language is to be meaningful, each concern should be tested for every formulation of the clause. This solution is clearly impractical as it would lead to an excessive fragmentation of the results.

RELEVANT DECISIONS AND INTERPRETIVE CONCERNS

Through the Navigator and other articles and websites 114 cases[61] emerged wherein an umbrella clause breach was alleged and the decision was rendered after 1 January 2012. [62] The

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[61] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic* (ICSID Case No. ARB/03/23); *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentine Republic*, ICSID Case No. ARB/04/16; *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01; *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* [I], ICSID Case No. ARB/05/20; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11; *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v The Argentine Republic); *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29); Hochtief AG v The Argentine Republic, ICSID Case No. ARB/07/31; *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29); *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, ICSID Case No. ARB/07/12; *Alapli Elektrik B.V v Republic of Turkey*, ICSID Case No. ARB/08/13; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine* (Award) ICSID ARB/08/11; *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)); *Caratube International Oil Company LLP v Republic of Kazakhstan* ICSID Case No. ARB/08/12; *Marion Unglaube v Republic of Costa Rica* (ICSID Case No. ARB/08/1); *Chevron Corporation and Texaco Petroleum Corporation v Ecuador* (II), PCA Case No. 2009-23; *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2; *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v India*, PCA Case No. 2013-09; *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v The Czech Republic* (PCA Case No. 2010-5*); H&H Enterprises Investments, Inc. v Arab Republic of Egypt* (ICSID Case No. ARB/09/15); *Iberdrola Energía, S.A. v Republic of Guatemala (I)* (ICSID Case No. ARB/09/5; *ICS Inspection and Control Services Limited (United Kingdom) v Republic of Argentina* UNCITRAL, PCA Case No. 2010-9; *Reinhard Hans Unglaube v Republic of Costa Rica* (ICSID Case No. ARB/09/20); *Swisslion DOO Skopje v Macedonia, former Yugoslav Republic of* (ICSID Case No. ARB/09/16); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic*, ICSID Case No. ARB/09/1; *AES Corporation and Tau Power B.V v Republic of Kazakhstan* (ICSID Case No. ARB/10/16); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania* (ICSID Case No. ARB/10/13); *İçkale İnşaat Limited Şirketi v Turkmenistan*, ICSID Case No. ARB/10/24; *David Minnotte and Robert Lewis v Republic of Poland* (ICSID Case No. ARB(AF)/10/1); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay); *Standard Chartered Bank v United Republic of Tanzania* (ICSID Case No. ARB/10/12); *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v Republic of Kazakhstan* (SCC Case No. 116/2010); *Franck Charles Arif v Republic of Moldova* (ICSID Case No. ARB/11/23); *Mohamed Abdel Raouf Bahgat v Arab Republic of Egypt* (PCA Case No. 2012-07)(PCA Case No. 2012-07); *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (II)* (ICSID Case No. ARB/11/12); *Highbury International AVV and Ramstein Trading Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/1); *Isolux Netherlands, BV v Kingdom of Spain*, SCC Case V2013/153; *Khan Resources Inc., Khan Resources B.V and Cauc Holding Company Ltd. v the Government of Mongolia and Monatom Co., Ltd.* (PCA Case No. 2011-09); *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20; *Khan Resources Inc., Khan Resources B.V and Cauc Holding Company Ltd. v the Government of Mongolia and Monatom Co., Ltd.* (PCA Case No. 2011-09); *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19; *Murphy Exploration & Production Company International v Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434). This case was already mentioned in the original study but the claimant initiated a new umbrella clause claim before a different, non-ICSID forum; *OI European Group B.V v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25); *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12); *The Renco Group, Inc. v Republic of Peru* (I) (ICSID Case No. UNCT/13/1); *Tulip Real Estate and Development Netherlands B.V v Republic of Turkey*, ICSID Case No. ARB/11/28; *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v Hungary* (ICSID Case No. ARB/12/3); *Oxus Gold v Republic of Uzbekistan* (UNCITRAL 2012); *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v Arab Republic of Egypt* (ICSID Case No. ARB/12/11); *Blue Bank International & Trust (Barbados) Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM*

Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v Hungary (ICSID Case No. ARB/12/2); *Enkev Beheer B.V v The Republic of Poland* (PCA Case No. 2013-01); Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/21); *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia* (ICSID Case No. ARB/12/39); *Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v Kingdom of Spain* (ICSID Case No. ARB/12/17); *Lao Holdings N.V v Lao People's Democratic Republic (I)* (ICSID Case No. ARB(AF)/12/6); *Yosef Maiman, Merhav (MNF), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v Arab Republic of Egypt* (PCA Case No. 2012/26); *Supervision y Control S.A. v Republic of Costa Rica*, ICSID Case No. ARB/12/4; Telefónica S.A. v United Mexican States (ICSID Case No. ARB(AF)/12/4); *Transban Investments Corp. v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/24; *Valle Verde Sociedad Financiera S.L. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/18); *Kristian Almås and Geir Almås v The Republic of Poland* (PCA Case No. 2015-13); *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V v Kingdom of Spain* (ICSID Case No. ARB/13/31); *Cervin Investissements S.A. and Rhone Investissements S.A. v Republic of Costa Rica*, ICSID Case No. ARB/13/2; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/13/36); *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v Czech Republic*, PCA Case No. 2014-03; *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia* (ICSID Case No.ARB/13/32); *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic* (ICSID Case No. ARB/13/8); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/30*; South American Silver Limited v Bolivia*, PCA Case No. 2013-15; *A11Y LTD. v Czech Republic* (ICSID Case No. UNCT/15/1); *EuroGas Inc. and Belmont Resources Inc. v Slovak Republic*, ICSID Case No. ARB/14/14; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain*, ICSID Case No. ARB/14/34; *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/14/10); *InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain* (ICSID Case No. ARB/14/12*); Ioan Micula, Viorel Micula and others v Romania (II)* (ICSID Case No. ARB/14/29); *NextEra Energy Global Holdings B.V and NextEra Energy Spain Holdings B.V v Kingdom of Spain* (ICSID Case No. ARB/14/11); *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v Republic of Poland* (ICSID Case No. ADHOC/15/1); *WNC Factoring Ltd (WNC) v The Czech Republic* (PCA Case No. 2014-34); *United Utilities (Tallinn) B.V and Aktsiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No. ARB/14/24; *9REN Holding S.a.r.l v Kingdom of Spain* (ICSID Case No. ARB/15/15); *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Spain*, ICSID Case No. ARB/15/16; *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1; *Belenergia S.A. v Italian Republic* (ICSID Case No. ARB/15/40); Cavalum SGPS, S.A. v Kingdom of Spain, ICSID Case No. ARB/15/34; *CEF Energia BV v Italian Republic* (SCC Case No. 158/2015); *Cube Infrastructure Fund SICAV and others v Kingdom of Spain*, ICSID Case No. ARB/15/20; *Foresight Luxembourg Solar 1 S. Á.R1., et al. v Kingdom of Spain*, SCC Case No. 2015/150; *Greentech Energy Systems A/S, et al v Italian Republic*, SCC Case No. V 2015/095; *Abed El Jaouni and Imperial Holding SAL v Lebanese Republic* (ICSID Case No. ARB/15/3); *Eskosol S.p.A. in liquidazione v Italian Republic* (ICSID Case No. ARB/15/50); *Novenergia II - Energy & Environment (SCA), SICAR v Kingdom of Spain* (SCC Case No. 063/2015); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID Case No. ARB/15/36; *SolEs Badajoz GmbH v Kingdom of Spain* (ICSID Case No. ARB/15/38); *Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain*, ICSID Case No. ARB/15/1; *STEAG GmbH v Kingdom of Spain*, ICSID Case No. ARB/15/4; *Strabag SE v Libya*, ICSID Case No. ARB(AF)/15/1; *Watkins Holdings S.à r.l. and others v Kingdom of Spain*, ICSID Case No. ARB/15/44; *Dominion Minerals Corp. v Republic of Panama*, ICSID Case No. ARB/16/13; *EBO Invest AS, Rox Holding AS and Staur Eiendom AS v Republic of Latvia* (ICSID Case No. ARB/16/38); *Kontinental Conseil Ingénierie S.A.R.L c/ Gabon*, Aff. CPA n° 2015-25; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italian Republic* (ICSID Case No. ARB/16/5); *Etrak İnşaat Taahut ve Ticaret Anonim Sirketi v State of Libya* (ICC Case No. 22236/ZF/AYZ); *Sun Reserve Luxco Holdings SRL v Italy* (SCC Case No. 132/2016); *Consutel Group SpA in liquidazione v People's Democratic Republic of Algeria*, PCA No 2017-33; *CMC Africa Austral, LDA, CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., and CMC MuratoriCementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa v Republic of Mozambique* (ICSID Case No. ARB/17/23); *Lidercón, S.L. v Republic of Peru* (ICSID Case No. ARB/17/9); *Lotus Holding Anonim Şirketi v Turkmenistan* (ICSID Case No. ARB/17/30); *Nissan Motor Co., Ltd. v Republic of India* (PCA Case No. 2017-37); *Ortiz Construcciones y Proyectos S.A. v People's Democratic Republic of Algeria* (ICSID Case No. ARB/17/1); *Michael Anthony Lee-Chin v Dominican Republic* (ICSID Case No. UNCT/18/3); *Navodaya Trading DMCC v Gabonese Republic*; *Petroceltic Holdings Limited and Petroceltic Resources Limited v Arab Republic of Egypt* (ICSID Case No. ARB/19/7).

cut-off date is 7 February 2022. Out of the total amount of cases, in 44 decisions umbrella clauses were debated in a fashion consequential for this paper.

In 65 instances[63] the case was inconsequential. First of all, inconsequential means that tribunals merely noted that the matter under consideration did not concern an umbrella clause without further analysis. This outcome was reached in 8 cases.[64] Secondly, the reference to umbrella clause claims is merely in the Notice of Arbitration and no mention of it is made in the jurisdiction and/or merits decisions or in the order to discontinue the proceedings. In 10 decisions tribunals adopted this approach.[65] Thirdly, the tribunal had reached a decision on

[62] The cut-off day of the original study was 1 May 2012, the navigator however does not allow to select decisions based on the month in which they were issued.

[63] See footnotes number 64-65-66-67.

[64] *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01 (Decisions on Objections to Jurisdictions) (25 August 2006) paras 15 and 85; *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01 (Decisions on Liability) (27 December 2010) para 197; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic,* ICSID Case No. ARB/09/1 (Award of the tribunal) (21 July 2017) paras 884, 892. *İçkale İnşaat Limited Şirketi v Turkmenistan*, ICSID Case No. ARB/10/24 (Award) (8 March 2016) paras 332 and 341; *Tulip Real Estate and Development Netherlands B.V v Republic of Turkey*, ICSID Case No. ARB/11/28 (Award) (10 March 2014) para 448; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v Czech Republic*, PCA Case No. 2014-03 (11 October 2017) (Final Award) paras 464-466; *United Utilities (Tallinn) B.V and Aktsiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No. ARB/14/24 (21 June 2019) (Award) para 927; Although it was not made public, in *Dominion v Panama* (*Dominion Minerals Corp. v Republic of Panama*, ICSID Case No. ARB/16/13) according to IA Reporter (Lysa Bohmer 'Analysis: Arbitrators in Dominion Minerals v Panama Unanimously Dismiss Denial of Benefits Related to Shareholder's Dual Nationality, but Disagree on Merits and Damages' (16 November 2020)) it did not involve an umbrella clause breach. It was held that no court decision could breach an obligation by adjudicating on a contractual matter under its jurisdiction. *Lidercón, S.L. v Republic of Peru* (ICSID Case No. ARB/17/9) (Award) (6 March 2020) paras 170-171.

[65] *Blue Bank International & Trust (Barbados) Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20 (Request for Arbitration) (22 June 2012) para 147; *South American Silver Limited v Bolivia*, PCA Case No. 2013-15 (30 April 2013) (Notice of Arbitration) para 53-54; *South American Silver Limited v Bolivia*, PCA Case No. 2013-15 (22 December 2018) (Award); *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v The Czech Republic* (PCA Case No. 2010-5) (Final Award) (19 Septeber 2013); *Petroceltic Holdings Limited and Petroceltic Resources Limited v Arab Republic of Egypt* (ICSID Case No. ARB/19/7) (Order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1)) (15 September 2020); *Alapli Elektrik B.V v Republic of Turkey*, ICSID Case No. ARB/08/13 (Excerpts of Award) (16 July 2012) paras 314-315; *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v Hungary* (ICSID Case No. ARB/12/3) (Award) (17 April 2015) paras 187-189; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v Hungary* (ICSID Case No. ARB/12/2) (11 march 2013) (Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5)) paras 70-72; *Telefónica S.A. v United Mexican States* (ICSID Case No. ARB(AF)/12/4) (Order taking note of the discontinuance of the proceeding pursuant to Article 49(1) of the Arbitration (Additional Facility) Rules) (20 February 2018); *Valle Verde Sociedad Financiera S.L. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/18). Award not published conclusion reached by reading the IA Reporter's article (Luke Eric Peterson 'Analysis: What have we learned from the first wave of post-denunciation ICSID claims against Venezuela – and why do investors keep suing Venezuela there?' (November 30, 2017)); *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/14/10) (Order for the discontinuance of the proceeding for lack of payment of the required advances, pursuant to ICSID Administrative and Financial Regulation 14(3)(d)) (5 January 2018).

other grounds and no in-depth discussion of umbrella clauses was considered necessary. This view was adopted in 34 cases.[66] Lastly, decisions that were selected by the tool as rendered

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[66] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1 (Award) (22 August 2012), para 64, para 281; *Hochtief AG v The Argentine Republic*, ICSID Case No. ARB/07/31 (Decision on Liability) (29 December 2014) paras 291 and 336(c); *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2 (Award) (31 October 2012) paras 539-540; *H&H Enterprises Investments, Inc. v Arab Republic of Egypt* (ICSID Case No. ARB/09/15) (Award) (6 May 2014) para 415(a); *Iberdrola Energía, S.A. v Republic of Guatemala* (I) (ICSID Case No. ARB/09/5) (Award) (17 August 2012) para 346; *Marion Unglaube v Republic of Costa Rica* (ICSID Case No. ARB/08/1) (Award) (16 May 2012) paras 190-191; *Reinhard Hans Unglaube v Republic of Costa Rica* (ICSID Case No. ARB/09/20) (Award) (16 May 2012) para 191; *Swisslion DOO Skopje v Macedonia, former Yugoslav Republic of* (ICSID Case No. ARB/09/16) (Award) (6 June 2012) paras 323-325; *AES Corporation and Tau Power B.V v Republic of Kazakhstan* (ICSID Case No. ARB/10/16) (Award) (1 November 2013) para 374. In this case although the tribunal arguably talks of elevating an obligation to the level of a treaty commitment, it is not enough without a declaration of the applicable law to the claim to determine function; *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania* (ICSID Case No. ARB/10/13) (Award) (2 March 2015); *David Minnotte and Robert Lewis v Republic of Poland* (ICSID Case No. ARB(AF)/10/1) (Award) (16 May 2014) para 203; *Standard Chartered Bank v United Republic of Tanzania* (ICSID Case No. ARB/10/12) (Award 2 November 2012); *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v Republic of Kazakhstan* (SCC Case No. 116/2010) (Award) (19 December 2013) paras 1314-1316; *Franck Charles Arif v Republic of Moldova* (ICSID Case No. ARB/11/23) (Award) (8 April 2013) paras 388-389, 392-399; *Mohamed Abdel Raouf Bahgat v Arab Republic of Egypt* (PCA Case No. 2012-07)(PCA Case No. 2012-07) (Final Award) (23 December 2019) paras 264 and 288; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (II)* (ICSID Case No. ARB/11/12) (Award) (10 December 2014); *Highbury International AVV and Ramstein Trading Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/1) (Award) (26 December 2013) paras 234-241; *Murphy Exploration & Production Company International v Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434) (Partial Final Award) (6 May 2016) para 294; *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v Arab Republic of Egypt* (ICSID Case No. ARB/12/11) (Decision on Liability and Heads of Loss) (21 February 2017) paras 187,230-234, 281, 348; *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/21) (Award) (13 November 2017); *Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v Kingdom of Spain* (ICSID Case No. ARB/12/17) (Award 14 August 2015) paras 197-198; *Lao Holdings N.V v Lao People's Democratic Republic (I)* (ICSID Case No. ARB(AF)/12/6) (Settlement Agreement) (15 June 2014) article 7; *Lao Holdings N.V v Lao People's Democratic Republic (I)* (ICSID Case No. ARB(AF)/12/6) (Award) (6 August 2019) paras 272-273; *Transban Investments Corp. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/24 (Award 22 November 2017); *Cervin Investissements S.A. and Rhone Investissements S.A. v Republic of Costa Rica*, ICSID Case No. ARB/13/2 (15 December 2014) (Decision on Jurisdiction); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/13/36) (Award) (4 May 2017) paras 352-356; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/13/36) (Decision on Annulment) (11 June 2020); *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic* (ICSID Case No. ARB/13/8) (Award) (9 April 2015); *Mağdenli Yer Hizmetleri ve Taşıma Anonim Şirketi v Kazakhstan* (2015); *EuroGas Inc. and Belmont Resources Inc. v Slovak Republic*, ICSID Case No. ARB/14/14 (18 August 2017) (Award of the Tribunal) paras 459-461; *Ioan Micula, Viorel Micula and others v Romania (II)* (ICSID Case No. ARB/14/29) (Award) (5 March 2020) paras 298-301 and 449; *NextEra Energy Global Holdings B.V and NextEra Energy Spain Holdings B.V v Kingdom of Spain* (ICSID Case No. ARB/14/11) (Decision on Jurisdiction, Liability and Quantum Principles) (12 March 2019) para 602; *Cavalum SGPS, S.A. v Kingdom of Spain*, ICSID Case No. ARB/15/34; The decision not being public the assessment considered Lisa Bohmer's article in IA Reporter (Lisa Bohmer 'Analysis: in Cavalum v Spain, Majority Finds that Promise of Reasonable Return was the "cornerstone" of Spain's Renewables Framework; David Haigh Considers that Claimants had Vested Rights to Higher Incentives' (September 8 2020)); *Abed El Jaouni and Imperial Holding SAL v Lebanese Republic* (ICSID Case No. ARB/15/3) (Decision on jurisdiction, liability and certain aspects of quantum) (25 June 2018) paras 960-962; *SolEs Badajoz GmbH v Kingdom of Spain* (ICSID Case No. ARB/15/38) (Award) (31 July 2019) para 466; *STEAG GmbH v Kingdom of Spain,* ICSID Case No. ARB/15/4 (8 September 2020) (Decision on Jurisdiction, Liability and Principles of Quantum) paras 701-704; *Watkins Holdings S.à r.l. and others v Kingdom of Spain*, ICSID Case No. ARB/15/44 (21 January 2020) (Award) paras 629-630; *Etrak İnşaat Taahut ve Ticaret Anonim*

after 1 May 2012, but where also discussed in the original study, and the additional decisions or further documentation failed to change the original study's characterisation of the case. Double counting involved 12 cases.[67]

An additional category contains cases where it was not possible to make a determination on consequentiality. This issue was encountered in 2 cases[68] because the decisions rendered, or a significant portion thereof, were not available for reading, and news and analysis outlets failed to offer a window into otherwise confidential proceedings. Another example is had in proceedings wherein, although one or more decisions have been rendered, is at too early a stage in the litigation to assess whether future substantive decisions will be consequential for the purpose of this study. This issue was encountered in 3 instances.[69]

Sirketi v State of Libya (ICC Case No. 22236/ZF/AYZ) (Final Award) (22 July 2019). Although the decision is still unpublished IA Reporter has given sufficient information to classify the decision as inconsequential. Damien Charlotin 'Revealed: in new ICC BIT award, Libya's lack of compliance with an earlier settlement agreement results in treaty breach; Turkish claimant Etrak is awarded $22 Million' (4 October 2019); *CMC Africa Austral, LDA, CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., and CMC MuratoriCementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa v Republic of Mozambique* (ICSID Case No. ARB/17/23) (Award) (24 October 2019) paras 448-449.

[67] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11 had been deemed 'non-consequential by the original study. The award and decision on annulment, both rendered after the original study's cut off point, fail to change this assessment; *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v The Argentine Republic); *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon*, ICSID Case No. ARB/07/12, the award rendered on June 7 2012, did not change the conclusions of the original study. *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)), was analysed in the original study as one of the three cases of particular importance that post-dated the cut of point. *Chevron Corporation and Texaco Petroleum Corporation v Ecuador* (II), PCA Case No. 2009-23; *BIVAC v Paraguay (Decision on Jurisdiction) (n 19)*; *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29); *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine* (Award) ICSID ARB/08/11; *Caratube International Oil Company LLP v Republic of Kazakhstan* ICSID Case No. ARB/08/12; *ICS Inspection and Control Services Limited (United Kingdom) v Republic of Argentina* UNCITRAL, PCA Case No. 2010-9; *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12); *The Renco Group, Inc. v Republic of Peru* (I) (ICSID Case No. UNCT/13/1).

[68] *Yosef Maiman, Merhav (MNF), Merhav-Ampal Group, Merhav-Ampal Energy Holdings v Arab Republic of Egypt* (PCA Case No. 2012/26); Luke Eric Peterson 'In new Israel-Egypt pipeline rulings, McRae-chaired tribunal finds BIT breaches, and Collins-chaired contract tribunal orders Egyptian state-owned companies to pay $1 billion to investor' (7 February 2018); *Navodaya Trading DMCC v Gabonese Republic* (Decision on jurisdiction) (29 January 2019); *Navodaya Trading DMCC v Gabonese Republic* (Award) (2 December 2020); Damien Charlotin 'Uncovered: Kaufmann-Kohler chaired tribunal confirms that OIC Agreement contains consent to arbitration, but ultimately dismisses mining claims on the merits' (17 February 2021).

[69] *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia* (ICSID Case No. ARB/13/32) (Decision on Respondent's Application under ICSID Arbitration Rule 41(5)) (2 December 2014); The preliminary decision merely ruled on whether the case could be dismissed under RULE 41(5), which the tribunal excluded. Two issues in particular (*i.e.* whether Hungarian investors are precluded from filing claims under article 10(1) last sentence of the ECT, as well as the effect of the forum selection clause in the contract) could become relevant in a later decision. *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v Republic of Poland* (ICSID Case No. ADHOC/15/1) (Partial Award on Jurisdiction) (4 March 2020) para 5.87. After reporting the parties'

Like in the original study, 4 key, though controversial, interpretational considerations are deemed to affect the operation of the umbrella clause, namely 'function', 'scope', 'jurisdictional precedence', and 'privity'. Their definition does not differ from the one given in the original study' s methodology already accounted for above.

The remainder of this section is concerned with the arbitral case law in connection to each of these considerations.

FUNCTION

OVERALL FINDINGS

Tribunals discussed the function, or effect, of umbrella clauses in 13 decisions. Out of these 13 decisions no tribunal argued that umbrella clauses could be interpreted as an aspirational statement. Four tribunals held that the clause was only operational when the State exercised its sovereign powers, but not when it acted in a commercial capacity. One tribunal considered this possibility in order to rule out this interpretation. In 4 instances tribunals held that umbrella clauses internationalise the relevant obligations, or said differently, that umbrella clause violations are to be decided in accordance with international law. Lastly, in 5 decisions tribunals adjudicated that the purpose of umbrella clauses is essentially jurisdictional and it does not affect the law applicable to the dispute by internationalising it.

UMBRELLA CLAUSES AS OPERATIONAL WHEN THE STATE EXERCISES SOVEREIGN POWERS

In *Mobil v Argentina* the tribunal argues that a 'significant interference' by the government or other public agencies is needed in order to engage treaty protection, which may not be triggered by the purely commercial aspects of a claim:

> 'The standard of protection of the treaty will be engaged only when there is a specific breach of the treaty rights and obligations or contract rights protected under the treaty. Purely commercial aspects of a contract might not be protected by the treaty, at least

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arguments, mainly focused on privity and attribution, the tribunal held that the discussion shall be joined to the merits of the parties' dispute. Such decision is not yet available. *Michael Anthony Lee-Chin v Dominican Republic* (ICSID Case No. UNCT/18/3) (Partial Award on Jurisdiction) (15 July 2020).

unless there is significant interference by governments or public agencies with the rights of the investor.

None of the measures complied in this case can be described as a commercial question as they are all related to decisions by the government or public authorities that have resulted in the interferences and breaches noted.'[70]

Similarly, the same reasoning was adopted by the *Supervision v Costa Rica* investment tribunal:

'It is important to specify that not any contractual breach by the State signatory to an Investment Treaty that contains an umbrella clause can be alleged as a direct violation of the Treaty. In *El Paso Energy v Argentina* the Tribunal stated that an umbrella clause cannot transform any contractual claim into a claim under the treaty, and held that the clause would only be applicable if in the specific case the State acts as sovereign entity not as a private party […] [71]

This reasoning was also adopted in *Karkey v Pakistan*[72] and in *Consutel v Algeria*.[73]

By contrast, this argument was assessed and specifically rejected in *Strabag SE v Libya*, for lack of textual reference:

'[…] Respondent argues that Article 8(1) of the Treaty can operate only where the State acts in a sovereign capacity involving some exercise of sovereign authority - puissance

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[70] *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentine Republic (Mobil v Argentina)*, ICSID Case No. ARB/04/16 (10 April 2013) (Decision on Jurisdiction and Liability) paras 1011-1012.

[71] *Supervision y Control S.A. v Republic of Costa Rica*, ICSID Case No. ARB/12/4 (18 January 2017) (Award) para 282.

[72] *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 (22 August 2017) (Award) para 401: '[…] [E]ven if the Tribunal finds that Lakhra's alleged breaches of the 2009 RSC are attributable to Pakistan (whether under domestic or international law), simple commercial breaches are not within the protection offered by an umbrella clause.'

[73] *Consutel Group SpA in liquidazione v People's Democratic Republic of Algeria*, PCA No 2017-33 (Final Award) (3 February 2020) para 321: 'The facts invoked by the Claimant in favour of the tribunal's competence are as many alleged violations of the contractual commitments of Algerie Télécom. The tribunal holds the contractual violations between Spec-Com and Algérie Télécom cannot on their own, without the intervention of the sovereign powers of the *puissance publique*, establish the tribunal's competence on the basis of the treaty. The tribunal shared in this regard the position of various tribunals which ruled against their own competence to adjudicate on simple contractual violations when the State did not act *de iure imperii*, but only *iure gestionis*.' Translated from French by the author.

publique - or that it can only apply to conduct involving breaches of international law. Hence, Article 8(1) of the Treaty cannot apply to ordinary commercial acts. The difficulty is that such arguments in effect call for the Tribunal to introduce limits or conditions to Article 8(1) that do not appear in its language or necessarily follow from its ordinary meaning. Respondent's contention that Article 8(1) of the Treaty only covers contractual disputes involving some exercise of puissance publique, for example, has no foundation in the text of the article. […].'[74]

UMBRELLA CLAUSES INTERNATIONALISING DOMESTIC LAW OBLIGATIONS

In *Garanti Koza LLP v Turkmenistan* the tribunal argues that the question of whether an umbrella clause had been breached is one of international law:

> 'At the same time, whether a particular action by Turkmenistan or one of its state organs constituted or caused a failure "to observe any obligation [Turkmenistan] may have entered into with regard to investments" of Garanti Koza is a question of international law that arises under the BIT. '[…] Whether an obligation created by the BIT has been breached falls to be decided by the Tribunal as a matter of international law.'[75]

In *Greentech Energy Systems v Italy*,[76] although the tribunal's reasoning mainly focused on the potential interference between contractual and treaty forum selection clauses, it also delivered more general remarks on the nature of the claims initiated under the treaty, thereby including umbrella clause claims:

> 'It is clear also that Claimants are not making a claim for breach of contract in the present arbitration. Claimants have claimed for violations of the ECT and international law. Given the foregoing, the issue faced by the SGS v Philippines and BIVAC v Paraguay tribunals, of distinguishing a contract claim from a treaty claim, does not arise here.'[77]

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[74] *Strabag SE v Libya*, ICSID Case No. ARB(AF)/15/1 (29 June 2020) (Award) para 164.
[75] *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20 (19 December 2016) (Award) para 332.
[76] *Greentech Energy Systems A/S, et al v Italian Republic*, SCC Case No. V 2015/095.
[77] *Greentech Energy Systems A/S, et al v Italian Republic*, SCC Case No. V 2015/095 (23 December 2018) (Final Award) para 220.

Similarly, in *ESPF v Italy*[78] the tribunal ruled that the claimant's investment is 'elevated' to an international law obligation:

> 'Having found that they constitute obligations for the purposes of the Umbrella Clause, Italy's assurances as to the specific rate and duration (20 years) granted to each of the Claimants' investments become elevated to an obligation under international law. This "internationalization" of contractual (and statutory and regulatory) obligations is what gives the Tribunal jurisdiction to hear the Claimants' complaints because they are not party to the GSE Agreements, but the ECT provides protection to obligations owed to their Investments.'[79]

In *Sun Reserve v Italy*,[80] another case brought against the Italian Republic for breach of its commitments under the ECT, the tribunal likewise argued for the internationalisation of commitments.[81]

UMBRELLA CLAUSES AS HAVING AN ESSENTIALLY JURISDICTIONAL FUNCTION

In *Micula v Romania*, despite utilising the term 'elevate', it is doubtful whether the tribunal intended to make contractual obligations subject to international law. In this specific instance the tribunal appears to be utilising this term to explain that the non-treaty obligation was brought under the protective umbrella of the treaty or was 'covered' under the treaty. The proper law to assess the breach of the umbrella clause according to the tribunal is nevertheless the law of the contract, according to the example set in *SGS v Philippines*:

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[78] *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italian Republic* (ICSID Case No. ARB/16/5).

[79] *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italian Republic* (ICSID Case No. ARB/16/5) (Award) (14 September 2020) para 793.

[80] *Sun Reserve Luxco Holdings SRL v Italy* (SCC Case No. 132/2016).

[81] *Sun Reserve Luxco Holdings SRL v Italy* (SCC Case No. 132/2016) (25 May 2020) (Final Award) para 575: '[…] [I]t is apparent that Claimants' claims in these proceedings address a number of Respondent's alleged actions or inactions going beyond the GSE contracts, and present them as violations of Respondent's international obligations under Article 10(1) ECT. In other words, Claimants' claims trigger Respondent's obligations under international law. These claims do not require this Tribunal to make a finding regarding either a breach of the GSE contracts, not least because Claimants or Respondent are not parties to them, or a violation of Italian law.'

'The purpose of the umbrella clause is to cover or "elevate" to the protection of the BIT an obligation of the state that is separate from, and additional to, the treaty obligations that it has assumed under the BIT. As noted by the *Burlington v Ecuador* tribunal, this separate and additional obligation does not exist in a vacuum; it is subject to its own proper law. In the words of the tribunal in *SGS v Philippines*, an umbrella clause

> ... does not convert non-binding domestic blandishments into binding international obligations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the [relevant agreement] from the law of the Philippines to international law.

This Tribunal concurs with this view.'[82]

In *Philip Morris v Uruguay* the tribunal avers that the umbrella clause is unable to change the law that applies to the original obligation:

> 'A trademark gives rise to rights, but their extent, being subject to the applicable law, is liable to changes which may not be excluded by an umbrella clause: if investors want stabilization they have to contract for it.'[83]

In *BayWa r.e. v Spain*, the tribunal rejected the umbrella clause claim on the ground that no contractual obligation could be found. Incidentally, however, the tribunal also delivers remarks on the umbrella clause's inability to change the proper law applicable to a given obligation, seemingly adhering to the 'jurisdictional internationalisation' perspective:

> 'But even if it were a promise, it would be a promise under Spanish law, an obligation governed by that law. The obligations to which the umbrella clause refers are paradigmatically obligations governed by the law of the host State (in the case of contractual obligations, the proper law of the contract). But unless a national law creates

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[82] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* (*Micula v Romania*), ICSID Case No. ARB/05/20 (11 December 2013) (Award) paras 417-418.
[83] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay (Philip Morris v Uruguay)*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay) (8 July 2016) (Award) para 481.

vested rights, obligations under such a law cease when the law is relevantly and validly amended or repealed. […]'[84]

Furthermore, in *CEF Energia v Italy* the tribunal concurs that umbrella clause obligations are essentially jurisdictional. The tribunal ruled that the umbrella clause did not have the effect of changing the law applicable to the relevant obligations: '[t]he GSE Agreements are all subject to Italian law, and the awards which Claimant cite do not have the effect of overriding a choice of governing law made by the parties thereto. […].'[85]

The tribunal in *KCI v Gabon* also came to similar conclusions:

> It is artificial to suggest that the foundation of a claim borne out of the failure to comply with a contractual obligation is based on the treaty; the treaty merely opens up a competence. The contractual obligation cannot change source, being regulated by the *lex contractas* […]. This obligation is not regulated by international law […]. The role of the treaty is to refer to contractual obligations; those preserve their nature but the investor gains the option to invoke the before an investment tribunal […].[86]

Lastly, it is possible to argue that the tribunal in *Supervision v Costa Rica* also indirectly reached the same conclusion. The tribunal averred that the fundamental basis of the treaty claim was essentially contractual and creates a parallel between its reasoning and the decision on admissibility in *SGS v Pakistan*.[87] Given the more explicit statement in favour of the clause being operational only when the State exercises sovereign powers, the decision is ascribed to this latter category.

SCOPE

OVERALL FINDINGS

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[84] *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Spain (BayWa r.e. v Spain)*, ICSID Case No. ARB/15/16 (2 December 2019) (Decision on Jurisdiction, Liability and Directions on Quantum) para 443.
[85] *CEF Energia BV v Italian Republic* (SCC Case No. 158/2015) (Award) (16 January 2019) para 254.
[86] *Kontinental Conseil Ingénierie S.A.R.L c/ Gabon*, Aff. CPA n° 2015-25 (23 December 2016) (Final Award) para 180. Translated from French by the author.
[87] *Supervision v Costa Rica (Award) (n 71)* paras 315-318. The full quotation is reported in the subsection devoted to 'jurisdictional precedence'.

The 'scope' refers to the delineation of the particular obligations on which an umbrella clause operates. In the 28 cases tribunals expressed a view on the scope of umbrella clauses three categories have emerged. First of all, tribunals have, in a considerable percentage of the cases analysed in this study, argued that only consensual obligations could be protected under the umbrella clause. This interpretation was adopted in 10 cases. Secondly, in 2 cases the investment tribunal argued that umbrella clauses operated surely on consensual commitments, but the issue of whether they could encompass unilateral commitments was either not discussed or not decided on. Lastly, the third category comprises cases wherein tribunals held that the scope of umbrella clause extended to 'any' commitment undertaken by the host State in relation to an investment. This approach was adopted in 16 decisions.

BREACH OF OBLIGATION DEPENDS UPON CONSENSUAL AGREEMENT

In *Mobil Exploration v Argentina*, the tribunal agreed with the respondent State's argument that only 'consensual obligations' would be protected under the umbrella clause:

> [...] [T]he Tribunal agrees with Argentina that Article II (2) (c) is concerned with consensual obligations arising independently of the BIT itself [...].[88]

A further example of this interpretation is given in *RREEF v Spain* where the tribunal affirms that the umbrella clause could only be interpreted as allowing for a breach of bilateral obligations to trigger the operation of an umbrella clause:

> [...][T]he expression "any obligations" calls for a broad interpretation but, on the other hand, the phrase "it has entered into" seems to refer exclusively to bilateral relationships existing between the Respondent and the Claimants, to the exclusion of general rules; and the Spanish (*"las obligaciones que haya contraído con los inversores"*) or French (*"les obligations qu'elle a contractées vis-à-vis d'un investisseur"*) lead to the conclusion that the last sentence of Article 10(1) ECT only applies to contractual obligations.[89]

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[88] *Mobil v Argentina (Decision on Jurisdiction and Liability) (n 70)* para 1010.
[89] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain (RREEF v Spain)*, ICSID Case No. ARB/13/30 (30 November 2018) (Decision on Responsibility and on the Principles of Quantum) para 284.

A11Y v Czech Republic represents a peculiar case. Article 2(3) is a combination of a floor provision and an umbrella clause.[90] The clause expressly states that both States shall observe the provisions of 'specific agreements' concluded by '[i]nvestors of one Contracting Party […] with the other Contracting Party.'[91] The tribunal held that in this specific case the clause only covered consensual undertakings while making similar remarks on the scope of more 'typically worded' umbrella clauses:

> 'Firstly, the scope of Article 2(3) is limited to investors that have specific agreements with the host state. The floor provision covers only investors with specific agreements and the umbrella clause refers to "these specific agreements." It is with respect to such investors that Article 2(3) requires the Contracting Parties to observe both the provisions of the specific agreements and the provisions of the Treaty.'[92]
>
> '[A][…] typical umbrella clause such as the one found in the model UK BIT provides that: "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party".'[93]
>
> '"Any obligation" can refer not only to contractual obligations but also to treaty obligations. The Contracting States in the present Treaty merely spelled out what those obligations consist of […].'[94]

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[90] *A11Y LTD. v Czech Republic* (ICSID Case No. UNCT/15/1) (Decision on Jurisdiction) (9 February 2017) para 74.
[91] *Ibidem* para 72.
[92] *Ibidem* para 80.
[93] *Ibidem* para 81.
[94] *Ibidem* para 82.

Other relevant cases where tribunals have decided in a similar manner are *RWE Innogy v Spain,*[95] *9REN Holding v Spain,*[96] *BayWa r.e. v Spain,*[97] *Cube Infrastructure v Spain,*[98] *Stadtwerke München v Spain,*[99]*Oxus v Uzbekistan*[100] and *Ortiz v Algeria.*[101] *Enken Beheer v Poland* also appears to align with this interpretation. Although not expressly stated, the tribunal argued that assurances cannot be considered as obligations within the meaning of the umbrella clause.[102]

BREACH OF CONSENSUAL COMMITMENTS INCLUDED - OTHER COMMITMENTS NOT DEBATED OR DECIDED ON

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[95] *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain* (*RWE Innogy v Spain)*, ICSID Case No. ARB/14/34 (30 December 2019) (Decision on Jurisdiction, Liability and certain issues of quantum) paras 677, 678-680: ''The key issue for the Tribunal is whether this protection requires some form of specific consensual obligation in order to be engaged. The Tribunal considers that it does, as follows from the ordinary meaning of the words "*obligations it has entered into with an Investor or an Investment* ..."'.

[96] *9REN Holding S.a.r.l v Kingdom of Spain* (ICSID Case No. ARB/15/15) (Award) (31 May 2019) para 342. Although unilateral commitments, other than those enshrined in the legal framework, have not been expressly mentioned, the tribunal stressed that only undertakings 'entered into' would be protected under the clause.

[97] *BayWa r.e. v Spain Decision on Jurisdiction, Liability and Directions on Quantum) (n 84)* para 442: 'In the Tribunal's view, the umbrella clause in the last sentence of Article 10.1 of the ECT only applies to obligations specifically entered into by the host State with the investor or the investment. The paradigm case is an obligation under an investment contract duly entered into. […]'.

[98] *Cube Infrastructure Fund SICAV and others v Kingdom of Spain (Cube Infrastructure v Spain)*, ICSID Case No. ARB/15/20 (19 February 2019) (Decision on Jurisdiction, Liability and Partial Decision on Quantum) para 452: 'On a plain reading, the reference in Article 10(1) ECT – the 'umbrella clause' – to "any obligations it has entered into with an Investor or an Investment of an Investor" (emphasis added) points to a specific engagement entered into by an ECT Contracting Party with a specific claimant or a specific group of claimants. The Tribunal does not consider general legislative measures to be engagements of this kind.'

[99] *Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain* (*Stadtwerke München v Spain)*, ICSID Case No. ARB/15/1 (2 December 2019) (Award) para 380: ''A literal reading of this sentence, and particularly of the words "entered into with an Investor," leads one to conclude that the ECT negotiators intended the umbrella clause to cover only contractual obligations or contractual-like arrangements, that is to say obligations assumed specifically in respect of a particular individual or legal person. The words "enter into" are normally used to refer to the process of making contracts with other persons. They would not usually be used to refer to non-contractual like obligations assumed by governments in their regulations or legislators in respect of their laws with effect either *erga omnes* or in respect of an objectively defined group of beneficiaries. In those latter situations, one would be more likely to refer to the government or legislature "assuming" a general obligation in respect of a beneficiary, rather than "entering into" an obligation with someone.'

[100] *Oxus Gold v Uzbekistan* (UNCITRAL 2012) (Award) (17 December 2015) para 379: 'As mentioned above (para. 368), the umbrella clause refers to obligations "entered into" which implies a counterpart and not a general undertaking of an obligation.'

[101] *Ortiz Construcciones y Proyectos S.A. v People's Democratic Republic of Algeria* (ICSID Case No. ARB/17/1) (29 April 2020) (Award) para 423: 'Aux termes de l'article 33(3) de la CVDT, il faut présumer que les « termes obligations contractées » et « *obligaciones contraídas* » ont le même sens. Il convient dès lors d'élucider le sens de ces termes qui concilie le mieux les deux textes. À cet égard, le Tribunal est plutôt enclin à suivre la position de la Défenderesse lorsqu'elle explique que seul le sens commun aux deux termes permet de concilier les deux textes. En l'espèce, le dénominateur commun aux deux textes est que l'État hôte est tenu de respecter ses engagements contractuels.'

[102] *Enkev Beheer B.V v The Republic of Poland* (PCA Case No. 2013-01) (First Partial Award) (29 April 2014) paras 378.

In *Foresight v Spain*, the tribunal argues that the umbrella clause operates on 'specific commitments', but it does not address the question of whether such commitments shall only be consensual, or unilateral undertakings could also be covered:

> 'In the Tribunal's view, the obligation on the Respondent under Article 10(1) ECT to "observe any obligations it has entered into with an Investor or an Investment of an Investor" applies to a specific commitment rather than a general regulatory act. The Tribunal has concluded that the Respondent did not make such a specific commitment to the Claimants. […]'[103]

Similarly, in *EDF v Argentina*, the tribunal argued that a contractual violation was certainly to be considered as a breach of a commitment. No argument was put forward as to whether violations of unilateral undertakings would also be covered:

> […] [T]he serious repudiation of concessions obligations implicated by failure to respect the currency clause (Concession Anexo II, Subanexo 2) must clearly be seen as a violation of "commitments ... undertaken with respect to investors" (Article 10(2), Argentina-Luxembourg BIT) and a "commitment undertaken in connection with the investments made by nationals or companies from the other Contracting Party" (Article 7(2), Argentina-Germany BIT).[104]

THE SCOPE OF OPERATION OF UMBRELLA CLAUSES REACHES BEYOND CONSENSUAL OBLIGATIONS

In *Micula v Romania*[105] the tribunal emphasises how the term 'any obligations' is capacious enough to include all types of commitments, thereby also counting unilateral promises, so long as they are specifically entered into with a particular investor:[106]

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[103] *Foresight Luxembourg Solar 1 S. Á.R1., et al. v Kingdom of Spain (Foresight v Spain)*, SCC Case No. 2015/150 (14 November 2018) (Final Award and Partial Dissenting Opinion of Arbitrator Raül Vinuesa) para 413.
[104] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic* (ICSID Case No. ARB/03/23) (11 June 2012) (Award) para 940.
[105] *Micula v Romania (Award) (n 82)* para 415.
[106] Luke Eric Peterson 'Majority of Tribunal Sets High Bar for Relying on Treaty's Umbrella Clause: Commitments to Investors Must Be Vested Rights under Local Law' (IA Reporter, January 6, 2014).

> The Tribunal agrees with the tribunal in *Eureko v Poland* that the term "'[a]ny' obligations is capacious; it means not only obligations of a certain type, but 'any' – that is to say, all – obligations entered into with regard to investments of investors of the other Contracting Party." In addition, the BIT specifies that these obligations must also be "entered into with an investor [...] with regard to his or her investment". This language suggests that the state must have committed with respect to a particular investor with regard to his or her investments. […] Thus, the umbrella clause in this BIT covers obligations of any nature, regardless of their source, provided that they are indeed "obligations" entered into with a particular investor with regard to his or her investment.

In *Philip Morris v Uruguay*, the tribunal was tasked with determining whether the concession of a trademark would attract the protection of the umbrella clause. Although the tribunal ultimately decides that the concession of a trademark could not be defined as a 'commitment', it also implies that unilateral commitments, such as authorisations, could attract umbrella clause protection:

> 'The question for this Tribunal is whether a trademark falls between the two categories, i.e. whether it can be considered a commitment under general legislation or by reason of the individual consideration involved in the initial grant as a specific commitment to as specific investment or investor.'
>
> Unlike the case of an authorisation or a contract, where the host State may undertake some specific obligations, Uruguay entered into no commitment "with respect to the investment" by granting a trademark. It did not actively agree to be bound by any obligation or course of conduct; it simply allowed the investor to access the same domestic IP system available to anyone eligible to register a trademark. While the trademark is particular to the investment, it stretches the word to call it a "commitment."'[107]

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[107] *Philip Morris v Uruguay (Award) (n 83)* 479-480.

A further example of this approach can be found in *Koch Minerals v Venezuela*. Although the tribunal dismissed the claim, its reasoning seemed to entail that an umbrella clause claim could be grounded on unilateral commitments such as representations or assurances:

> ***'Article 11(2):*** […] The Tribunal has indeed not seen any cogent evidence of any material representation, assurance or undertaking made by the Respondent to KOMSA in regard to its interest in FertiNitro […]. Accordingly, the Tribunal dismisses KOMSA's claim under Article 11(2), the "Umbrella Clause", of the Treaty.'[108]

In *Greentech Energy v Italy*[109]the tribunal majority held that the term 'obligations' was to be considered broad enough to include certain legislative and regulatory commitments so long as they are specific enough to be directed to a specific investor or its investment:

> '[…] [T]he Tribunal majority is inclined to interpret "obligations" referred to in the ECT's umbrella clause as sufficiently broad to encompass not only contractual duties but also certain legislative and regulatory instruments that are specific enough to qualify as commitments to identifiable investments or investors.'[110]

In *WNC v Czech Republic* the tribunal did not go as far as determining whether specific legislative and regulatory commitments would be included in the scope of the clause. It nevertheless appears to agree that its scope would exceed mere consensual commitments so as to encompass unilateral undertakings or pledges as long as they are specific and directed to a particular investor:

> 'The term "umbrella clause" is often used as a convenient shorthand for "observation of undertaking". That nomenclature does not expand the scope of the obligation to observe an undertaking under international law. An undertaking is a formal and legally binding pledge

[108] *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v Bolivarian Republic of Venezuela (Koch Minerals v Venezuela)*, ICSID Case No. ARB/11/19 (Award) (30 October 2017) para 8.50.
[109] *Greentech Energy v Italy (Final Award) (n 77).*
[110] *Ibidem* para 464. The tribunal also averred that the 'cumulative effect' of the various provisions gave them the specificity required. Greentech Energy v Italy (Final Award) (n 77) para 466: ''The Tribunal majority instead finds that, taken as a whole, the Conto Energia decrees, the GSE letters, and the GSE Agreements, amounted to obligations "entered into with" specific PV operators. Those obligations were sufficiently specific, setting forth specific tariff rates for a fixed duration of twenty years. Accordingly, whether any of the Conto Energia decrees, GSE letters, or GSE Agreements would, in isolation, be covered by the ECT's umbrella clause is not the relevant question here, given that each of Claimants' investments received benefits pursuant to all three types of "obligations"'.

> to do something. States are obliged under international law to observe their undertakings. This is, *inter alia,* part of the duty of good faith and the principle of *pacta sunt servanda.*'[111]
>
> [...] The requisite elements of an undertaking to be observed under international law are a specific, clear and direct commitment from a State to an identified beneficiary. It is not sufficient, for example, that there be a general policy, a generic statement of principle, a general legal principle or a municipal law of universal application (which would not include a law specifically identified to provide foreign investment with protections or a law formalising a concession agreement).[112]

Another example of a decision which recognised a broader scope to obligations protected under the umbrella clause is *Belenergia v Italy*. Regulations addressed to foreign and internal investors alike cannot create obligations because of their general character.[113] The tribunal nevertheless appears to recognise that not only commitments 'entered into' with the investor are protected under the umbrella, but also those specifically addressed at the investor, *viz* unilateral commitments and specific legislative commitments.[114]

Additional examples of decisions whereby tribunals stretched the scope of the protected undertakings beyond consensual undertakings are *Isolux v Spain*,[115] *OperaFund v Spain*,[116]

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[111] *WNC Factoring Ltd (WNC) v The Czech Republic* (PCA Case No. 2014-34) (Award) (22 February 2017) para 321.
[112] *Ibidem* para 322.
[113] *Belenergia S.A. v Italian Republic* (ICSID Case No. ARB/15/40) (Award) (6 August 2019) para 617-618.
[114] *Ibidem* para 615-617.
[115] *Isolux Netherlands, BV v Kingdom of Spain*, SCC Case V2013/153 (Final Award) (6 July 2016) para 771: 'The Arbitral Tribunal accepts that, in particular instances, laws or administrative acts may contain commitments, in particular when they are specifically addressed to foreign investors [...]. The obligation to submit to arbitration found in several investment codes is a typical example. However, a rule addressed to both domestic and foreign investors cannot, by reason of its general character, generate obligations only towards the former, even when they are investors of a Contracting Party.' Translated from Spanish.
[116] *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID Case No. ARB/15/36 (6 September 2019) (Award) para 569: '[...] The present Tribunal finds the interpretation of most Spanish RE cases more convincing and notes in this context that the tribunal in Isolux was of the view that the ECT's umbrella clause, although speaking of "an obligations" because it referred to "entered into" was limited to contractual obligations and that the tribunal in Novenergia held that "Article 10(1) of the ECT does indeed provide for a duty of each Contracting Party to 'observe any obligations it has entered into with an Investor', a provision that recalls the 'umbrella clause' contained in several investment treaties. However, the application of the umbrella clauses requires that the host State either concluded with the investor a specific contract or made to the investor a specific personal promise."' Although by looking at the reasoning of the tribunal it would appear that the *Isolux v Spain* tribunal limited scope only to contractual obligations, legislative commitments specifically addressed to foreign investors are, according to the Isolux tribunal, protected under the umbrella. See footnote 115.

Antin v Kingom of Spain,[117] *Khan Resources v Mongolia,*[118] *Eskosol v Italy,*[119] *Novenergia v Spain,*[120] *ESPF v Italy,*[121] *Sun Reserve v Italy,*[122] and *Nissan v India*[123] and *OI European Group v Venezuela*.[124]

JURISDICTIONAL PRECEDENCE

OVERALL FINDINGS

The issue of jurisdictional preference reflects the interpretive challenge faced by tribunals when deciding what consequence to attribute to the jurisdictional clauses that are part to many of the contracts that represent the underlying obligation umbrella clauses allegedly operate on. Moreover, tribunals have also been called upon to rule on the interaction between contract and treaty *fora* when a fork-in-the-road clause is present. Tribunals have had to determine whether their jurisdiction to hear an umbrella clause claim is affected by the jurisdictional clause in the contract, or the interference between contract and treaty *fora*. This issue was discussed in 12

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[117] *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V v Kingdom of Spain* (ICSID Case No. ARB/13/31) (Award) (15 June 2018) para 438.

[118] *Khan Resources Inc., Khan Resources B.V and Cauc Holding Company Ltd. v the Government of Mongolia and Monatom Co., Ltd.* (PCA Case No. 2011-09) (25 July 2012) (Decision on jurisdiction) para 438; *Khan Resources Inc., Khan Resources B.V and Cauc Holding Company Ltd. v the Government of Mongolia and Monatom Co., Ltd.* (PCA Case No. 2011-09) (2 March 2015) (Award) paras 295-296.

[119] *Eskosol S.p.A. in liquidazione v Italian Republic* (ICSID Case No. ARB/15/50) (Award) (4 September 2020) para 462: 'The very notion of "enter[ing] into" an obligation "with an investor" implies […] some *interaction* between the State and the investor, from which a particular obligation results. In most cases, that interaction presumably would be *direct*, such as through a contract or an investment authorization. Nonetheless, the Tribunal does not rule out […] that in rare cases a State might be shown to have entered into obligations *indirectly* with a given investor, for example by making a binding commitment to a narrow and targeted class of investors in which that investor is known to fall. Even so, such obligations would be expected to be documented in some form other than through laws of general applicability.'

[120] *Novenergia II - Energy & Environment (SCA), SICAR v Kingdom of Spain* (SCC Case No. 063/2015) (Final Arbitral Award) (15 February 2018) para 715: '[T]he application of the umbrella clauses requires that the host State either concluded with the investor a specific contract or made to the investor a specific personal promise.'

[121] *ESPF v Italy (Award) (n 79)* paras 754, 755, 758, 792. The tribunal required some degree of specificity, *viz* for the promissor and promise to be identified or identifiable, but it did include specific unilateral and regulatory commitments within the perimeter of protection of the clause.

[122] *Sun Reserve Luxco v Italy (Final Award) (n 81)* paras 988-995. The tribunal in this case utilises the word 'privity' as a synonym of 'specificity'.

[123] *Nissan Motor Co., Ltd. v Republic of India* (PCA Case No. 2017-37) (Decision on Jurisdiction) (29 April 2019) para 277.

[124] *OI European Group B.V v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25) (Award) (10 March 2015) para 589: 'The Tribunal agrees with the Claimant that the Clause of Incorporation is broadly worded. As previous tribunals have reflected the term "any obligation" includes obligations entered into by law. Consequently, Venezuela has accepted the commitment to fulfil all of the legal obligations established in the Venezuelan legal system."

decisions. This study has found that tribunals answered this question in three ways. First of all, some tribunals upheld their own jurisdiction but refused to exercise it on inadmissibility grounds. This interpretation was adopted in 3 instances. By contrast, in 8 instances tribunals decided that their jurisdiction was unaffected by the exclusive forum selection clause in the contract. Lastly, in 1 case a tribunal proceeded to the merits on the ground that any other decision would tantamount to denial of justice. No tribunal has argued that its jurisdiction was precluded by the contractual forum selection clause or in reason of the fork-in-the-road provision.

JURISDICTION UPHELD BUT NOT EXERCISED ON INADMISSIBILITY GROUNDS

In *Supervision v Costa Rica* the tribunal having established jurisdiction goes on to assess whether admissibility is affected due to the presence of fork in the road and waiting periods requirements.[125] Although jurisdiction for the umbrella clause claim was not discussed directly, the tribunal argued that this scenario was analogous to that of the exclusive forum selection clause in *SGS v Philippines* where admissibility was rejected on the ground that a party could not ground its claim on a contract without itself complying with it:

> 'The Tribunal considers that the actions filed in the local proceeding and in the arbitration share a fundamental normative source and pursue ultimately the same purposes. The fundamental normative source is the same because compensation was claimed for lost profits derived from the failure of Costa Rica to adjust the VTI service rates according to what Claimant alleges was established in the Contract, […].
>
> Since the claims were all based on the violation of the Contract and share the same normative source, based on the approach established in *Pantechniki v Albania,* one can conclude that the claims presented before local tribunals are the same as the ones presented before this Tribunal. […].
>
> […]

[125] *Supervision v Costa Rica (Award) (n 71)* para 292.

> Therefore, the Tribunal considers that the claims of Claimant coincide. They consist of the compensation for lost profits derived from the conduct or omissions of Costa Rica, which are alleged in the local proceeding as violating national law, while in the arbitration proceedings, the conduct of Costa Rica is alleged as contrary to the provisions of Treaty. In both cases Respondent's acts are essentially qualified as illegal because Claimant considers that the adjustment of rates was not done as agreed to in the Contract.'[126]

A similar reasoning was followed in *Consutel v Algeria*[127] and *KCI v Gabon*[128] which in reason of their length are only reported in the footnote.

CONTRACTUAL FORUM SELECTION CLAUSE IRRELEVANT

In *Garanti Koza LLP v Turkmenistan* the tribunal upheld its jurisdiction. This interpretation was grounded on the notion that despite the fact that umbrella clause claims stem from an alleged violation of a contract, they are not contractual claims but rather legally distinct BIT claims which are therefore unaffected by a contractual forum selection clause.

> 'The fact that the Contract provides for resolution of disputes arising under the Contract in the Arbitration Court of Turkmenistan does not deprive this Tribunal of jurisdiction over claims pleaded and arising under the BIT. As the ad hoc committee in *Vivendi I* observed: "A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty." The tribunal in *SGS v Paraguay* explained that "this rule applies with equal force in the context of an umbrella clause."'[129]

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[126] *Supervision v Costa Rica (Award) (n 71)* paras 315-318.
[127] *Consutel v Algeria (Final Award) (n 73)* para 374: '[…] [T]he tribunal holds that the operation of the [umbrella clause] could not allow the Claimant to circumvent the compromissory clause applicable to its contractual undertakings by submitting to this Tribunal the contractual claims that the contracting parties agreed on submitting to exclusive competence of a different jurisdiction.'
[128] *Kontinental Conseil v Gabon (Final Award) (n 86)* paras 180-188.
[129] *Garanti Koza v Turkmenistan* (*Award*) *(n 75)* (despite the decision on jurisdiction not having been made public) para 245. The subsequent paragraph 246 is also reads: 'The answer to this objection to the jurisdiction of the Tribunal is that the Claimant has asserted multiple claims under the BIT. In addition to its umbrella clause claim, the Claimant also asserts claims for direct and indirect expropriation, for denial of fair and equitable treatment, for unreasonable and discriminatory measures, and for denial of full protection and security. Whatever merit each of those claims may have, each is stated as a claim arising under the BIT, not under the Contract. This

The tribunal's interpretation in *Greentech Energy Systems v Italy* was similar to the *Garanti Koza* tribunal's reasoning:

> 'The Tribunal begins by noting that Claimants are not party to the GSE Agreements. Thus, regardless of the wide scope of the forum selection clause in those agreements which Respondent alleges, Claimants do not appear to have standing to assert claims for breach of contract in Italian court and Respondent has not stated otherwise. It is clear also that Claimants are not making a claim for breach of contract in the present arbitration. Claimants have claimed for violations of the ECT and international law. Given the foregoing, the issue faced by the SGS v Philippines and BIVAC v Paraguay tribunals, of distinguishing a contract claim from a treaty claim, does not arise here. The Tribunal thus denies Respondent's objection based on the forum selection clauses in the GSE Agreements and minimum guaranteed price contracts.'[130]

A similar reasoning was also followed in *EDF v Argentina*. The tribunal, after stating that the clause was irrelevant because the claimants were not parties to the contract in question, averred that the option to have their claims heard before it rested on the alleged breach of treaty commitments:

> In this connection, it is necessary to reject Respondent's argument based on the forum selection clause in Article 40 of the Concession Agreement. Claimants were not party to that Concession. Their claim rests on breach of investment treaties, which as such clearly fall within the Tribunal's jurisdiction.[131]

A similar position was held in *Gavrilovic v Croatia*[132] and *Belenergia v Italy*[133] were both tribunals quoting *SGS v Paraguay* argued that even if it requires a showing of a contractual

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Tribunal has no jurisdiction to adjudicate whatever contract claims the Claimant may have, and will not attempt to do so.'

[130] *Greentech Energy v Italy (Final Award) (n 77)* para 220.

[131] *EDF International v Argentina (Award) (n 104*) para 930.

[132] *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia* (ICSID Case No. ARB/12/39) (Award) (26 July 2018) para 420: 'The Tribunal agrees with the Claimants. The distinction between treaty claims and contract claims is well established, and it disposes of the Respondent's second admissibility objection. The Tribunal adopts the analysis of the *SGS v Paraguay* tribunal, which held that a claimant may invoke an umbrella clause when "the alleged breach of the treaty obligation depends upon a showing that a contract or other qualifying commitment has been breached, [because] the source of the obligation cited by the claimant, and hence the source of the claim, remains the treaty itself."'

[133] *Belenergia v Italy (Award) (n 113)* paras 356-357.

breach the source of the umbrella clause claim remains the treaty itself. Tribunals in *ESPF v Italy,*[134] *Sun Reserve v Italy*[135] and *Nissan v India*[136] also followed this rut.

JURISDICTION OR ADMISSIBILITY DEBATE IRRELEVANT ON DENIAL OF JUSTICE GROUNDS

An original viewpoint is given by the *Strabag SE v Libya* decision. The tribunal was mindful of the polarised state of the debate on the interference between a forum selection clause and the jurisdiction of the arbitral tribunal.[137] Nonetheless, the tribunal focuses on the current state of disrepair of Libyan courts to argue that it not retaining jurisdiction would tantamount to denial of justice:[138]

> 'the Tribunal believes that in this case, this issue must be considered in light of the protracted conditions of insecurity in Libya since 2011. A compelling body of evidence, adduced by both Parties, shows that since the revolutionary hostilities in 2011, conditions in Libya have been characterized by recurring events of intensive fighting between rival groups, widespread violence, and the widespread breakdown of State authority. As a practical matter, there is not today, and has not been for some years, the possibility for Claimant to pursue its claims in Libyan courts in tranquillity and safety. […].'[139]

PRIVITY AND ATTRIBUTION

OVERALL FINDINGS

[134] *ESPF v Italy (Award) (n 79)* para 376: 'The reasoning in these two cases highlights the distinction between a claim of treaty violation and a claim of breach of contract. The Claimants have brought the former. In so far as the Claimants' umbrella clause claims are concerned, the Claimants are not parties to the GSE Agreements and their claims are not for breaches of the GSE Agreements *per se*; they are for breach of the provisions of the ECT that protect an Investor and its Investment from arbitrary acts by the state, by way of the broad language of the umbrella clause in the ECT.' Interestingly, although jurisdictional precedence was debated in the section devoted to jurisdiction, the tribunal in its admissibility remarks stated that issues relating to admissibility had already been dealt with when discussing jurisdiction (para 395).
[135] *Sun Reserve Luxco v Italy (Final Award) (n 81)* paras 576-577.
[136] *Nissan v India (Decision on Jurisdiction) (n 123)* para 280.
[137] *Strabag SE v Libya (Strabag v Libya)*, ICSID Case No. ARB(AF)/15/1 (29 June 2020) (Award) para 195.
[138] *Ibidem* para 196.
[139] *Ibidem* para 196.

The issue of 'privity' is relevant to the umbrella clause debate in reason of the fact that the underlying obligations umbrella clauses allegedly operate on may not have been entered into directly by the State with the investor. On the investor's side it is not infrequent for locally incorporated entities to enter into the contract. From the State's perspective, sub-state entities can undertake commitments with regard to investors. Tribunals have held different views on whether the State could be responsible for the acts of sub-state entities as well as on whether investors could initiate a claim for the violation of an obligation they are not privy to.

Decisions analysing privity from the perspective of the State (best known as 'attribution') and from that of the investor are kept separate in this study for improving the comparability with the original study and because tribunals have adopted different approaches. This does not rule out the possibility of a case being concerned with both privity and attributions issued, thereby being counted on either side. From the claimant's perspective in 6 decisions the tribunal required privity and held that the investor, in reason of not being directly owed the obligation, was not entitled to a claim. In 7 instances, tribunals held that so long as the obligation in question related to the claimant's investment it was irrelevant whether the investor entered into it directly.

Moving to the point of view of the respondent State, tribunals in order to assess attribution to the respondent State of the conduct of a sub-state entity sometimes relied on the ILC Articles on State responsibility and in particular on articles 4, 5 and 8. Sometimes they employed other international law criteria *viz* representation, apparent authority or veil piercing. Finally, some held that the law applicable to the issue is identical to the law applicable to the contract.[140] The problem with adopting this distinction, aside from issues of comparability and fragmentation of the analysis, is the lack of clarity displayed by tribunals, which have been reluctant to decide on the issue.[141] For these reasons, this study has chosen not to differentiate between the criteria applied and limits itself to determining whether the tribunal attributed a given conduct to the State.

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[140] James Crawford and Paul Mertenskötter, 'The Use of ILC Attribution Rules in Investment Arbitration' in Meg Kinnear, Geraldine Fischer, Jara Minguez Almeida, Luisa Fernanda Torres and Mairée Uran Bidegain (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015)160-193, 165-166.

[141] Shotaro Hamamoto, 'Parties to the "Obligations" in the Obligations Observance ("Umbrella") Clause, Clause' [2015] ICSID Review Foreign Investment Law Journal 449, 457-464.

In 6 instances tribunals held that the State was not responsible for the actions of legal entities with separate legal personality even when said entity was fully owned by the State, or performed a public function. On the other hand, 4 tribunals held that nothing prevents commercial actions being attributed to the State and that the relevant international law shall determine whether or not this is the case in a specific instance.

CLAIMANT SIDE

PRIVITY REQUIRED

The tribunal in *Enkev v Poland* after affirming that the assurances in question did not constitute an obligation under the meaning of the umbrella clause, went on to argue that such assurances were, however, directed to claimant's local subsidiary not the claimant itself:

> [...] The so-called "assurances" of 20I0 and 20II invoked by the Claimant were directed at Enkev Polska (not the Claimant); and, from their terms, neither can be considered as an obligation within the meaning of the Umbrella Clause. In the Tribunal's view, such "assurances" fell far short of creating any new legal obligation not already imposed upon the City by Polish law towards Enkev Polska.[142]
>
> In conclusion, but most importantly of all, none of these complaints alleged by the Claimant impugn the Respondent's treatment of the Claimant's rights derived from its shares in Enkev Polska: all such complaints, as pleaded by the Claimant, are directed solely at the treatment of Enkev Polska itself and its Premises. That suffices to cause the Tribunal to dismiss the Claimant's claims under Article 3 of the Treaty.[143]

In *WNC v the Czech Republic* case the tribunal upholds the privity requirement:

> 'An undertaking is likewise owed to the identified beneficiary of the undertaking. Under international law, merely because a State may owe an obligation to observe an

[142] *Enkev Beheer v Poland (First Partial Award) (n 102)* para 378.
[143] *Ibidem* para 379.

undertaking given to a company does not mean that the State also owes that same obligation to observe the undertaking to that company's shareholders. […]'[144]

Similarly, in *Belenergia v Italy,*[145] *Lotus v Turkmenistan,*[146] *Oxus v Uzbekistan*,[147] and *Consutel v Algeria*[148] tribunals held that claimants had to show their privity to the obligation allegedly breached by the respondents.

PRIVITY NOT REQUIRED

In *Supervision v Costa Rica*, the tribunal acknowledged that privity was not necessary if the investment treaty concluded between the investor's home State and the respondent State provided for investment arbitration in relation to 'investments', not investors:

> 'As a result, the Tribunal considers that the appropriate approach is to decide whether the consent of the State Parties was given in respect to the investor, or in respect to its investments. In the first case, the scope of the clause is more restricted and in principle it is limited to the obligations assumed by the State receiving the investment directly from the investor. In contrast, in the second case, if consent is given with respect to the investment, the scope of the clause is greater and the contractual relationship does not

[144] *WNC Factoring v Czech Republic (Award) (n 111)* para 323.

[145] *Belenergia v Italy (Award) (n 113)* para 614: 'Article 10(1) ECT provides in its last sentence that "[e]*ach Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*" Pursuant to this provision, Belenergia has to demonstrate that Italy has breached an obligation "*entered into with*" Belenergia.' Paragraphs 615-618 are also relevant.

[146] *Lotus Holding Anonim Şirketi v Turkmenistan* (ICSID Case No. ARB/17/30) (Award) (6 April 2020) para 172: 'The difficulties facing Lotus Holding, as the only Claimant in this case, are that it is not a party to any of the contracts in question here, and that it has not articulated in its Request for Arbitration a claim that the Respondent's dealings with Lotus Enerji have violated rights held by Lotus Holding under the BIT and/or the ECT. All of the contracts were concluded by Lotus Enerji. The "monies due to Lotus Holding" are, under those contracts, monies due to Lotus Enerji. Lotus Holding had no more than the expectation or hope of receiving some benefits, in its capacity as shareholder of Lotus Enerji, from any monies received under those contracts by Lotus Enerji, *e.g.* in the form of dividends.'

[147] *Oxus Gold v Uzbekistan (Award) (n 100)* para 377: 'Finally, another hurdle which Claimant has not overcome is the fact that the parties to the PEA are Goskomgeology and Marakand and not the State and Oxus. As such, the privity requirement would be an additional impediment which would prevent Claimant to rely on the umbrella clause with regard to the "revocation" of its alleged contractual rights to development of the Khandiza Deposit.'

[148] *Consutel v Algeria (Final Award) (n 73)* para 371: 'The tribunal adjudicates […] that even if the treaty protects indirect investment it does not follow that the umbrella clause is applicable to commitments undertaken with a subsidiary of the investor. The text of article 10(2) of the Switzerland-Alegria treaty says that, on the contrary, the clause is applicable to commitments 'vis-à-vis investments carried out in its territory by investors of the other contracting party […]'. Translated by the author.

necessarily have to be between the host State and the investor, but can for example be through a subsidiary.'[149]

Similarly, in *EDF v Argentina* the tribunal argued that the umbrella clause encompasses commitments undertaken in relation to specific investments, not only investors:

> The "umbrella clauses" in question are broadly worded. A clear and ordinary reading of these dispositions covers commitments undertaken with respect to investors, or undertaken in connection with investments. The Tribunal notes that Article 10(2) of the Argentina-Luxemburg BIT covers commitments undertaken with respect to investors while Article 7(2) of the German BIT, even broader in scope, covers "*commitment undertaken in connection with the investments*."
>
> Concession agreements granted to foreign investors for specific investments, such as those at issue in this arbitration, fall within the protection of an "umbrella clause".[150]

In *ESPF v Italy,*[151] *Sun Reserve v Italy*[152], *Infrared v Spain,*[153] *BayWa r.e. v Spain,*[154] *Mobil v Argentina*[155] tribunals considered sufficient for the relevant obligation to be owed towards the investor's investment.

[149] *Supervision v Costa Rica (Award) (n 71)* para 289.
[150] *EDF International v Argentina (Award) (n 104*) paras 938-939.
[151] *ESPF v Italy (Award) (n 79)*, para 793: '[…] Again, it is important to note that the Claimants do not claim for a breach of the GSE Agreements themselves; the claim is for a breach of the obligation owed to its Investments not to unilaterally modify the tariffs, which obligation is evidenced clearly by the provisions of the GSE Agreements.'
[152] *Sun Reserve Luxco v Italy (Final Award) (n 81)*. Although the issue of privity of contract is not addressed in-depth, the tribunal throughout its decision refers to obligations 'with an investor or its investment', thereby indicating that the latter would suffice. See for instance paras 989 or 990.
[153] *InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain* (ICSID Case No. ARB/14/12) (Award) (2 August 2019) para 478: '[…] As regards the "*umbrella obligation*" claim, the Tribunal notes – again, in keeping with the views of the tribunal in *Novenergia* – that such a claim may well require demonstration of a personal obligation entered into by Respondent towards Claimants or their investments. Here, however, the Respondent's actions, enactments and representations were directed generally at the entire Spanish CSP sector, ***not*** directly or personally towards Claimants or their investments.'
[154] *BayWa r.e. v Spain Decision on Jurisdiction, Liability and Directions on Quantum) (n 84)*: '[…] [T]ribunals have consistently resolved (occasional dicta to the contrary notwithstanding) that the ECT umbrella clause only protects obligations specifically entered into by the host State with the investor or the investment. These have almost always been contractual obligations. In no case of which the Tribunal is aware has a provision of the general law of a host State been enforced under the umbrella clause in Article 10.1 of the ECT or an equivalent provision.'
[155] The tribunal accepts contractual obligation with regard to 'investments'. See *Mobil v Argentina (Decision on Jurisdiction and Liability) (n 70)* para 1010: […][T]he Tribunal agrees with Argentina that Article II (2) (c) is concerned with consensual obligations arising independently of the BIT itself (*i.e.* under the law of the host state

ATTRIBUTING COMMERCIAL CONTRACTS ENTERED INTO BY SEPARATE LEGAL ENTITY

NON-ATTRIBUTED

The tribunal in *Almås v Poland* examined at length the issue of privity from the perspective of the State. The claim focused entirely on ANR's conduct and its alleged motivation to terminate the Lease Agreement and raises obvious issues of attribution. ANR was a separate legal entity from Poland and allegedly exercised its contractual powers in terminating the Lease Agreement.[156]

The tribunal turned to the ILC Articles on State Responsibility in order to determine whether the conduct in question could be attributed to Poland. It ruled out that the ANR could constitute a State organ under article 4 of the ILC Articles on State Responsibility[157] or that the entity acted under Poland's control, directions or instructions for the purpose of article 8.[158] Most relevantly for this study, the tribunal also appears to reject the possibility that attribution would be possible in the context of commercial contracts:

> 'All [the tribunal] needs to decide is that the termination was in purported exercise of contractual powers, and it does so decide. That being so, the termination of the Lease Agreement was not attributable to Poland under ILC Article 5.'[159]

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or possibly under international law), which are not entered into *erga omnes* but with regard to particular persons and that they must be specific obligations concerning the investment

[156] *Kristian Almås and Geir Almås v The Republic of Poland* (PCA Case No. 2015-13) (Award) (27 June 2016) para 204.

[157] *Ibidem* para 209- 210.

[158] *Ibidem* para 272.

[159] *Ibidem* para 251.

A similar conclusion was also reached in *EBO Invest v Latvia,*[160] *Oxus v Uzbekistan,*[161] *Gavrilovic v Croatia,*[162] *Consutel v Algeria*[163] and *Mağdenli v Kazakhstan.*[164] Tribunals denied that the alleged obligation by relevant entities could be attributed to the respondent States according to articles 4, 5 and 8 of the ILC Articles on State responsibility.

ATTRIBUTED

Although the contract had been entered into by State Concern 'Turkmenavtoyollary, a separate entity set up by Presidential Decree,[165] the tribunal in *Garanti Koza v Turkmenista*n adjudicated that its actions were clearly attributable to Turkmenistan:

> 'The connection between the Contract and the Government of Turkmenistan appears on the face of the Contract. TAY is identified in the Contract as "Owner." "Owner" is in turn defined as "State Concern 'Turkmenavtoyollary' acting on behalf of

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[160] *EBO Invest AS, Rox Holding AS and Staur Eiendom AS v Republic of Latvia* (ICSID Case No. ARB/16/38) (Award) (28 February 2020) para 343: 'the Tribunal does not consider that the conduct of SJSC Airport that is at issue in this arbitration can properly be said to implicate the exercise of governmental authority. Rather, as in *Almås v Poland, Jan de Nul v Egypt, Hamester v Ghana* and other cases to which the Respondent has referred in its submissions, the conduct of SJSC Airport with which this dispute is concerned is of a quintessentially commercial character, *i.e.*, the management of its relationship with private investors in relation to the development of real estate in accordance with contracts concluded for that purpose on commercial terms and governed by Latvian private law. As the Respondent has correctly argued, ordinary contractual acts, without more, are not generally considered to constitute acts of governmental authority.' For the full reasoning on attribution paras 308-354.

[161] *Oxus Gold v Uzbekistan (Award)* see above footnote 147.

[162] *Gavrilovic v Croatia (Award) (n 132)* (Award) para 1159: 'The term "it" refers to the State, and not to entities that are separate and distinct from the State. The Tribunal has found that the Respondent is not a party to, or otherwise bound by, the Purchase Agreement. That is, the Respondent did not enter into any contractual obligation towards the Claimants, and is not responsible for any contractual obligations that may have been owed to the Claimants and may not have been performed. It follows that there can be no breach of Article 8(2) of the BIT, and the Tribunal need not further consider this argument.'

[163] *Consutel v Algeria (Final Award) (n 73)* paras 371 and 374.

[164] *Mağdenli Yer Hizmetleri ve Taşıma Anonim Şirketi v Kazakhstan* (2015). The award is not public but the IA Reporter commentary gives sufficient information to make a determination: '[…] [A] majority of the tribunal also dismissed Magdenli's claims that it was entitled to a reimbursement of "additional investment" put into ATMA by the claimant. […] Kazakhstan did not dispute that Magdenli had a claim for these sums, but stressed that reimbursement was ATMA's obligation under the Association Agreement, not the state's. The majority agreed, as it held that Magdenli's claim was contractual in nature, and the tribunal had no jurisdiction over Kazakhstan under the Association Agreement.Nor could Magdenli rely on the umbrella clause in this respect, the majority continued. Indeed, according to the arbitrators, Kazakhstan had not undertaken any obligation with respect to the Association Agreement.' See Charlotin Danien 'Revealed: Tribunal hearing claim against Kazakhstan refuses to construe local litigation requirements as binding, but shows deference to State's need for post-Sovietic transition and sees no breach of Turkish BIT' (February 9 2020), available upon subscription at https://www-iareporter-com.ezproxy.unibo.it/articles/revealed-tribunal-hearing-claims-against-kazakhstan-refuses-to-construe-local-litigation-requirement-as-binding-but-shows-deference-to-states-need-for-post-soviet-transition-and-sees-no-breach-of/.

[165] *Garanti Koza v Turkmenistan* (*Award*) (n 75) 46.

Turkmenistan Government." The Contract also provides that it "is concluded on the basis of Decree of the President of Turkmenistan No. 9429," and that it comes into effect after its registration with the Turkmen Ministry of Economy and Development. These provisions of the Contract confirm that the acts of TAY in furtherance of the Contract were attributable to Turkmenistan.'[166]

A similar reasoning inspired the decision by the tribunal in *Strabag v Libya*:

> The Tribunal now turns to the question of whether, for the purposes of Article 8(1) of the Treaty, the RBA, TPB and HIB, by entering into contracts with an investor, are to be taken as if Libya itself "entered into" the contracts. [167]
>
> Reviewing the overall circumstances cumulatively, including the public importance of the functions carried out by RBA, TPB and HIP and their vesting with governmental authorities, their lack of administrative and financial economy, the nature of the contracts and their being deeply bound with state interest, and the existence of overwhelming evidence that demonstrates that an array of public authorities had a major hand in the conclusion and performance of the contracts, the Tribunal is of the view that, in this case, there is an exceptional combination of circumstances compelling the conclusion that the Respondent did, indeed, "enter into" the obligations in the disputed contracts within the meaning of Article 8(1) of the Treaty.[168]

In *Ortiz v Algeria*[169] the tribunal decided in a similar fashion. The tribunal adjudicated that some of the acts complained, in particular in relation to the transferring of the factory, could be attributed to Algeria pursuant to article 8 of the ILC Articles on state responsibility.

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[166] *Ibidem* paras 334-335.
[167] *Strabag v Libya (Award) (n 74)* para 171.
[168] *Ibidem* para 187.
[169] *Ortiz v Algeria (Award) (n 101)* paras 190-263 for the full reasoning on how it is difficult to consider commercial actions as acts of '*puissance publique*'. The tribunal nevertheless finds that the transferring of the factory could be attributed to Algeria.

Similarly, in *CC/Devas v India* the tribunal, after rejecting attribution under articles 4 or 5 of the ILC Articles,[170] admitted it under article 8.[171]

EMERGING TRENDS, DISSIPATING AND CONFIRMED PATTERNS

This section draws some conclusions regarding the patterns that emerged in relation to the four interpretive concerns examined above, especially in comparison with the results of the original study. It also provides some general remarks on umbrella clause claims.

Before discussing each interpretive concern some general remarks on umbrella clause claims are appropriate. Although the original study screened all known investment cases, by the original author's own acknowledgement,[172] umbrella clause claims became prevalent only after *SGS v Pakistan* in 2003. Decisions analysed in the original study were therefore concentrated over a period of approximately 9 years, which roughly overlaps with the timeframe of the follow-up study conducted herein which considers decision issued between 1 May 2012 and February 7 2022. Of the cases reviewed in the original study, 68 were found to discuss umbrella clauses.[173] The follow-up study found 102 cases wherein an umbrella clause breach was alleged.[174] This leads to conclude that over a comparable time frame cases concerning umbrella clauses have considerably increased.

The debate on the interpretation of umbrella clauses maintains practical significance despite the dwindling popularity of the clause. Studies illustrating a drop in popularity of the umbrella clause have underscored a trend showing the increasing reluctance of treaty drafters to include umbrella clauses in their BITs.[175] In the decades between 1959 and 2000, about 56% of treaties

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[170] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v India*, PCA Case No. 2013-09 (Decision on Jurisdiction and merits) (25 July 2016) para 281: 'In the present case, having regard to the circumstances leading to the Devas Agreement as they emerge from the pleadings of the Parties, the Tribunal concludes that, when entering into the Agreement, Antrix was not acting as an organ of the Respondent, whether under the provisions of Articles 4 and 5 of the ILC Articles. The Agreement itself does not constitute an obligation the Respondent has entered into within the meaning of Article 11(4).'

[171] *Ibidem* para 288: 'The Tribunal endorses the analysis of Article 8 contained in the *Tulip* case; however, based on the factual situation, the end result is quite different. While in the *Tulip* case, the tribunal concluded that there was no evidence supporting attribution of Emlak's acts to the State, there can be no doubt that, in the present case, Antrix, in invoking *force majeure*, was "acting on the instructions of, or under the direction or control of that State in carrying out the conduct," to quote Article 8.'

[172] Jude (n 7) 612.

[173] The number goes up to 71 if the 3 additional cases analysed after the cut-off date are also taken into account.

[174] Twelve decisions where simply 'double counted'.

[175] Boltenko (n 4) 403-405.

omitted umbrella clauses. This percentage dropped to 47% in treaties concluded from 2001 to 2010, only to sharply increase to 75% in treaties signed between 2011 and 2016.[176] In 2018 the UNCTAD found that out of the 29 treaties concluded that year, only 1 contained an umbrella clause.[177]

The study conducted herein has shown, however, that the marked decline in the popularity of umbrella clauses[178]has yet to adversely affect the number of umbrella clause claims filed over the last decade. The reason behind this apparent disconnect between trends in treaty formulation on the one hand and investment claims on the other hand, shall be found in the lower number of treaties signed in recent decades. Over the three time periods considered above, known investment treaties concluded in each time window went from 1711 down to 717 and continued their decline to 110 between 2011 and 2016.[179] Older treaties wherein umbrella clauses were a fairly popular occurrence, therefore, still represent a higher percentage of the treaties currently in force.

Claimants have also found creative paths to include umbrella clause claims regardless the absence of an actual umbrella clause in the relevant treaty. Mostly, they have done so through the Most Favoured Nation ('MFN') clause. Through the MFN clause claimants have argued that having access to umbrella clause protections from other treaties to which the respondent

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[176] UNCTAD Investment Policy Hub 'Mapping of IIA clauses' available at https://investmentpolicy.unctad.org/pages/1031/mapping-of-iia-clauses accessed on 8 July 2022;

[177] Salacuse (n 2) 371. UNCTAD, 'Recent Developments in the International Investment Regime—Taking Stock of IIA Reforms' (June 2019) 2, available at https://unctad.org/system/files/official-document/diaepcbinf2019d5_en.pdf, accessed on 14 January 2022.

[178] Raúl Pereira de Souza Fleury, 'Umbrella clauses a trend towards its elimination' [2015] Arbitration international 679; Raúl Pereira de Souza Fleury 'Closing the umbrella: a dark future for umbrella clauses?' [13 October 2017], available at http://arbitrationblog.kluwerarbitration.com/2017/10/13/closing-umbrella-dark-future-umbrella-clauses/, accessed on 8 July 2022; Ho (n 1) 259; UNCTAD, 'World Investment Report 2015', 113, https://unctad.org/system/files/official-document/wir2015_en.pdf, accessed on 8 July 2022; UNCTAD, 'World Investment Report 2016', 113, available at https://unctad.org/system/files/official-document/wir2016_en.pdf, accessed on 8 July 2022; UNCTAD, 'World Investment Report 2017', 121, available at https://unctad.org/system/files/official-document/wir2017_en.pdf, accessed on 8 July 2022; UNCTAD, 'World Investment Report 2018', 97, https://unctad.org/system/files/official-document/wir2018_en.pdf, accessed on 8 July 2022; UNCTAD, 'World Investment Report 2019', 107, available at https://unctad.org/system/files/official-document/wir2019_en.pdf, accessed on 8 July 2022; UNCTAD, 'World Investment Report 2020', 115, available at https://unctad.org/system/files/official-document/wir2020_en.pdf, accessed on 8 July 2022; UNCTAD, 'World Investment Report 2021', 131, available at https://unctad.org/system/files/official-document/wir2021_en.pdf, accessed on 8 July 2022.

[179] UNCTAD Investment Policy Hub 'Mapping of IIA clauses' available at https://investmentpolicy.unctad.org/pages/1031/mapping-of-iia-clauses, accessed on 8 July 2022;

State is a party is integral part of the guarantees afforded to them.[180] Arguably, this kind of arguments could extend the life (and perhaps the welcome) of umbrella clause claims. In the light of the above, it is reasonable to assume that umbrella clause claims will be a common happenstance in the near future regardless of a decline in popularity of the clause as a treaty feature. A debate on umbrella clause interpretation is, by consequence, a topic worth exploring from a practical standpoint.

The declining importance of the clause is nevertheless arguably transpiring in current decisions. This study, *inter alia*,[181] has underscored how tribunals have been avoidant around interpreting umbrella clauses. In the original study, 18 of the cases classified as inconsequential, were decided on 'other grounds' and an in-depth discussion of umbrella clause claims was deemed unnecessary.[182] In 1 instance,[183] the tribunal motivated its decision by arguing that deciding on the umbrella clause claim would not add further elements for determining compensation with respect to the treaty standards already examined. A decade later, the percentage of claims foregoing an in-depth discussion on umbrella clauses is considerably higher. This study found that out of the 65 instances classified as inconsequential, in 34 decisions tribunals reached their conclusions on 'other grounds'.[184] In 10 decisions the

[180] For decisions wherein this argument was introduced see Reinisch and Schreuer (n 55) 941-942, 967. For a critique of this practice please see, *inter alia*, Mara Valenti, 'The Scope of an Investment Treaty Dispute Resolution Clause: It is Not Just a Question of Interpretation' [2013] Arbitration International 243, 255-256. Valenti Mara, 'The Most Favoured Nation Clause in BITs as a Basis for Jurisdiction in Foreign Investor—Host State Arbitration' [2014] Arbitration International 447.
[181] Reinisch and Schreuer (n 180) 965-966.
[182] See footnote 11 of Chapter 2.
[183] *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* (ICSID Case No. ARB/05/15) (award and dissenting opinion) (1 June 2009) para 464.
[184] See footnote 66 of Chapter 2.

'other ground' was FET.[185] Expropriation alone appeared in just 1 instance.[186] Tribunals shied away from reasoned arguments on umbrella clause claims by averring that the analysis would not supplement their assessment of causation, liability or damages with any new element. This trend to summarily dispose of umbrella clause claims, especially when no additional compensation could be awarded even if a breach were to be proven, could be borne out of the persisting disagreements in the interpretation of the clause. Tribunals could reasonably be eager to skip on a contentious topic and funnel their efforts towards more established treaty standards.

The focus now shifts on the 4 interpretive concerns that are the subject-matter of this study. First of all, with regard to 'function' the original study was able to argue that a growing consensus had surfaced on this topic. The vast majority of tribunals expressing their view on the effect of an umbrella clause favoured the interpretation attributing to the clause an essentially jurisdictional function. It was also highlighted how other interpretations were relegated to early decisions.[187]

Over the last decade, after the original study was published, some of the patterns relating to function have been confirmed while others need to be updated. Out of the 13 decisions in which function was discussed no tribunal held that the umbrella clause was to be interpreted as an

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[185] *Hochtief AG v The Argentine Republic*, ICSID Case No. ARB/07/31 (Decision on Liability) (29 December 2014) paras 291. *AES Corporation and Tau Power B.V v Republic of Kazakhstan* (ICSID Case No. ARB/10/16) (Award) (1 November 2013) para 374. *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v Republic of Kazakhstan* (SCC Case No. 116/2010) (Award) (19 December 2013) paras 1314-1316. *Mohamed Abdel Raouf Bahgat v Arab Republic of Egypt* (PCA Case No. 2012-07) (PCA Case No. 2012-07) (Final Award) (23 December 2019) paras 264 and 288. *Murphy Exploration & Production Company International v Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434) (Partial Final Award) (6 May 2016) para 294. *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/13/36) (Award) (4 May 2017) paras 352-356. *NextEra Energy Global Holdings B.V and NextEra Energy Spain Holdings B.V v Kingdom of Spain* (ICSID Case No. ARB/14/11) (Decision on Jurisdiction, Liability and Quantum Principles) (12 March 2019) paras 601- 602. *SolEs Badajoz GmbH v Kingdom of Spain* (ICSID Case No. ARB/15/38) (Award) (31 July 2019) para 466. *STEAG GmbH v Kingdom of Spain,* ICSID Case No. ARB/15/4 (8 September 2020) (Decision on Jurisdiction, Liability and Principles of Quantum) paras 701-704. *Watkins Holdings S.à r.l. and others v Kingdom of Spain*, ICSID Case No. ARB/15/44 (21 January 2020) (Award) paras 629-630.

[186] *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v Arab Republic of Egypt* (ICSID Case No. ARB/12/11) (Decision on Liability and Heads of Loss) (21 February 2017) paras 187, 348. Arguably, although the tribunal did interpret the umbrella clause, in *Karkey v Pakistan* is was also stated the umbrella clause claim was made redundant because the same issue was being addressed as expropriation. See *Karkey v Pakistan (Award) (n 72)* para 398: '[T]he question of whether Lakhra's alleged breaches of the 2009 RSC are also capable of amounting to a breach of the Treaty is moot because the property rights which have been expropriated in this scenario (and Karkey's corresponding losses) are exactly the same: the Post-Termination Contract Rights'.

[187] Jude (n 7) 638.

aspirational statement. This interpretation has been deserted by tribunals, thereby confirming the findings of the original study.

Consensus around jurisdictional interpretation however failed to emerge as strongly as it did in the previous study. While this view appears to still be popular, other interpretations have gained a foothold. Four tribunals argued that the clause was only operational when the State exercised its sovereign powers, but not when it acted in a commercial capacity. In 4 other instances tribunals argued that umbrella clause violations are to be decided in accordance with international law. Lastly, in 5 decisions tribunals ruled that the purpose of umbrella clauses is essentially jurisdictional and it does not affect the law applicable to a dispute by internationalising it.

Additionally, some tribunals' remarks regarding the MFN clause's ability to import umbrella clauses from other treaties lead to believe that third camp interpretation is less popular than what this study has been able to capture. Some tribunals entered the ongoing debate concerning whether MFN clauses could import not only substantial standards of treatment, but also procedural advantages.[188] The repercussion of this debate on the standards of protection that can be imported through the MFN are largely irrelevant for this study. What is relevant, however, is that some tribunals averred that umbrella clauses amount to substantive standards of treatment, together with other standards such as full protection and security or fair and equitable treatment.[189] This interpretation appears to indirectly undermine the possibility that

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[188] James M Claxton, 'The Standard of Most-Favored-Nation Treatment in Investor-State Dispute Settlement Practice' in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore 2020) 288.

[189] Without pretending to provide an exhaustive list of cases, see Facundo Pérez-Aznar, 'The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements' [2017] Journal of International Economic Law 777, 782-786 and Simon Batifort and Heath J Benton, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: putting the brakes on multilateralization' [2017] The American Journal of International Law 873, 889-899. In *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23(5 February 2016) (Annulment Proceeding) paras 237–39: 'If German investors in Argentina have the benefit of a treaty provision requiring the Host State to honour commitments undertaken (or entered into) in relation to their investment, then they are being accorded a form of treatment which is not expressly granted to French investors by the Argentina-France BIT. That situation falls squarely within the terms of the MFN clause. Even if Argentina is right in arguing that MFN clauses should be subjected to an *ejusdem generis* limitation—as to which, it is unnecessary for the Committee to comment—the umbrella clause is part of the same genus of provisions on substantive protection of investments as the fair and equitable treatment clause and other similar provisions which feature in the Argentina-France BIT'; Similarly, in *Franck Charles Arif v Moldova (*ICSID Case No ARB/11/23 (8 April 2013) (Award)) the tribunal concurred that the French claimant could use the Moldova-France BIT's MFN clause to import the umbrella clause from Moldova's BITs with either the UK or the US. The tribunal at para 395 states: 'The tribunal agrees with the Claimant that "Umbrella Clauses" are substantive in nature. A breach

umbrella clauses could be interpreted either as an aspirational statement or as a fundamentally jurisdictional provision.

The original study's findings concerning 'jurisdictional precedence' have largely been confirmed by this study. In the original study, the majority of tribunals held that the jurisdiction of an international investment tribunal to hear umbrella clause claims was not affected by the presence of a contractual forum selection clause or a fork-in-the-road provision. The author in drafting its conclusions was however cautious of the fact that, although a minority, cases dismissed on jurisdictional or admissibility grounds were recent. This line of reasoning also found support in 2 of the 3 cases that had been examined after the cut-off date. The ultimate conclusion of the original study was therefore that it was incorrect to dismiss this line of jurisprudence as having disappeared, although coexistence of claims seemed to be the majoritarian view.[190]

This finding has been largely confirmed by this study. Although no tribunal held that its jurisdiction was precluded on jurisdictional grounds, 3 argued that the admissibility of the claim was affected by the contractual forum selection clause or the fork-in-the-road provision. Additionally, 1 tribunal acknowledged the debate but did not take a side in it, choosing instead to uphold its jurisdiction on the ground that not retaining the case would amount to denial of justice. In the great majority of cases, however, tribunals have decided that their jurisdiction was unaffected by the forum selection clause in the contract, or the fork-in-the-road provision of the treaty.

On the 'scope' of the clause the original study concluded that there was a general consensus around the fact that at least consensual obligations were included within the scope of protection of the umbrella clause.[191] This pattern is confirmed by this study. In all 28 of the cases analysed, tribunals held that at least contractual obligations fell under the 'protective umbrella of the treaty'. While in 10 of these decisions the tribunal did not go beyond consensual undertakings,

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of specific undertakings covered by an 'umbrella' clause will give rise to a substantive breach of the BIT. […]'. Moreover, in *Içkale v Turkmenistan* (*İçkale İnşaat Limited Şirketi v Turkmenistan*, ICSID Case No. ARB/10/24 (8 March 2016) (Award)) paras 328-330, the tribunal, despite arguing that the interpretation of the MFN clause according to its ordinary meaning could not be viewed as allowing for the importation of the umbrella clause standard, does not seem to contest the claimant's assertion that it is indeed a 'substantive standard. See also *Consutel v Algeria (Award) (n 73)* 354-359; Julien Chaisse (n 55) 4-5.

[190] Jude (n 7) 638-639.

[191] *Ibidem* 638.

in 16 cases it was argued that the wording of the clause was capacious enough to include unilateral commitments. In most decisions stretching the scope of the clause to unilateral undertakings the tribunal held that such commitments had to be specific to the investor or its investment.

Decisions arguing that only consensual obligations shall be included, as well as cases where a 'more capacious' interpretation of the terms 'any obligation' was preferred, both increased. Tribunals have been more unlikely to leave unsettled the question of whether non-contractual obligations fell within the scope of the umbrella clause. Further, decisions wherein tribunals afforded protection to unilateral, though often specific, commitments appear to have gained the lead.

On the issue of 'privity' and 'attribution' the original study found existing case laws to be evenly split. No clear pattern could be identified.[192] This study partially concurs with this finding.

From the perspective of attribution, tribunals were indeed evenly split. Some found that they could attribute the actions of sub-state entities or other independent entities to the State, either entirely or partially. Others, by contrast found that the action in question could not be attributed to the State.

Concerning privity, however, the results of this study differ from those of the original study. Cases wherein being privy to the relevant contractual commitment was no longer considered necessary significantly outweigh the number of tribunals that upheld this requirement.

In conclusion, umbrella clauses still appear to be an area wherein consensus is lacking, with the only possible exception of jurisdictional precedence. Concerning 'function' the consensus underscored in the original work seems to have dissipated.

Moving forward from this picture, but keeping in mind its findings for future use, this work is mainly concerned with 2 out of the 4 interpretive concerns mentioned herein, *viz* 'function' and 'jurisdictional precedence'. The remainder of this work mainly focuses on these two

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[192] *Ibidem*.

concerns and in particular on whether the interpretation of one concern, namely jurisdictional precedence, could be used to confirm the interpretation of function.

In order to achieve this objective, it is first necessary to narrow the focus of the enquiry to the two interpretations of function which appear as *prima facie* plausible according to the letter of the VCLT interpretation rules. The following chapter addresses this issue.

CHAPTER 3

FUNCTION: PRELIMINARY ANSWERS AND OPEN QUESTIONS

INTRODUCTION

The first chapter introduced the topic of umbrella clause interpretation, accounting for inconsistencies in relation to how the clause was interpreted, despite tribunals seemingly all adopting the same interpretive methodology. It likewise introduced a few assumptions that will not be questioned in the remainder of the thesis (e.g. the relative stability of the umbrella clause's wording for the purpose of determining 'function') and identified in the 'function' of the umbrella clause the main interpretive concern.

The last chapter's main purpose was first and foremost to provide clarity, to picture the current status of the dissensus around umbrella clause interpretation. In addition to photographing the state of the art on this debate, it also garnered useful data. The information collected in the study will be used to at various points of this thesis to underpin or, inversely, to challenge different arguments.

This chapter's main concern is with identifying the arguments and issues that will be carried forward into the next chapters and readying the reader for the second part of the thesis. To this end, chapter 3 is split in 2 parts.

The first part focalises on two of the four interpretive camps on the issue of the umbrella clause's function. It explains how the interpretation of the umbrella clause as an aspirational statement, as well as the distinction between *acta iure imprerii* and *iure gestionis*, are not respectful of the general rule on treaty interpretation. Beyond arguments grounded on the ordinary meaning of the words in their context, which is arguably not respected by proponents of the first two interpretive camps, it is explained how the 'far reaching consequences' evoked by certain tribunals to justify a restrictive view of the clause, have been vastly exaggerated. Additionally, there is no reliable test for distinguishing between *acta iure imperii* and *acta iure gestionis*. The arguments advanced by tribunals in favour of these interpretations will in turn be itemised and challenged.

The second part illustrates why the third and fourth interpretive camps appear, *ictu oculi*, not implausible. The ordinary meaning is, on the surface, respected. Nothing in the clause indicates what law shall apply to the violation of the umbrella clause standard. The problem of how much sovereignty States shall surrender is an issue of subjective comfort, while the historical argument, though useful, is not decisive.

IMPLAUSIBLE INTERPRETATIONS

COUNTERPOINT TO FIRST CAMP INTERPRETATION (ASPIRATIONAL STATEMENT)

ORDINARY MEANING AND CONTEXT

The starting point to challenge the reasoning of the *SGS v Pakistan* tribunal is the ordinary meaning of the words in their context.[1] This is justified both in reason of the primacy held by the ordinary meaning standard within the structure of the general rule on interpretation as well as by the path followed by the first SGS tribunal whose self-declared most prominent concern was identifying the ordinary meaning.[2] The methodology employed by the tribunal in identifying the ordinary meaning will be assessed before redirecting the focus on context.

Language variations are susceptible of affecting the interpretation of function, but the reasoning of this decision could arguably be ill-adapted to a more classically worded umbrella clause which is the primary concern herein. The Switzerland-Pakistan BIT requires the treaty parties to 'constantly guarantee the observance of the commitments.'[3] By contrast, more classically worded clauses, such as article X (2) of the Switzerland-Philippines treaty, state that the host State shall 'observe any obligation it has assumed with regard to investments'.[4] The *SGS v Pakistan* tribunal averred that '[t]he phrase "constantly [to] guarantee the observance" of some statutory, administrative or contractual commitment' did not necessarily create a 'new international law obligation on the part of the Contracting Party, where clearly there was none

[1] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) (6 August 2003) (Decision on Jurisdiction) para 164.
[2] *SGS v Pakistan (Decision on Jurisdiction) (n 1)* para 164.
[3] Article 11 of the Switzerland-Pakistan BIT (1995).
[4] Article X (2) of the Switzerland-Philippines (1997).

before.'[5] Despite the scepticism[6] surrounding the difference in wording as being the element responsible for the different interpretation of the clause, the *SGS v Philippines* tribunal noted the difference in language between the umbrella clause in the Switzerland-Pakistan treaty and the Switzerland-Philippines BIT:

> […] It should be noted that the "umbrella clause" in the Swiss- Pakistan BIT was formulated in different and rather vaguer terms than Article X(2) of the Swiss-Philippines BIT. Article 11 of the Swiss-Pakistan BIT provides that:
>
> "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."
>
> Apart from the phrase "shall constantly guarantee" (what could an inconstant guarantee amount to?), the phrase "the commitments it has entered into with respect to the investments" is likewise less clear and categorical than the phrase "any obligation it has assumed with regard to specific investments in its territory" in Article X(2) of the Swiss-Philippines BIT.[7]

The interpretation of the clause as an aspirational statement in *SGS v Pakistan* could be attributed to the vagueness of the wording 'constantly guaranteed the observance' as well as to the fact that no specific commitment *via-à-vis* the investor or its investment was singled out.[8] The absence of constraining language in these two propositions lessens the effect of the auxiliary verb 'shall', ordinarily indicative of a strong obligation.

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[5] *SGS v Pakistan (Decision on Jurisdiction) (n 1)* para 166.

[6] See for instance, August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (CUP 2020) 868: 'Nevertheless, it seems that independent of the specific differences in wording, there is a deep divergence in views as to the precise effect of the underlying concept of an umbrella clause […] The following overview shows textual variations found in IIA practice.'; James Crawford, 'Treaty and contract in investment arbitration' [2008] Arbitration International 351, 353; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC v Republic of Paraguay* (ICSID Case No. ARB/07/9) (29 May 2009) (Decision on Jurisdiction) para 138.

[7] *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (ICSID Case No. ARB/02/6) (29 January 2004) (Decision on Jurisdiction) para 119.

[8] Carlo De Stefano, *Attribution in International law and Arbitration* (OUP 2020) 125.

As explained by the *SGS v Philippines* tribunal, however, this interpretation would be harder to justify when more peremptory expressions such as 'shall observe any obligation,[9] are employed. This terminology places a direct obligation on State parties to fulfil commitments specifically undertaken with a foreign investor or in relation to an investment.

More relevant to a critique of the decision in *SGS v Pakistan* is the methodology employed in the assessment of the ordinary meaning which arguably is irrespective of the guidelines of the VCLT. The first SGS tribunal advocates for something beyond the simple analysis of the ordinary meaning to be attributed to the word in their context. It mentions that the 'consequences' of interpreting the clause as suggested by SGS would be so 'far reaching in their scope', 'automatic, unqualified and sweeping in their operation', as well as 'burdensome in their potential impact' so as to require clear, convincing and persuasive evidence as to the 'shared intent of the parties in that respect'.[10]

Authors have criticised the tribunal's focus on 'clear and convincing evidence' as effectively voiding the umbrella clause of content, contrary to both the principle of *effet utile* and to the drafters' apparent intentions.[11] The tribunal arguably departs from the standards of the VCLT on the attribution of ordinary meaning to the words. 'Supplementary means of interpretation' pursuant to article 32 of the VCLT allow for such departure in order to confirm or, under certain circumstances, determine the ordinary meaning as it had emerged pursuant to the general rule. Interpreters can utilise to this effect preparatory work, circumstances surrounding the conclusion of the treaty as well as other unspecified supplementary means. The *SGS v Pakistan* tribunal, however, held that the absence of supplementary interpretive means, *viz* the absence of clear, convincing and persuasive evidence, could amend the ordinary meaning. Arguably, this contradicts the letter and the spirit of the rules on interpretation under the VCLT, largely reflective of customary international law.

As a further criterion to determine the ordinary meaning of the clause, the tribunal recalled the concept of '*in dubio mitius*' or '*in dubio pars mitior est sequenda*'.[12] According to the *in dubio mitius* principle, also referred to as the principle of restrictive interpretation, treaties shall be

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[9] Philippines - Switzerland BIT (1997), article X(2).
[10] *SGS v Pakistan (Decision on Jurisdiction) (n 1)* para 167.
[11] Jean Ho, *State responsibility for breaches of investment contracts* (CUP 2018) 201.
[12] *SGS v Pakistan (Decision on Jurisdiction) (n 1)* para 171.

interpreted in favour of State sovereignty. When treaty provisions are open to more than one interpretation, the view placing the smaller obligation on sovereign States shall be preferred, and when an obligation is not conveyed clearly, its less onerous extent shall be selected.[13]

The applicability of this principle, both in general, as well as in the specific instance of umbrella clause interpretation, is doubtful. These paragraphs address the general applicability of the principle. The VCLT criteria on treaty interpretation are not exclusive. Drawing from other principles is therefore possible insofar as those principles are compatible with the general rule under article 31.[14] It is therefore left to the discretion of interpreters whether to employ customary interpretation rules or other treaty interpretation material which preceded the Convention.[15] Earlier international decisions seemed to be open to the *in dubio mitius* principle.[16] Even then, however, the court recognised that this principle would have to be used as a last resort[17] and should not foster an interpretation which would be 'contrary to the plain terms of the article and destroy what has been clearly granted'.[18]

Later decisions applied this principle restrictively and as a subsidiary means of interpretation. For instance, in the *River Older* case, the PCIJ ruled that the principle would only be applicable when, regardless 'all pertinent considerations, the intention of the Parties still remains doubtful.' Only then the interpretation which is most favourable to the freedom of States shall be adopted.[19] In a more recent decision the ICJ held that a treaty provision whose purpose is the limitation of the sovereignty of a State shall be interpreted no differently than any other treaty provision, 'i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.'[20] Thus, the maxim *in dubio*

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[13] Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: a Commentary* (2nd edn, Springer 2018) 577.
[14] *Ibidem* 577.
[15] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 57.
[16] *Case concerning the steamboat ''Wimbledon'' (Britain et al v Germany)* [1923] PCIJ Series A01, 24; *Case concerning Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* [1932] PCIJ Ser A/B No 46, 167; Dörr and Schmalenbach (n 13) 577.
[17] Eric De Brabandere and Isabelle Van Damme, 'Good Faith in Treaty Interpretation' in Andrew D Mitchell, M Sornarajah, and Tania Voon (eds), *Good Faith and International Economic Law* (OUP 2015) 46.
[18] *Case concerning the steamboat ''Wimbledon'' (Britain et al v Germany)* [1923] PCIJ Series A01, 24-25.
[19] *Case concerning Territorial Jurisdiction of the International Commission of the River Oder (United Kingdon v Poland)* [1929] PCIJ Ser A No 23, 26;
[20] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, para 48.

mitius does not constitute a principle of treaty interpretation[21] and its contemporary significance is disputed.[22]

This view appears to be confirmed in the most recent Appellate Body decisions at WTO level. In the *EC-Hormones* case the Appellate Body in order to interpret the member's obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures held that the in *dubio mitius* principle was widely recognised in international law as a supplementary interpretive mean.[23] The Appellate Body's reasoning did not rely on this principle as a last resort, not following the rut dug by the PCIJ in this respect. After the text, object and purpose of article 3.1 of the DSU had been examined, the Appellate Body focused on the *in dubio mitius* principle without inquiring into subsequent practice and agreements or other supplementary means of interpretation.[24]

This approach was not confirmed in later decisions. Parties' submissions relying on this principle have not been followed by the Appellate Body.[25] Furthermore, the Appellate Body in recent decisions does cast doubts on the relevance of the *in dubio mitius* principle to WTO dispute settlement whilst affirming that, even if applicable, its usefulness is confined to instances where the meaning remains 'inconclusive or ambiguous after its analysis under Articles 31 and 32 of the *Vienna Convention*.'[26]

Having examined the question of the general applicability, or even of the existence, of this principle in contemporary international law, time has come to turn to its usefulness in justifying the interpretation of the umbrella clause elaborated by the first SGS tribunal. The ICJ appears

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[21] Dörr and Schmalenbach (n 13) 578.

[22] *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* [2005] PCA 27 RIAA 35, para 53: '[I]t has also been noted in the literature that a too rigorous application of the principle of restrictive interpretation might be inconsistent with the primary purpose of the treaty […]. Restrictive interpretation thus has particularly little role to play in certain categories of treaties – such as, for example, human rights treaties. Indeed, some authors note that the principle has not been relied upon in any recent jurisprudence of international courts and tribunals and that its contemporary relevance is to be doubted.' *Federal Reserve Bank of New York v Iran*, *Bank Markazi* IUSCT Case A28 [2000] 36 Reports 5, paras 67-68. See also Thomas W Wälde, 'Interpreting Investment Treaties: experiences and examples', in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 733-735.

[23] *Report of the WTO Appellate Body, EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Docs WT/DS26/AB/R, WT/DS48/AB/R (13 February 1998) para 165, footnote 154.

[24] De Brabandere and Van Damme (n 17) 47.

[25] *Ibidem*.

[26] *Report of the Appellate Body, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/ AB/R (19 January 2010) para 411.

to have denied the existence of the *in dubio mitius* principle while the WTO Appellate Body scaled back its importance. However, even admitting that this principle has a place in treaty interpretation, its position would be subordinated to the general rule under article 31 as well as to the supplementary means of treaty interpretation under article 32.[27]

It is doubtful whether the *SGS v Pakistan* tribunal clears this threshold. Article 32 requires the application of supplementary interpretive means. The tribunal in this case held that the absence of those means, *viz* of clear and convincing evidence confirming the apparent meaning of the words,[28] was enough to reject the meaning suggested by the claimant. In the light of these considerations, even if the *in dubio mitius* principle was relevant, it cannot by itself replace or bypass principles of customary international law enshrined in the VCLT.

As an additional point, the *SGS v Pakistan* tribunal spells out the importance of context in the interpretation of the clause. As mentioned in the first chapter, context in umbrella clause interpretation is often synonymous to the location of the clause within the treaty structure.[29] In the pioneer umbrella clause decision it was argued that in reason of being placed in a section of the treaty which dealt with procedural treaty standards, the clause could not be interpreted as a substantive 'first order' treaty provision.[30]

Even admitting that the clause's positioning lends itself to this interpretation of context, these circumstances have not reproduced themselves in a substantial portion of treaties and are therefore difficult to generalise.[31] For instance, in the article 10(1) of the Energy Charter Treaty ('ECT'), pursuant to which many umbrella clause investment claims have been initiated, both FET and umbrella clause standards are placed in the same section.[32] Similarly, in the 1991

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[27] *Case concerning Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom v Poland)* [1929] PCIJ Ser A No 23, 26.
[28] *SGS v Pakistan (Decision on Jurisdiction) (n 1)* para 167.
[29] *Ibidem* para 169.
[30] *Ibidem* para 170.
[31] Christoph Schreuer, 'Travelling the BIT Route: of waiting periods umbrella clauses and forks in the road' [2004] The Journal of World Investment & Trade 231, 253.
[32] ECT, article 10 (1): 'Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.'

Argentina-US BIT, the umbrella clause is enshrined in article 2, which in different sections also hosts clauses for non-discriminatory treatment, FET as well as full protection and security.

THE FAR-REACHING CONSEQUENCES

The reasoning in *SGS v Pakistan* exudes the outstanding preoccupation of the tribunal over the far-reaching consequences that would materialise if the interpretation proposed by the investor, *viz* full internationalisation, was to be accepted.[33] These consequences, in the words of the first SGS tribunal, would alter the balance of benefits in the interrelation between different agreements and legal systems. Benefits would indeed flow exclusively to the investor.[34] The tribunal spelled out the main consequences of adopting the interpretation proposed by the claimant:

> '[…] Firstly, Article 11 would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments to an investor of the other Contracting Party. […] Secondly, the Claimant's view of Article 11 tends to make Articles 3 to 7 of the BIT substantially 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. A third consequence would be that an investor may, at will, nullify any freely negotiated dispute settlement clause in a State contract. […] [The] investor could always defeat the State's invocation of the contractually specified forum, and render any mutually agreed procedure of dispute settlement, other than BIT-specified ICSID arbitration, a dead-letter, at the investor's choice. […][35]

Each of the three concerns expressed in the *SGS v Pakistan* decision will in turn be examined below.

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[33] *SGS v Pakistan (Decision on Jurisdiction) (n 1)* paras 167-168.
[34] *Ibidem* paras 169.
[35] *Ibidem* para 168.

THE UMBRELLA CLAUSE REPLACING OTHER TREATY STANDARDS: AN EXAMPLE FROM FET

The observation of some commentators that substantive obligations in BITs cover issues such as non-discrimination, national treatment or free transfer of payment which are not, generally speaking, the subject-matter of a contract,[36] has received some empirical validation. This section shows that the umbrella clause, regardless of whether it is interpreted expansively, would not be able to capture all claims brought under other substantive treaty violations.

A choice has been made to focus on FET. This choice was dictated by the near ubiquitous presence of FET[37] in investment treaties, making decisions on the interchangeability with umbrella clause claims easier to access. Furthermore, this argument by the *SGS v Pakistan* tribunal was incorporated in the *El Paso Energy* decision on jurisdiction, which averred that the treaty could be streamlined into an umbrella clause and a dispute settlement mechanism, to the detriment of substantive provisions such as, *inter alia*, the FET.[38] This section will demonstrate that, although their grounds could occasionally overlap, the two claims are based on different standards.

If an umbrella clause was to replace seemingly all other investment standards, its reach would have to be wider, or at least as wide, in scope as the standards that is meant to replace. Yet, thus far the evidence flows into the opposite direction. Tribunals, after examining other treaty standards, mostly FET, often held that umbrella clause issues would not add anything meaningful to the assessment of the investor's claims. This would suggest that the alleged violations introduced under the heading 'umbrella clause claims' could to some extent be covered under other standards. At chapter 2 it was highlighted how many umbrella clause claims are dismissed without an in-depth discussion of the merits. It is relatively common for

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[36] Schreuer (n 31) 253.

[37] Elodie Dulac and Jia Lin Hoe 'Substantive Protections: Fairness' [14 January 2022] available at https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/substantive-protections-fairness, accessed on 29 July 2022; Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2016) 145. The author underscored how in 2014, the FET provision was missing in only 50 out of a total of 1,964 BITs. FET was also the most frequently breached standard. See Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 8.96.

[38] *El Paso Energy International Company v The Argentine Republic* (ICSID Case No. ARB/03/15) (27 April 2006) (Decision on Jurisdiction) para 76. Johnatan B Potts, 'Stabilizing the role of umbrella clauses in bilateral investment treaties: intent, reliance, and internationalization' [2011] Virginia Journal of International Law 1005, 1017.

tribunals to justify their choice by arguing that the decision was reached on different grounds and a detailed analysis of the merits was therefore unwarranted, especially when unlikely to offer the investor further grounds for compensation. Out of the 65 instances singled out in the study conducted at chapter 2 wherein no in-depth discussion of umbrella clause claims was undertaken, in 34 decisions tribunals reached their conclusions on other grounds.[39] In 10 decisions the 'other ground' was FET.[40] This is exemplified by *Hochtief v Argentine*:[41]

> […] [E]specially because the terms of the protections accorded under Articles 2, 3 and 4 of the BIT appear to overlap. The claims concerning Full Protection and Security [BIT Articles 2(1) and 4(1)], the claims concerning expropriation [BIT Article 4(2)], the claims concerning arbitrary or discriminatory measures, and the claims concerning the 'observance of obligations' or 'umbrella clause', are all based on essentially the same facts and same arguments as the claims based upon the FET standard. It is not argued that these other standards entail a different approach to causation or to determination of quantum, or to liability for a different range of losses; […]

If tribunals are able to forego reasoned arguments on treaty standards by claiming that the analysis would not bring any new element for assessing causation, liability or damages, and that the claims are essentially borne out of identical facts and arguments, it is reasonable to assume that the two standards share some connective tissue. A trend had emerged to dismiss umbrella clause claims on the ground that they could not add further grounds for compensation

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[39] See chapter 2 at footnote 66.

[40] *Hochtief AG v The Argentine Republic*, ICSID Case No. ARB/07/31 (Decision on Liability) (29 December 2014) paras 291; *AES Corporation and Tau Power B.V v Republic of Kazakhstan* (ICSID Case No. ARB/10/16) (Award) (1 November 2013) para 374; *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v Republic of Kazakhstan* (SCC Case No. 116/2010) (Award) (19 December 2013) paras 1314-1316; *Mohamed Abdel Raouf Bahgat v Arab Republic of Egypt* (PCA Case No. 2012-07) (PCA Case No. 2012-07) (Final Award) (23 December 2019) paras 264 and 288; *Murphy Exploration & Production Company International v Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434) (Partial Final Award) (6 May 2016) para 294; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/13/36) (Award) (4 May 2017) paras 352-356; *NextEra Energy Global Holdings B.V and NextEra Energy Spain Holdings B.V v Kingdom of Spain* (ICSID Case No. ARB/14/11) (Decision on Jurisdiction, Liability and Quantum Principles) (12 March 2019) paras 601- 602; *SolEs Badajoz GmbH v Kingdom of Spain* (ICSID Case No. ARB/15/38) (Award) (31 July 2019) para 466; *STEAG GmbH v Kingdom of Spain,* ICSID Case No. ARB/15/4 (8 September 2020) (Decision on Jurisdiction, Liability and Principles of Quantum) paras 701-704; *Watkins Holdings S.à r.l. and others v Kingdom of Spain*, ICSID Case No. ARB/15/44 (21 January 2020) (Award) paras 629-630. Expropriation appeared in just 1 decision. *See Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v Arab Republic of Egypt* (ICSID Case No. ARB/12/11) (Decision on Liability and Heads of Loss) (21 February 2017) paras 187, 348.

[41] *Hochtief v Argentina (Decision on Liability) (n 40)* para 291, footnotes omitted.

even if a breach was found. By contrast, no trend could be highlighted of tribunals foregoing the analysis of other treaty standards because they would not bring anything substantial to the conclusions already reached analysing the umbrella clause. Therefore, at best, there is an argument to be made that umbrella clause claims have been to some extent replaced by other treaty standards. The opposite argument, however, has little empirical evidence underpinning it.

Secondly, certain conditions have to be met in order for umbrella clause claims and FET claims to be interchangeable. They can be based on different grounds and, in that scenario, it is difficult to see how one could replace the other. A contractual violation does not *ipso facto* amount to a denial of FET.[42] One of the limbs that make up the FET standards, e.g. non-arbitrariness or due process, has to be violated in order for a breach of contract to violate the investment receiving State's BIT obligation to provide FET. This concern is not reproduced in case of alleged umbrella clause violations. In this latter instance, 'a breach of contract in and of itself is sufficient to activate protection under an umbrella clause.'[43] For example, in *SGS v the Philippines*, where it was held that umbrella clauses enabled investment treaty tribunals to assess a contractual violation by applying the law of the contract, protection was engaged upon a breach of contract. The manner of the breach was immaterial.[44] Similarly, in *Joy Mining v Egypt* the tribunal, which championed the distinctions between *acta iure imperii* and *iure gestionis*, adjudicated that a violation of a contract carried out in a sovereign capacity by the host State breached the umbrella clause.[45]

Thirdly, the interchangeability of FET and umbrella clause standards rests upon the assumption that investment contracts indisputably create protected expectations for the investor which in turn constitute an independent ground for denial of FET. This reasoning is built on the premise that a contractual violation by the host State triggers the umbrella clause protection while, at the same time, the same contractual violation frustrates the investor's expectations thereby activating FET protection.

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[42] Christoph Schreuer, 'Fair and Equitable Treatment (FET): interaction with other standards' [2007] Transnational Dispute Management 18, 20.
[43] Jean Ho (n 11) 260.
[44] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 7)* para 128.
[45] *Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No. ARB/03/11) (6 August 2004) (Award on Jurisdiction) paras 72, 75, 79 and 81. Jean Ho (n 11) 260- 261.

The view that all contractual commitments by a State qualify as expectations eligible for FET protection can nevertheless be challenged.[46] Indeed, while the preservation of investor's expectations is arguably the crux of the FET standard,[47] a limited number of contract-based expectations qualify as 'protected expectations.'[48] Specific undertakings which convinced the investor to invest meet this threshold. Whilst investor expectations are an element of the FET standard, they do not feature in discussions on umbrella clause protection. Whichever of the four interpretations identified herein one prefers, frustration of investors' protected expectations is not a requirement for umbrella clause protection.[49]

Lastly, the FET standard is concerned with actions or inactions of the host State which infringe upon the right of the investor to be treated in a certain manner and do not necessarily involve contractual, unilateral or otherwise specific promises undertaken *vis-à-vis* the investor. For instance, FET has been interpreted as requiring, *inter alia*, the host State to provide the investor with a fair and efficient judicial system for the adjudication of its disputes. Certain types of serious procedural shortcomings amounting to denial of justice can violate the FET standard. Lack of proper notification, failure to hear the investor, refusal to entertain a suit, undue delays, or inadequate administration of justice are material factors that can constitute a FET breach.[50] Governmental decision-making could likewise violate the FET standard. 'The use of power for improper purposes as well as coercion and harassment by State officials are self-evident and severe violations of the FET standard […]'.[51] Lastly, legislative acts may be scrutinised under the FET. The acts or omissions making up a FET violation may or may not involve a contractual violation, or else the violation of a specific commitment undertaken by the investment receiving State and protected under the umbrella clause.

Tribunals deciding on umbrella clause violation apply different criteria. Even when they recognise that the umbrella clause 'covers obligations of any nature, regardless of their source',

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[46] Christoph Schreuer, 'Fair & Equitable Treatment' [2005] Transnational Dispute Management 63, 93. Jean Ho (n 11) 261.

[47]Schreuer (n 42) 17: 'It is widely accepted that the most important function of the FET standard is the protection of the investor's legitimate expectations through the creation of a transparent and stable legal framework. See for instance *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (29 May 2003) (Award) para 154.

[48] Jean Ho (n 11) 261.

[49] *Ibidem* 261.

[50] Nicolas Angelet 'Fair and Equitable Treatment' [2011] Max Planck Encyclopedias of International Law, para 17.

[51] *Ibidem* para 20-21.

they often qualify that statement by adding that 'they still need to be '"obligations" entered into with a particular investor with regard to his or her investment.'[52] The FET embraces acts and omissions that go beyond the type of breach that can be captured under the umbrella clause. For instance, the tribunal in *PSEG Global v Turkey*[53] held that FET protects investors from violations that would escape the scope of the umbrella clause standard:

> A number of recent awards have extensively discussed the meaning of the "umbrella clause" and there is no point for this Tribunal to go over this discussion again. […] [I]t suffices to note that there are different views about whether a contract breach can be transformed into a treaty breach or should be handled differently […]. As the Tribunal has not found a specific breach of obligations under the Contract, the issue does not arise in this case. Questions concerning the interference arising from the exercise of sovereign powers of the State have been discussed above in connection with the breach of fair and equitable treatment and are, in the light of the facts of this case, independent from contract rights.

STATE RESPONSIBILITY ENGAGED FOR A BREACH OF A REGULATORY OR MUNICIPAL STATUTE

The argument advanced in the *SGS v Pakistan* decision that every breach of a statute or regulation would entail the responsibility of the State if the umbrella clause were to be interpreted expansively has been debunked in subsequent umbrella clause decisions. Specificity of the commitment towards the investor or, at the very least, its investment is the common denominator to decisions which have recognised that unilateral commitments could find protection under the umbrella clause.

Tribunals have not consistently recognised that non-contractual obligations could be shielded under the umbrella clause. Furthermore, even when admitting that unilateral legislative or statutory commitments could be protected under the umbrella, tribunals have displayed some caution to include only commitments which are specific to the investor or its investment.

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[52] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* (*Micula v Romania*), ICSID Case No. ARB/05/20 (Award) (11 December 2013) para 415.

[53] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v Republic of Turkey* (ICSID Case No. ARB/02/5) (Award) (19 January 2007) para. 271.

Looking at the data from the study conducted at chapter 2, in the 28 cases wherein tribunals expressed a view on the scope of umbrella clauses three categories emerged. Two are relevant for present purposes. Firstly, in many of the cases gathered, tribunals adjudicated that only consensual obligations could be protected under the umbrella clause. This interpretation was adopted in 10 cases. Secondly, tribunals held that the scope of umbrella clause extended to 'any' commitment undertaken by the host State in relation to an investment. This approach was adopted in 16 decisions. It is nevertheless crucial to underscore that in this second category tribunals which have accepted the argument that statutory or otherwise legislative commitments could be afforded protection under the clause have imposed non-negligible restrictions on that statement. For instance, in *Greentech Energy v Italy*[54]the tribunal stated that the term 'obligations' was broad enough to include certain legislative and regulatory commitments so long as they are specifically directed towards a specific investor or its investment:

> '[…] [T]he Tribunal majority is inclined to interpret "obligations" referred to in the ECT's umbrella clause as sufficiently broad to encompass not only contractual duties but also certain legislative and regulatory instruments that are specific enough to qualify as commitments to identifiable investments or investors.'[55]

Another decision wherein the broader scope of obligations protected under the umbrella clause has been recognised is *Belenergia v Italy*. The tribunal nevertheless imposed similar restrictions to the decision in *Greentech Energy v Italy*: regulations addressed to foreign and internal investors alike could not, according to the tribunal, create protected obligations because of their general character.[56] The tribunal nevertheless appears to recognise that not only commitments 'entered into' with the investor are protected under the umbrella, but also

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[54] *Greentech Energy Systems A/S, et al v Italian Republic* (*Greentech Energy v Italy)*, SCC Case No. V 2015/095 (23 December 2018) (Final Award).

[55] *Ibidem* para 464. The tribunal also averred that the 'cumulative effect' of the various provisions gave them the specificity required. See also paragraph 466: ''The Tribunal majority instead finds that, taken as a whole, the Conto Energia decrees, the GSE letters, and the GSE Agreements, amounted to obligations "entered into with" specific PV operators. Those obligations were sufficiently specific, setting forth specific tariff rates for a fixed duration of twenty years. Accordingly, whether any of the Conto Energia decrees, GSE letters, or GSE Agreements would, in isolation, be covered by the ECT's umbrella clause is not the relevant question here, given that each of Claimants' investments received benefits pursuant to all three types of "obligations"'.

[56] *Belenergia S.A. v Italian Republic* (ICSID Case No. ARB/15/40) (Award) (6 August 2019) para 617-618.

those specifically addressed at the investor, *viz* unilateral commitments and specific legislative commitments.[57]

Tribunals have not overhauled their reasoning in recent cases law. In *Novenergia II v Spain*[58] the tribunal held that in order for the umbrella clause to be applicable it would require the host State to either conclude 'with the investor a specific contract' or make 'to the investor a specific personal promise.' In *Eskosol v Italy*,[59] *inter alia*,[60] the tribunal similarly placed the accent on the notion of a specific commitment or interaction with the investor:

> '[…][T]he Tribunal does not rule out […] that in rare cases a State might be shown to have entered into obligations *indirectly* with a given investor, for example by making a binding commitment to a narrow and targeted class of investors in which that investor is known to fall. Even so, such obligations would be expected to be documented in some form other than through laws of general applicability.'[61]

OI European Group v Venezuela is the only case identified in this study where specificity was not required. '[…] [T]he terms "any obligation" include obligations entered into by law. Consequently, Venezuela has accepted the commitment to fulfil all of the legal obligations established in the Venezuelan legal system.'[62] This case, however, seemingly being alone at holding this view is no valid argument to validate the apprehensions of the first SGS tribunal.

NULLIFICATION OF THE NEGOTIATED FORUM SELECTION CLAUSE IN THE CONTRACT

This point is more problematic and it will be extensively discussed in later chapters. Here it suffices to explain that the study conducted at chapter 2 shows how tribunals, regardless how expansive or restrictive their interpretation of function, have shown a consolidated trend to

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[57] *Ibidem* paras 615-617.
[58] *Novenergia II - Energy & Environment (SCA), SICAR v Kingdom of Spain* (SCC Case No. 063/2015) (Final Arbitral Award) (15 February 2018) para 715.
[59] *Eskosol S.p.A. in liquidazione v Italian Republic* (ICSID Case No. ARB/15/50) (Award) (4 September 2020).
[60] *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italian Republic* (ICSID Case No. ARB/16/5) (Award) (14 September 2020) paras 754, 755, 758, 792. The tribunal required some degree of specificity, *viz* for the promissor and promise to be identified or identifiable, but it did include specific unilateral and regulatory commitments within the perimeter of protection of the clause.
[61] *Eskosol v Italy (Award) (n 59)* para 462.
[62] *OI European Group B.V v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25) (Award) (10 March 2015) para 589.

accept parallel proceedings.[63] This approach is challenged in the remainder of this thesis, where it is argued that only full internationalisation would allow for parallel proceedings.

OPERATIONAL WHEN THE STATE EXERCISES SOVEREIGN POWERS

MOTIVATIONS

The inconsistencies of interpreting umbrella clauses as a mere aspirational statement have been sufficiently discussed. Furthermore, tribunals and commentators have tended to distance themselves from this interpretation, to the point that no other decisions could be unearthed in support of this line of reasoning. At this point the focus of this work should pivot to the interpretive camp which has recognised umbrella clauses as operational only when the host State exercised sovereign powers.

This line of reasoning is still being followed by certain tribunals to this day. In 6 of the cases reviewed in the original study,[64] to which shall be added the 4 instances[65] identified in the study conducted at Chapter 2, tribunals held that the clause was only operational when the State exercised its sovereign powers, but not when it acted in a commercial capacity. For example, in *Supervision v Costa Rica* the tribunal argues that not all contractual breaches would constitute a treaty violation:

> 'It is important to specify that not any contractual breach by the State signatory to an Investment Treaty that contains an umbrella clause can be alleged as a direct violation of the Treaty. In *El Paso Energy v Argentina* the Tribunal stated that an umbrella clause cannot transform any contractual claim into a claim under the treaty, and held that the

[63] See Chapter 2 'Jurisdictional Precedence'.

[64] *Joy Mining Machinery v Egypt (Award on Jurisdiction)* (n 45) paras 72-82; *El Paso v Argentina (Decision on Jurisdiction) (n 38)* paras 79-85; *Pan American v Argentine Republic* (ICSID Case No. ARB/03/13) (27 July 2006) (Decision on Preliminary Objections) para 112; *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16) (28 September 2007) (Award) para 310; *Malicorp v Arab Republic of Egypt* (ICSID Case No. ARB/08/18) (7 February 2011) (Award) para 126; *CMS v Argentine Republic* (ICSID Case No. ARB/01/8) (12 May 2005) (Award), para 299, later partially annulled, including the part mentioned herein, for failure to state reasons.

[65] *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentine Republic (Mobil v Argentina)*, ICSID Case No. ARB/04/16 (10 April 2013) (Decision on Jurisdiction and Liability) paras 1011-1012; *Supervision y Control S.A. v Republic of Costa Rica*, ICSID Case No. ARB/12/4 (18 January 2017) (Award) para 282; *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 (22 August 2017) (Award) para 401; *Consutel Group SpA in liquidazione v People's Democratic Republic of Algeria*, PCA No 2017-33, Award (3 February 2020) para 321.

> clause would only be applicable if in the specific case the State acts as sovereign entity not as a private party […] [66]

Unlike in the *SGS v Pakistan* decision where the interpretation selected therein was the subject-matter of a lengthy and detailed motivation, tribunals opting for this interpretation of the umbrella clause are, generally, more stingy when stating their reasons.[67]

Common arguments tying together decisions are nonetheless present. First of all, tribunals draw a distinction between commercial aspects of a dispute and aspects involving forms of State, or sovereign, interference. In an excerpt later quoted in the *El Paso* decision,[68] the *Joy Mining* tribunal adjudicated that a 'basic general distinction' could be drawn 'between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the contract involved.'[69]

As an additional common ground, some tribunals held that in order for a contractual violation to constitute a protected breach, a treaty standard other than the umbrella clause, such as MFN or FET, had to be violated. The *Joy Mining* tribunal, *inter alia*,[70] expressed the view that the contractual nature of the transaction could not be altered through the involvement of a government agency.[71] The jurisdiction of a treaty-based tribunal requires a specific violation of treaty rights.[72] The non-release of a bank guarantee could not, in the eyes of the tribunal, amount to a violation of treaty standards such as FET, full protection and security or expropriation.[73] The tribunal concluded that 'an umbrella clause inserted in the Treaty, and not

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[66] *Supervision y Control v Costa Rica (Award) (n 65)* para 282.

[67] For instance, in *Karkey Karadeniz v Pakistan (Award)* (n 65) para 401, the tribunal laconically avers that commercial breaches are not covered under the clause: '[…] [E]ven if the Tribunal finds that Lakhra's alleged breaches of the 2009 RSC are attributable to Pakistan (whether under domestic or international law), simple commercial breaches are not within the protection offered by an umbrella clause.'

[68] *El Paso v Argentina (Decision on Jurisdiction) (n 38)* para 79.

[69] *Joy Mining Machinery v Egypt (Award on Jurisdiction)* (n 45) para 72.

[70] *El Paso v Argentina (Decision on Jurisdiction) (n 38)* paras 84-85. The *Pan American* tribunal presented this argument in particularly explicit terms. See *Pan American v Argentina (Decision on Preliminary Objections) (n 64)* para 112: '[…] [I]n the Tribunal's view, it is especially clear that the umbrella clause does not extend its jurisdiction over any contract claims when such claims do not rely on a violation of the standards of protection of the BIT, national treatment, MNF clause, fair and equitable treatment, full protection and security, protection against arbitrary and discriminatory measures, protection against expropriation or nationalisation either directly or indirectly, unless some requirements are respected.[…]'. *Sempra Energy v Argentina (Award) (n 64)* para 309; *CMS v Argentina (Award) (n 64)* para 299; *Consutel v Algeria (Award) (n 65)* paras 322-324.

[71] *Joy Mining Machinery v Egypt (Award on Jurisdiction)* (n 45) para 79.

[72] *Ibidem* para 75.

[73] *Ibidem* para 78.

very prominently,' could transform 'all contract disputes into investment disputes under the Treaty'. The exception to this proposition would be 'a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case.'[74]

As a further argument, some decisions reflect the concern already expressed in *SGS v Pakistan*[75] that the scope of the clause would be subject to almost indefinite expansion. The *El Paso* tribunal made this evident from the outset by stressing its discomfort with the argument that all contractual, and potentially non-contractual, commitments would be afforded protection under the clause:

> [T]he question for the Tribunal is whether […] an umbrella clause […] would […] transform *all* contractual undertakings into international law obligations and, accordingly, to turn breaches of *the slightest such obligations* by the Respondent into breaches of the BIT.[76]
>
> […]
>
> [I]f one considers that it elevates contract claims to the status of treaty claims, it should result as an unavoidable consequence that all claims based on any commitment in legislative or administrative or other unilateral acts of the State or one of its entities or subdivisions are to be considered as treaty claims.[77]

An additional point of contact with the *SGS v Pakistan* decision is the claim that the all other treaty standards would be rendered superfluous if a violation of 'any' commitment were to also to constitute a treaty breach. This view was portrayed, *inter alia*, in the *El Paso*[78] case law:

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[74] *Ibidem* para 81.

[75] *El Paso v Argentina (Decision on Jurisdiction) (n 38)* para 71. The tribunal refers to the arguments advanced in the SGS v Pakistan decision on this subject as 'more than conclusive'.

[76] *El Paso v Argentina (Decision on Jurisdiction) (n 38)* para 67. See also *Pan American* tribunal presented this argument in particularly explicit terms. See *Pan American v Argentina (Decision on Preliminary Objections) (n 64)* para 96.

[77] *El Paso v Argentina (Decision on Jurisdiction) (n 38)* paras 71, 77. See also *Pan American* tribunal presented this argument in particularly explicit terms. See *Pan American v Argentina (Decision on Preliminary Objections) (n 64)* para 101.

[78] *El Paso v Argentina (Decision on Jurisdiction) (n 38)* paras 73, 76. See also *Pan American* tribunal presented this argument in particularly explicit terms. See *Pan American v Argentina (Decision on Preliminary Objections) (n 64)* para 102, 105.

> […] [T]he interpretation given in *SGS v Philippines* […] renders the whole Treaty completely useless : indeed, if this interpretation were to be followed - the violation of *any legal obligation* of a State, and not only of any contractual obligation with respect to investment, is a violation of the BIT, whatever the source of the obligation and whatever the seriousness of the breach - it would be sufficient to include a so-called "umbrella clause" and a dispute settlement mechanism, and no other articles setting standards for the protection of foreign investments in any BIT. […]

Lastly, tribunals seem to support their arguments through ample reliance on what has been improperly called 'precedent'. Oftentimes tribunals underpinned their argument by aligning themselves to decisions wherein the international law implications of contractual breaches were discussed, regardless of whether the reasoning related to an umbrella clause. For instance, in *Consutel v Algeria* the tribunal relied on prior decisions in *Waste Management II*,[79] *Azurix v Argentine*[80] and *RFFC v Morocco*[81] (in 2 of which umbrella clauses were not being discussed)[82] in order to strengthen its claim that breaches of contract would not *ipso facto* constitute a treaty violation. Of the cases where the umbrella clause was discussed, tribunals regularly recalled the reasoning of previous tribunals on the same point. The *El Paso* tribunal, for instance, referenced the distinction drawn in the *Joy Mining* investment arbitration between commercial aspects and aspects involving sovereign authority.[83]

Much in a similar fashion, leaving aside whether these awards were misquoted or their reasoning de-contextualised,[84] the *Sempra Energy* tribunal seemed content to build on the wisdom of 'recent decisions' which had 'contributed to the gradual lessening of the mystery surrounding the umbrella clause.[85] The Tribunal declared to fully subscribe the view expressed

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[79] *Consutel v Algeria (Award) (n 65)* para 322. *Waste Management, Inc. v United Mexican States (II)* (ICSID Case no. ARB(AF)/00/3) (Award) (30 April 20004) paras 174-175.
[80] *Consutel v Algeria (Award) (n 65)* para 323. *Azurix Corp. v The Argentine Republic (I)* (ICSID Case No. ARB/01/12) (14 July 2006) (Award) para 315.
[81] *Consutel v Algeria (Award) (n 65)* para 324. *Consortium RFCC v Royaume du Maroc*, ICSID Case No. ARB/00/6 (Arbitration Award) (22 December 2003) para 66.
[82] Anthony Jude, 'Umbrella Clauses since SGS v Pakistan and SGS v Philippines' [2013] Arbitration International 607, 613 footnote 24 in relation to the Waste Management case. Further the part of the *Azurix* award referred to in *Consutel* was not the section of the award wherein the umbrella clause was discussed. See *Azurix v Argentina (Award)* (n 80) para 384.
[83] *El Paso v Argentina (Decision on Jurisdiction) (n 38)* para 79.
[84] Jean Ho (n 11) 206-207. The author underscores that despite the consensus allegedly forming, according to Jude Anthony's study, around jurisdictional internationalisation, tribunals have often misunderstood or misquoted the reasoning in *SGS v the Philippines*.
[85] *Sempra Energy v Argentina (Award) (n 64)* para 309.

in *SGS v the Philippines* 'that ordinary commercial breaches of a contract are not the same as Treaty breaches'. A contractual dispute over payment shall be kept distinct from a Treaty dispute. Similarly, the Tribunal also agreed with the view adopted 'in *SGS v Pakistan* that such a distinction is necessary so as to avoid an indefinite and unjustified extension of the umbrella clause'.[86]

COUNTERPOINTS

Aside from arguments suggesting the indefinite expansion of protected commitments, contractual or otherwise, as well as decisions arguing that all other standards would become redundant if a violation of any commitment on the part of the State would be interpreted as a treaty breach (for which the reader is redirected to the previous section), the arguments leveraged against this interpretation can be ascribed to 2 main categories. Under the first category, this interpretation is unsubstantiated pursuant to the VCLT rules. The ordinary meaning of the text is disregarded while the reliance on precedents is misplaced. The *effet utile* of the umbrella clause, herein understood as a corollary of good faith interpretation, is muted. Secondly, tribunals have not introduced a reliable test for separating contract and treaty violation thereby creating the potential for arbitrary results. Furthermore, even if said test existed it would require an analysis of the merits of the dispute. These arguments will be in turn examined hereinafter.

NON-RESPECT OF THE INTERPRETIVE CRITERIA UNDER THE VCLT

NON-RESPECTFUL OF THE ORDINARY MEANING

The criticism most often leveraged against this interpretation is the lack of textual reference to support it. A few tribunals interpreting umbrella clauses have expressly rejected this interpretation for this reason. One instance of this type of reasoning can be found in the *Strabag SE v Libya* case:

> '[…] Respondent argues that Article 8(1) of the Treaty can operate only where the State acts in a sovereign capacity involving some exercise of sovereign authority - puissance

[86] *Ibidem* para 310.

> publique - or that it can only apply to conduct involving breaches of international law. Hence, Article 8(1) of the Treaty cannot apply to ordinary commercial acts. The difficulty is that such arguments in effect call for the Tribunal to introduce limits or conditions to Article 8(1) that do not appear in its language or necessarily follow from its ordinary meaning. Respondent's contention that Article 8(1) of the Treaty only covers contractual disputes involving some exercise of puissance publique, for example, has no foundation in the text of the article. […].'[87]

Academics have also expressed similar concerns.[88] No clear distinction could be drawn between the two types of obligations: umbrella clauses refer generally to 'obligations' without distinguishing between those that are commercial and those that are sovereign in nature. 'Neither do they distinguish between treaties entered into by the state as a merchant and as a sovereign.'[89]

This argument could have recently acquired fresh ammunitions, *viz* the formulations of the clause in newly signed investment instruments. In fact, a marked difference in the language of the clause, compared to its more classically worded counterparts, could be noticed.

The treaty Parties specified that a breach of the umbrella clause required 'the exercise of governmental authority'. This is exemplified in the 2018 European Union-Singapore Investment Protection Agreement at article 2.4, subsection 6:

> Where a Party, itself or through any entity mentioned in paragraph 7 of Article 1.2 (Definitions), had given a specific and clearly spelt out commitment in a contractual written obligation towards a covered investor of the other Party with respect to the covered investor's investment or towards such covered investment, that Party shall not frustrate or undermine the said commitment through the exercise of its governmental authority […].

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[87] *Strabag SE v Libya*, ICSID Case No. ARB(AF)/15/1 (29 June 2020) (Award) para 164. Another example can be sourced in *Burlington Resources, Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5) (2 June 2010) (Decision on Jurisdiction) para 190: '[…] Ecuador alleges that Burlington's claims do not involve the exercise of sovereign power. This requirement, however, has no support in the text of the umbrella clause of the Treaty. […]'.
[88] Crawford (n 6) 368; Jean Ho (n 11) 211-212; Emmanuel Gaillard, 'A Black Year for ICSID' [2007] Transnational Dispute Management 1, 1-9.
[89] Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, OUP 2021) 376.

In a similar manner, the EU-Vietnam FTA does contain a rather elaborate umbrella clause, providing, in article 14, as follows:

> "Where a Party has entered into a written agreement with investors of the other Party or their investments referred to in article 13 [Scope of section II Investment Protection] that satisfies all of the following conditions, that Party shall not breach the said agreement through the exercise of government authority. The conditions are:
>
> (a) The written agreement is concluded and takes effect after the date of entry into force of this Agreement;
>
> (b) The investor relies on that written agreement in deciding to make or maintain an investment referred to in article 13 . . . other than the written agreement itself and the breach causes actual damage to that investment;
>
> (c) The written agreement creates an exchange of rights and obligations in connection to the said investment, binding on both parties; and
>
> (d) The written agreement does not contain a clause on the settlement of disputes between the parties to that agreement by international arbitration."[90]

Many are the innovations implemented under these formulations of the clause. No doubt the aim is to address some perceived shortcomings in the interpretation and application of this standard.[91] The emphasis on 'written' agreements in both clauses, the specifications concerning the mutuality of obligations on both Parties and the essential nature of the protected obligations to the decision to invest and to maintain said investment expressed in the EU-Vietnam FTA are borne out of concerns expressed over the wide reach of the clause.[92]

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[90] EU-Vietnam Free Trade Agreement ('FTA'), Chapter 8, Article 14. See Olga Boltenko, 'The Umbrella Revolution: State Contracts and Umbrella Clauses in Contemporary Investment Law' in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Polic*y (Springer Nature Singapore 2020) 405.

[91] Alvin Yeo SC, Chou Sean Yu and Koh Swee Yen 'Accessing Investment Treaty Protection: The Investor's Perspective' [14 January 2022] available at https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/accessing-investment-treaty-protection-the-investors-perspective , accessed on 7 August 2022.

[92] Jarrod Hepburn, 'Analysis: EU-Vietnam Investment Agreement Complicates European Position, Both Reflecting and Diverging from Earlier EU Agreements' [2018] Investment Arbitration Reporter 1.

The aspect which is most relevant to our analysis is the specification that the '[State] shall not frustrate or undermine the said commitment through the exercise of its governmental authority'.[93] The language utilised in these 2 instances is sharply different from the formulation of classical umbrella clauses which generically mentions 'obligations', 'commitments' or 'undertakings' while the manner of the eventual breach is not hinted on. The amendments in the wording of the clause suggest that either States intended to underscore through a change in terminology an aspect of the umbrella clause that had not emerged with clarity in its classical formulation, and has caused uncertainty in its application, or, like for many other additions,[94] the treaty Parties wanted to restrict the scope of application of the clause with respect to its original formulation. Either way, drafters are implicitly admitting that the letter of the treaty did not clearly convey the distinction between *acta iure imperii* and *iure gestionis*.

EFFET UTILE NOT RESPECTED

It is time to shift the attention to a different aspect of the general rule of interpretation, *viz* the *effet utile* as defined pursuant to the good faith requirement.[95] In the words of the WTO Appellate Body the *effet utile* is a 'fundamental tenet of treaty interpretation flowing from the general rule […]'.[96] The interpreter shall attribute meaning and effect to all the terms of the treaty and is not at liberty to adopt a reading that would gut entire clauses or paragraphs of their purpose or utility.[97]

Arguably, if the interpretation advanced in certain decisions were to be validated this would be in breach of the good faith requirement. Some tribunals[98] held that in order for a contractual

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[93] Or, similarly that the '[State] shall not breach the said agreement through the exercise of government authority'. See EU-Vietnam FTA at Chapter 8, article 14.

[94] For instance, the requirement that the protected obligations be in writing.

[95] Gardiner (n 15) 151. De Brabandere and Van Damme (n 17) 44-45.

[96] *Japan-Taxes on Alcoholic Beverages*, AB-1996-2, WT/DS8,10 &11/AB/R (1996).

[97]United States - Standards for Reformulated and Conventional Gasoline AB-1996-1, WT/DS2/AB/R (1996) 23, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/2ABR.pdf&Open=True; Gardiner (n 15) 160-161.

[98] *El Paso v Argentina (Decision on Jurisdiction) (n 38)* paras 84-85. The *Pan American* tribunal presented this argument in particularly explicit terms. See *Pan American v Argentina (Decision on Preliminary Objections) (n 64)* para 112: '[…] [I]n the Tribunal's view, it is especially clear that the umbrella clause does not extend its jurisdiction over any contract claims when such claims do not rely on a violation of the standards of protection of the BIT, national treatment, MNF clause, fair and equitable treatment, full protection and security, protection against arbitrary and discriminatory measures, protection against expropriation or nationalisation either directly or indirectly, unless some requirements are respected.[…]'. *Sempra Energy v Argentina (Award) (n 64)* para 309; *CMS v Argentina (Award) (n 64)* para 299; *Consutel v Algeria (Award) (n 65)* paras 322-324; *Joy Mining Machinery v Egypt (Award on Jurisdiction)* (n 45) paras 75-79.

violation to clear the threshold for a protected breach, a treaty standard other than the umbrella clause, such as MFN or FET, had to be violated.

Were this perspective to be accepted as valid, one might rightly wonder what would be of the function of the umbrella clause within the treaty. If another treaty standard has to be violated in order for the umbrella clause to be triggered it is legitimate to question whether the clause adds any protection to the treaty which was not already covered under a different standard. In this sense, this interpretation arguably violated the good faith limb of the *effet utile* requirement.[99]

SUPPLEMENTARY INTERPRETIVE MEANS: 'PRECEDENTS'

Moving to the issue of reliance on precedents, two are the main aspects to retain. First of all, precedents, if at all relevant, become so only to 'supplement' the results of the application of the general rule on interpretation. Secondly, in this context it is doubtful whether precedents have been consistent enough to justify these tribunals' conclusions.

Before looking into whether tribunals have applied precedents correctly in interpreting the umbrella clause, it is necessary to establish what role precedents play in this context. The first chapter has already explored the importance of precedents. Despite tribunals falling shy of accounting for the reasons for considering precedents, recent scholarship suggested that precedents can fit in the frame of supplementary interpretation means.[100]

Two options were sketched as potentially viable. The first suggested that precedents could qualify as circumstances of the treaty's conclusion. This option is not explored herein because the treaties investment tribunals were called upon to interpret could not, for temporal reasons, have taken into account investment decisions on umbrella clauses. The second option relied on the open-worded nature of article 32, *viz* on the list of what can constitute a supplementary means of interpretation not being exhaustive.[101] Some tribunals have argued that room could

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[99] Anthony Sinclair, 'Standards of Protection: Umbrella clause' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), International Investment Law (Bloomsbury T&T Clark 2015) 927. See also Hein-Jürgen Schramke, 'The Interpretation of Umbrella Clauses in Bilateral Investment Treaties' [2007] Transnational Dispute Management 1, 21-22.

[100] Esmé Shirlow and Michael Waibel, 'Article 32 of the VCLT and Precedent in Investor-State Arbitration: A Sliding Scale Approach to Interpretation' in Esmé Shirlow and Kiran Nasir Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future* (Kluwer 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4120361.

[101] See *inter alia* Yves Le Bouthillier, 'Article 32 1969 Vienna Convention' in Olivier Corten, Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP 2011) paras 42-46.

be found therein to include previous decisions.[102] This is the role attributed to precedents in this analysis.

In the light of what has been said in the previous paragraph, it is doubtful whether the 'supplementary' role of this interpretive mean was respected. The *El Paso* tribunal, for instance, referenced the distinction drawn in the *Joy Mining* investment arbitration between commercial aspects and aspects involving sovereign authority to anchor its interpretation to other authoritative voices in the field.[103] Crucially though, the resort to supplementary interpretive arguments was done ahead of any analysis on the ordinary meaning.

In fact, the tribunal rather than assess the wording of the 1994 US-Argentina BIT, which was the basis for the investment claim, recalled the 2004 US Model BIT. In the words of the tribunal this text 'clearly elevates only the contract claims stemming from an investment agreement *stricto sensu,* that, is an agreement in which the State appears as a sovereign, and not all contracts signed with the State or one of its entities to the level of treaty claims, as results from its Article 24(l)(a).'[104]

The importance of context is recognised within the general rule. Context does encompass subsequent agreements, in particular 'any agreement relating to the treaty which was made between all the parties […]'[105] as well as any instrument by at least one party and 'accepted by the other parties as an instrument related to the treaty.'[106] The US Model BIT, however, was merely a template for future negotiations, exclusively crafted by one of the treaty Parties. The absence of analysis of the actual treaty language cannot therefore be excused through these means even if, and this is by no means an admission, the language of the 2004 US Model BIT could be interpreted as the *El Paso* tribunal suggested. It appears that in this instance, the tribunal looked at precedents while disregarding the ordinary meaning, in a clear violation of the general rule on interpretation.

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[102] Shirlow and Waibel (n 100). *Enron Corporation and Ponderosa Assets L.P. v Argentine Republic*, (Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award*)* (Rule 54 of the ICSID Arbitration Rules) (7 October 2008, ICSID Case No. ARB/01/3) para 32. *The Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL (Award on Jurisdiction) (28 January 2008) paras 49-50. *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (Interim Award) (1 December 2008, PCA Case No. 34877) paras 119-121.
[103] *El Paso v Argentina (Decision on Jurisdiction) (n 38)* para 79.
[104] *Ibidem* para 80.
[105] VCLT, Article 31 (2)(a).
[106] VCLT, Article 31 (2)(b).

Not dissimilarly, the *Sempra Energy* tribunal relied on precedents to claim that the conundrum that once surrounded umbrella clause interpretation has now been resolved to the benefit of the distinction between *iure imperii* and *iure gestionis* breaches:

> Various recent decisions have dealt with the meaning and extent of the "umbrella clause", and the mystery surrounding the matter seems to be gradually lessening'. […]
>
> […] The decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty con- text have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.[107]

A commentator noticed that there was no 'clear preponderance of arbitral authority in support of a 'governmental' limitation'.[108] Furthermore, many commentators and tribunals have denied that any legal justification could be found to support the argument to qualify the effect of a plainly worded umbrella clause by way of imposing a 'governmental' requisite. [109] The study conducted over the last chapter has not altered the pertinence of this statement: tribunals are far from unanimous on this interpretation of the function of the umbrella clause.[110]

It shall also be underscored, however, that the tribunal latched onto putatively relevant precedents without undergoing an examination of the ordinary meaning of the terms of the clause in question. It is therefore reasonable to doubt on the appropriateness of this analysis regardless of the accuracy in identifying relevant precedents.

WHERE TO DRAW THE LINE: IS THERE A TEST?

Now that the tribunals' 'fluid' relationship with the rules of interpretation has been addressed it is time to devote some attention to the problem of the separation of *iure imperii* versus *iure*

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[107] *Sempra Energy v Argentina (Award) (n 64)* paras 309- 310.

[108] Anthony Sinclair (n 99) 925. See also Jacomijn J Van Haersolte-Van Hof, Anne K Hoffmann, 'The Relationship between International Tribunals and Domestic Courts' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 982.

[109] Anthony Sinclair (n 99) 925.

[110] See Chapter 2 at section 'Umbrella clauses as operational when the State exercises sovereign powers.'

gestionis actions of the State. Academics and tribunals have flagged the absence of a reliable test to separate between the two types of actions.[111]

The distinction could, in theory, rely on analogies from other areas of international law, *viz* sovereign immunity.[112] Such analysis has, however, being defined as troublingly subjective, and at the whim of one's cultural, political and economic preferences, thereby being potentially subject to inconsistencies. Sovereign domain is a perimeter whose dimensions considerably vary from one State to the next.[113] When a State organ is a direct Party to the contract, it is hard to distinguish between sovereign and commercial conduct. Tribunals admitted to the difficulty of 'knowing where and how to draw the line'.[114]

Other commentators have seen a similarity with the rules on attribution of the conduct of a State enterprise to the State. Both instances often seek to discipline the State's uses, as well as its alleged abuses, of governmental powers to escape its obligations or violate a contract with a foreign investor. According to the proponents of this test, in case of a merely commercial conduct nothing justifies the attribution of the conduct of a State enterprise or instrumentality to the State or the application of an investment treaty.

This reasoning is likened to the approach followed in WTO and ECJ competition law, whereby the conduct of State enterprises and agencies is not scrutinised when it complies with 'a 'business judgment test' or 'market investor test'',[115] *i.e.* if they operate as if they were private, profit-driven, commercial actors.[116] Tribunals have nevertheless highlighted the difficulties of concretely applying this test, especially when State organs are directly involved:

> The Tribunal notes here the challenge of drawing a line between an ordinary commercial breach of contract and acts of sovereign interference or *jure imperii*, particularly in the context of a contract entered into directly with a State organ (here,

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[111] See for instance Richard Happ, 'Dispute Settlement under the Energy Charter Treaty' [2002] German Yearbook of International Law 331, 345-346. Although the author specifically refers to the ECT, its observations hold general validity.
[112] Anthony Sinclair (n 99) 927.
[113] *Ibidem*.
[114] *Ibidem*. See for instance, *Sempra Energy v Argentina (Award) (n 64)* para 311: 'In many cases, it might be difficult to draw this distinction, as not every kind of conduct can be clearly ascribed to one or the other type. […]'
[115] Thomas W Walde, 'The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases' [2005] Journal of World Investment & Trade 183, 197-198.
[116] *Ibidem* 198.

> the Ministry of Finance). Logically, one can characterize every act by a sovereign State as a "sovereign act"—including the State's acts to breach or terminate contracts to which the State is a party. It is thus difficult to articulate a basis on which the State's actions, solely because they occur in the context of a contract or a commercial transaction, are somehow no longer acts of the State, for which the State may be held internationally responsible.[117]

Further, this test also runs into practical difficulties. Some tribunals and academics[118] have pointed out its inaptness to strike out claims at the jurisdictional stage. As exemplified in *SGS v Paraguay*, the question of whether the acts were 'sovereign' was better reserved for the merits stage:

> In any event the Tribunal need not, and cannot, at this stage decide whether Claimant has made a showing of Treaty breach. As we explained in Section III.B above, the threshold at the jurisdictional stage is whether the facts alleged by Claimant could, if proven, make out a claim under the Treaty. Claimant maintains it has alleged sufficiently "sovereign" acts in connection with contractual non-performance; Respondent maintains it has not. Resolution of that dispute is properly reserved to such time as both Parties have fully presented their evidence and arguments.[119]

The *Impregilo* v *Pakistan*,[120] *El Paso* v *Argentina*[121] and *PanAm* v *Argentina*[122] tribunals were likewise in the impossibility to determine, after the jurisdictional hearings, whether the alleged contractual breaches were sovereign acts that violated the umbrella clause because the litigants were yet to file the arguments on the merits.[123]

Now that the arguments that negatively impact the plausibility of the first and second interpretive camps have been explored in some detail, it is time to dedicate some attention to

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[117] *Societe Generale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29) (12 February 2010) (Decision on Jurisdiction) para 135.
[118] See for instance Jean Ho (n 11) 212. Crawford (n 6) 351.
[119] *SGS v Paraguay (Decision on Jurisdiction)* para 135.
[120] *Impregilo S.p.A. v Islamic Republic of Pakistan (II)* (ICSID Case No. ARB/03/3) (22 April 2005) (Decision on Jurisdiction) para 316.
[121] *El Paso v Argentina (Decision on Jurisdiction) (n 38)* para 86.
[122] *Pan American v Argentina (Decision on Preliminary Objections) (n 64)* para 115.
[123] Jean Ho (n 11) 212. Potts (n 38) 1036.

interpretive camps which are not so easily discounted. The next section will demonstrate that third and fourth camp interpretations of the umbrella clause's function appear to be compatible with the VCLT rules on treaty interpretation. Arguments to the contrary are, indeed, not decisive.

QUESTIONS TO RETAIN

The leading motivation behind the writing of this chapter is, at least in part, to establish that some of the proposed interpretations of function, for a variety of already illustrated reasons, do not comply with the criteria of treaty interpretation enshrined in articles 31 and 32 of the VCLT, largely reflective of customary international law. The flip side of this argument, however, is that other interpretations such as jurisdictional internationalisation (or third camp) or full internationalisation (or fourth camp) are both, *ictu oculi*, plausible based on the aforementioned interpretive rules. The chapter will now turn to demonstrate the *prima facie* plausibility of both camps.

THE THIRD CAMP: A *PRIMA FACIE* REASONABLE APPROACH

Recalling the definition of umbrella clauses given in the first chapter, 'umbrella clauses' are provisions in investment protection treaties whereby the host State is bound to observe the obligations or commitments it has entered into (or assumed) with a foreign investor and/or with regard to its investments.[124]

Pursuant to third camp interpretation the function of the umbrella clause is to provide foreign investors with assurances concerning the performance of the obligations or commitments the host State has undertaken under its own laws, or the law applicable to the contract.[125] Failure

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[124] Benjamin Samson 'Umbrella Clauses' [2021] Max Planck Encyclopedias of International Law; Reinisch and Schreuer (n 6) 855. Definitions of the umbrella clause which place the accent on the level of protection afforded to the investor, rather than to the obligations on the investment hosting State, are also common. See for instance, Leng Lim Chin, 'Umbrella Clauses' in Lim Leng Chin, Martins Paparinskis and Jean Ho (eds), *International Investment Law and Arbitration* (CUP 2021) 332, the author defines the umbrella clause as 'treaty clause which extends the independent protection of the treaty to breaches of contractual or other commitments made by the host State in relation to the foreign investor's investment'. Salacuse (n 89) 370: 'One of the most common formulations of the umbrella clause in investment treaties is the following: 'Each party shall observe any obligation it may have entered into with regard to investments in its territory by investors of the other contracting Party.''
[125] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 7)* para 126.

to observe binding commitments will result in a breach of the treaty,[126] *viz* a breach of the umbrella clause. The issue of the extent or content of such obligations is not converted into a question of international law.[127] Under this interpretation the clauses' function is essentially jurisdictional. It provides for the enforcement of contractual obligations against host States though investment treaty tribunals.[128]

Employing the same suite of tools that has led to declare the implausibility of the first two interpretations, the heightened degree of difficulty will be immediately apparent. Starting with the ordinary meaning of the words in their context, this interpretation does not appear to unduly stretch, or ignore, the letter of the treaty.

Being bound by a treaty to observe the obligations entered into with foreign investors or with regard to their investments translates in a treaty obligation to honour the undertakings *vis-à-vis* a foreign investor. The text of the treaty does not necessarily instruct the interpreter on the law applicable to those obligations, which might *prima facie* be the law applicable to the commitment.[129]

Similarly, approaching the questions from the angle of the object and purpose of the treaty this requirement seems likewise not to pose particular issues. The clause protects investors from violations, *viz* purely contractual violations, which would not, under normal circumstances, find protection under other treaty standards.[130] This seems consistent with the wider purpose of the treaty which, broadly speaking, is to better the prosperity of the treaty Parties by way of attracting foreign investors through a friendly regulatory environment.[131]

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[126] *Ibidem* para 128. See also paragraph 119, where the tribunal stresses the primacy of the text.
[127] *Ibidem* para 128.
[128] Jean Ho (n 11) 206.
[129] Crawford (n 6) 370.
[130] See, *inter alia*, Schreuer (n 31) 250-251; Schramke (n 99) 2-3.
[131] Anthony Sinclair, 'The substance of nationality requirements in investment-treaty arbitration' [2005] ICSID Review 357, 363. *Romak SA. v The Republic of Uzbekistan* (PCA Case No. 2007-07/AA280) (Award) (26 November 2009) para 189; *Phoenix Action, Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5 (award) (15 April 2009) para 97. For voices questioning the impact of BITs on the flow of foreign investments see Damon Vis-Dunbar and Henrique Suzy Nikiema, 'Do Bilaterial Investment Treaties Lead to More Foreign Investment?', *Investment Treaty News*, 30 April 2009, available at https://www.iisd.org/itn/en/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/ , accessed on 15 June 2022. Jeswald W Salacuse and Nicholas P Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' in Karl P Sauvant, and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009). Neumayer Eric and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to

Protection is here to be intended as access to the jurisdiction of an investment tribunal which comes with certain undeniable advantages both with respect to local courts or non-investment arbitration as well as in relation to diplomatic protection. Firstly, disputes are 'depoliticised', *viz* moved from the political bilateral arena to a judicial forum specialising in mixed investor-State litigation which adjudicates on the basis of objective legal criteria.[132] Secondly, the requirement to exhaust internal remedies before initiating an international claim, typical of diplomatic protection, has disappeared unless a specific agreement to the contrary is reached.[133] Lastly, there are also non-negligible benefits at the enforcement stage for ICSID arbitrations,[134] which represent the lion share of investment proceedings. The award is not only binding on the parties, but also non-amenable of being appealed or subject to remedies other than those provided for in the ICSID Convention.[135]

The limb of the principle of effectiveness which is enshrined in the good faith requirement is also, on the surface, satisfied. The clause serves a function and is given a meaning within the treaty structure which was not fulfilled through any other provision therein, *viz* affording

Developing Countries?' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009).

[132] See Christoph Schreuer, 'Investment Protection and International Relations' in August Reinisch, Ursula Kriebaum (eds), *The Law of International Relations, Liber amicorum Hanspeter Neuhold* (Eleven international publishing 2007) 345-358. This is confirmed in the words of Aron Broches reported in documents concerning the drafting history of the Washington Convention. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formulation of the Convention (History of the Convention), Vol. II, Part 1, 464: 'The Convention would […] offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy'.

[133] ICSID Convention, article 26. Christoph Schreuer, August Reinish and Loretta Malintoppi, *The ICSID Convention: A Commentary* (CUP 2009) 403, para 188: 'Article 26 reverses the situation under traditional international law: the Contracting States waive the requirement of exhaustion of local remedies unless otherwise stated.'

[134] ICSID Convention, article 53 (1): 'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.' See Schreuer and others (n 133) 1099-1109, paras 10-46. Susan Choi, 'Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions' [1995] New York University Journal of International Law and Politics 175, 179. See also Alexandrov A Stanimir, 'Enforcement of ICSID awards: articles 53 and 54 of the ICSID Convention' in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 322-337, 325-326.

[135] ICSID Centre 'ICSID Releases New Caseload Statistics for the 2022 Fiscal Year' available at https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-new-caseload-statistics-2022-fiscal-year , accessed on 30 August 2022;

protections to investors for violations of contractual obligations which would not have been protected under other treaty standards.[136]

Detractors of this interpretations leverage against it the historical development of the clause. Evidence has been unearthed that, originally, the clause was designed to achieve two objectives: firstly, the creation of an international law obligation whose breach would give rise to international responsibility. Secondly, the establishment of an international law dispute settlement procedure to decide on the breach of, and enforce, this obligation. Evidence showed that the umbrella clause had been intended to ensure that State contracts, as well as other obligations entered into with the investment receiving State, were removed from the domain of the host State's legal framework.[137]

The obligation to perform would not be governed exclusively by its proper law, most commonly the host State's law, thereby being exposed to unilateral variation or termination. The umbrella treaty provision coats the terms of an investment contract with an additional layer of stability. Treaty provisions designed to shield investors from sovereign power while ensuring that an arbitration tribunal would apply international legal principles to disputes would have their effectiveness questioned were the contract to remain subject to local law, thereby also remaining vulnerable to local legislative and executive powers.

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[136] Schreuer (n 31) 255.

[137]See *Eureko B. V v Republic of Poland* (19 August 2005) (Partial Award) para 251, footnotes omitted. Emmanuel Gaillard, 'Investment Treaty Arbitration and Jurisdiction Over Contract Claims- the SGS Cases Considered' in Todd Weiler (ed), *International Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 326 footnote 4, available at https://www.shearman.com/~/media/Files/NewsInsights/Publications/2005/01/Investment-Treaty-Arbitration-and-Jurisdiction-o__/Files/IA_Investment-Treaty-Arbitration_040308_10/FileAttachment/IA_Investment-Treaty-Arbitration_040308_10.pdf. The author quotes an excerpt from Prosper Weil, 'Problèmes relatifs aux contrats passés entre un Etat et un particulier' (1961) 128 Collected Courses of The Hague Academy of International law 95, 130: 'there is, in fact, no particular difficulty on what concerns engaging the contractual of the State when exists between the State party to the contract and the national State of the contracting party an 'umbrella treaty' (*traité 'de couverture'*) which renders the commitment to fulfil the contract an international obligation of the State party to the contract *vis-à-vis* the State of the other Contracting Party. The umbrella treaty transforms contractual obligations into international obligations and also guarantees […] the 'intangibility' of the contract or be responsible for violating the treaty; international responsibility for contractual violation will be engaged regardless of whether the action would be allowed pursuant to domestic law, thereby engaging the international responsibility of the contracting State *vis-à-vis* the national State of the other contracting party'. Professor Weil was referring to the 1962 OECD Draft Convention on the Protection of Foreign Property which, as revised in 1967, stated at article 2 that 'Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.' See also Frederick A Mann, 'British Treaties for the Promotion and Protection of Investments' [1981] British Yearbook of International Law 241, 245-246, para 6.

At the time of the umbrella clause's inception, view that to this day has not shifted in many countries, the prevailing doctrine averred that a host State could not effectively promise *via* an investment contract that it would not amend its own laws in a fashion susceptible of affecting the transaction.[138] Similarly, the argument that a State's international responsibility could be engaged by a mere State breach of contract with a foreign investor, without evidence of some additional internationally wrongful element, *viz* the 'refusal to adjudicate claims locally or unilateral repudiation of contractual rights and obligations through legislative intervention', was never backed by substantial support.[139]

The historical argument is, however, not decisive. Its proponents underscore its limitations with respect to the ordinary meaning and the general rule of interpretation which takes priority. Even those who have conducted this historical research on the clause have acknowledged its secondary position with respect to the primary rules of treaty interpretation.

Commentators avow that the circumstances surrounding the conclusion of the treaty take the back seat in the task of interpreting the letter of the umbrella clause. The primary duty of any investment tribunal seized to assess an umbrella clause claim, or any other treaty claim for that matter, is to strive to interpret its text and apply it.[140] From this perspective, if jurisdictional internationalisation fulfils the criteria of article 31 of the VCLT, resorting to the historical background, or to other instruments from the traditional lawyerly arsenal of interpretive aids,[141] would not be strictly necessary.[142]

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[138] Anthony Sinclair (n 99) 907.
[139] *Ibidem* 907-908. International Law Commission (FV García-Amador, Rapporteur), *Report of the International Law Commission on the work of its eleventh session*, 20 April to 26 June 1959, UN Doc.A/4169, 26-31, especially paragraph 121 available at https://legal.un.org/ilc/documentation/english/a_cn4_119.pdf , accessed on 14 June 2022: 'In accordance with the doctrinal position described above, the mere non-performance of the contract would, at least in principle, constitute an "un- lawful" act, but in traditional practice and doctrine non-performance gives rise to state responsibility only if it involves an act or omission contrary to international law. Borchard, one of the first to contribute to the formulation of the traditional doctrine, contended that "diplomatic interposition" in such cases of responsibility "will not be based on the natural or anticipated consequences of the contractual relation, but only on arbitrary incidents or results, such as a denial of justice or flagrant violation of local or international law'.'
[140] Anthony Sinclair (n 99) 911. Gardiner (n 15) 164.
[141] See Chapter 1 on supplementary interpretive means.
[142] Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing 2016) 245: 'Unlike Article 31, Article 32 is not expressly drafted in mandatory terms. The true nature of Article 32, however, can be appreciated only by distinguishing the case in which supplementary means are used *to confirm* the meaning of any given provision resulting from the interpretation reached on the basis of Article 31, from the case in which they are used *to determine* such meaning. In the first case, Article 32 leaves the interpreter the possibility—but does not impose upon him the obligation—to resort to supplementary means to con- firm the interpretation reached

Secondly, the historical perspective, though useful to understand the broader context wherein the treaty was assembled, fails to capture the present meaning that the treaty Parties attribute to a provision.[143] Referring to the historical research performed on the clause, a commentator has written:

> An historical examination of the origins of the observance of undertakings clauses shows in the clearest manner that the intention of States negotiating and drafting such clauses is to permit a breach of contract to be effectively characterised as the breach of an international obligation by the host State.[144]

This provides little information on how the Parties interpret that clause now, as opposed to the time of drafting, which is the main question the general and supplementary rules on interpretation are there to answer.[145]

THE FOURTH CAMP: A *PRIMA FACIE* REASONABLE APPROACH

Having as the starting point the same definition of umbrella clause already mentioned at the beginning of the last sub-section, fourth camp interpretation is seemingly plausible pursuant to the VCLT interpretation rules. Similarly to the third camp, the function of the umbrella clause is to provide foreign investors with assurances concerning the performance of the obligations or commitments the host State has undertaken under its own laws, or the law applicable to the

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on the basis of Article 31. As pointed out by a tribunal, 'it is perfectly acceptable to arrive at an appropriate interpretation under Article 31 and stop there'.'

[143] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, 243 para 66: '[…]It is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.' Gardiner (n 15) 467-474. See also Torp Helmersen Sondre, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' [2013] European Journal of Legal Studies 127;

[144] Gaillard (n 137) 345.

[145] Gardiner (n 15) 467. Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 2: […] [T]he evolutionary interpretation of treaties can be explained by a proper understanding of the intention of the parties, the intention of the parties being the most important thread running through the law of treaties. As such, the evolutionary interpretation of treaties is not a separate method of interpretation; it is rather the result of a proper application of the usual means of interpretation, as means by which to establish the intention of the parties.' See also Julian Wyatt, *Intertemporal Linguistics in International Law: Beyond Contemporaneous and Evolutionary Treaty Interpretation* (Hart Publishing 2020) 199-219.

contract. Failure to observe binding commitments will result in a breach of the treaty, *viz* a breach of the umbrella clause.

By contrast with the previous interpretive camp, contractual obligations are converted into international law commitments. The law on state responsibility will be engaged in case of a contractual breach regardless of whether the breach is, under local law, justified by a change in legislation. Under international law States cannot invoke their own laws to excuse their own internationally wrongful acts.[146] Lastly, as it was the case pursuant to the third camp, the investment dispute resulting of an alleged breach will be heard before an investment tribunal.

Dusting off the same tool box which has led to declare the implausibility of the first two interpretations, as well as the *prima facie* plausibility of the third, the degree of difficulty at challenging this interpretation becomes apparent. Moving from the ordinary meaning of the words in their context, this interpretation does not appear to unduly stretch, or ignore, the terms of the treaty.

Once more a treaty-enshrined commitment to observe the obligations entered into with the foreign investor, or with regard to its investment, translates in a treaty obligation to honour the undertakings *vis-à-vis* a foreign investor. The letter of the treaty falls short of leaving instructions concerning the law applicable to those obligations. Given that the clause is part of a treaty, governed by international law, it is plausible for international law to also apply to the obligations internationalised as part of an international law commitment.

Similarly, the object and purpose of the treaty seem not to pose particular issues. As it is the case for the third camp, the clause protects investors from violations, *viz* purely contractual violations, which would not under normal circumstances be protected by other treaty standards.

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[146] Anthony Sinclair 'State Contracts in Investment Treaty Arbitration' PhD thesis, University of Cambridge (2013) 179-180: 'In the absence of other specific wording, international law ultimately governs the merits of an umbrella clause claim and controls any reference to the law of the host State or any other applicable law. International law characterises whether a State's acts are lawful or not as a matter of international law and there is "no exception for cases where rules of international law require a State to conform to the provisions of its internal law". International law ultimately governs the merits of umbrella clause claims, thereby lending additional security to any specific stabilisation or intangibility clauses the State may have agreed, and providing protection against any attempt to extinguish its obligations by manipulation of its own laws.' James Crawford, 'The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries' (CUP 2002) 89 para 7, available at https://assets.cambridge.org/97805218/13532/sample/9780521813532ws.pdf.

The level of protection is comparatively higher as a contractual violation engages the responsibility of the State under international law.

This interpretation is also in line with the wider purpose of the treaty which, broadly speaking, is to better the prosperity of the treaty Parties by way of increasing the inflow of foreign funds through a friendly regulatory environment.[147] Surely, the scale is tipped markedly in favour of the investor, but this is not necessarily a sign that this interpretation shall be ruled out. States are at freedom to decide that larger concessions are needed in order to widen the stream of foreign investments.[148]

The limb of the principle of effectiveness which is the good faith requirement is also, on the surface, satisfied. The clause serves a function which was not being fulfilled by any other treaty provision, *viz* affording protection to investors for violations of contractual obligations which would have not, generally speaking, been captured under other treaty standards.

Ultimately, criticisms of the fourth camp interpretation of the clause, though not unfounded, appear more akin to policy arguments than legal observations. Some have advanced an argument against the plausibility of this interpretation by affirming that neither general international law nor investment treaties are designed to keep at bay all manners of host State meddling with foreign investments. For instance, expropriation standards do not stipulate that a host State violates the treaty by the mere fact of expropriation.[149] Similarly, for other treaty standards of protection such as FET an act of the host State compromising the foreign investor's rights does not *ipso facto* conduce to a violation of the treaty. Treaty protection of qualifying investment rights is therefore not absolute: interference by a host State with a foreign investor's rights, thereby also including contractual rights, is permitted without incurring international responsibility insofar as its conduct does not impinged upon treaty provisions or standards.[150] Popular interpretations of the umbrella clause, *viz* third camp interpretation as expressed in *SGS v Philippines*, do not make investment contracts inviolable. The *SGS v Philippines* approach urges the application of national law to the breach of contractual obligations by a State.

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[147] Sinclair (n 131) 363.
[148] *SGS v Pakistan (Decision on Jurisdiction) (n 1)* para 173.
[149] Jean Ho (n 11) 215.
[150] *Ibidem*.

By contrast, the *Noble Ventures v Romania* approach, *i.e.* the fourth camp approach, promotes the inviolability of investment contracts. Accordingly, pursuant to the umbrella clause if a State breaches a contract, it thereby *ipso facto* violates international law.[151] It has been averred that contractual protection as conceived under the fourth camp is excessive because contracts are transformed into 'super-investments' imposing a much higher level of protection in comparison to other types of protected investments.[152]

This concern is legitimate, but arguably not decisive. Surely, this level of inviolability of contractual obligations is far reaching. Treaty Parties nevertheless enjoy the right to set by themselves the level of discomfort they are willing to tolerate in order to garner foreign funds. Although extreme, it is possible that States have deemed it necessary to guarantee the inviolability of investment contracts as part of their economic strategy.

CONCLUSIONS

This chapter's first objective was to remove two cards from the deck. In other words, the aim is to show how the VCLT rules on interpretation appear sufficient, given the information currently on the table, to rule out the interpretation of umbrella clauses as an aspirational statement, as well as the, rather artificial, distinction between *acta iure imperii* and *acta iure gestionis*.

To this end, it was shown how the umbrella clause could not be interpreted as an aspirational statement because this solution does not respect the ordinary meaning. The 'far reaching consequences' mentioned by the first *SGS* tribunal also appear to lack empirical, as well as theoretical, support.

Similarly, the distinction between *acta iure imperii* and *iure gestionis* is artificial. It does not follow the general rule of interpretation because the ordinary meaning is not respected. Further, the reliance on precedents, *viz* on supplementary interpretive means, on which tribunals appear to lean on is misleading. Lastly, the test to separate between the 2 types of *acta* is susceptible of producing arbitrary results.

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[151] *Ibidem*.
[152] *Ibidem*.

This chapter's second objective was to shift the attention to the third and fourth interpretive camps as the two only *prima facie* plausible alternatives. It is underscored how both options are respectful of the ordinary meaning, the object and purpose of the treaty, as well as of the *effet utile* requirement, at least on the surface. Additionally, the arguments, either historical or policy-driven, that could set them apart are not decisive.

Having these constraints in mind, the next chapter will introduce further interpretive arguments which, based on the general rules of interpretation, could arguably aid one of the two interpretive camps to claim the lead. The route for identifying the correct interpretation of function, it has been stated at the outset, forces the thesis to take a detour to consider the problem of jurisdictional precedence.

The next 2 Chapters examine the issue of 'jurisdictional precedence'. It will be shown how, at a closer look, third camp interpretation would lead to an implausible and arbitrary interpretation of this other interpretive concern.

CHAPTER 4

THIRD CAMP: JURISDICTION VERSUS ADMISSIBILITY

INTRODUCTION

In the previous chapter, two interpretive camps in relation to function have emerged as most persuasive, *viz* the third and the fourth camp. The last chapter advanced the argument that third camp interpretation was *prima facie* reasonable, but at a closer scrutiny it would cause the jurisdictional precedence concern to be interpreted in an implausible manner. This chapter's main concern is with substantiating this statement.

Since this chapter's main focus is with jurisdictional internationalisation, and its definition is crucial to the issues discussed herein, it is useful to recall at the outset the gist of the third interpretive camp. Pursuant to the third camp, a breach of contract violates *ipso facto* both the contract and the treaty, despite obligations under the contract not being reproduced at treaty level. The international investment tribunal vested with jurisdiction over the matter may adjudicate whether the umbrella clause has been breached, but the assessment will be carried out under the municipal law governing the contract since, unlike in the fourth camp, obligations specified in the contract remain contractual in nature. Under the third camp the function of umbrella clauses is essentially jurisdictional.

Contracts, however, often come with their own forum selection clause. Tribunals under the contract and the treaty would have to adjudicate on the same subject-matter, *viz* whether the contract has been breached, because this in turn also determines whether the umbrella clause has been breached. This creates the potential for conflict between the offer to arbitrate tendered to the investor under the treaty and the jurisdictional clause within the contract, in particular when the treaty pre-dates the contract.[1] The interaction between the two, especially in relation to how it could affect the treaty tribunal's ability to decide a matter on its merits, is the crux of this chapter. Tribunals adhering to the third interpretive camp have oftentimes issued inconsistent decisions in terms of the effects contractual forum selection clauses have on their

[1] Sanja Djajic, 'Contractual claims in treaty-based arbitration - with or without umbrella and forum selection clauses' [2011] International Arbitration Law Review 173, 174.

ability to decide a case on the merits. These differences are unlikely to be attributed to a difference in the wording of the treaty or the forum selection clause involved.[2]

Forum selection clauses, however, are not the only culprit. Tribunals have also found it difficult to decide whether a claim brought for breach of contract could engage the preclusive effects of the fork-in-the-road provision within the treaty, thereby preventing subsequent treaty claims for breach of the umbrella clause. In this instance, third camp interpretation would likewise ensure that the contract claim, and the treaty claim would be decided on the ground of whether the contract has been breached, and on the basis of the law applicable to that same contract.

Three categories have emerged. Within the first category fall cases where tribunals determine that they had no jurisdiction due to the presence of a contractual forum selection clause or the preclusive effects of the fork-in-the-road provision. This approach was applied to just one arbitration. Cases where tribunals determined that they had jurisdiction but declined to exercise it on admissibility grounds belong to the second category. This approach has been applied, even most recently, to a few instances. Lastly, there is the third category in which tribunals upheld their jurisdiction and proceeded to the merits phase despite the contractual forum selection clause or other potential interferences between contract and treaty claims. This approach has been applied to the majority of cases.[3]

This chapter focuses on the jurisdiction *versus* admissibility debate, *viz* on the first two categories. For reasons concerning the clarity of exposition, as well as the overall length of what is already a rather robust chapter, cases where the tribunal proceeded to consider a dispute's ultimate merits will not presently be discussed.

The chapter's main tenet is that a decision based on lack of jurisdiction is more plausible than one based on lack of admissibility. Admissibility is an afterthought with respect to jurisdiction:

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[2] By way of example the *SGS v Paraguay* decision on jurisdiction, in which the umbrella clause claim was held admissible, does not present substantial differences in how the umbrella clause (article 11 of the Switzerland-Paraguay BIT of 1992) or the contractual forum selection clause (*SGS Societe Generate de Surveillance SA. v The Republic of Paraguay* ICSID ARB/07/29 (Decision on Jurisdiction) (12 February 2010) para 125) was formulated when compared with the umbrella clause (article 3(4) of the Netherlands-Paraguay BIT 1992) or the forum selection clause in *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC v Republic of Paraguay* (ICSID Case No. ARB/07/9) (29 May 2009) (Decision on Jurisdiction) para 144. In this latter decision, however, the claim was held inadmissible.

[3] Anthony Jude, 'Umbrella Clauses since SGS v Pakistan and SGS v Philippines' [2013] Arbitration International 607, 625; Anthony Sinclair & Hafsa Zayyan 'The investment treaty arbitration review: observance of obligations', available at https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/observance-of-obligations#footnote-043-backlink, accessed on 12 August 2021.

it only becomes relevant once jurisdiction has been established. Lacking the power to decide a case, the tribunal would automatically not be in the position to be concerned with its admissibility. In order to make the case for lack of jurisdiction the chapter first takes aim at the offer to arbitrate under the treaty. It is argued that the investor waived it by way of agreeing to an exclusive forum selection clause in a contract.

Further, this chapter also argues that, provided that certain conditions are met, fork-in-the-road provisions could preclude treaty jurisdiction. It would not be unreasonable to aver that, being the breach of contract the common foundation underpinning both contract and treaty claims, and keeping in mind that in both instances said breach would have to be decided according to the law applicable to the contract, interference between the two *fora* could occur.

The first part of this work identifies the peculiarities of ICSID jurisdiction, or more generally, investment treaty jurisdiction, and distinguishes between jurisdiction and admissibility. Understanding how ICSID jurisdiction is based on the consent of the arbitrating parties, as well as the fact that consent is achieved in two stages (the conclusion of the treaty being the offer, generally followed by the investor's filing of the claim as the acceptance) is crucial to establishing how the offer to arbitrate can be waived prior to its acceptance, thereby arguably preventing the formation of the treaty tribunal's jurisdiction.

The second part of the chapter is two-fold. It first examines the reasoning behind leading decisions on the third interpretive camp and identifies some unsettled issues holding tribunals back from ruling on lack of jurisdiction instead of admissibility. Three are the main issues singled out within investment decisions. First of all, tribunals question whether investment treaties may confer rights on individuals. Secondly, they find doubtful whether a private party could by contract waive rights or dispense with the performance of obligations under international law. Thirdly, the latter concern is heightened when considering that those rights, even admitting individuals are vested with them under international investment law, aim to achieve some public interest purpose.

The last part of the second section challenges the abovementioned issues. Firstly, it is argued that it is plausible for investors to be bearers, or at least beneficiaries of investment rights. To this end, the persuasiveness of each of the four main models concerning the nature of investment rights is assessed. Secondly, the chapter looks into whether rights or obligations can be waived by way of a contract with a private party. In order to do so this work delves into

whether forum selection clauses can fulfil the requirements for international waivers. Further, it expands upon the public interest concerns involved in waiving an individual treaty right by comparing it with the practice of the European Court of Human Rights. Lastly, this chapter discusses whether forum selection clauses in contracts can actually perform the role of waivers in relation to umbrella clause claims. It does so by closely analysing the language of a few examples of contractual forum selection clauses.

In spite of having attracted most of the attention of investment tribunals in relation to umbrella clause related jurisdictional challenges, contractual forum selection clauses are not the only source of potential conflict between treaty and contract jurisdiction. As already mentioned, fork-in-the-road dispute settlement provisions within treaties could also pose a threat to investment treaty jurisdiction if contractual claims are first filed before one of the other itemized options. For this reason, after briefly defining and accounting for the popularity of these clauses, the chapter look into whether and how potential interference could materialise.

The last section of this chapter addresses the consequences of dismissing a claim for lack of jurisdiction over inadmissibility. Two main effects are identified: under the former scenario the ground for annulment of the award pursuant to article 52(1)(b) of the ICSID Convention, i.e. manifest excess of powers, is available to the investor.

Non-ICSID admissibility decisions are also non-amenable of being challenged. Challenge criteria would depend on the rules set by the arbitration seat. These rules, as interpreted by local courts, state, generally speaking, that only a decision that dispose of the matters at issue in a definitive manner can be challenged.

Moreover, if the investment claim is dismissed for lack of jurisdiction in reason of the forum selection clause in the contract, it is contended that the home State could find itself in breach of the treaty obligation owed to the other State Party to keep open an arbitration offer. It is doubtful whether the same breach would occur were the claim to be held inadmissible.

The section also observes how, if jurisdiction were to be curtailed as a consequence of the fork-in-the-road provision, this scenario would constitute the fulfilment of the letter of the treaty, rather than a violation thereof. It is, however, not unreasonable to argue that the extreme uncertainty that could result from the interference between the treaty and contract dispute settlement provisions could fall outside of the perimeter of what the treaty Parties could have reasonably intended.

JURISDICTION AND ADMISSIBILITY

Even tribunals that agree on the third camp as the correct interpretation of umbrella clause claims have issued inconsistent decisions in terms of the effects that the contractual forum selection clause has on its ability to decide a case on its merits.[4] In order to be able to take part to the jurisdiction *versus* admissibility debate, it is first necessary to define the two concepts and account for their differences. This section first defines jurisdiction and the scope of this chapter's enquiry into it. Secondly, this section illustrates the difference between admissibility and jurisdiction.

JURISDICTION: SCOPE OF THE ENQUIRY AND DEFINITION

Tribunals and commentators[5] have often used the term 'jurisdiction' to refer to two concepts which are kept separate in the ICSID Convention and arbitration rules,[6] *viz* the 'jurisdiction of the Centre' and 'competence of the tribunal'. For instance,[7] article 41 of the ICSID Convention provides:

> (1) The Tribunal shall be the judge of its own competence.
>
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

The notion of 'jurisdiction of the Centre' corresponds to a concept called 'general jurisdiction', which defines 'the objective range and outer limits of the ambit for all cases in accordance with the ICSID Convention.'[8] By comparison, the 'competence of the Tribunal' is a concept often

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[4] Jude (n 3).
[5] Hanno Wehland, 'Chapter 8: Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules' in Crina Baltag (ed) *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2016) 230; Christoph Schreuer and others, The ICSID Convention (2nd edn, CUP 2009) 532; Veijo Heiskanen, 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' [2014] ICSID Review 231, 231-233.
[6] This is true for the English and Spanish version, the French version, however, indiscriminately speaks of *compétence*, regardless of whether it refers to the Centre or to an arbitral tribunal. Heiskanen (n 5) 235; Saar A Pauker, 'Admissibility of claims in investment treaty arbitration' [2018] Arbitration International 1, 5.
[7] Other instances where the distinction is mentioned are Rule 41 and 42(4) of the ICSID Arbitration Rules; Wehland (n 5) 228-229.
[8] *Abaclat and Others v Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v The Argentine Republic)* Dissenting Opinion of George Abi-Saab (2011) para 12, available at

referred to as 'special jurisdiction', which defines 'the subjective range and limits of the ambit of jurisdiction of the organ in a particular case, according to the specific jurisdictional title bearing the consent of the parties'.[9] Whereas the 'jurisdiction of the Centre' is primarily determined by whether the requirements set under the ICSID Convention are met,[10] the 'competence of the Tribunal' typically follows from the arbitration agreement between the investor and the host State.[11] Special jurisdiction only becomes relevant after the threshold for general jurisdiction has been met.[12] This chapter is concerned with jurisdiction, hereinafter intended as the power of the arbitral tribunal to adjudicate a particular case based on the consent of the arbitrating parties, *viz* special jurisdiction or competence.

A feature of jurisdiction under the ICSID Convention, or of investment arbitration more generally, is that consent, although it shall be obtained from both arbitrating parties, is seldom expressed simultaneously.[13] Traditionally, consent should be reached through a direct agreement between the host State and the investor recorded in a single instrument, e.g. a compromissory clause in an investment agreement.[14] Consent, however, may also originate from a unilateral offer by the host State, expressed in its legislation[15] or in a treaty,[16] which is

https://www.italaw.com/sites/default/files/case-documents/ita0237.pdf, accessed on 12 July 2021. Wehland (n 5) 230; Andrea Marco Steingruber, 'Some remarks on Veijo Heiskanen's Note 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' [2014] ICSID Review 675, 678.

[9] *Abaclat v Argentina (Dissenting Opinion of George Abi-Saab) (n 8)* para 12. Wehland (n 5) 227-248, 230. Steingruber (n 8) 678. Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' [2014] McGill Journal of Dispute resolution 1, 2-3, available at https://investmentlaw.univie.ac.at/fileadmin/user_upload/p_investmentlaw/Writings/A055.pdfaccessed accessed on 12 June 2022.

[10] Specifically, the requirements under article 25 to 27 of the ICSID Convention which go under the heading 'Jurisdiction of the Centre. Steingruber (n 8) 677-678.

[11] Wehland (n 5) 230. Heiskanen (n 5) 234-236.

[12] Heiskanen (n 5) 234-236. Yannick Radi, *Rules and practices of international investment law and arbitration* (CUP 2020) 362. Steingruber (n 8) 678-679.

[13] ICSID is the most popular forum for investment claims, however, split consent is a feature common to other institutions. Relevant for the purposes of the present chapter are cases of arbitration under the auspices of the Permanent Court of Arbitration (PCA) as a few relevant cases have emerged from this institution in recent years. Article 1 first paragraph of the 2012 PCA Arbitration Rules(https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf), provides that 'Where a State, State-controlled entity, or intergovernmental organization has agreed with one or more States, State-controlled entities, intergovernmental organizations, or private parties that disputes between them in respect of a defined legal relationship, whether contractual, treaty- based, or otherwise, shall be referred to arbitration under the Permanent Court of Arbitration (PCA) Arbitration Rules 2012 (hereinafter the "Rules"), then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.' Similarly to ICSID, the article requires the agreement of the arbitrating parties. Like for ICSID arbitrations, however, investors have been able to accept treaty offers to arbitrate by way of filing a claim. See for instance *Consutel Group S.p.A. in liquidazione v People's Democratic Republic of Algeria*, PCA No. 2017-33 (Final Award, 3 February 2020) paras 9-12, available at https://www.italaw.com/sites/default/files/case-documents/italaw11187.pdf, accessed on 13 August 2021.

[14] Schreuer and others (n 5) 192.

[15] *Ibidem* 196.

[16] *Ibidem* 205-208.

later accepted by the investor, most commonly by way of filing an investment claim. Nowadays this latter kind of indirect consent covers the vast majority of investment cases in a phenomenon called arbitration without privity.[17]

The consent expressed by the treaty Parties to make investment arbitration available to qualifying investors from the other treaty Party is an offer to arbitrate from the perspective of the investor, and a binding 'commitment to offer' from the point of view of the other State Party. The offer does not *ipso facto* vest the investment tribunal with jurisdiction over claims.[18] Jurisdiction arises if the offer is later accepted by the investor, generally through filing a claim, presuming that said offer is still valid by the time the investor files for arbitration (e.g. the treaty is still in force), or the investor itself has not waived the right to accept it, assuming it has the power to do so. Once the tribunal establishes that, at the time of filing, it has jurisdiction over the dispute it continued to do so regardless of subsequent events.[19]

DEFINING ADMISSIBILITY AND DISTINGUISHING IT FROM JURISDICTION

Once a tribunal has affirmed its authority on a matter, but before proceeding on to the merits, it often deals with a claim's admissibility.[20] Admissibility is a well-known concept in international litigation: both the ICJ Rules[21] and the ILC Articles on State Responsibility,[22] *inter alia*, recognise the power of an international court or tribunal, which has assumed jurisdiction over an international claim, to refuse exercising that jurisdiction, and decline

[17] *Ibidem* 190-191. See generally, Jan Paulsson, 'Arbitration Without Privity' [1995] ICSID Review - Foreign Investment Law Journal 232, 232. Catherine Amirfar and Nelson Goh, 'Tribunal Jurisdiction and the Relationship of Investment Arbitration with Municipal Courts and Tribunals' in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore 2020) 948-949. Alvik Ivar, *Contracting with Sovereignty State: Contracts and International Arbitration* (Hart Publishing 2011) 123. Christoph Schreuer, 'Landmark Investment Cases on State Consent' in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Oxford: Hart Publishing 2022) 259 available at https://investmentlaw.univie.ac.at/fileadmin/user_upload/p_investmentlaw/Writings/A062.pdf.

[18] Schreuer and others (n 5) 206-207.

[19] Christoph Schreuer, 'At What Time Must Jurisdiction Exist?' in Jacques Werner and Arif Hyder Ali (eds), *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought* (Cameron May 2009) 267-270.

[20] Steingruber (n 8) 678-680.

[21] Article 79(1) reads: 'Following the submission of the application and after the President has met and consulted with the parties, the Court may decide, if the circumstances so warrant, that questions concerning its jurisdiction or the admissibility of the application shall be determined separately.'

[22] Article 44 of the Articles on State Responsibility goes under the heading 'Admissibility of Claims'.

deciding a claim on its merits.[23] Despite its well-established role in international adjudication,[24] admissibility receives no mention in the ICSID Convention or Arbitration Rules.[25] Similarly, the UNCITRAL Arbitration Rules, also make no mention of admissibility. Yet, tribunals, regardless the lack of direct textual references, have consistently rendered admissibility decisions.[26]

Admissibility has been relied upon especially when claims were not yet deemed 'ripe' for adjudication despite a tribunal having jurisdiction over the case. It deals with whether it is appropriate for tribunals to hear a case, or the claim's the suitability for adjudication on the merits.[27] Brownlie held that 'an objection to the admissibility of a claim invites the tribunal to dismiss (or perhaps postpone) the claim on a ground which, while it does not exclude its authority in principle, affects the possibility or propriety of its deciding the particular case at the particular time'.[28] By way of example, admissibility has been invoked, *inter alia*, when local remedies had not been exhausted, time limitations or compulsory negotiation periods had not elapsed.[29]

Academics and tribunals for determining whether a particular issue is one of jurisdiction or admissibility focused on whether a preliminary objection takes aim at the tribunal (making the objection one of jurisdiction) or at the claim (meaning that the objection relates to admissibility).[30] An objection to admissibility is 'a plea that the tribunal should rule a claim to be inadmissible on some ground other than its ultimate merits, whereas an objection to jurisdiction can be described as a plea that the tribunal itself is incompetent to give any ruling

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[23] Pauker (n 6) 1-2. Laurent Gouiffes and Melissa Ordonez, 'Jurisdiction and admissibility: are we any closer to a line in the sand?' [2015] Arbitration International 107,109.
[24] Saar A Pauker and Benny Winston, 'The Concept of (In)admissibility in Investment Treaty Arbitration: Limited Yet Indispensable' [2021] ICSID Review 189, 189-190.
[25] Wehland (n 5) 227-248, 232. August Reinisch, 'Jurisdiction and Admissibility in International Investment Law' [2017] Law and Practice of International Courts and Tribunals 21, 30-31. Pauker and Winston (n 24) 190. For a voice against the jurisdiction/admissibility distinction in the context of investment arbitration see generally Christer Söderlund and Elena Burova, 'Is There Such a Thing as Admissibility in Investment Arbitration?' [2018] ICSID Review-FILJ 525; Friedrich Rosenfeld, 'Arbitral Praeliminaria – Reflections on the Distinction between Admissibility and Jurisdiction after *BG* v. *Argentina'* [2016] Leiden Journal of International Law 137.
[26] Pauker (n 6) 1.
[27] Wehland (n 5) 227-248, 232.
[28] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 693. *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31 Decision on Jurisdiction (2011) para 90, available at https://www.italaw.com/sites/default/files/case-documents/ita0405.pdf, accessed on 15 July 2021.
[29] Reinisch (n 25) 30-31; Pauker (n 6) 8-64. Steingruber (n 8) 680.
[30] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20 Decision on Jurisdiction and Admissibility (2008) para 63, available at https://www.italaw.com/sites/default/files/case-documents/ita0530.pdf, accessed on 17 July 2021; *Hochtief v Argentina (Decision on Jurisdiction) (n 28)* para 90; Wehland (n 5) 227-248, 234; Radi (n 12) 363. Zachary Douglas 'The International Law of Investment Claims' (CUP 2010) 148, para 311.

at all whether as to the merits or as to the admissibility of the claim'.[31] The tribunal's incompetence stems from the parties' consent not vesting it with the power to adjudicate a claim.[32] In the context of investment arbitration 'the parties' are the host State and the investor, not the State Parties to the treaty.

The difference can be a narrow one, and it is not unlikely for an issue to be categorised as one of admissibility or jurisdiction depending on treaty language. For instance, the second sentence of article 26 of the ICSID Convention provides that '[a] Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.' When a treaty clearly provides that consent to investment arbitration depends upon local remedies being exhausted, failure to go through local courts is a jurisdictional issue. However, if the language of the BIT is unclear or silent as to whether exhaustion of local remedies constitutes a precondition for consenting to arbitrate, tribunals often categorised the problem as one of admissibility.[33]

THIRD CAMP: BETWEEN JURISDICTION AND ADMISSIBILITY

Investment tribunals adopting the third interpretive camp, but declining to decide umbrella clause claims based on the merits, have ruled against their own jurisdiction[34] or, more frequently, admissibility.[35] The purpose of this section is to make a case that it is more plausible for a claim to be rejected, or stayed, on the ground of jurisdiction than admissibility.

In order to better understand how treaties and contracts could interact to potentially bar an umbrella clause claim from reaching the merits phase it is useful to take a step back to understand the sequence of events that leads to an investment tribunal having jurisdiction over

[31] Wehland (n 5) 227-248, 232; Douglas (n 30) 146, 306; Pauker (n 6) 7.
[32] Pauker and Winston (n 24) 192: 'It is well settled [...] that any condition for a State's consent to arbitration is a jurisdictional requirement. This theme is plainly straightforward: if the host State made its consent to international arbitration conditional upon the fulfilment of certain requirements, and such conditions are not fully met, the State's consent does not materialize.'
[33] Pauker (n 6) 9. Pauker and Winston (n 24) 192-194.
[34] *Toto v Lebanon,* (Decision on Jurisdiction) (11 September 2009) para 202, available at https://www.italaw.com/sites/default/files/case-documents/ita0869.pdf, accessed on 3 August 2021.
[35] Jude (n 3) 625-628. *BIVAC v Paraguay (Decision on Jurisdiction) (n 2)* paras 143-159. More recently, the same reasoning was displayed in an *obiter* in *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine* (*Bosh v. Ukraine*), ICSID Case No. ARB/08/11 (Award) (25 October 2012) paras 252-259. *Consutel v Algeria (Final Award) (n 13)* paras 372–375. *Kontinental Conseil Ingénierie S.A.R.L c/ Gabon*, Aff. CPA n° 2015-25 (Final Award) (23 December 2016) paras 172-190, available at https://jusmundi.com/en/document/decision/fr-kontinental-conseil-ingenierie-v-gabonese-republic-sentence-finale-friday-23rd-december-2016 , accessed on 13 August 2021. For a review of recent trends in the umbrella clause debate see Sinclair & Zayyan (n 3).

an umbrella clause claim. Umbrella clauses in their basic formulation are a treaty commitment by the host State to respect all of their undertakings, thereby including contractual commitments, in relation to foreign investments. In the same treaty, there is usually a 'consent' clause under which the State gives its pre-emptive authorisation to litigate treaty claims before an investment tribunal, most commonly ICSID.[36] The combination of the 'consent' clause and the umbrella clause constitutes an offer to qualifying investors to litigate alleged umbrella clause breaches before an investment tribunal.

Subsequently to the conclusion of the treaty, the host State and the foreign investor could enter into a contract, which often has its own exclusive forum selection clause[37] for adjudicating contractual violations. Under the third interpretive camp the international tribunal vested with jurisdiction over whether an umbrella clause has been breached will have to conduct its assessment of the umbrella clause violation according to the contract and the municipal law governing it, most frequently the law of the host State.[38] The difference between an umbrella clause claim and a contractual claim would be essentially jurisdictional, i.e. in the access to an international investment forum under the treaty.

Against this backdrop, and considering that they essentially decide on the same subject-matter, some questions are warranted as to the interaction between the exclusive jurisdictional clause under the contract on the one hand and the offer to arbitrate umbrella clauses under the treaty on the other hand. In the event of an alleged contractual violation, which simultaneously also breaches the umbrella clause, the question is whether the international investment treaty forum is still available to the investor. The ensuing question, assuming said forum is no longer viable, is whether the issue preventing the claim from reaching the merits stage is one of jurisdiction or admissibility.

As mentioned, two are the ways whereby treaty rights to arbitrate umbrella clause claims could be affected, one concerns admissibility, the other jurisdiction. The former relies on the argument that, although the option to accept the offer to arbitrate is still open to the investor, it would be inappropriate for the tribunal to hear a claim that has a breach of contract as its

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[36] Schreuer and others (n 5) 206-208, paras 431-435.

[37] Douglas (n 30) 375. For a true conflict to arise, a contractual choice of forum for the settlement of disputes must be stipulated as an exclusive forum.' Hop Dang Xuan, 'Jurisdiction clauses in state contracts subject to bilateral investment treaties' [2011] International Arbitration Law Review 1.

[38] Rudolf Dolzer, 'Investment Contracts' in Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer (eds), *Principles of International Investment Law* (3rd edn, OUP 2022) 124-125.

premise, but ignores that another provision within that same contract refers contractual disputes to another forum.[39] Commentators advocating for lack of jurisdiction as the preferred approach tend to focus on how the subsequent contractual forum selection clause waived the consent of either, or both, of the arbitrating parties to have their claim heard by an investment tribunal.[40] The first part of this section illustrates the reasoning that has led most tribunals to privilege inadmissibility over lack of jurisdiction: it identifies tribunals' concerns with recognising the possibility of a waiver of investment rights. The second part of the section challenges the arguments behind said concerns.

ADMISSIBILITY OVER JURISDICTION?

The *SGS v Philippines* decision was the first to explicitly draw a line between jurisdiction and admissibility concerning umbrella clause claims as interpreted according to the third camp. On a side note, the contract arguably pre-dated the BIT and it would not have been possible for it to waive rights or dispense with the performance of obligations that had not arisen yet.[41]

The tribunal nevertheless looked into whether a contractual forum selection clause could dispense with the performance of treaty rights and obligations. The tribunal's reasoning has since been followed, or commented on, by nearly every tribunal considering whether a subsequent contract could interfere with a treaty right or commitment: [42]

> In the Tribunal's view, this principle is one concerning the admissibility of the claim, not jurisdiction in the strict sense. The jurisdiction of the Tribunal is determined by the combination of the BIT and the ICSID Convention. It is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public

[39] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 para 154.
[40] Stephen Donnelly 'Conflicting Forum Selection Agreements in Treaty and Contract' [2020] International and Comparative Law Quarterly 759.
[41] Declaration (Dissenting opinion of Antonio Crivellaro) on *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, para 2, available at https://www.italaw.com/cases/documents/1020, accessed on 16 August 2021.
[42] For tribunals adhering to the reasoning in *SGS v Philippines* please see *BIVAC v Paraguay (Decision on Jurisdiction) (n 2)* paras 143-159. More recently, the same reasoning was displayed in an *obiter* in *Bosh v Ukraine (Award) (n 35)* paras 252-259. *Consutel v Algeria (Final Award) (n 13)* paras 372–375. *Kontinental v Gabon (Final Award) (n 34)* paras 172-190.

interest. Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract. The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so [...]. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction.[43]

The tribunal's reasoning on ruling out lack of jurisdiction has two main aspects. First of all, it is argued that jurisdiction is determined by a combination of the BIT and the ICSID Convention. Secondly, the tribunal looks into the possibility to waive rights and dispense with the performance of treaty obligations by way of contract.

On the first aspect, the first part of this chapter has already illustrated how jurisdiction is not based solely on the treaty, or the ICSID Convention. It requires in order to be perfected the subsequent acceptance of the investor, generally achieved through the act of filing a claim. Thus, it is more appropriate to speak of a treaty offer, not jurisdiction, being affected by contract.[44]

More relevant moving forward is the second aspect. A separate agreement could hypothetically bear on jurisdiction in two separate and independent ways: the host State could revoke or amend its standing offer or the investor could, either partially or fully, waive its right to accept the proposal.[45]

Revocation of consent to arbitrate on the side of the State is inherently problematic. The chief concern from the perspective of revocation is that the offering of international arbitration as a forum for the resolution of investment disputes is part of the agreement with the home State.[46] It could therefore be difficult to see how the host State could revoke consent, or perhaps even

[43] *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No ARB/02/) (29 January 2004) (Decision of the Tribunal on Objections to Jurisdiction) para 154.
[44] See also on this aspect, *Concurring and Dissenting Opinion of Professor Brigitte Stern in Impregilo SpA v The Argentine Republic*, ICSID Case No. ARB/07/17, 21 June 2011, para. 53: [...] [T]he State can shape this consent as it sees fit, in providing for the basic conditions under which such a consent is given, in other words, the conditions under which such an 'offer to arbitrate' is made to the foreign investors.
[45] Donnelly (n 40) 767.
[46] *Ibidem* 768-769.

propose a different forum for the adjudication of investment disputes, without *ipso facto* breaching its treaty obligations *vis-à-vis* other State Parties.

By comparison, the investor's right to accept an offer to litigate before an international investment tribunal is not subject to the limitations that come with being party to an international treaty. However, for investors to be able to waive their right to accept the offer to investment arbitration certain preconditions, which the *SGS v Philippines* tribunals identifies in the form of open questions, should be met. First of all, the investor should be the bearer, or at least the beneficiary,[47] of the right to accept the offer to investment arbitration, as it would otherwise be difficult to explain how it could waive somebody else's right.[48] Secondly, the investor should be able to waive the right 'by contract', or in other words by way of entering a contractual commitment.[49] Lastly, the public interest concerns intrinsic in the investor being able to waive a right vested in it under a treaty shall not outweigh the interest of the investor in disposing of what are presumably its rights or benefits.

In the light of the above, the following section first looks into the relationship between investors and investment rights. Subsequently, it explores whether forum selection clauses are suitable to perform the role of waivers and the public interest concerns that this could entail. On a last note, the section looks at some examples on whether and how the wording of forum selection clauses in contracts could waive the right to accept the offer to arbitrate umbrella clause claims before an investment tribunal.

NATURE OF INVESTMENT RIGHTS: TO WHOM DO THEY BELONG?

[47] Martins Paparinskis, 'Investment Treaty Arbitrations and the (New) Law of State Responsibility' [2013] European Journal of International Law 617, 644 argues that although no tribunal had so far decided on the general question of whether it is possible to waive treaty rights, investors should be able to waive those rights regardless of whether they are the direct holders or just the beneficiaries. He goes further by hinting that even if it is acting as an agent, the investor could waive the procedural rights under the principle of agency in international law.
[48] Douglas (n 30) 366-367; Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' [2003] British Yearbook of International Law 151, 243.This is a lesson learnt from the partial non-enforceability of the Calvo Clause. The Calvo Clause is a provision, most common in Latin American States, that derives from the Calvo Doctrine. The Calvo Doctrine's central tenet is that foreigners who establish themselves in another country should be entitled to the same protection as nationals of that host country, but no better. The Calvo clause implements this doctrine by requiring foreigners to submit their claims to local courts to be adjudicated pursuant to municipal laws and regulations. Additionally, the clause also provides that foreigners shall renounce the right to diplomatic protection from their home State. This latter aspect was almost never upheld because the right to exercise diplomatic protection belonged to the investor's home State. The investor, therefore, had no right to waive it.
[49] For instance, see also *BIVAC v Paraguay (Decision on Jurisdiction) (n 2)* para 145.

THE PROBLEM IS UNSETTLED: FOUR PARADIGMS EMERGING

The granting of direct redress to investors in an international forum is often described as the main feature of investment arbitration.[50] By contrast, the issue of who is owed the obligations originating from investment treaties has been perceived as marginal.[51] The 'direct *versus* derivative right conundrum' is nevertheless crucial to a number of issues, e.g. consenting to the commission of wrongful acts, waiving rights[52] or whether countermeasures can be opposed to investors or merely to States.[53] Particularly relevant to the umbrella clause debate is whether the investor has the option to waive treaty rights, and in particular the right to accept an offer to investment arbitration, by way of a forum selection clause in a contract.[54]

Academics are heeding increasing attention to this issue and four main paradigms have been identified to account for the nature of investment rights: that of direct rights, moulded after the example of human rights and rights to consular protection; that of delegated or derivative rights, which draws from international rules on diplomatic protection; that of third party beneficiaries, which relies on the analogy with rights enjoyed by third States under the Vienna Convention on the Law of Treaties and the position of third party beneficiaries under contract law; and the theory of split procedural and substantive rights.[55]

[50] Aron Broches 'The Convention on the settlement of Investment disputes between States and Nationals of other States' (1972) 136 Recueil des Cours de l'Academie de Droit International 331: 'From the legal point of view the most striking feature of the Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law.'

[51] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v Mexico*, ICSID AF Case No. ARB/(AF)/04/05 (Concurring Opinion of Arthur W. Rovine) (21 November 2007) para 43. Rovine called into question whether the 'direct or derivative right debate' was necessary in order to address an investment dispute concerning countermeasures.

[52] Andrea K Bjorklund, 'Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working' [2007] Hastings Law Journal 241, 268-270. Eric De Brabandere, *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications* (Cambridge University Press 2014) 67-70.

[53] Sergio Puig, 'No Right Without a Remedy: Foundations of Investor-State Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge E Vinuales (eds), *The Foundations of Investment Law* (OUP 2014) 255. See also Anastasios Gourgourinis, 'Investors' Rights *qua* Human Rights? Revisiting the "Direct"/ "Derivative" Rights Debate', in Malgosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights* (Leiden Martinus Nijhoff 2012) 177-182. See also Jacomijn J Van Haersolte-Van Hof, Anne K Hoffmann, 'The Relationship between International Tribunals and Domestic Courts' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 984-1002.

[54] The argument that the contractual forum selection clause was to be interpreted as an implied waiver of the right to appeal to the ICSID system for disputes arising out of contractual violations was put forward in *SGS v Paraguay (Decision on Jurisdiction) (n 2)* para 177-181. Paparinskis (n 47) 643-644.

[55] Paparinskis (n 47) 621-627. Douglas (n 48) 151-289.

Commentators have rarely[56] looked directly at the question of who is the beholder of the right to accept treaty arbitration. More frequently, they looked at the generic category of 'rights under the treaty' and deemed it inclusive of the right to accept an offer to treaty arbitration. [57]

In this section each paradigm will be examined and the arguments in favour and against it brought forward. The intent is to show that the direct rights approach is best placed to portrait the nature of investment obligations at the present time. Further, it is contended that even if the third-party beneficiary model cannot be ruled out completely, it is plausible that under both the direct right and third-party beneficiary models, the investor should be able to waive the relevant rights or benefits.

DIRECT RIGHTS OF THE INVESTOR

The direct rights theory contends that in modern treaty arbitration investors, not States, are independently vested with and enforce procedural and substantive investment treaty rights, in contrast with diplomatic protection rules, and in analogy to claims under human rights and consular protection treaties.[58] Whereas under the former only States would enjoy BIT rights, according to the latter such right would vest both the investor and the State.

Recent ICJ decisions[59] have ruled that there is no impediment to the conferral of rights upon individuals or corporations, by way of an international treaty instrument. In *La Grand,*[60] Germany alleged that the failure of the US to, *inter alia*, inform its nationals of their right to

[56] Donnelly (n 40) 769-770: 'For the reasons given in the previous section, the focus lands on the investor's right to accept the offer of treaty arbitration. This right belongs to the investor alone and not to the State of its nationality. […] But it is difficult to see what right of the State is engaged. Even if it is conceived of as some right to allow its investors to go to arbitration, such a right is still parasitic on the first-order right of the investor itself that is truly in issue.'

[57] Paparinskis (n 47) 644. Christoph Schreuer, 'Investment Protection and International Relations' in August Reinisch, Ursula Kriebaum (eds), *The Law of International Relations, Liber amicorum Hanspeter Neuhold* (Eleven international publishing 2007) 354-358. See generally De Brabandere (n 52) 55-70. The author writes in detail about the distinction between substantial and procedural rights. However, when addressing the difficulties waivers would encounter if the derivative rights theory were to be upheld, this distinction seems to fade: 'The capacity of investors to waive the rights they are granted under investment treaties, including the access to investment treaty arbitration, is not generally accepted in the practice of tribunals.'

[58] Gourgourinis (n 53) 158-159.

[59] *The Permanent Court of International Justice in the Jurisdiction of the Courts of Danzig case (Advisory Opinion),* (1928) PCIJ Rep Series B No 15, had already expressed a similar opinion. A treaty between Poland and Danzig regulated employment conditions for the former workforce of Danzig Railways, now employed by the Polish Railway Administration. The issue of whether the workers could sue Polish railways directly in the Danzig Courts to recover compensation on the basis of treaty provisions was brought before the PCIJ which dismissed Poland's objection that the treaty created rights and obligations solely between treaty parties.

[60] *La Grand (Germany v. United States of America),* Judgment, I.C.J. Reports 2001, p. 466; This precedent was reaffirmed in the *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America),* Judgment, ICJ Reports 2004, p. 12, para 40.

contact the German authorities, violated individual rights of detainees pursuant to Article 36, paragraphs 1(a), second sentence, and (b) of the Vienna Convention on Consular relations.[61] The Court first impliedly,[62] then explicitly,[63] admitted the possibility of creating individual rights regardless their classification as human rights.[64]

A convincing argument in favour of the 'emancipation' of the investment regime from rules on diplomatic protection, focused on investors being 'masters of the claim'. They are under no obligation to notify their national State of the existence of proceedings, or to consult it on issues, procedural or substantial, originating from said proceedings. The self-interest of the investor is paramount in deciding to pursue investment claims.[65] The preservation of future diplomatic relationships between State parties to investment treaties is not a relevant factor. The financial burden of the claim falls entirely on the investor while damages recovered from violations replenish in the investor's coffers.

Were the investor simply stepping into the shoes of its home State, then it would be reasonable to expect the State to retain at least residual interest over the claim and that it would be able to regulate the conduct of its nationals in the course of the proceedings.[66] In two NAFTA investment arbitration cases the home State appealed to the tribunal, not the investor, pursuant to article 1128 of the NAFTA, to have the investor's claim dismissed.[67] Additionally, article

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[61] *La Grand (n 60)* 481 para 38. Namely, pursuant to paragraph (a), nationals of the sending State shall have the same freedom to communicate with, and access to, consular officers of the sending State; Under paragraph (b) upon request of the detainee and without delay inform the competent consular authorities of its detention and to have communications intended for consular authorities forwarded to the recipients without delay. The competent authorities of the receiving state shall also inform the detainee of said rights without delay.

[62] *Ibidem* 483 para 42.

[63] *Ibidem* 494 para 77: 'Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights […]'.

[64] *Ibidem* 494, para 78: the Court reasoned it did not need to address Germany's plea that being informed of the right to consular assistance had arisen to the level of a human right. The possibility of creating individual rights directly enforceable via the conclusion of treaties is uncontroversial. See *Gourgourinis (n 53)* 150-151. Van Haersolte-Van Hof and Hoffmann (n 53) 986-987. See also, generally, Ole Spiermann, 'The LaGrand Case and the Individual as a Subject of International Law*'* [2003] Zeitschrift fur Offentliches Recht (ZOR) 197.

[65] ICSID Documents Concerning the Origin and Formulation of the Convention History, Vol. Il Part 2 (Washington, 1968) 982, paras 5-6, available at https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-2.pdf, accessed on 23 March 2021.

[66] Douglas (n 48) 169-170. Chittaranjan F Amerasinghe, *Diplomatic Protection* (OUP 2008) 67. The Court of Appeal of England and Wales deciding on a non-justiciability dispute on Ecuador's challenge to the *Occidental* Award (*Occidental Exploration and Production Company v Ecuador* [2005] EWCA Civ 1116, IIC 203, paras 19-22) relied on the functional independence of the investor's rights, and on the lack of the national state's involvement or consent, to argue in favour of direct rights.

[26] Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (CUP 2018) 194. Both interpretations if accepted would have led to rejecting jurisdiction in *GAMI* and to a dismissal based on the merits in *Mondev*. Both States however formally stood by the letter of article 1128 of the NAFTA that allows for State submissions merely for interpretive issues. In *GAMI Investments Inc. v United*

1128 subordinated the possibility of State Parties to intervene in the proceedings to the rendering of a notice, in writing, to the disputing parties.[68]

The lack of control over the claim is in sharp contrast with the practice of diplomatic protection. In *Barcelona traction*[69] the ICJ emphasised the discretionary power of the home State, which could exercise diplomatic protection 'to whatever extent it thinks fit', thereby including acting as the 'sole judge of whether protection will be granted' as well as of the purview of such protection.[70] The State is likewise entitled to waive, compromise or discontinue the claim irrespective of the wishes of injured nationals. Furthermore, damages are awarded to the State which is under no obligation to redistribute.[71]

The direct rights theory is in line with the interests of the State when ratifying an investment treaty. The exercise of diplomatic protection, though discretionary, had important disadvantages for the State concerned, *viz* the potential disruption of international relations with the other State party.[72] International *fora* hosted numerous and protracted litigations between host and home States.

By giving direct recourse to investors, home States are disencumbered from the strains created by investment disputes, including pressure from businesses to step forward.[73] The dispute mechanism is 'depoliticized', i.e. disputes are moved from the political bilateral arena to a judicial forum specialising in mixed investor-State litigation which adjudicates on the basis of objective legal criteria.[74]

Mexican States (Submission of the United States) (30 June 2003); *Mondev International LTD v Unites States of America,* ICSID Case No. ARB(AF)/99/2, (Second Submission of Canada pursuant to NAFTA article 1128) (7 July 2021), available at *https://www.italaw.com/sites/default/files/case-documents/italaw9080.pdf,* accessed on 12 March 2021. See also Rudolf Braun Tillmann, 'Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law' [2014] Journal of World Investment & Trade 73, 92-93. Douglas (n 48)170.

[68] This changed in the Agreement between the United States-Mexico-Canada Agreement, concluded 30 November 2018, entered into force 1 July 2020 (USMCA), article 14.D.7(2): 'The non-disputing Annex Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.' Arguably this is part of a wider trend in investment arbitration to give greater control to the treaty party over the dispute. Further on the issue see Kendra Magraw, 'Trends and ISDS Backlash Related to Non-Disputing Treaty Party Submissions' in Catharine Titi (ed), *Public Actors in International Investment Law. European Yearbook of International Economic Law* (Springer 2021) 79-96.

[69] *Case Concerning Barcelona Traction, light and power company (Belgium v Spain)*, Preliminary Objections (Int'l Ct. Justice February 5, 1970) 45, available at https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf, accessed on 12 March 2021.

[70] *Ibidem* paras 78-79.

[71] Douglas (n 48) 167.

[72] Van Haersolte-Van Hof and Hoffmann (n 53) 991-992.

[73] Polanco (n 67) 36-37.

[74] See Schreuer (n 57) 345-358. This is confirmed in the words of Aron Broches reported in documents concerning the drafting history of the Washington Convention. Convention on the Settlement of Investment Disputes between

An additional argument in favour of independent rights of the investor is the scarce attention to the genuine interest of the national State in the pursuit of investment claims. Evidence has shown that investment treaties entered into force after the *Barcelona traction* decision, which essentially bestowed upon the State of incorporation the right to choose whether to espouse the claim of legal persons, have preponderantly adopted the criterion of incorporation and the seat for determining the nationality of the investor.[75] It has been highlighted how the *Barcelona Traction* decision turned away from seeking a genuine interest of the national State in the claim.[76] Indirectly, this point was also made by Amerasinghe:

> [t]he rule that the injured alien must have the nationality of the claimant State at the time of the injury flows from account being taken of the national State's interest. Nationality at the time of the injury is the bond which creates rights in respect of the individual at international law. The modification introduced by the *Nottebohm Case*, which in a certain limited circumstance required a genuine link between alien and national States, may also in a way be explained by reference to the genuine interest of the claimant State.[77]

By contrast to the genuine link, the criterion of incorporation has been criticised for its disregard for economic realities. Incorporating a company in a given jurisdiction could derive from consideration other than a strong connection with the country, e.g. tax purposes. The choice of many BITs to define nationality based on the place of incorporation is oblivious to a genuine link and consequently also the genuine interest of the home State in the claim.[78]

Moreover, in investment claims the investor is in a better position to waive treaty rights compared to the rules of diplomatic protection. The Calvo clause had limited effects on the

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States and Nationals of Other States, Documents Concerning the Origin and the Formulation of the Convention (History of the Convention), Vol. II, Part 1, 464: 'The Convention would […] offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy'.

[75] Douglas (n 48) 172 at footnote 104. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 49.

[76] Judge Gros, *inter alia*, in a separate opinion pertaining to the Barcelona traction decision (available at https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-09-EN.pdf, accessed on 15 March 2021) where he criticised the decision for failing to acknowledge economic realities. He contends the State whose national economy is *in fact* adversely affected shall possess the right to take legal action: 'it is even more true of investment via a limited company than of an individual or a ship that it cannot be given consideration at the international level unless the state which puts forward the claim has suffered a damage to its national economy', (para 22).

[77] Amerasinghe (n 66) 66, footnotes omitted.

[78] Douglas (n 48) 172-173.

right to resort to diplomatic protection because the investor lacks the powers to waive a right that vests the State.[79]

The possibility for the investor to waive the right to bring its claim before an international forum is less controversial, as the so-called 'fork-in-the-road' provision indicates. The clause is a typical BIT provision leaving to the investor the option between litigating its claims before the domestic courts of the offending State or international arbitration.[80] Choice once made is irreversible.[81] The fork-in-the-road clause strengthens the standing of investors as 'masters of the claim' and consequently the case for direct rights.

Furthermore, damages in the investment regime are a pure assessment of the economic damage suffered by the investor.[82] This supports the conclusion that the investor is not bringing a claim in the public interest but in its own. In the *Chorzow factory case* concerning diplomatic protection the PCIJ was careful in keeping the two planes separate:

> Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to the state, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a state; it can afford a convenient scale for the calculation of the reparation owed to the state.[83]

Lastly, the parallel invocation of responsibility by the investor and the State,[84] in deference to the almost ubiquitous State-to-State forum selection clause, supports the direct nature of

[79] *Ibidem* 172-173. The Calvo clause has two functions. First of all, to have all disputes adjudicated in accordance with the national law of the State. Secondly, to waive the rights to appeal to diplomatic protection. See Amerasinghe (n 66) 66, 191-211.

[80] Christoph Schreuer, 'Travelling the BIT Route: of waiting periods umbrella clauses and forks on the road' [2004] The Journal of World Investment & Trade 232, 239-240. Although other options could also be available such as non-treaty commercial arbitration.

[81] Although as Douglas observes if a claim for denial of justice shall arise as a consequence of local proceedings than the investor would have the option for that claim to bring it before an international tribunal. Douglas (n 48) 172-173. Schreuer (n 80) 241-242. Schreuer advises abundance of caution in assessing whether the right to recourse to investment arbitration has been waived given the advantages offered by the investment regime. He argues that only if the claim is the same that has been brought before a local court it will then be barred from being heard before an investment tribunal.

[82] Tillmann (n 67) 94-95. See also Van Haersolte-Van Hof and Hoffmann (n 53) 1001.

[83] *Case concerning the Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Merits) (1928) PCIJ Rep Series A No 17, 28.

[84] The issue of parallel invocation is contentious with sharp disagreements between scholars. For instance, Douglas (n 48) 190-191, argues that investment treaty obligations are owed directly and exclusively to the investor. In favour of parallel claims see Martins Paparinskis 'Investment Arbitration and the Law on Countermeasures' [2008] British Yearbook of International Law 264, 287-292 and 331-342.

investment rights. The creation of a parallel mechanism for a single model of invocation of responsibility is otherwise difficult to justify.[85]

DELEGATED RIGHTS OF THE STATE

The investment regime has been associated with, and to a great extent is the replacement of, a legal regime where the national State enjoys exclusive rights, *viz* diplomatic protection.[86] Diplomatic protection is the invocation by a State of the responsibility of another for injury occasioned by an internationally wrongful act of that State to a natural or legal person being a national of the invoking State.[87] Under the customary international law of diplomatic protection the State invokes its own rights. The purpose of this subsection is to look into whether it would be plausible to consider the direct redress of the investor for treaty violations merely as invocation of the rights of the State.

Delegation of diplomatic protection rights to a third-party agent is in theory conceivable, although the 2006 ILC Articles on Diplomatic Protection[88] did not address agency directly. The ILC under Special Rapporteur Dugard found that no general rules could be credited on the subject of delegated diplomatic protection. Everything depends on the nature of the treaty or institutional relationship between the delegating State, the agent State and the respondent State against which the diplomatic protection claim is initiated.[89] Although the debate proved inconclusive, chiefly due to the lack of State practice, the common thread was the admissibility of delegation subject to the consent of the respondent State.[90]

The 'master of the claim argument', together with the assumption that national States hold little interest in the claim, could be rebutted by bringing the example of 'taxation measures'. When a claim is filed to the extent that 'taxation measures' allegedly amount to expropriation the

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[85] Paparinskis (n 84) 335.
[86] Bjorklund (n 52) 264.
[87] Ursula Kriebaum, 'The nature of investment disciplines' in Zachary Douglas, Joost Pauwelyn and Jorge E Vinuales (eds), *The Foundations of Investment Law* (OUP 2014) 45-46.
[88] ILC Draft Articles on Diplomatic Protection with Commentary, in Official Records of the General Assembly, Fifty-Eight Session (2006).
[89] Special Rapporteur John Dugard 'Fifth report on diplomatic protection' [2004] A/CN.4/538, 47 para 9, available at https://legal.un.org/ilc/documentation/english/a_cn4_538.pdf, accessed on 17 March 2021.
[90] Paparinskis (n 47) 625 footnote 46. See also Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' [2008] British Yearbook of International Law 264, 296 footnote 150.

competent fiscal authorities may veto the investor's right to arbitrate. Pursuant to NAFTA Article 2103(6):[91]

> Article 1110 (Investment - Expropriation) shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim […], where it has been determined pursuant to this paragraph that the measure is not an expropriation. The investor shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6[92] at the time that it gives notice under Article 1119. If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120.

Whilst NAFTA, together with other similarly formulated treaties,[93] did not affirm that tax matters cannot be arbitrated, the fiscal authorities in both host and home State may halt arbitral proceedings. A 'tax veto' requires unanimity: the competent authorities must 'agree that the measure is not an expropriation'.[94] A measure of this kind demonstrates the clear interest retained by States in this crucial source of revenue. Further, this regime is difficult to explain unless it is admitted that the obligation was owed to some Party other than the investor, to imply otherwise would entail that the State is entitled to forestall another entity's rights.[95]

Denial of benefits clauses count as another counterargument to the lack of interest of the State of nationality in the pursuit of the claim. Denial of benefits clauses are a fashion of countering

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[91] The same reasoning applies to the USMCA article 32.3(8) on 'Taxation Measures' which is closely worded and has identical function to article 2103(6) of the NAFTA.

[92] Pursuant to the Annex to article 2103.6 the Competent Authorities are (a)in the case of Canada, the Assistant Deputy Minister for Tax Policy, Department of Finance; (b)in the case of Mexico, the Deputy Minister of Revenue of the Ministry of Finance and Public Credit ("Secretaría de Hacienda y Crédito Público"); and (c)in the case of the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury.

[93] Polanco (n 67) 194. For instance, Canada continues using the filtering mechanism for taxation measures using NAFTA as a starting point, while adding some key amendments, i.e. competent taxation authorities can determine not only whether the measure is expropriatory, but also whether it violates an 'investment or legal stability agreement' (an agreement between the central government authorities of a contracting party and the investor concerning an investment). A similar wording is included in the Canada–Costa Rica BIT, but here the taxation authorities have broader faculties, as they can jointly determine that a claim 'is without foundation and consequently, there are no grounds for submitting such claim to arbitration'. (See for example, Canada-Ukraine BIT of 1994, Art. XII; Canada–Latvia of 1995, Art. XII; Canada–Trinidad and Tobago BIT of 1995, Art. XII). In the Canada-Costa Rica BIT of 1998 (Article XI (2)) appears to have even broader scope allowing the inter-State 'tax panel' to block a claim based on 'lack of foundations'.

[94] William W Park, 'Arbitration and the Fisc: NAFTA's Tax Veto' [2001] Chicago Journal of International Law 231, 236.

[95] Paparinskis (n 90) 335, footnote 392.

the use of the investor's corporate structuring as a way of treaty shopping through the acquisition of a favourable nationality,[96] which in turn is the gateway to securing investment treaty protection.[97] Under such clauses States, generally speaking, reserve the right to deny treaty benefits to companies that, despite being incorporated in a State, have no economic connections with it. Connecting economic tissue is normally defined either as an actual economic activity or ownership or control over the company by nationals of the other treaty Party. These provisions are not present in every treaty, but are commonly found in treaties concluded by the US and Canada.[98]

From a different perspective, denial of benefits clauses, could also be explained by taking into account the interest of the investment-receiving State. When entering into investment treaties States presumably long to create a favourable investment climate for greater economic cooperation between themselves in the hope of increasing investment flows and therefore, their own prosperity and that of their nationals.[99] Moving from the assumption that investment treaties could contribute to the achievement of these goals, it is not unreasonable to wonder whether the object and purpose of these treaties could be better pursued through a 'bond of greater substance' than is captured under some loose definitions of nationality in investment treaties.[100]

Considering that the investment regime has come under fire for allegedly limiting State sovereignty,[101] it is not unreasonable from the point of view of investment importing countries to want greater control, quantitatively and qualitatively, on what investors are entitled to treaty protection. Lending support to this argument is the fact that the choice to deny benefits is left

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[96] Anthony Sinclair, 'The substance of nationality requirements in investment-treaty arbitration' [2005] ICSID Review 357, 380-382; Dolzer and Schreuer (n 75) 55-56; Lindsay Castrell, Paul Jean Le Cannu, 'Procedural Requirements of Denial-of-Benefits' clauses in investment treaties: a review of arbitral decisions' [2015] ICSID Review 78, 79.
[97] Sinclair (n 96) 363. For instance, article 25(1) of the ICSID Convention establishes that the jurisdiction of the Centre is limited 'to any legal dispute arising directly out of an investment, between a Contracting State […] and a *national* of another Contracting State […]'.
[98] Castrell and Le Cannu (n 96) 80. Examples of this clause are in the Energy Charter Treaty article 17(1); article 1113 of the NAFTA; US BIT Model of 2012, article 17.
[99] Rudolf Dolzer 'Interpretation and Intertemporal Application of Investment Treaties' in Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer (eds), Principles of International Investment Law (3rd edn OUP 2022) 37.
[100] Sinclair (n 96) 363.
[101] Dominic N Dagbanja, 'The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective' [2016] Journal of African Law 56, 58-59. The crux of the argument is that investment arbitration reverses the host States' position of ultimate control over national affairs by undermining its regulatory autonomy. Arbitration often results in scrutiny of domestic laws and practices in the light of treaty rules. Sensitive domestic measures, including environmental protection, resource conservation, public health, banking reforms, revocation of permits, measures adopted in response to economic crises, termination of concession contracts and application of tax laws are not exempted from scrutiny.

to the investment-receiving country. For instance, article 17 of the 2012 US Model BIT states that '[a] Party may deny the benefits of this Treaty to an investor of the other Party […]'. Article 1113(1) of the NAFTA likewise focuses on making the option available to the investment-receiving State.[102]

The argument that investment arbitration, through the institution of agency, could be construed as a form of diplomatic protection,[103] however, rests on three assumptions. First of all, that BITs are agreements between the home State and the investment receiving jurisdiction authorising the investor to exercise diplomatic protection. Secondly, that such authorisation amends the procedure for exercising diplomatic protection rights. Thirdly, that the national State of the investor loses its right to exercise diplomatic protection as a consequence of the delegation.

This construction was not realised by investment treaties. Treaty language does not support viewing investment arbitration as an instance of delegated diplomatic protection and the idea of simply implying such a complex legal arrangement by silence is unfeasible. The consistent parallelism of State-State and investor-State dispute settlement clauses goes in favour of the possibility of parallel invocation. To imply otherwise would be unfairly dismissive of the ubiquitous State-State dispute settlement clauses [104] which would be rendered largely redundant, contrary to the *effet utile* required under treaty interpretation rules. Historically, investor-State dispute selection clauses supplemented Friendship, Commerce and Navigation (FCN) treaty models without supplanting State-State clauses in those treaties.[105] There is a presumption against implying a change in the absence of evidence to the contrary.

Concerning the second argument on amending the institution of diplomatic protection, aspects peculiar to investment arbitration (i.e. functional control of the investor over the dispute, absence of exhaustion of domestic remedies requirements and the calculation of damages by exclusive reference to the investor's damages) suggest a qualitatively different approach with respect to diplomatic protection. The natural conclusion is to read such aspects as pertaining to

[102] This formulation is maintained in the investment chapter of the USMCA agreement at article 14.14(1).
[103] James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' [2002] American Journal of International Law 874, 887–888.
[104] Giorgio Sacerdoti 'Bilateral Treaties and Multilateral Instruments on Investment Protection' Collected Courses of the Hague Academy of International Law, 104.Two identical clauses can hardly be found, however, generally speaking, BITs refer to disputes or divergencies concerning the 'interpretation and/or application' of the treaty.
[105] Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' [2014] Harvard International Law Journal 1, 17-19.

the different nature of investment arbitration and not as amendments superimposed on the original diplomatic protection model.[106]

On the last argument, there is a presumption in favour of the State retaining the right to exercise diplomatic protection. Without express exclusion of the State's rights, and considering the presence of broadly worded State-State dispute settlement provisions, the context leads to concluding that the right to invoke diplomatic protection is retained by the State. Although article 27 of the ICSID Convention rules out diplomatic protection[107] after an agreement between the investor and the defendant State to settle their dispute through investment arbitration has been reached, it is doubtful whether this translates in a general rule of international law to freeze the invocation of diplomatic protection in a non-ICSID arbitration. During the drafting process of the Convention, article 27 was considered innovative and subsequent practice has failed to create a broader customary rule.[108]

Lastly, the argument in favour of derivative rights appears to be stronger in the NAFTA/USMCA treaties. Even if its advocates aver that the derivative model finds support in NAFTA Chapter 11 arbitrations,[109] that statement is soon qualified by adding that 'any relevant practice by NAFTA parties is *stricto sensu* limited to and relevant for the four corners of NAFTA'.[110]

Although it could be perceived as a first step in favour of the derivative model in general, the NAFTA reflects the inter-State perspective more strongly than most investment treaties. It expresses substantive rules as either States' commitments or investors' benefits, never as their rights, limits investors' rights to file claims in substantive areas and requires a failure to agree on the inter-State level as a precondition for certain types of claims.[111]

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[106] Paparinskis (n 90) 295-296 footnote 150. See also Van Haersolte-Van Hof and Hoffmann (n 53) 1001.

[107] Article 27 (1): 'No Contracting State shall give diplomatic protection […] in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention'.

[108] Paparinskis (n 47) 643; Andreas Kulick, *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 134.

[109] *The Loewen Group, Inc. and Raymond L. Loewen (Claimants) and United States of America (Respondent)* Case No. ARB(AF)/98/3 (Award) (26 June 2003) para 233 available at https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf , accessed on 27 July 2021.

[110] Anastasios Gargourinis 'The Nature of Investor's Rights under Investment Treaties: A Rejoinder to Martins Paparinskis' [31 October 2013] available at https://www.ejiltalk.org/the-nature-of-investors-rights-under-investment-treaties-a-rejoinder-to-martins-paparinskis/, accessed on 17 August 2021.

[111] Martins Paparinskis 'Reply to Gourgorinis' [24 October 2013] available at https://www.ejiltalk.org/reply-to-gourgourinis/, accessed on 17 August 2021.

In reason of these peculiarities, it is reasonable to expect cases and practice to be shaped by a greater appreciation of the inter-State perspective. One should therefore be cautious in transposing a regional agreement's co-mingling of concepts of diplomatic protection with investment law more generally.[112]

Although most commentators referred to the NAFTA, as the USMCA had yet to come into force, these arguments still appear sound in today's regulatory environment. Similarly to the NAFTA, the USMCA does not speak of investor's rights, but of 'treatment accorded' by the State Parties.[113] Further, the USMCA article 32.3(8) on 'Taxation Measures' is closely worded and, serves an identical function to article 2103(6) of the NAFTA: it forces the investor to have its claim identified, explicitly or by silence, as one of expropriatory nature by the State Parties before it can be submitted for arbitration. As the arguments making the derivative model more plausible are largely confined to the NAFTA/USMCA, which do not have an umbrella clause, alternative models on the nature of investor's rights further strengthen beyond the perimeter of those regional treaties.

THIRD PARTY BENEFICIARIES

Another alternative approach sees individuals which have been granted the ability to file claims for international law violations on their own behalf become third-party beneficiaries of the treaties.[114] The third-party beneficiary approach is *prima facie* consistent with both the intentions of the States and the language of the treaty which bestows upon claimants autonomous rights. It also appears in line with the States retaining some rights under investment treaties, such as the right to terminate the treaty or amend it.[115]

Arguably, however, paradigms available to describe this model are inadequate to depict a situation where the beneficiary is not at the same level of the contracting Parties, especially considering the emphasis placed on consent under both contractual and treaty models. Article 34 of the VCLT establishes that 'consent' by the third State is needed in order to create rights or obligations for third parties. Similarly, treaty Parties may not revoke or amend a right, pursuant to article 37 of the VCLT, if it is intended as not being revocable without the third

[112] *Ibidem*.
[113] See for instance USMCA, articles 14.4 and 14.5, referring respectively to national treatment and most-favored nation treatment.
[114] Bjorklund (n 52) 265.
[115] *Ibidem* 266.

Party's consent. Consent of the third State is likewise needed to revoke or modify obligations, unless it was agreed otherwise.[116]

Looking at the contract law paradigm similar constraints emerge. Leaving aside the laws and regulations peculiar to any State, the UNIDROIT Principles on International Commercial Contracts (UNIDROIT Principles) do not require consent from the beneficiary to create rights. Modification or revocation, however, is free only until the beneficiary has either accepted or relied on these rights.[117]

Although some treaties have been concluded to further a common standard of treatment of individuals, make available additional protection for certain categories of them, as in the case of investors, or impose upon them obligations, individuals are afforded no mention in articles 34-37 of the VCLT. They are vulnerable to the revocation and amendment of treaty rights not being entitled to the protection of article 37(2).[118] Regarding obligations imposed on individuals under a treaty (e.g. concerning international criminal law or taxation) it would appear odd if they could only produce effects after the individual consented to them.[119]

This analogy proves inadequate because the individual, unlike a third State, is a passive element in the process. The experimental and innovative nature of this paradigm is better understood, by own admission of those advancing this interpretation,[120] as a pointer to a future where non-State actors will perhaps evolve from the status of mere recipients of a 'benevolent grant of rights' to that of active participants in the creation of international norms, consciously choosing to become holders of specific rights.[121]

More crucially the distinction between direct rights and third-party rights could be of little consequence if the ultimate purpose of the analysis is to determine whether the investor will be able to waive treaty rights:

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[116] International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (2016), article 5.2.1

[117] UNIDROIT Principles, article 5.2.5.

[118] Christine Chinkin, *Third Parties in International Law* (OUP 1993) 120-121. Article 37(2) establishes that the right may not be revoked or modified by the parties of it is established that the right was not intended to be revocable or amendable without the consent of the third State.

[119] Anthea Roberts, 'Triangular Treaties: the Extent and Limits of Investment Treaty Rights' [2015] Harvard International Law Journal 353, 370-372.

[120] *Ibidem* 363.

[121] Paparinskis (n 47) 625.

> If the investor is a beneficiary of treaty rights in favour of third person, the right of waiver would be perfectly unproblematic. The VCLT regime on the creation of rights in Article 34, 36 and 37 protects the third state from the creation or modification of rights without its consent but in no way limits the right of the third state to cease benefiting from its rights.[122]

The contract law paradigm paves the path to a similar conclusion. Article 5.2.6 of the 2016 UNIDROIT Principles which goes under the heading 'Renunciation' provides that '[t]he beneficiary may renounce a right conferred on it'. The comment to the article explains that the third party may expressly or impliedly renounce the benefit[123] bestowed on it by the contracting parties.

CONTINGENT RIGHTS PARADIGM

A possible variant of the direct rights theory is to separate between substantive obligations of investment protection and the obligation to submit to investor-State arbitration after the claimant investor has filed a notice to initiate investment proceedings. The minimum standards of investment protection would therefore come to be defined as 'adjudicative standards for the claimant's cause of action rather than binding obligations owed directly to the investor.'[124] Substantive obligations would exist merely on the inter-State plane and be opposable by one State party to another. On the other hand, procedural obligations are directly enforceable by the investor after the conclusion of the agreement to arbitrate:

> [u]pon the claimant's filing of a notice of arbitration, the claimant investor perfects the host state's unilateral offer to arbitrate, and the two parties thus enter into a direct legal relationship in the form of an arbitration agreement. [125]

Through the act of filing, the claimant becomes a counterparty to the host State's obligation to have its conduct in relation to foreign investments assessed on the ground of investment protection rules as established in the treaty. The duty of the host State to pay compensation if the international tribunal finds its conduct to be in breach of these rules is part to this obligation.

[122] *Ibidem* 644.
[123] UNIDROIT Principles, commentary to article 5.2.6.
[124] Douglas (n 30) 35, para 73.
[125] *Ibidem*.

This theory has been criticised for being too artificial, as it creates a distinction between procedural and substantive right which is not mentioned in the treaty, compared to the more natural, and therefore preferable, direct rights theory.[126] Arguably, however, it is also unable to account for the rights enjoyed by the investor in the *interim* period prior to the acceptance of the offer to arbitrate. For instance, with fork-in-the-road provisions the investor is empowered to submit its dispute to a local venue thereby foregoing the right to access investment arbitration for that claim. This option is available to the investor before filing a notice to arbitrate thereby weakening the argument that rights are only available to the investor after the offer to arbitrate has been accepted.

DRAWING SOME CONCLUSIONS

The derivative or delegated model appears unconvincing. The language of the treaty as well as the arbitral practice which displays the great degree of independence enjoyed by investors with respect to their home States are a strong pointer toward the investor being entitled to rights which are independent from those of its home State. Exceptions in favour of the derivative or delegated model are of little numerical significance.[127] Further, those exceptions are concentrated in the former NAFTA, now USMCA, and are difficult to generalise across the investment field.

Given that those treaties have no umbrella clause, this model also loses persuasiveness relative to the subject matter of this chapter. The contingent rights paradigm fails to account for the rights enjoyed by investors before the notice of arbitration is filed, as well as preaching for a distinction that has no support in the treaty language.

The paradigm of third-party beneficiaries is an interesting alternative to the direct rights model and cannot be ruled out completely. Arguments have been advanced that this model is better placed than the current investor-centred paradigm to address legal issues, such as the rights of the treaty Parties acting collectively as well as the relationship between the investor and its home State.[128]

[126] *Ibidem* para 74.
[127] Polanco (n 67) 103. Despite being rarely applied these mechanisms have sometimes brought serious consequences. One arbitration claim under the NAFTA being fully prevented after a simple exchange of letters by which the States agreed that the tax measure did not amount to expropriation. The investor had no say in the matter and was given no recourse.
[128] Anthea Roberts 'Triangular treaties: the nature and limits of investment treaty rights' [2015] Harvard International Law Journal 353, 354.

The paradigm, however, relies on models created for situations where the third party was at the same level as the treaty Parties, *viz* States in the case of treaties and private entities in that of contracts. Individuals in international law do not enjoy the same rights as States in the formation of international treaty law. Both the direct and third-party beneficiary models, however, seemingly give the investor the possibility to renounce a right or benefit bestowed upon it by the treaty Parties, provided that certain conditions are met.

The chapter has addressed the nature of investment rights, and in particular to whom they belong, and has concluded that investors being bearers, or beneficiaries, of these rights is more plausible than the alternatives. It is now time to turn our attention to the following issue brought up by the *SGS v Philippines* tribunal, *viz* whether the right can be waived by way of entering a contract or there are public interest reasons preventing the parties from disposing of that right.

WAIVERS

In public international law the term 'waiver' denotes the renunciation or abandonment of a right or claim by a subject of international law, either unilaterally or by agreement, without the right being transferred to another subject of international law.[129] It is now time to explore whether the investor can waive a treaty right, and in particular the right to accept the offer to arbitrate, either partially or fully, by way of entering contracts with an exclusive forum selection clauses.[130] To this end, the subsection will first look into whether contracts fulfil the characteristics of an international law waiver. Further, it will expand upon whether public interest concerns could prevent investors from waiving what are presumably their rights, or benefits.

THE CHARACTERISTICS OF A VALID WAIVER

In order to determine whether, and under what conditions, contractual forum selection clauses may serve as waivers it is first necessary to itemise the characteristics of a validly formulated waiver under international law.

[129] Feitchner Elisabeth 'Waiver' [2006] Max Planck Encyclopedias of International Law; Lucius Caflisch, 'Waivers in European and International Law' in Mahnoush H. Arsanjani, Jacob K. Cogan, Robert D Sloane and Sigfried Wiessner (eds), *Essay in International Law in Honor of W Michael Reisman* (Martinus Nijhoff Publishers 2011) 407.

[130] For another perspective on this question see also Marcia A Wiss and Charles B Rosenberg, 'Avoiding waiving a right to ICSID arbitration in the negotiation of a concession agreement' [2010] International Arbitration Law Review 8.

Formal requirements are unnecessary. The ICJ in the *Case Concerning the Temple of Preah Vihear*[131] placed emphasis on the intentions of the parties to the dispute. Absent any requirement, the Parties can choose whatever form they please insofar as it conveys their intentions. There is no reason to doubt that a contractual forum selection clause would be capable of conveying the parties' intent.

The only formality required under the ICSID Convention is that consent to ICSID arbitration be expressed in writing. Consent to treaty arbitration *via* a direct agreement may be achieved through a compromissory clause in an investment agreement between the host State and the investor submitting future disputes arising from the investment operation to ICSID jurisdiction.[132] An argument that sees forum selection clauses as capable of conveying consent to treaty arbitration while, at the same time, being unable to provide consent *not* to arbitrate is unpersuasive.

A relevant concern in both general international law and investment law is that of establishing consent unequivocally. This was clarified by the ICJ in the *Preah Vihear case*: 'the sole relevant question [to determine jurisdiction] is whether the language employed in any given declaration does reveal a clear intention.'[133] A corollary to this principle being that an ambiguous or unclear statements would not suffice to waive jurisdiction. The reasoning of the ICSID tribunal in *Agua del Tunari v. Bolivia*,[134] followed later by *TSA v. Argentina*[135] and *Crystallex v. Venezuela,*[136] reflects on these considerations:

> As to the [...] case of a separate document containing an exclusive forum selection clause that designates a forum other than ICSID, the Tribunal notes that the *specific intent* of the parties to preclude ICSID jurisdiction will be more difficult to ascertain

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

[132] Schreuer and others (n 5) 192 para 382.

[133] *Case concerning the Temple of Preah Vihear (Preliminary objections) (n 131)* 32.

[134] *Aguas del Tunari SA v Bolivia*, ICSID Case No ARB/02/3 (Decision on Jurisdiction) (21 October 2005) para 115.

[135] *TSA Spectrum de Argentina SA v Argentina* ICSID Case No ARB/05/5, Award (19 December 2008) para 58: '[…] if the contract contains a specific clause on dispute settlement, this does not exclude recourse to the settlement procedure in the treaty, unless there is a clear indication in the contract itself or elsewhere that the parties to the contract intended in such manner to limit the application of the treaty'.

[136] *Crystallex International Corp v Venezuela* ICSID Case No ARB(AF)/11/2, Award (4 April 2016) para 481: '[…] even if it were minded to find that an investor may waive by contract rights contained in a treaty, any such waiver would have to be formulated in clear and specific terms: a waiver, if and when admissible at all, is never to be lightly admitted as it requires knowledge and intent of forgoing a right, a conduct rather unusual in economic transactions.'

> than in the case of explicit waiver. […] [I]t is not the existence of the exclusive forum selection clause that would be given effect by an ICSID tribunal, but rather that the tribunal could, at most, give effect to a waiver implied from the existence of an exclusive forum selection clause. [...] A separate conflicting document should be held to affect the jurisdiction of an ICSID tribunal only if it clearly is intended to modify the jurisdiction otherwise granted to ICSID. […] [A]n explicit waiver by an investor of its rights to invoke the jurisdiction of ICSID pursuant to a BIT could affect the jurisdiction of an ICSID tribunal. However, the Tribunal will not imply a waiver or modification of ICSID jurisdiction without specific indications of the common intention of the Parties.

In the view of the tribunal, consent to waive jurisdiction is most unproblematic when written in express terms. This was the case, for instance, in *Azurix*[137] where the contractual forum selection clause established the jurisdiction of the court of contentious administrative matters of the City of La Plata 'waiving any other forum, jurisdiction or immunity that may correspond' for all disputes arising from the Bidding contract.

Implied waivers are more complex to interpret,[138] but their validity could be recognised provided that 'clear intent' is manifested. The tribunal in *Aguas del Tunari* reasoned that a waiver could be implied from the presence of an exclusive forum selection clause, provided that such was the intent of the parties.[139] This approach is coherent with general international law concerning implied waivers. In the *Case concerning Armed Activities on the Territory of the Congo*[140] the ICJ observed 'that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right.'

The ILC commentary on Article 45 of the Draft Articles on Responsibility of States for internationally wrongful acts[141] strengthens the argument that implied waivers, though possible, shall unequivocally be inferred from the conduct or the statements of the State

[137] *Azurix Corp v Argentina*, ICSID Case No ARB/01/12 (Decision on Jurisdiction) (8 December 2003) para 26.
[138] In fact, their validity is often dismissed, see for instance Darius Chan, 'The high-water mark of an umbrella clause' [2012] International arbitration law review 21, 25.
[139] Although it could be contended that the intent of the claimant would suffice, given that the right to accept treaty arbitration belongs to it exclusively.
[140] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168 para 293.
[141] Article 45 'Loss of the right to invoke responsibility': 'The responsibility of a State may not be invoked if: (*a*) the injured State has validly waived the claim; (*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.'

concerned.[142] The ILC also specified, quoting the decision in *Certain Phosphate Lands in Nauru,*[143] that a clear and unequivocal waiver cannot be sourced from an ambiguous statement which shall not displace a point of view clearly and repeatedly expressed.[144] In the context of investment arbitration this assertion shall be interpreted in the sense that tribunals will abstain from upholding unclear and equivocal contractual forum selection clauses as waivers of jurisdiction.

The key to allowing implied waivers seems to be, as in the case of express waivers, clear intent.[145] For the above reasons, the requirements set out by tribunals such as *SGS v Paraguay,*[146] demanding waivers to be express,[147] appears unjustified. While a presumption against waivers implied by silence lies sound foundations in the necessity to find unequivocal intent, rejecting implied waivers, as more recently happened in *MNSS v Montenegro*[148] is not justified under international law.[149]

For a waiver of an international legal right to be effective, it is necessary for it to be made by the international legal person, whether it be a State, an international organization or, in limited cases, an individual, whose right, or benefit, is being waived. The investor is competent to renounce a right or benefit on behalf of itself, marking a shift away from the Calvo doctrine.[150]

When redress was frequently sought by investors through diplomatic protection, the Calvo clause,[151] a corollary of the Calvo doctrine, was a contractual provision agreed upon between

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[142] *Armed Activities on the Territory of the Congo (n 140)* para 293: '[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal'.

[143] *Certain Phosphate Lands in Nauru (Nauru v. Australia),* Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, 250, para 20.

[144] ILC 2001 Report A/56/10, 122, para 5, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, accessed on 16 April 2021.

[145] Feitchner (n 129) paras 8-10.

[146] *SGS v Paraguay (Decision on Jurisdiction) (n 2)* para 179-180.

[147] *Ibidem* para 180: '[a]t least in the absence of an express waiver, a contractual forum selection clause should not be permitted to override the jurisdiction to hear Treaty claims of a tribunal constituted under that Treaty.'

[148] *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro,* ICSID Case No ARB(AF)/12/8 (Award) (4 May 2016) para 163: 'investors may waive the rights conferred to them by treaty provided waivers are explicit and freely entered into by investors.'

[149] Donnelly (n 40) 774.

[150] Amerasinghe (n 66) 15-16*,* explaining the Calvo doctrine. Calvo, the Argentinean scholar after whom the clause was named, expressed in 1868 his opposition to intervention on behalf of citizens or of their property interests abroad. Moving from the principle of independence and equality of States he argued that aliens were entitled to the same standard of treatment as nationals but no higher. See Schreuer (n 57) 345-358.

[151] Amerasinghe (n 66) 192. Amerasighe explains that the clause was normally two-pronged: 'the first provided that all disputes concerning the terms of the contract, its interpretation, or facts relating to its performance or non-performance, should be decided in the courts of the contracting State, whose law was to be the proper law; the

the host State and the investor which intended, *inter alia*, to bar the latter from seeking diplomatic protection from his home State. The clause was hardly successful, outside Latin America, because the right being waived belonged to the State, not the investor:

> [A]n alien cannot by means of a Calvo Clause waive rights which in international law belong to his State because diplomatic protection is premised on the concept that an injury to a national arising from a breach of international law is an injury to the national State itself. An alien cannot waive this right as it is not in his power to do so.[152]

If the investor, as it is here contended, is the direct bearer or beneficiary of the right to accept the offer to arbitrate the issue does not arise as the investor is competent to waive a right on its own behalf.

PUBLIC INTEREST CONCERNS

A further issue tribunals and academics have grappled with is whether investment rights can be waived at all. As the *SGS v Philippines* tribunal, they have sometimes been hesitant about the possibility of waiving a right in the light of the public interest concerns involved.[153] By way of analogy, they often turned their attention at another case law rich area of international law in which individuals are vested with direct rights and decisions have been handed out on whether they could be waived, *viz* human rights law.[154]

To the extent that the ECtHR has opened the door to waivers,[155] the Grand Chamber in *Scoppola v Italy,*[156]*inter alia*, laid out some requirements:

second provided for a complete or partial surrender of rights under international law by the contractor and most importantly a waiver of protection by the contractor's own State.'

[152] *Ibidem* 195.

[153] For a perspective contrary to endorsement of waivers see De Brabandere (n 52) 67-70.

[154] Ole Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties' [2004] Arbitration International 179,182, 207-208; See generally, Anne K Hoffmann, 'The Investor's Right to Waive Access to Protection under a Bilateral Investment Treaty' [2007] ICSID-Review Foreign Investment Law Journal 69.

[155] In *D.H. and Others v. the Czech Republic*, Application no. 57325/00, 13 November 2007, the Court ruled that there could be no valid waiver of the rights of children not to be racially discriminated against in their education. After outlining the requirements for a valid waiver at paragraph 202 the Grand Chamber, at paragraph 204, held that it 'considers that, even assuming the conditions referred to in paragraph ***Error! Reference source not found.*** above were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest'.

[156] *Scoppola v. Italy* (No 2) (2010) 51 EHRR 12, para 135; See also *Hermi v. Italy*, Application no. 18114/02, 18 October 2006, para. 73; *D.H. and Others v the Czech Republic (n 155)* para 202.

> Neither the letter nor the spirit of Article 6 prevents a person from waiving them of his own free will, either expressly or tacitly. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance [...] In addition, it must not run counter to any important public interest […].

Some of these requirements are, however, less of a concern in investment arbitration.[157] This is the case of minimum safeguards and public interests. Moving from minimum safeguards, informed consent, although extremely important in human rights jurisprudence, is way less so in the field of investment. In *D.H. and Others v. the Czech Republic*, the minimum guarantees spelled out by the Grand Chamber included 'full knowledge of the facts' as the foundation of informed consent. The Court highlighted how informed consent was especially important given that parents of the Roma children were members of a disadvantaged and often poorly educated community whose ability to evaluate all aspects related to consequences of their consent could be doubted.[158] These concerns are considerably less pronounced in the case of foreign investors which are oftentimes established corporations with access to legal advice during negotiations.

More relevant could be the requirement that consent be expressed 'without constraint'.[159] In the *Deweer v. Belgium*[160] case the Court averred that 'compelling pressure', in this instance in the form of 'compelling economic pressure', could undermine the free nature of consent. The Court argued that the possibility of a closure order to come shortly into effect, combined with the high probability that it could last till a decision on the merits had been reached, causing the Belgian butcher to lose both his income and most likely his entire business, put in contrast with the relative moderation of the fine leads to the conclusion that the waiver of the right to fair trial was tainted by constraint.[161] Investment tribunals have sometimes looked into whether

[157] Hoffmann (n 154) 93-94.
[158] *D.H. and Others v the Czech Republic (n 155)* para 203. The ability of the waiving party to appreciate the consequences of its decision was a concern highlighted by the court in other cases, *inter alia*, *Pfeifer and Plankl v. Austria*, Application no. 10802/84, 25 February 1992, para 308. The Court reasoned that Mr Pfeifer was approached by the judge in the absence of his lawyer, the latter not having been summoned despite his previous involvement in the proceedings. The question he was asked was one of legal nature, whose repercussions Mr Pfeifer, a layman, could not have entirely appreciated. The Court also added that the fact that the applicant stated the presence of his lawyer was unnecessary made no difference.
[159] *D.H. and Others v the Czech Republic (n 155)* para 202.
[160] *Deweer v Belgium,* Application no. 6903/75, 27 February 1980, para 51.
[161] *Ibidem* para 54.

waivers were freely negotiated and answered in the affirmative,[162] although it is not impossible to imagine situations where a waiver could be signed under duress.

Public interest is a concern,[163] although arguably to a lesser extent than for human rights.[164] Professor Schreuer averred that, despite being mainly to the benefit of investors, investor-State arbitration also has an 'important function in the public interest for the relations between the States concerned'.[165] This argument is sound because investment arbitration has largely replaced diplomatic protection with the advantage that pressure on home States to espouse claims has been lifted while State-State tensions have been, to a great extent, supplanted by investor-State disputes.[166] However, although these are valid concerns they shall not be overstated. If the Grand Chamber in *Scoppola v Italy*[167] was able to argue that '[n]either the letter nor the spirit of Article 6 prevents a person from waiving them of his own free will, either expressly or tacitly', it is reasonable to assume that individuals have a wider power to waive rights under a BIT than they do under human rights instruments, e.g. the ECHR.[168]

IMPACT OF FORUM SELECTION CLAUSES ON UMBRELLA CLAUSES

Now that the possibility of waiving a right has been discussed, the next logical step is to ascertain whether forum selection clauses in contracts can act as waivers of the right to accept the offer to arbitrate, and in particular of the offer to arbitrate umbrella clause claims. The following subsection will look into whether the language of forum selection clauses in contracts is able to waive the right to accept the offer to arbitrate umbrella clause claims before a treaty tribunal.

FOCUSING ON THE CONTRACT

Whether contractual forum selection clauses could prevent investment treaty tribunals from hearing umbrella clause claims is a complex question whose answer will largely depend on the

[162] See for instance *MNSS v Montenegro (Award) (n 148)* paras 161-162-164; *BIVAC v Paraguay (Decision on Jurisdiction) (n 2)* para 148.
[163] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 43)* para 154.
[164] Hoffmann (n 154) 93-94.
[165] *MNSS v Montenegro (Award) (n 148)* paras 163. This was also acknowledged in *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 43)* para 154: 'Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest.'
[166] See in particular article 27 of the ICSID Convention which excludes recourse to diplomatic protection after the parties have consented to ICSID Arbitration.
[167] *Scoppola v Italy (n 156)* para 135.
[168] Spiermann (n 154) 207-208; Hoffmann (n 154) 93-94.

specific wording of the forum selection clause being examined. For this reason, this section is largely built on concrete instances of formulations of the choice of forum clause.

Three examples will help illustrate this point. In *Gavrilovic v Croatia*[169] article 11 of the Purchase Agreement read: 'The Regional Commercial Court in Zagreb will have jurisdiction over any dispute from this Agreement'.[170] In *Azurix v Argentina*[171] article 1.5.5 of the Bidding Terms and Conditions provided for 'the exclusive jurisdiction of the courts for contentious-administrative matters of the City of La Plata "for all disputes that may arise out of the Bidding, waiving any other forum, jurisdiction or immunity that may correspond"'. In *Belenergia v Italy*[172] the exclusive jurisdiction clause under the GSE Conventions on feed-in-tariffs and minimum prices read: 'For any dispute arising out of or in any case connected to the interpretation and/or execution of the [Convention] and the documents referred to therein the Parties agree on the exclusive jurisdiction of the Court of Rome.'

The wording of article 11 of the Purchase Agreement in *Gavrilovic* could be interpreted as too restrictive to include any commitment beyond the contract itself. As the forum selection clause merely refers to 'disputes under this agreement', it is unlikely that it could have an impact on umbrella clause claims which are brought under the treaty.

Interpreting the other two forum selection clauses could yield a different result. The treaty claim under the umbrella clause in *Azurix* would 'arise out of' the Bidding contract, as there is no obligation independent of the contract itself. A similar reasoning could apply to the wording 'arising out of or […] connected to the interpretation and/or execution' of the contract in *Belenergia*. In this latter case, the treaty tribunal would very likely be deprived of jurisdiction because it would be difficult to rule on a breach of an umbrella clause under the treaty without being empowered to interpret or apply the contract.

In this latter two instances, it is not unreasonable to argue that the jurisdiction of the tribunal to hear umbrella clause claims would be successfully prevented, as the forum selection clause in the contract could act as a waiver of the investor's right to have its umbrella clause claim heard before an investment tribunal. As the consent of the arbitrating parties would be

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[169] *Georg Gavrilovic ́ and Gavrilovic D.o.o. v Republic of Croatia* ICSID Case No ARB/12/39 (Award) (26 July 2018).
[170] *Ibidem* 133, para 416, footnote 575.
[171] *Azurix v Argentina (Decision on Jurisdiction) (n 137)* 26.
[172] *Belenergia S.A. v Italy* ICSID Case No ARB/15/40 (Award) (6 August 2019) para 206.

successfully prevented, it is possible to argue that barring a claim on the ground of jurisdiction could be a more accurate choice than denying admissibility.

It is however interesting to observe that a clause being ineffectual at waiving jurisdiction may not translate in a stronger case for bringing back admissibility objections. Indeed, it could also be questioned whether article 11 of the Purchase Agreement in *Gavrilovic* would be effective in preventing a claim's admissibility. The wording 'disputes from this agreement' indicates that the contract-based forum would be solely concerned with contractual claims. Although based on a contractual violation, umbrella clause claims under the third camp are still treaty claims.

It is doubtful whether in this case the tribunal would be able to argue, as it has done in *SGS v Philippines*, that 'a party to a contract cannot claim on that contract without itself complying with it'.[173] It is not unreasonable to argue that no breach of contract would occur if the two claims existed in parallel: insofar as disputes 'from the contract' are litigated before the contract-based tribunal, while the treaty tribunal is concerned with the breach of the umbrella clause, parallel claims seem unproblematic.

In conclusion, examples have shown how the language of certain contractual forum selection clauses could arguably be interpreted as waiving the right to accept the offer to arbitrate under the treaty. At the same time, when it is doubtful whether a certain clause could waive said treaty right, the possibility of having parallel claims appears perhaps more convincing than rejecting the claim on admissibility grounds.

Thus far, this chapter has explored the question of how and whether forum selection clauses in investment contracts could waive the offer to arbitrate tendered by the treaty Parties to qualifying foreign investors. The option to waive, though perhaps the more accurate term would be to 'bar access to', international investment arbitration could come from the treaty dispute settlement clause in the form of a fork-in-the-road provisions.

The following subsection will first look at the reality of the formulation of dispute settlement clauses in investment treaties. Secondly, it will analyse the interaction between the dispute settlement options in treaties, particularly when they propose multiple mutually exclusive alternatives. The potential repercussions on umbrella clause claims caused by the choice of the

[173] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 43)* para 154.

investor to file a claim for breach of contract before the forum legitimated therein will also be looked into.

FOCUSING ON THE TREATY: THE FORK-IN-THE-ROAD

So far, this chapter has only considered one, clearly oversimplified, scenario: one treaty jurisdictional clause expressing the treaty Parties' offer to submit treaty disputes, thereby including umbrella clause claims, before an international investment tribunal, most commonly ICSID. It was easy to assume that the ability to waive said offer depended exclusively on the wording of the contractual forum selection clause, rather than on a combination of the formulations and interactions between treaty and contract dispute settlement provisions, as well as on the actions of the parties to the dispute.

Reality is, however, infinitely more complex. Despite pre-emptive consent of the State Parties to submit claims to international investment arbitration remaining a constant, it shall be underscored that this is often just one of the options commonly available under investment treaties for settling investment disputes.

Some treaties list among the alternative *fora* the host State's domestic courts or tribunals.[174] For instance, article VII (2) of the very popular US-Argentina 1991 BIT reads:

> 'In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. 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.

[174] Markus Petsche, 'The Fork in the road Revisited: an attempt to overcome the clash between formalistic and pragmatic approaches' [2019] Washington University Global Study Law Review 391, 393.

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 [investment] arbitration […].'

The term 'or' at paragraph 2, together with the condition attached at the start of paragraph 3, explicit the mutually exclusive nature of the option proposed. For this reason, a 'fork' is said to exist. Once the investor opts for one of the available *fora* other legal remedies can no longer be pursued. The investor is, therefore, bound to continue in the pursuit of the route it first elected.[175]

The OECD, in a study published in 2012,[176] found that the most frequently observed treaty practice consists of having investors choose between international arbitration and domestic courts.[177] Over half of the sample considered offered investors a choice between at least two arbitration *fora*, with the number of proposed alternatives increasing over time.[178]

Various formulations of dispute settlement clauses regulate investors' access to domestic courts and international arbitration. In the order of frequency observed in the OECD study, 4 main alternatives were identified. First of all, the treaty gives the disputing parties a choice between domestic remedies and international arbitration. Secondly, it creates a chronological roadmap to make either adjudicative venue successively available. Thirdly, it identifies the competent institution in relation to the subject matter of the dispute. Lastly, a handful of treaties in the sample take an approach that does not fit within those main categories.[179]

This chapter is mainly concerned with the first, and most popular, formulation of the clause. This scenario also corresponds to what investment tribunals have most frequently dealt with. Conflict has arisen because investors which had first taken recourse to domestic courts then attempted to submit arbitration claims on the basis of the relevant investment treaty.[180]

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[175] Gerhard Wegen and Lars Markert, 'Investment Arbitration – Food for Thought on Fork-in-the-Road – A Clause Awakens from Its Hibernation', in Christian Klausegger, Peter Clain et al (eds), *Austrian Yearbook on International Arbitration 2010, Austrian Yearbook on International Arbitration* (Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2010) 272.
[176] Pohl Joachim, Kekeletso Mashigo and Alexis Nohen (2012), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", OECD Working Papers on International Investment, 2012/02, OECD Publishing http://dx.doi.org/10.1787/5k8xb71nf628-en , 12.
[177] *Ibidem* 12.
[178] *Ibidem* 8.
[179] *Ibidem* 12.
[180] Wegen and Markert (n 175) 272.

MULTIPLE, MUTUALLY EXCLUSIVE, *FORA* (ALSO KNOWN AS 'FORK-IN-THE-ROAD')

The analysis departs from an examination of alternative mutually exclusive *fora*, commonly referred to as 'fork-in-the-road' provisions. 'Conflict' between treaty and contract dispute settlement provisions, though perhaps the word 'interaction' would be better suited in this instance, could arise under, at least, one scenario. Both instruments could mention the same forum thereby potentially creating some connecting tissue.

The enquiry into the coexistence of these 2 dispute settlement instruments starts from explaining the effect of fork in the road provisions. The typical dispute settlement clause in the treaty precludes access to international investment arbitration, as well as to other mentioned forms of dispute settlement, when another choice of forum for the same dispute has been validly pursued.[181]

Three are the main formulations of the clause. First of all, some formulations provide that investors may resort to investor-State arbitration only when no previous submission was filed before another court or tribunal. Secondly, investors hold a choice between several dispute settlement mechanisms. The choice, once made, is expressly indicated as final. Thirdly, some treaty provisions may be regarded as implied fork-in-the-road clauses: while the choice between alternatives is explicit, it is not expressly indicated as final.[182]

For the purposes of this chapter, i.e. understanding whether access to international investment arbitration can be precluded, the effect of the different formulations of the clause does not vary. For this reason, all formulations will hereinafter be referred to as the 'fork-in-the-road' provision.

Once a forum is selected no recourse can be had to the other, or as the Latin maxim puts it, '*una via electa non datur recursus ad alteram*'.[183] One instance of this provision can be read in the France-Argentina BIT of 1991, at article 8 (2):

[181] *Ibidem* 272-273.
[182] Petsche (n 174) 397-398.
[183] Schreuer (n 80) 239-240. See also Petsche (n 174) 393, 395-396. Bernardo Cremades and Ignacio Madalena, 'Parallel Proceedings in International Arbitration' [2008] Arbitration International 507, 530. See also *Supervision y Control S.A. v Republic of Costa Rica*, ICSID Case No. ARB/12/4 (18 January 2017) (Award) paras 293-294.

> '[…] Once an investor has submitted the dispute either to the jurisdiction of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.'

Assuming the there is no issue concerning the sameness of the disputing parties, three residual aspects shall determine whether interference with proceedings under the contract can occur, namely on what matters, at what time and by whom the choice was made.

Concerning the first aspect, loss of access only applies in relation to the same dispute, involving the same parties.[184] Academics have stressed that not every appearance of the investor before a national or administrative court would satisfy this requirement, and given the preclusions it would entail, the assessment should not be taken lightly.[185] 'Sameness' of the dispute has indeed been regarded as a crucial issue.[186]

'SAMENESS' OF THE 'DISPUTE'

Before turning to 'sameness', a few words shall be spared on the meaning of the term 'dispute', which has been the subject-matter of several decisions from both the PCIJ and the ICJ. In the *Mavrommatis Concessions case* the PCIJ defined a dispute as a 'disagreement on a point of law or fact, a conflict of legal views or interests between two persons.'[187] In a later advisory opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, a dispute was defined as 'a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.'[188] In the *Texaco v Libya* preliminary award the term was given a broader definition so as to encompass 'present divergence of interests and opposition of legal views.'[189]

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[184] Schreuer (n 80) 240-241. See also Petsche (n 174) 393 (footnotes omitted): 'Virtually all tribunals have held that strict identity between the two disputes is necessary in order for a FITR provision to bar the initiation of investor-state arbitration proceedings. While some tribunals have focused on the legal bases of the claims at stake, others have applied the so-called triple-identity test (or rule), requiring identity of parties, causes of action, and relief sought.'

[185] Schreuer (n 80) 241. See also Romesh Weeramantry, Brian Chang and Joel Sherard-Chow 'Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis' [2022] ICSID Review 1, 29-33.

[186] Petsche (n 174)398.

[187] *Mavrommatis Palestine Concessions (Greece v UK)* Jurisdiction, 1924 PCIJ (ser. A) No. 2 (Aug. 30), 12.

[188] *Interpretation of Peace*, Advisory Opinion*: ICJ Reports* 1950, p. 65, 74.

[189] *Texaco Overseas Petroleum Co and California Asiatic Oil Co v Libyan Arab Republic*, Preliminary Award (1975) 53 ILR 389, 416 (1979).

Whatever nuance of the definition one ends up preferring it is fairly uncontroversial that potential disagreements concerning a contract's performance, *viz* the shared subject matter of disputes under the treaty and the contract, would meet this initial threshold.[190]

The fork-in-the-road clause is not triggered unless both proceedings concern the 'same' dispute. The language of many typical fork-in the-road clauses makes this point rather clear. The use of the definite article 'the', coupled with the singular of the word 'dispute', foster the idea that is one and the same dispute to which the different alternative *fora* are made available.[191]

Shifting the focus on the criteria for identifying 'sameness', it shall be underscored how they have not been shared by all tribunals. The first approach, labelled by some as the 'formalistic' approach, relied on the difference between treaty and contract, as well as on the triple identity test.[192] The second approach, so-called 'pragmatic', adopts a more flexible threshold.[193]

The first approach is perhaps best exemplified by the decision in *CMS v Argentina*, where the tribunal stressed that '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.'[194]

This distinction was often adopted in combination with the triple identity test, providing a checklist of criteria allowing to differentiate between contract and treaty claim. Said test was applied in the case of, *inter alia*, *Toto v Lebanon*, where the arbitral tribunal stated that it would only lack jurisdiction if 'a claim with the same object, parties and cause of action (had) already (been) brought before a different judicial forum.' [195]

The second approach was first adopted in *Pantechniki v Albania*.[196] After an unsuccessful attempt to recover the promised amount in local proceedings commenced at the court of Tirana,

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[190] Petsche (n 174) 401.
[191] Wegen and Markert (n 175) 273.
[192] *Ibidem* 405-407.
[193] *Ibidem* 402.
[194] *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) (17 July 2003) (Decision on Jurisdiction) para 80.
[195] *Toto v Lebanon (Decision on Jurisdiction) (n 34)* para 211.
[196] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21 (30 July 2009) (Award). Dissatisfaction with the triple identity test was also expressed in *Chevron Corporation*

the investor initiated ICSID proceedings. The sole arbitrator reasoned that the relevant test was whether 'the fundamental basis of the claim' being heard by the investor-State arbitral tribunal was 'autonomous of claims to be heard elsewhere.'[197] Upon further elaboration of his reasoning the arbitrator pointed out the need 'to determine whether claimed entitlements have the same normative source.'[198] The arbitrator also mentioned that it was necessary to assess whether the ICSID claim could truly enjoy 'an autonomous existence outside the contract.'[199]

In the instance of third camp interpretation of umbrella clause claims, arguably, the threshold of 'sameness' under either test could be satisfied. Assuming that the parties are indeed the same, the claims would share the same object and cause of action as required under the triple identity test.[200] Both claims would have to be decided based on whether the contract had been breached and ground that decision on the same set of facts and applicable law.

This position, however, is not uncontroversial. It requires to ignore, at least to some extent, the formal distinction between treaty and contract claims. Under the third interpretive camp, indeed, the umbrella clause is still a treaty standard, and claims brought for a violation thereof are, therefore, treaty claims. Contract claims are, on the other hand, filed over a violation of the contract.

This test closely resembles, and could even be said to overlap with, the test employed to determine whether issues of *litispendence* or *res judicata* may occur between two disputes. For this reason, the reader is redirected to the sections of chapter 5 which deal with these concerns.

The pragmatic test proposed in *Pantechniki v Albania* would yield a positive outcome. Treaty and contract claims, in this instance, do share the same cause of action, *viz* the contract, and are decided according to the law applicable to said contract. The foundation and nature of

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*and Texaco Petroleum Company v. The Republic of Ecuador (II) (*Third Interim Award on Jurisdiction and Admissibility*)* (27 February 2012) para 4.76.

[197] *Pantechniki v Albania (n 196)* 61.

[198] *Ibidem* 62.

[199] *Ibidem* 64. Petsche (n 174) 416. Serena Lee and Myron Phua, '*Supervisión y Control v Costa Rica:* Developing the Pantechniki v Albania Standard for 'Fork in the Road' Provisions in Investment Treaties' [2019] ICSID Review 203, 208-209.

[200] *Toto v Lebanon (Decision on Jurisdiction) (n 34)* para 211.

umbrella clause claims is contractual.[201] No independent umbrella clause claim could exist without the breach of contract.[202]

TIMING

The second aspect shall now be addressed. It should be established at what point the choice was irrevocably made. If consent alone triggers the irrevocable choice pursuant to the fork-in-the-road provision, it would be consequential that agreeing to a forum selection clause in the contract subsequently to the entry into force of the treaty, regardless of whether the clause was exclusive, would close off access to other routes. If, on the other hand, the choice was expressed by the act of filing a claim, investment arbitration could still be a viable option.

For this latter argument to be valid, however, a few conditions shall be fulfilled. Proceedings under the contract shall not have been initiated and the forum selection clause in the contract should not be exclusive, broadly-worded and subsequent to the treaty. In this instance, the offer to bring the claim before an international investor-State tribunal would have arguably been waived ahead of filing.

Two elements militate in favour of filing, not consent, being responsible for the fork-in-the-road clause's preclusive effects. First of all, dispute settlement clauses often employ terminology such as 'once submitted' which suggests that consent alone is not enough to trigger them.[203] Secondly, subsequent practice also goes in this direction. Investment tribunals seized with the question of whether a fork-in-the-road provision had been triggered assessed whether the same dispute had already been filed to a domestic court, thereby precluding access to international investment arbitration on the matter concerned.[204]

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[201] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 43)* para 155: 'SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim'.
[202] Wegen and Markert (n 175) 279-280: '[…] the sole arbitrator discarded the contract/treaty claim distinction and it can be speculated that he would also have given effect to the fork-in-the-road clause had there been an umbrella clause – provided that the fundamental basis of the parallel proceedings had been the same.'
[203] See, *inter alia*, US-Argentina 1991 BIT, at article VII (2); France-Argentina 1991 BIT, at article 8(2); Energy Charter Treaty 2080 UNTS 95 1994 (ECT), article 26(2).
[204] Schreuer (n 80) 241-249. See for instance *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic) (21 November 2000) (Award); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 (Award) (25 June 2001); *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5 (Decision on Jurisdiction) (8 August 2000).

SEIZING THE INITIATIVE

The last aspect consists of examining the language of fork-in-the-road provisions, as it appears that they can only be triggered at the investor's initiative.[205] This interpretation also appears coherent with the purpose of dispute settlement provisions, i.e. to present investors from the other treaty Party with the option of multiple investment *fora*, and make it so that withdrawal of said offer would require renegotiating or denouncing the treaty. If States could engage the preclusive effects of the fork-in-the-road by initiating (perhaps on a pretext) proceedings *aliunde*, the purpose of the provision would be muted. As a consequence, if, in the event of a contractual disagreement, the State took the initiative and filed a claim before the forum designated in the contract, which also figures as one of the alternatives mentioned in the treaty, it is doubtful whether this action would preclude access to international investment arbitration.

Assuming the conditions itemised above are met, *viz* the same dispute was filed by the investor to one of the alternative *fora* proposed in the treaty, access to international investment arbitration for umbrella clause claims could be successfully prevented. There would be no need for the contractual forum selection clause to be exclusive. The preclusive effect would be entirely produced by a combination of the fork-in-the-road clause in the treaty and the action of the investor. The contract would become a relatively neutral instrument. Even if the contract had no dispute settlement clause, the act of filing to the competent forum could still engage the fork-in-the-road provision if said forum appeared among the treaty dispute settlement options.

This preclusion, with the uncertainties that it entails in relation to 'waiting periods' (see below), would be a matter of jurisdiction, not admissibility. Jurisdiction concerns the power of the arbitral tribunal to hear a claim. Said power is defined in its scope by the consent of the arbitrating parties, *viz,* in general, a combination of the offer under the treaty, expressed in the dispute settlement clause, and the acceptance of the investor.[206] Preclusion, in this instance, would be the direct result of the *out out* structure of the treaty offer and the acceptance, as expressed through the act of filing. Under such circumstances, the preclusion would pertain to how consent is shaped and, therefore, be a matter of jurisdiction.

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[205] Schreuer and others (n 5) 365.

[206] See, *inter alia*, Jason Rotstein, 'Before Ending the Case: Disassembling Jurisdiction and Admissibility in BG v. Argentina [2019] Georgetown Journal of International Law 81, 95-96; *Abaclat v Argentina (Dissenting Opinion of George Abi-Saab) (n 8)* para 12; Wehland (n 5) 230; Steingruber (n 8) 678. Schreuer (n 9) 2-3; Wehland (n 5) 230; Heiskanen (n 5) 234-236.

POTENTIAL ISSUES OF REASONABLENESS

Before wrapping up the conclusion to this chapter, it is worth spending a few words on some residual issues which could help demonstrate how the third camp interpretation could lead to unreasonable outcomes. Problems of coherence and logic within the arbitration system, as well as potential issues with the arbitrariness of decisions, could arise.

Namely, it will be explained how the requirement of 'sameness' that was associated with the dispute also applies to its forum. Secondly, it will be highlighted how the 'subsequent' requirement that was introduced for contractual waivers of the treaty's offer to arbitrate could, in this context, be dispensed with. Lastly, the hortatory or compulsory nature of waiting periods and whether they are respected could also impact, perhaps arbitrarily, the applicability of the fork-in-the-road clauses' preclusive effects.

CONFLICT OF JURISIDCTION AND 'SUBSEQUENT' REQUIREMENT

The scenario sketched above is only valid if the both instruments, i.e. the contract and the treaty, expressly designate the same forum, or share the same forum as their common option despite the absence of a forum selection clause in the contract. A different picture could emerge if the forum designated, either expressly or by default, in the contract did not also appear among the alternatives mentioned in the treaty.

For instance, if the contract indicates that future disputes shall be settled *via* arbitration under the aegis of the Stockholm Chamber of Commerce ('SCC'), while the treaty gives the investor the alternative between the ICSID arbitration and domestic courts, there would be no preclusive relation between the two proceedings, at least not under the fork-in-the-road provision.

Assuming the non-applicability of the *lis pendens* principle and the unwillingness to halt the proceedings over 'comity' concerns,[207] in such instance, whether the submission of a dispute to the designated contractual forum could prevent the same dispute from being heard before an investor-State tribunal would depend on the formulation of the contractual forum selection clause. *Mutatis mutandis*, subsequent broad and exclusive forum selection clauses could waive the treaty's offer to settle disputes before an international investment tribunal. Further, consent

[207] See chapter 5.

to a different forum, not the filing of a claim before it, would waive access to investment treaty arbitration.

This chapter has repeatedly affirmed that only a subsequent contractual agreement would be able to express a renunciation in relation to the offer to arbitrate tendered in the treaty. There is no reason to revisit this statement. It is hard to see how an investor could waive a right or benefit it has not received yet.

The question this section tries to answer, however, is whether this requirement could be dispensed with if access to investment treaty arbitration was precluded through the fork-in-the-road clause. In other words, when the contract pre-dates a treaty which contains a fork-in-the-road provision and their dispute settlement options share a common forum, it is reasonable to ask ourselves whether the act of filing a claim through said forum after the treaty's entry into force would engage the fork-in-the-road provision.

Typically, investment tribunals determine whether a dispute exists at the critical date. Investment treaties often limit their jurisdiction to disputes arising after the entry into force of the treaty. The time at which the dispute arises, which does not coincide with 'the time of the events leading to the dispute',[208] therefore holds decisive importance.[209] It would be plausible to envisage a dispute originating from a contract which pre-dates the treaty, provided that the dispute grounded on that very contract arises after the treaty's conclusion.

Preclusion of international investment arbitration would be a plausible outcome. Given that filing, not consent, engages the fork-in-the-road provision, whether consent to the forum

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[208] The approach investment tribunals have taken on the matter is markedly different from the position held by the ICJ. See *Phosphates in Morrocco (Italy v France)*, Judgment [1938] PCIJ Rep Series A/B No 74, 29. Jurisdiction only extends to events that take place after a certain date, most often the date of the instrument wherein consent to jurisdiction is enshrined. The ICJ and its older version, the PCIJ, were concerned with intertemporal issues to jurisdiction in multiple decisions. These courts rejected having jurisdiction over disputes relating to facts or situations which occurred before a critical date. In *Phosphates in Morocco* the PCIJ held that '[…] the dispute submitted to it by the Italian Government […] did not arise with regard to situations or facts subsequent to the ratification of the acceptance by France of the compulsory jurisdiction, and that in consequence it has no jurisdiction to adjudicate on this dispute.' See also *Certain Property (Liechtenstein v Germany)*, Preliminary Objections, Judgment, ICJ Rep. 2005, p. 6, 25. In the *Certain Property case* the ICJ followed the footsteps of its predecessor in declaring that the relevant facts or situations 'to which regard must be had ... are those with regard to which the dispute has arisen or, in other words, 'those which must be considered as being the source of the dispute'.

[209] Schreuer (n 19) 265. See, *inter alia*, *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID ARB/97/7 (Decision on objections to Jurisdiction) (January 25 2000) paras 90-98. *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v The Republic of Peru*, ICSID Case No. ARB/03/4 (also known as: Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v The Republic of Peru) (7 February 2005) (Award) paras 48-59.

selection clause in the contract was reached before the conclusion of the treaty, as well as whether said consent was formulated to the exclusion of other venues, becomes irrelevant.

Preclusions that may result from the fork-in-the-road provision are at once wider and more restrictive with respect to contractual waivers. More restrictive because of the cumulative conditions on which its applicability depends, *viz* the filing of the same dispute to one of the mutually exclusive alternatives itemised in the treaty's dispute settlement clause. Wider, because there is no need for the forum selection clause in the contract to be either subsequent or exclusive, as the prejudicial effect descends from the treaty's exclusivity requirements alone. In fact, even if the contract had no dispute settlement clause the fork-in-the-road provision could still be triggered if the claim ended up being filed before one of the alternatives itemised in the treaty dispute settlement clause.

WAITING PERIODS

The way is not yet clear of hurdles. Oftentimes, treaties require that the arbitrating parties undergo a period of negotiations, preliminary conciliation, mediation or other procedural steps before a dispute can be filed.[210]

The question is whether the forum would be validly selected, and its preclusive effect maintained, if the investor did not respect said waiting period, or did not undergo the entirety of the activities requested. For instance, a problem could arise if the contract provided for no cooling off period, or a shorter cooling off period, while the treaty required to undertake 6 months of preliminary negotiations before a claim could be filed to any forum. It is not unreasonable to question whether the preclusive effects of the claim's filing would be preserved in a similar instance.

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[210] Gary Born and Marija Šćekić, 'Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford 2015) 227. See also Aravind Ganesh 'Cooling-Off Period (Investment Arbitration)' [2017] Max Planck Encyclopedia for International Procedural Law, Working Paper 7, available at https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/WPS7_2017_Ganesh_Cooling_Off_Period__Investment_Arbitration_.pdf. UN Conference on Trade and Development 'Investor-State Disputes: Prevention and Alternatives to Arbitration' UNCTAD/DIAE/IA/2009/11, 41 , available at https://unctad.org/system/files/official-document/diaeia200911_en.pdf, accessed on 5 August 2022. Catherine Kessedjian, Anne van Aaken, Runar Lie, Loukas Mistelis, 'Mediation in Future Investor-State Dispute Settlement' (2020) Academic Forum on ISDS Concept Paper 2020/16, 5, available at https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf, accessed on 27 August 2022.

Waiting periods, also known as cooling-off periods, are all but an infrequent occurrence. The majority of BITs contain clauses expressing such requirements.[211] What is striking, however, is the lack of consistency over how they have been interpreted.[212] On the one hand, some tribunals and interpreters view waiting periods as a hortatory provision without constraining force.[213] Others, on the other hand, argue that they shall be interpreted as a compulsory requirement, especially when compulsory language, such as 'shall' or 'should' or precise requirements of conduct are imposed.[214] The debate also extends to whether lack of compliance would entail jurisdiction or admissibility.[215]

This latter debate is also very relevant for our purposes. Were the issue to be considered as one of admissibility[216] the preclusive effect of the fork-in-the-road provision would be engaged. As recalled earlier in this chapter, 'an objection to the admissibility of a claim invites the tribunal to dismiss (or perhaps postpone) the claim on a ground which, while it does not exclude its authority in principle, affects the possibility or propriety of its deciding the particular case at the particular time'.[217] This argument, funnelled to our ends, suggests that the jurisdiction of investment tribunals is not prejudiced by a problem of admissibility. In turn, if jurisdiction is properly seized, the claim was regularly 'filed' or 'submitted'. A valid submission triggers the

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[211] Ganesh (n 205). See also Joachim, Mashigo and Nohen (n 176) 17. Schreuer (n 80) 232.

[212] Born and Šćekić (n 205) 228. The authors suggest 'that the disputes and uncertainties arising from pre-arbitration procedural requirements argue decisively for treating requirements to negotiate or conciliate as invalid or unenforceable in many cases; that such agreements should, even when valid, generally be treated as non-mandatory and aspirational, rather than mandatory, absent clear language to the contrary; and that even valid, mandatory pre-arbitration procedural requirements should not ordinarily constitute jurisdictional bars to the initiation of arbitral proceedings, but should instead be regarded as matters of admissibility or procedure, that are capable of cure and whose breach does not ordinarily preclude resort to arbitration.'

[213] See generally Born and Šćekić (n 205). See also *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) (6 August 2003) (Decision on Jurisdiction) para 184. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) (Award) (24 July 2008) para 343.

[214] See for instance, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) (14 January 2004) (Decision on jurisdiction); *Murphy Exploration and Production Company International v. Republic of Ecuador (I)* (ICSID Case No. ARB/08/4) (Award on jurisdiction) (15 December 2010) para 110-133. See also Born and Šćekić (n 205) 236. Jaramillo J Troya 'Cooling-off periods in investment treaty arbitration: an opportunity to negotiate or a mere formality? Views from a Negotiation Perspective' [2014] Seminar Paper, Harvard Law School 28, available at https://rraae.cedia.edu.ec/Record/SENESCYT_9d72cbb5a53eb8675ece08629fbbd3e4.

[215] Born and Šćekić (n 205) 227. See also Ganesh (n 205). See also, generally, Samuel Wordsworth, 'Abaclat and Others v Argentine Republic: Jurisdiction, Admissibility and Pre-conditions to Arbitration' [2012] ICSID Review 255.

[216] See, for a decision where the issue was considered as one of admissibility, *Supervision v Costa Rica (Award) (n 183)* paras 336-341. Also note that the reasoning appears to contradict itself. At paragraph 339 the tribunal refers to proper notice as 'an important element of the State's consent to arbitration'. On the other hand, however, it relegates the issue to one of 'admissibility', despite the fact that matters that constitute the fabric of the arbitrating parties' consent to arbitrate are generally considered a jurisdictional problem.

[217] Crawford (n 28) 693. *Hochtief v Argentina (Decision on Jurisdiction) (n 28)* para 90.

preclusive effects of the fork-in-the-road provision regardless of whether the proceedings are later paused.

Weighing in on an in-depth debate on the issue of waiting periods goes beyond the scope of this chapter. At present, it is important to underscore that, aside from creating a very complex set of rules in order to determine whether international investment tribunals have jurisdiction, the rules' application is unclear and lends itself to potentially arbitrary results.

DOES THE DISTINCTION MATTER?

Regardless of whether a claim is barred from proceeding into the merits phase on the basis of jurisdiction or admissibility, both appear to lead to the same end result: the tribunal does not decide the claim on its ultimate merits. It is therefore legitimate to enquire into whether distinguishing between the two concepts has any practical bearing.

It is arguable that the distinction holds some importance in ICSID investment treaty arbitration because only a tribunal's decision with respect to the former, not the latter,[218] can be contested before an ICSID *ad hoc* committee under article 52(1)(b).[219] Furthermore, the possibility to annul non-ICSID investment decisions could likewise depend on this distinction. Lastly, the distinction could also matter for determining whether the host State breached the obligation to offer owed to the investor's home State under the treaty.

GROUNDS TO CHALLEGE AN AWARD

ICSID

First of all, a decision on jurisdiction can be challenged pursuant to article 52(1)(b) of the ICSID Convention for 'manifest excess of power' if the tribunal exercised jurisdiction despite the lack thereof or wrongly declined to exercise jurisdiction.[220] Such option may not be available in the case of admissibility.[221] The majority of the *Abaclat* tribunal referred to a

[218] Unless some argue jurisdiction has been mischaracterised by the tribunal as admissibility. See for instance, Pauker (n 6) 70.
[219] Douglas (n 30) 307.
[220] *Ibidem* 308; Wehland (n 5) 227-248, 234; Pauker (n 6) 67-68.
[221] Gouiffes and Ordonez (n 23) 108.

material difference in the standard of review of decisions referring to jurisdiction and to admissibility:

> 'Whereby a decision refusing a case based on a lack of arbitral jurisdiction is usually subject to review by another body, a decision refusing a case based on a lack of admissibility can usually not be subject to review by another body'.[222]

As the arbitrating parties' consent establishes the 'powers' of a tribunal to adjudicate a case, and paragraph 52(1) (b) speaks of 'excess of powers' on the part of the tribunal, such ground has been described as one relating exclusively to jurisdiction.[223] Mr. Broches, widely considered to be the founding father of the ICSID Convention, explained that the clause applied to instances where the tribunal exceeds the scope of the parties' agreement or *compromis* or decides on points which have not been submitted to it.[224]

By contrast, a tribunal's finding on admissibility will lead to an annulment by an ICSID *ad hoc* committee only when the tribunal failed to state the reasons underpinning its decision,[225] or the decision itself was reached following a serious departure from a fundamental rule of procedure.[226]

NON-ICSID

In the event of non-ICSID arbitrations, available grounds for annulment also appear to be limited in the event of an admissibility decision. The seat of the arbitration will determine where the relevant decision is deemed to have been produced. Its applicable law will likewise decide on what grounds it could be challenged before local courts.[227]

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[222] *Abaclat and Others v Argentine Republic*, *(formerly Giovanna a Beccara and Others v The Argentine Republic)* ICSID Case No. ARB/07/5 (Decision on Admissibility 2011) para 247 (ii), available at https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf, accessed on 18 July 2021.

[223] Amirfar and Goh (n 17) 953, especially footnote 55.

[224] Schreuer and others (n 5) 937.

[225] Article 52(1)(e) of the ICSID Convention states that a party may request an annulment on the ground that 'the award has failed to state the reasons on which it is based.'

[226] Article 52(1)(d) of the ICSID Convention states that a party may request an annulment on the ground that there has been a serious departure from a fundamental rule of procedure; Reinisch (n 25) 25.

[227] Gordon Blanke, 'Recourse Against Non-ICSID Investment Arbitration Awards in the MENA Region' [2016] BCDR International Arbitration Review 361, 362: '[…] [N]on-ICSID investment arbitrations – unlike delocalized ICSID proceedings – have a legal place or seat which determines the curial courts, or courts of *primary* jurisdiction, that are competent to rule on an action to set aside or nullify an award rendered there.' See also Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' [2015] Journal of International Arbitration 621, 629-630.

In non-ICSID arbitrations, the place of arbitration is often not directly selected by the parties. Most investment treaties have no provision on the place of arbitration and the investor and the State will be unlikely to choose together the place of arbitration. Pursuant to article 18(1) of the widely popular 2010 UNCITRAL Arbitration Rules, however, absent any agreement of the parties concerning the place of arbitration, this latter shall be selected by the arbitral tribunal 'having regard to the circumstances of the arbitration'.[228]

For institutional arbitration, the institution often determines the seat. Practice has shown that investment treaty tribunals, not dissimilarly from institutions, usually select an arbitration-friendly and neutral seat in Europe or North America. Contrary to a widely shared belief, the restricted number of options from which the arbitral seat is chosen means that, in practice, the grounds for annulment do not substantially vary.[229] For this reason, *inter alia*, the below examples have been drawn from two popular European arbitration jurisdictions. Paris houses the ICC, while London is home to the London Court of International Arbitration ('LCIA').

Challenges, generally speaking, are not available to admissibility decisions, but only to final, or in some circumstances, *interim* 'awards.'[230] For instance, in France annulment pursuant to article 1492 of the Code of Civil Procedure is open to the parties on limited grounds and, more crucially, only arbitral awards can be subject to it:

> [...] [O]nly genuine arbitral awards, i.e. acts of the arbitrators which finally dispose, in whole or in part, of the dispute submitted to them, whether on the merits, on jurisdiction or on a procedural ground which leads them to terminate the proceedings, may be the subject of an action for annulment [...][231]

The same line of reasoning appears to have been followed by UK Courts and legislation. Moving from this latter, the Arbitration Act of 1996 at article 67 (1) (b) states that a 'party to arbitral proceedings may […] apply to the court […] for an order declaring an award made by

[228] Kateryna Bondar (n 227) 629-630.
[229] *Ibidem* 630.
[230] *Ibidem* 630-631.
[231] Translation by the author of the Arrêt de la Cour de cassation, civile, Chambre civile 1, 12 octobre 2011, 09-72.439: '[…] [S]eules peuvent faire l'objet d'un recours en annulation les véritables sentences arbitrales, c'est-à-dire les actes des arbitres qui tranchent de manière définitive, en tout ou en partie, le litige qui leur est soumis, que ce soit sur le fond, sur la compétence ou sur un moyen de procédure qui les conduit à mettre fin à l'instance […].' The decision is available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000024673814, accessed on 12 May 2022.

the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.'

Recent decisions have cast some light on the non-applicability of this procedure to decisions on admissibility. In *Sierra Leone v SL Mining*,[232] the African Republic challenged the arbitral tribunal's decision that it possessed substantive jurisdiction to decide the matters in dispute. The court in that occasion clarified that only matters of jurisdiction, not admissibility, could be subject to a challenge pursuant to article 67:

> It was common ground before me that there is a distinction between a challenge that a claim was not admissible before Arbitrators (admissibility) and a challenge that the Arbitrators had no jurisdiction to hear a claim (jurisdiction). Only the latter challenge is available to a party under s 67 […].[233]

Researching the norms of every single jurisdiction would be impractical. There is nevertheless room to argue that the impossibility to challenge decisions on admissibility, as opposed to awards on jurisdiction, appears to be a commonly shared trait across the arbitration field, as the New-York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention')[234] arguably confirms.

The New York Convention is concerned with the recognition and enforcement of foreign awards, not with internal setting aside procedures. Given the wide adhesion to this treaty,[235] however, it is not unreasonable to argue that the New York Convention, might give some indication on the practice followed on the matter of arbitral challenges.

Without describing in detail all grounds listed under article V of the New York Convention, it suffices to say that the article is concerned with the conditions pursuant to which the recognition or enforcement of an 'award' may be refused. Looking at the history of the New

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[232] *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), available at https://www.acerislaw.com/wp-content/uploads/2021/12/Republic-of-Sierra-Leone-v.-SL-Mining-Ltd.pdf, accessed on 12 May 2022.

[233] *Ibidem* para 8.

[234] New-York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

[235] Please see the official website for an up-to-date list of the State Parties and their reservations: https://www.newyorkconvention.org/list+of+contracting+states.

York Convention's drafting, it is clear that the term 'award' was meant to indicate a decision capable of disposing of the dispute:

> '[I]n the country where the award was made, the award must be "final and operative" and in particular, that its enforcement must not have been suspended. The expression "final and operative" was intended by the Committee to mean that an award must be a definitive adjudication of all matters at issue, and must have full legal force and effect.'[236]

Arguably, a decision on admissibility would not meet this criterion as it would not dispose definitely of any matter. It merely declares that it would be inappropriate for the tribunal to hear the dispute for the time being.

In conclusion, regardless of whether the decision in rendered under the aegis of the ICSID Convention, or by another international arbitration forum, it is doubtful whether a decision on the admissibility of the claim, as opposed to its jurisdiction, could be challenged.

BINDING OFFER OF CONSENT

Another aspect, most crucial for the argument advanced in this thesis, concerns a potential breach of the obligation to keep the offer to arbitrate open for the investor to accept, which is owed under the treaty to the other State Party. The main issue is whether a breach of treaty would occur if the contractual forum selection clause was deemed successful in preventing the formation of the investment tribunal's jurisdiction. The flip side of this question is whether such breach would not occur if the claim did not proceed to the merits phase for inadmissibility reasons.

In order to answer the above question, it is first necessary to assess the scope of the Contracting States' consent to arbitration under relevant BITs. Some examples will be useful in this matter, especially because treaty language appears consistent in the way State 'consent' has been shaped across different international law instruments.[237] For instance, article 28(1) of the

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[236] Report of the Committee on the Enforcement of International Arbitral Awards, E/2704: E/AC.42/4/Rev.1, 9 para 33, available at https://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958, accessed on 12 May 2022.

[237] For further examples of the obligation to consent enshrined in treaties see Schreuer and others (n 5) 206-208, paras 431-435. See also Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: substantive principles* (2nd edn, OUP 2017) 47-91. Despite the differences in the various formulations the key element, *viz* consent to submit a claim to arbitration is conveyed across all instruments.

Canadian 2021 Foreign Investment Promotion and Protection Agreement (FIPA), which goes under the heading 'Consent to Arbitration' reads as follows:

> Each Party consents to the submission of a claim to arbitration under this Section in accordance with the provisions of this Agreement, including the requirements of Article 25 (Request for Consultations) and Article 27 (Submission of a Claim to Arbitration).[238]

Similarly, article 25(1) of the US 2012 BIT Model provides that '[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.' In the recently signed, and not yet entered into force, Japan-Georgia BIT, article 23 paragraph 3 on the 'Settlement of Investment Disputes between a Contracting Party and an Investor of the Other Contracting Party' states that '[e]ach Contracting Party hereby consents to the submission of a claim to arbitration under this Article in accordance with this Agreement.'[239]

The wording of the treaties can reasonably be interpreted as committing the treaty Parties to consent to the submission of future treaty claims to arbitration. The common thread linking together all examples is the sentence '[e]ach Contracting Party consents to the submission of a claim to arbitration'. The dictionary definition of 'submission' concerning legal matters is that of a request or suggestion given to an adjudicatory body for consideration.[240] Read together with the qualifier 'to arbitration' the ordinary meaning of the sentence is that of giving the arbitral tribunal the authority to consider a claim. If the investment tribunal is to consider claims, it should have jurisdiction over them.

As a consequence, given that the tribunal's jurisdiction is part and parcel of the engagement to allow for the submission of claims, it is then not unreasonable to argue that if jurisdiction is waived the investment receiving State finds itself in breach of its commitment *vis-à-vis* the other treaty party to allow for the submission of treaty claims. The waiver, despite being legal from the perspective of the investor, is a violation of the treaty commitments entered into with the investor's home State.

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[238] 2021 Canadian FIPA, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6341/download, accessed on 19 July 2021.
[239] 2021 Georgia-Japan BIT, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6078/download, accessed on 19 August 2021.
[240] Oxford learner online dictionary; Longman dictionary of contemporary English (6th ed, Pearson education ltd 2014).

It is, however, doubtful whether the treaty language can be stretched so as to include an obligation on the treaty Parties to avoid acting in a manner that could hamper a claim's admissibility. The language of the treaty could be understood as suggesting that the treaty Parties' commitment is fulfilled once the tribunal's jurisdiction has been seized. Once vested of authority over a claim, the tribunal could assess said claim and deem it inappropriate to proceed further. In this latter instance, it is not unreasonable to conclude that the tribunal has considered the claim submitted to it, thereby fulfilling the State's obligation under the treaty.

In conclusion, an argument could be made that if the claim is rejected on admissibility grounds, it will be less permeable to annulment proceedings under the ICSID Convention. Further, not reaching the merits phase in reason of admissibility objections arguably could prevent the occurrence of a violation of treaty obligations from being committed by the investment receiving State.

FORK-IN-THE-ROAD PRECLUSION

The situation is clearly different in preclusions that could be result of the application of the fork-in-the-road. Indeed, these preclusions result from the fulfilment, not the violation, of the treaty's own terms.

The troubling reality that would emerge from the cumulative effect of jurisdictional challenges shall nevertheless be underscored. Not only agreements that are subsequent to the treaty's conclusion would have to be scrutinised for broadly worded exclusive forum selection clauses, but also disputes that arise from older contracts could have jurisdictional challenges brought against them.

The idea that this could reflect the intention of the treaty Parties is unconvincing. It is, for instance, unlikely that both States negotiating the treaty would be aware of dispute settlement clauses in investment contracts with their respective national investors and be in the position to weigh potential interferences between the two instruments.

Additionally, the criteria for assessing the 'sameness' of the dispute are not settled. Even the more restrictive triple identity test, when interpreted in a relaxed fashion, could be leveraged to demonstrate that contract and treaty disputes are essentially one and the same. The problem is, as it will be further explained in instances of *litispendence* and *res judicata*, that tribunals

do not appear to agree on whether its criteria should indeed be relaxed. This creates the potential for arbitrariness and, once more, inconsistent decision-making.

Further, the uncertainty around the language and interpretation of waiting periods requirements ads to the unpredictability of the decision-making process. Their mandatory nature is not a settled issue. The rendering of coherent decisions would be unlikely.

Similarly, doubts could also originate from the interaction between the two preclusive methods. It is not unreasonable to ask ourselves how the presence of a subsequent, broad and exclusive forum selection clause capable of waiving the investment arbitration offer should be interpreted when a fork-in-the-road provision would also bar jurisdiction at the time of filing. Because consent to a different forum pre-dates the submission of a dispute to that same forum, the host State could find itself in a breach of its treaty commitments. Such violation could have been avoided if the preclusion was generated through the act of filing. A question therefore arises as to whether such a difference could reasonably be justified in the light of the fact that the option to choose an alternative forum was already baked into the treaty.

On a final note, it is worth highlighting how these issues are a result direct of third camp interpretation of the umbrella clause. Under this camp umbrella clause claims share the nature and cause of action with disputes for contractual breaches. Had this not been the case, the distinction recalled from the *CMS* arbitration could have been maintained[241] and treaty and contract claim could have kept on marching on parallel, though formally distinct, paths. It is legitimate, in my view, to question whether such a complex, and perhaps arbitrary and uncertain, system of preclusions could have reasonably been intended by the treaty Parties.

FINAL CONCLUSIONS

Agreeing on the third camp for interpreting umbrella clauses does not guarantee that tribunals will see eye to eye when it comes to whether a claim shall proceed to the merits and, if not, under what grounds it shall be rejected. This chapter has dealt with instances in which tribunals have not initiated a discussion of the claim's merits, *viz* jurisdiction and admissibility. The main tenet is that lack of jurisdiction should prevail over the inadmissibility of the claim.

[241] See above *CMS v Argentina (Decision on Jurisdiction*) (n 194) para 80.

In order to make a case for lack of jurisdiction the chapter identified a number of unsettled issues, most importantly whether investors are direct holders, or third-party beneficiaries, of treaty rights (and more specifically of the right to accept the offer to arbitrate under the treaty), whether they are empowered to waive them, and finally whether they can do so by way of a contractual forum selection clause.

The chapter makes a case for the greater plausibility of the argument that the investor is the direct bearer, or at least the beneficiary, of treaty rights, by comparing existing models and assessing their accuracy in depicting the position of investors under contemporary investment law.

Having argued that the direct right model, and to a lesser extent the third-party beneficiary model, are most persuasive, and that they would both allow the bearer, or beneficiary, to waive treaty rights, the following part assesses whether the investor can waive investment rights through a contract. After the example set by human rights cases, the chapter concludes that it is reasonable for public interest concerns not to outweigh the freedom of the investor to dispose of its rights or benefits. Further, the research also suggests that contractual forum selection clauses, provided that they unequivocally convey the intentions of the parties, can serve as waivers.

Though the main topic of debate on the issue of jurisdictional precedence as affected by contractual forum selection clauses, it is arguably not the only one that would arise if the third camp interpretation were to be accepted. Fork-in-the-road provisions could also pose a challenge. Inconsistent and perhaps arbitrary results could follow from the interaction between the investor's filing of the 'same dispute' to the forum designed in the contract.

The last section of the chapter illustrates the pragmatic implications of having lack of jurisdiction prevail over inadmissibility. Research has found that under the ICSID Convention it is doubtful whether an admissibility decision can be subject to a certain type of annulment proceedings.

Similarly, in non-ICSID arbitration, domestic jurisdictions seem to be aligned on the fact that only a definitive decision which finally disposes of the matters at issue shall be challenged. The preparatory work to the drafting of the New-York Convention also appears to validate this position. Admissibility decisions cannot, therefore, generally speaking, be challenged.

Further, and more interestingly for the purposes of this work, if the treaty tribunal finds that it lacks jurisdiction this could have implications from the perspective of the obligations owed by the host State to the investor's home State under the treaty. In particular, it could be in breach of the commitment to keep open an offer to arbitrate for the investor to accept.

Unlike for contractual forum selection clauses, jurisdictional impediments that might arise as a consequence of fork-in-the-road provisions would qualify as an application, not a violation, of the treaty. The uncertainty and arbitrary outcomes that could be the result of the interaction between contractual and umbrella clause claims are unlikely to have been reasonably intended by the State parties to the treaty.

What the chapter to a large extent ignores, however, is the possibility of parallel proceedings under the investor-State dispute settlement mechanism and the forum selection clause in the contract. Tribunals adhering to the third interpretive camp have most often held parallel proceedings to be unproblematic. It would be interesting to see whether these decisions can be called into question on jurisdictional grounds.

CHAPTER 5

THIRD CAMP: LACK OF JURISDICTION *VERSUS* PARALLEL PROCEEDINGS

INTRODUCTION

Chapter 4 advanced a few arguments for privileging lack of jurisdiction over the inadmissibility of a claim and the consequences to be drawn from that conclusion. This chapter is a continuation on the same line of reasoning. It likewise limits the reach of its analysis to the third interpretive camp (or jurisdictional internationalisation). Its focus, however, shifts to challenging the position of tribunals that have allowed for parallel proceedings.

The overwhelming majority of investment tribunals[1] has adjudicated that two *fora* having jurisdiction respectively on the treaty breach (*i.e.* the breach of the umbrella clause) and the contract breach is unproblematic. One of the two main tenets advanced hereinafter consists of the argument that, in the majority of instances, lack of jurisdiction of the investment tribunal is a more persuasive alternative than parallel claims.

The second main tenet advocated for in this chapter is that other remedies available to prevent parallel proceedings or conflicting awards (*viz* litispendence, articles 26 or 53 of the ICSID Convention, *res judicata* or comity) would lead to fragmented results which involve a considerable degree of uncertainty and discretion. Even when parallel proceedings appear to be a plausible alternative, as the choice of forum clause in the contract and the fork-in-the-road provision both fail to preclude access to investment treaty arbitration, other remedies, either specific to the investment field or part of general international law, might intervene to regulate the relationship between contract and treaty disputes. Avowing that parallel claims might arise is therefore no acknowledgment that those claims might all results in valid awards.

The first part of this chapter has a two-fold structure. The first section examines the reasonings of tribunals which upheld parallel jurisdiction while also adhering to jurisdictional internalisation in order to identify common arguments in their decisions. The second section,

[1] See Chapter 2 at 'Summary of the Results of the Original Study', in particular the section on 'Jurisdictional Precedence' and 'Patterns identified in the Original Study'. On the outcome of the New Study, see Chapter 2 'Jurisdictional Precedence' and 'Emerging Trends, Dissipating and Confirmed Patterns'.

after a brief recap of the arguments already exposed in the previous chapter, argues that lack of jurisdiction is preferable, in the majority of instances, to parallel jurisdiction. The crux of the argument is, *mutatis mutandis*, that treaty jurisdiction is prevented from arising due to the offer to arbitrate having been waived by the investor, provided that a few preconditions are met. Preconditions which, evidence seems to suggest, would be met in the majority of instances.

This study demonstrates that waiving is not only possible but likely because in most instances the language of the contractual forum selection clause is comprehensive enough to include treaty claims which are related, or connected to, the contract. Additionally, jurisdiction, in most clauses, is formulated in an exclusive fashion.

The first of the chapter's main arguments will also be tested in preclusions resulting from fork-in-the-road clauses. The second part of the chapter is devoted to this scenario. Parallel proceedings, it is argued, could arise especially if cooling off periods are considered as essential elements of the Parties' consent to arbitration. Not fulfilling the requirements mandated therein could negate the fork-in-the-road's preclusive effects. This section, therefore, admits that parallel proceedings could be a relatively common, and perhaps undesirable, outcome under the third camp interpretation of the umbrella clause.

This section looks into potential additional remedies which could prevent parallel proceedings from occurring. Article 26 of the ICSID Convention is considered, and rejected, as a potential solution. The applicability and pertinence of the litispendence principle is discussed. It is doubted whether this remedy has secured a place among general principles of international law. Moreover, the existence of other requirements for its applicability are also called into question.

The final part of this chapter addresses the concept of principle of *res judicata* in the relationship between investor-State treaty awards, concerning the umbrella clause, and decisions rendered by the contractually designated forum for breach of contract. It is argued that the third camp interpretation, which has left nothing but a *locus procedendi* distinction between treaty and contract claims, could indeed impinge on the ability of contractually designated *fora* to render a decision for breach of contract after the treaty decision has been issued.

It is nevertheless highlighted how this interpretation is far from uncontroversial. Aside from the fact that the *res judicata* principle only applies to the same legal order, its discretionary application could result into uncertainty.

Additionally, it is argued that article 53 of the ICSID Convention would prevent proceedings for breach of contract from taking place after an ICSID award has been rendered, regardless of the applicability of the *res judicata* principle. Proceedings over a breach of contract, it is averred, could befit the definition of 'remedy' and would therefore be precluded.

Lastly, the possibility that tribunals may voluntarily halt their proceedings over concerns of comity is also explored. Some light is cast on the widespread recourse to this option in the investment field, as well as on the high degree of discretion that it entails.

PARALLEL JURISDICTION UPHELD: THE ARGUMENTS

Data collected at Chapter 2 shows that tribunals found that their jurisdiction was unaffected by the forum selection clause in 18 decisions.[2] In 4 of these decisions tribunals also convened that

[2] The following list is obtained by combining the findings of this study (second chapter) and those of Jude Anthony's research. *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29) (12 February 2010) (Decision on Jurisdiction) paras 166-185; *CMS Gas Transmission Company v The Argentine Republic* (ICSID Case No. ARB/01/8) (17 July 2003) (Decision on Jurisdiction) para 76; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic* (ICSID Case No. ARB/01/3) (2 August 2004) (Decision on Jurisdiction on Ancillary Claim) para 50; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic* (ICSID Case No. ARB/02/1) (3 October 2006) (Decision on Liability) para 61; *Siemens A.G. v The Argentine Republic* (ICSID Case No. ARB/02/8) (3 August 2004) (Decision on Jurisdiction) para 180; *Salini Costruttori S.p.A. and Italstrade S.p.A. v Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13) (9 November 2004) (Decision on Jurisdiction) para 96; *Impregilo S.p.A. v Islamic Republic of Pakistan (II)* (ICSID Case No. ARB/03/3) (22 April 2005) (Decision on Jurisdiction) paras 286-290; *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16) (11 May 2005) (Decision on Jurisdiction) para 121; *Eureko B. V v Republic of Poland* (19 August 2005) (Partial Award) para 113; *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan* (SCC Case No. 064/2008) (2 September 2009) (Partial Award on Jurisdiction and Liability) paras 158-159.*Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20 (Award) (19 December 2016) (despite the decision on jurisdiction not having been made public) paras 245-246; *Greentech Energy Systems A/S, et al v Italian Republic* (*Greentech Energy Systems v Italy)*, SCC Case No. V 2015/095 (23 December 2018) (Final Award) para 220; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic* (ICSID Case No. ARB/03/23) (Award) (11 June 2012) para 930; *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia* (ICSID Case No. ARB/12/39) (26 July 2018) (Award) para 420; *Belenergia S.A. v Italian Republic* (ICSID Case No. ARB/15/40) (Award) (6 August 2019) paras 356-357; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italian Republic* (ICSID Case No. ARB/16/5) (Award) (14 September 2020) para 376, para 395; *Sun Reserve Luxco Holdings SRL v Italy* (SCC Case No. 132/2016) (Final Award) (25 May 2020) paras 576-577; *Nissan Motor Co., Ltd. v Republic of India* (PCA Case No. 2017-37) (Decision on Jurisdiction) (29 April 2019) para 280.

the third camp better expressed the function of umbrella clauses.[3] Their arguments are hereinafter examined and compared.

SGS v Paraguay delivered the most extensive reasoning on the topic. Due to the significance of this decision the tribunal's full motivations are herein discussed. The decision advances several arguments which can be divided in two main categories. Under the first category, the tribunal found that the issue before it was not a matter of admissibility, but of jurisdiction. Under the second category, the tribunal explained why treaty jurisdiction could not be impaired by the contract or its forum selection clause.

Given the extensive arguments already put forth in the previous chapter in favour of the issue being considered as a jurisdictional problem, the first category will only be briefly mentioned. The second category, on the other hand, will be afforded a greater deal of attention in the following paragraphs.

Pursuant to the first category, the tribunal adjudicated that, even for the claims that are based on the contract, no valid argument was brought against their admissibility. The argument that the standard for evaluating both contractual and treaty claims was the contract itself was, in the eyes of the tribunal, a jurisdictional one.[4] Having found jurisdiction, the tribunal saw no reason to decline to exercise it:

> For the reasons set forth in Section V.A and in the first part of this Section V.B.3, this Tribunal-like the *BIVAC* tribunal-has found that we have jurisdiction over Claimant's Article 11 claims. And having so found jurisdiction, we do not see a basis for finding such claims inadmissible. To the contrary, having found jurisdiction, we would have to have very strong cause indeed to decline to exercise it.[5]

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[3] The following list is obtained by combining the findings of this study (see chapter 2) and those of Jude Anthony's. *SGS v Paraguay (Decision on Jurisdiction) (n 2)* paras 166-185; *CMS v Argentina (Decision on Jurisdiction) (n 2)* para 76; *Eureko v Poland (Partial Award) (n 2)* para 113; *Burlington v Ecuador* (ICSID Case No. ARB/08/5) (14 December 2012) (Decision on Liability) paras 212-215.

[4] *SGS v Paraguay (Decision on Jurisdiction) (n 2)* para 174: 'Second, even to the extent that certain of the Article 11 claims may be co-extensive with claims under the Contract, the Tribunal is not persuaded that this presents a basis to find them inadmissible. Respondent argued strenuously, in many forms, that the fundamental basis of Claimant's claims-and in particular Claimant's umbrella clause claims-is the Contract and not the Treaty. From that premise, as we noted earlier, one might contend that, at least for the Contract-based claims, the Article 11 breach will not be assessed under an independent, international law standard in the Treaty, but rather under the Contract. But that is an argument for declining *jurisdiction*, not for inadmissibility, and this Tribunal has already rejected that jurisdictional argument.'

[5] *SGS v Paraguay (Decision on Jurisdiction) (n 2)* paras 175.

Concerning the second category, the tribunal put forth several arguments. First of all, the tribunal averred that claims for breach of contract and for breach of treaty remain distinct of each other.[6] Having found that the umbrella clause (article 11) created under the treaty an obligation to 'constantly guarantee the observance of commitments' which was separate from the contract's, the tribunal upheld its jurisdiction to rule over an alleged breach of article 11:

> As a first step in our analysis, we turn back to Claimant's claims under Article 11. […] Claimant has not asked this Tribunal to adjudicate directly any claims for breach of the Contract as such. Claimant has, however, put before us Treaty claims under Article 11. The predicate for those claims is one or more breaches of the State's commitments to SGS-some of which commitments are, indeed, to be found in the Contract. But that does not alter the fact that, for purposes of the long-recognized distinction between contract and treaty claims discussed in Section V.A above, we are presented with claims under Article 11 of the Treaty.
>
> On this basis, we have little difficulty in finding jurisdiction over Claimant's claims under Article 11. That article creates an obligation for the State to constantly guarantee observance of its commitments entered into with respect to investments of investors of the other Party. […]
>
> […]
>
> Thus the Tribunal finds that it has jurisdiction over Claimant's claims under Article 11 that Paraguay failed to observe commitments it allegedly made to SGS, both under the Contract and under its alleged subsequent oral and written promises to make good on the claimed debt to SGS. And having found jurisdiction, we are of course mindful of the *Vivendi I* annulment committee's admonition that a "[t]ribunal, faced with such a claim and having validly held that it had jurisdiction, [is] obliged to consider and to decide it."[7]

Secondly, the tribunal expressed concerns that dismissing the claim would tantamount to recognising the effect of an implied waiver of BIT rights.[8] In the light of the significance of

[6] This was also the main argument advanced in *Eureko v Poland (Partial Award) (n 2)* paras 96-314.
[7] *SGS v Paraguay (Decision on Jurisdiction) (n 2)* paras 166-167-171.
[8] *Ibidem*, para 177: 'Fourth, this Tribunal is concerned that to dismiss umbrella clause claims as inadmissible on the ground that a forum selection clause is applicable to the parties' commitments under the Contract will be, in

the safety net that these provisions provide, silence was deemed insufficient to constitute a waiver:

> Given the significance of investors' rights under the Treaty, and of the international law "safety net" of protections that they are meant to provide separate from and supplementary to domestic law regimes, they should not lightly be assumed to have been waived. Assuming *arguendo* that the parties to the later-in-time Contract could have expressly excluded the right to resort to arbitration under the extant BIT, at least as to Contract-based claims under Article 11, they did not do so-and we would not take their silence as effecting that same waiver of Treaty rights.[9]

The tribunal quoted the decision in *Aguas del Tunari v Bolivia* to aver that an implied waiver was insufficient to impinge on its jurisdiction[10] and that the two jurisdictions could 'survive and coexist.'[11]

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effect, to read an implied waiver of BIT rights into every investment agreement that specifies a dispute resolution mechanism other than ICSID-a result we would not embrace.'

[9] *SGS v Paraguay (Decision on Jurisdiction) (n 2)* paras 178.

[10] *SGS v Paraguay (Decision on Jurisdiction) (n 2)* paras 179-180: 'In this regard, we agree with the tribunal in *Aguas del Tunari v Bolivia*, which considered the question of whether and under what circumstances a contractual forum selection clause could be held to work a waiver of the treaty right to invoke ICSID jurisdiction. The *Aguas del Tunari* tribunal drew a distinction between "(1) a separate document [*i.e.* a contract] that waives the right to invoke, or modifies the extent of, ICSID jurisdiction (where the intent of the parties to alter the possibility of ICSID jurisdiction is direct); and, (2) a separate document that contains an exclusive forum selection clause designating a forum other than ICSID (where the intent of the parties to alter the possibility of ICSID jurisdiction must be implied)." As to the second circumstance-the one that we also face in the present case- the *Aguas del Tunari* tribunal insisted that the mere designation of a non-ICSID forum in a contract, without an express waiver of ICSID jurisdiction, was insufficient to cause the tribunal to refrain from exercising its jurisdiction under the BIT: 'The Tribunal does not find the authority under the ICSID Convention for it to abstain from exercising its jurisdiction simply because a conflicting forum selection clause exists. To the contrary, it is the Tribunal's view that an ICSID tribunal has a duty to exercise its jurisdiction in such instances absent any indication that the parties specifically intended that the conflicting clause act as a waiver or modification of an otherwise existing grant of jurisdiction to ICSID. A separate conflicting document should be held to affect the jurisdiction of an ICSID tribunal only if it clearly is intended to modify the jurisdiction otherwise granted to ICSID.' 'We are in accord. In the instant case, there is no showing that the parties to the Contract clearly intended to exclude the jurisdiction of a tribunal formed under the Treaty to review SGS's Treaty claims. Paraguay, at least, must be deemed to have known the content of its own Treaty at the time its Ministry of Finance entered into the Contract; it either did not try, or did not obtain SGS's agreement, to clearly waive SGS's rights to seek separately arbitration of claims under the Treaty (necessarily including claims under Article 11 thereof). At least in the absence of an express waiver, a contractual forum selection clause should not be permitted to override the jurisdiction to hear Treaty claims of a tribunal constituted under that Treaty.'

[11] *SGS v Paraguay (Decision on Jurisdiction) (n 2)* paras 181: 'We are also in accord with Professor Crivellaro in his partial dissent in *SGS v Philippines*, when he argued that posing the question as whether a BIT dispute settlement clause should override a contractual forum selection clause (or *vice versa*, presumably) creates a conflict where there need not be one. As Professor Crivellaro explained, both provisions "survive and coexist"- both remain effective, with the only difference that the contract clause ceases to be an "exclusive" forum from the investor's perspective. As the *Bayındır v Pakistan* tribunal expressed it: "[W]hen the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty." That choice should not be foreclosed.'

Thirdly, the tribunal stated that upholding the tribunal's jurisdiction fulfilled the purpose and effect of article 11, *viz* to increase the protection of investors, and supply them with the option to enforce article 11 commitments:[12]

> […] One reason to read Article 11 as providing jurisdiction over contractual claims is to give purpose and effect to that provision. The State parties to the BIT intended to provide this Treaty protection in addition to whatever rights the investor could negotiate for itself in a contract or could find under domestic law, and they gave the investor the option to enforce it, including through arbitrations such as this one. […]

Lastly, claims under the contract and the treaty are not coextensive. The latter includes commitments by Paraguayan representatives which are not mentioned in the contract. Even if the perimeter of the dispute resolution clause is wide enough to encompass contractual breaches, the decision would still have to be grounded on elements other than the contract.[13]

Other decisions add no substantial arguments to this reasoning, with the exception of *CMS v Argentina*.[14] The tribunal, quoting the decision in *Lanco*, averred that pursuant to article 26 of the ICSID Convention[15] any other remedy was barred once consent to ICSID arbitration had been reached between the parties.

COUNTER-ANALYSIS OF THE ARGUMENTS

Assuming, for the reasons already discussed in the previous chapter, that the *SGS v Paraguay* tribunal is correct and the question is indeed one of jurisdiction, not admissibility, this section addresses the arguments listed above in favour of parallel proceedings, either directly or by refence to the previous chapter.

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[12] *Ibidem*, paras 176.
[13] *SGS v Paraguay (Decision on Jurisdiction) (n 2)* paras 173: '[…] Whether or not both might be within the reach of the Contract's broadly worded forum selection clause, the latter cannot be judged under the Contract alone. Whether Paraguayan representatives made the alleged commitments, whether those commitments could be relied upon by SGS, and whether the commitments were breached, must all be decided by this Tribunal with reference to the Treaty and the applicable bodies of law specified under it. Accordingly, it would sweep too broadly to say that all umbrella clause claims-and, in particular, all of the umbrella clause claims before us-can be disposed of on contractual grounds by the contractual forum.'
[14] *CMS v Argentina (Decision on Jurisdiction) (n 2)* para 72.
[15] Article 26 of the ICSID Convention reads as follows: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.'

Before moving ahead with the arguments which are original to the parallel claim scenario, it is first necessary to recall a few conclusions from the previous chapter that will be imported without additional discussion. First of all, under the third camp, umbrella clause claims are treaty claims. Tribunals seized with said claims determine whether a breach of the umbrella clause standard occurred by assessing whether the underlying obligation, *viz* the contract, was breached. The question shall be decided pursuant to the law applicable to the contract. The distinction between treaty claims (*viz* umbrella clause claims) and contract claims consists in the *forum* of the dispute. This implies that, following third camp interpretation, there is a direct relation, or connection, between contractual disputes and umbrella clause claims. In turn, this interpretation creates the potential for conflict if the contractual forum selection clause encompasses matters that are related, connected to, or arise from the contract. Secondly, for umbrella clauses interpreted according to the 'third camp', exclusive, subsequent and comprehensive[16] contractual forum selection clauses can waive the right to litigate umbrella clause claims before an investment tribunal. Lastly, the forum selection clause in the contract does not waive the tribunal's jurisdiction under the treaty, but rather the investor's right or benefit to accept the offer to litigate umbrella clause claims before an investment tribunal.

These 'imported' arguments are already sufficient to address most of the reasoning from *SGS v Paraguay*. The same goes for the argument that article 26 would be an obstacle to parallel proceedings being held before non-ICSID *fora*. Article 26 would not be triggered as it requires consent from the arbitrating parties, *i.e.* the investor and the host State, on ICSID jurisdiction.[17] The waiver, by contrast, acts on the right to accept the offer to arbitrate, thereby intervening before said consent is formed. Consent being the basis for jurisdiction, it is consequential that jurisdiction was yet to form.

The fundamental hurdle to a forum selection clause acting as a waiver is in the language of the clause itself. As mentioned in the last chapter, if the contractual clause is not broad enough to encompass treaty claims related, associated or in some way connected to the contract (e.g. umbrella clause claims) parallel proceedings become more likely.

[16] For another author explaining the potential for conflict between broad investment contract forum selection clauses and treaty claims also see Hop Dang Xuan 'Jurisdiction clauses in state contracts subject to bilateral investment treaties' [2011] International Arbitration Law Review 1, 11-12.

[17] Christoph Schreuer, *The ICSID Convention: A Commentary* (CUP 2009) 352, para 6: 'Art. 26 applies from the moment of consent […].'

The *SGS v Paraguay* tribunal also argued that interference between *fora* requires their jurisdiction to be coextensive. Aside from being an argument which is difficult to generalise to other cases, if the commitments by Paraguayan representatives was still related or connected to the contract, arguably it would have been captured by the broadly-worded choice of forum clause in the contract.

This section's main focus is on the language of contractual forum selection clauses. The purpose is to show that, in most known instances, jurisdiction under the contractual forum selection clause and the offer to arbitrate umbrella clause disputes have the potential to overlap and, therefore, to interfere.

CONTRACTUAL CLAUSES FORMULATION

This section examines the argument that, in order for jurisdiction to be rejected, contract and treaty *fora* shall have the same scope, or alternatively the contractual jurisdiction shall be more extensive so as to include treaty claims. If the clause is not, at least, as extensive in scope, not all treaty claims could be successfully waived. Similarly, only an exclusive contractual forum selection clause can act as an effective waiver.

In the previous chapter, it was highlighted how this problem is strictly dependent on the language of the forum selection clause at hand. Due to the density of topics already addressed therein, no significant effort was made to inquire about the prevalence of the different formulations.

This chapter goes a step deeper, and based on previous cases law tries to identify the prevalent (if any) formulation of forum selection clauses. All decision wherein jurisdictional precedence has been discussed, here understood as the sum of the decisions identified in both Jude Antony's study and the follow up study conducted at Chapter 2, have been scanned for extrapolating the contractual forum selection clauses discussed therein.

The language of these clauses is examined to determine whether they address solely contractual commitments or are susceptible of also encompassing undertakings related or connected to the contract, *i.e.* treaty commitments and, more specifically, umbrella clause undertakings. Additionally, this section explores how common it is for contractual forum selection clauses to funnel claims exclusively to the forum indicated in the contract.

It is nevertheless important to underscore that no statistical significance can be attached to this exercise. Access to all forum selection clauses in investment contracts is not attainable as these contracts are often not disclosed. Furthermore, there are no means to verify whether the forum selection clauses to which access is possible, in reason of having been the reported in publicly available investment decisions, are representative of all forum selection clauses. Additionally, this study relies on previous research which gathered cases wherein jurisdictional precedence was discussed (see Chapter 2) in order to muster up decisions wherein forum selection clauses were likely to be mentioned. This is not to say that all of the forum selection clauses in investment contracts which have been discussed in the course of investment litigation have been collected through this exercise.

This aspect having been foregrounded, there is nonetheless no good reason to assume that other forum selection clauses substantially differ in their formulation from the sample collected. Based on this latter premise, it is henceforth assumed that they are indeed a sample reflective of the language of all contractual forum selection clauses.

Out of 25 decisions[18] in which jurisdictional precedence has been discussed, 15 either report the contractual jurisdictional clause in full or in part so as to reveal its essential characteristics. Decisions that briefly describe the clause, or parts of it, have not been included in the tally over accuracy concerns. Some descriptions lack essential elements for a meaningful understanding of the clause's content. Others have been included in published decisions as part of the restatement of the parties' pleadings or memorials and the tribunal did not speak on the

[18] See Anthony Jude, 'Umbrella Clauses since SGS v Pakistan and SGS v Philippines' [2013] Arbitration International 607, 625. *Toto Costruzioni Generali S.p.A. v The Republic of Lebanon* (ICSID Case No. ARB/07/12) (11 September 2009) (Decision on Jurisdiction) para 202; *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (ICSID Case No. ARB/02/6) (29 January 2004) (Decision on Jurisdiction); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC v Republic of Paraguay* (ICSID Case No. ARB/07/9) (29 May 2009) (Decision on Jurisdiction); *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29) (10 February 2012) (Award); *CMS v Argentina (Decision on Jurisdiction) (n 2)* ; *Enron v Argentina (Decision on Jurisdiction on Ancillary Claim) (n 2)*; *LG&E v Argentina (Decision on Liability) (n 2)*; *Siemens v Argentina (Decision on Jurisdiction) (n 2)*; *Salini v Jordan (Decision on Jurisdiction) (n 2)*; *Impregilo v Pakistan (II) (Decision on Jurisdiction) (n 2)*; *Sempra v Argentina (Decision on Jurisdiction) (n 2)*; *Eureko v Poland (Partial Award) (n 2)*; *Mohammad Ammar v Tajikistan (Partial Award on Jurisdiction and Liability) (n 2)*; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine* (ICSID Case No. ARB/08/11) (25 October 2012) (Award); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador (II)* (ICSID Case No. ARB/06/11) (9 September 2008) (Decision on jurisdiction); *Supervision y Control S.A. v Republic of Costa Rica* (*Supervision v Costa Rica*), ICSID Case No. ARB/12/4 (Award) (18 January 2017); *Garanti Koza v Turkmenistan (Award) (n 2)* (despite the decision on jurisdiction not having been made public); *Greentech v Italy (Final Award) (n 2)*; *EDF v Argentine (Award) (n 2)*; *Gavrilovic v Croatia (Award) (n 2)*; *Belenergia v Italy (n 2) (Award)*; *ESPF v Italy (n 2) (Award)*; *Sun Reserve v Italy (n 2) (Award)*; *Nissan v India (n 2) (Decision on Jurisdiction)*; *Strabag SE v Libya (Strabag v Libya)*, ICSID Case No. ARB(AF)/15/1 (29 June 2020) (Award).

veracity, accuracy or completeness of the description, but simply imported it in its restatement of the disputing parties' arguments. Such description could therefore lack impartiality.[19] Pleadings might have mentioned the part of the clause that underpinned their argument, while omitting other, less helpful, elements.

Out of the 15 instances where the clause was reported in the decision, in 11 cases[20] the contractual forum selection clause was exclusive. They utilise a language such as 'all disputes that may arise',[21] 'exclusive jurisdiction',[22] 'jurisdiction' over 'any dispute'[23] or 'conflict',[24] 'a dispute of any kind'.[25]

Non-exclusive forum selection clauses, in most instances, failed to indicate the designated tribunal as the only forum competent to hear the entirety of the claims under the contract or in connection with it, thereby opening, at least theoretically, to the possibility of parallel

[19]An example can be found in *Siemens v Argentina (Decision on Jurisdiction) (n 2)* para 174: 'The Respondent argues that the Contract provides for the submission to the Federal Administrative and Contentious Courts of Buenos Aires any legal dispute in connection with the Contract. Siemens is submitting to the Tribunal a dispute related to contractual rights of a third party that does not qualify as an investor or as an investment. Siemens is not entitled to bring claims in connection with the Contract to a court other than agreed upon by SITS.' A further example can be found in *CMS v Argentina (Decision on Jurisdiction) (n 2)* at para 70: 'A separate jurisdictional objection raised by the Republic of Argentina is based on the argument that TGN's License has a separate dispute settlement mechanism before the Federal Courts of Buenos Aires on Contentious Administrative Matters. Similarly, it is argued, the Terms of the License provide for the submission of disputes to the Federal Courts of Buenos Aires on Civil and Commercial matters, entailing an express renunciation to any other forum or jurisdiction. All of this, in the Respondent's view, precludes submission to the instant dispute to an ICSID tribunal.' In both instances the tribunal appears to report on positions of the parties rather than objectively describing the clauses which remain unknown in some of their essential elements.

[20] *Toto v Lebanon (Decision on Jurisdiction) (n 18)* para 137; *BIVAC v Paraguay (Decision on Jurisdiction) (n 18)* para 159; *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29) (10 February 2012) (Award) para 36; *Salini v Jordan (Decision on Jurisdiction) (n 2)* para 71; *Greentech v Italy (Final Award) (n 2)* para 214; *Gavrilovic v Croatia (Award) (n 2)* para 416, footnote 575; *Belenergia v Italy (n 2) (Award)* para 342; *ESPF v Italy (n 2) (Award)* para 367; *Sun Reserve v Italy (n 2) (Award)* paras 563; *Nissan v India (n 2) (Decision on Jurisdiction)* para 267.

[21] *Nissan v India (n 2) (Decision on Jurisdiction)* para 267, clause 15 of the Mou Agreement.

[22] *Sun Reserve v Italy (n 2) (Award)* paras 563; *ESPF v Italy (n 2) (Award)* para 367. Both refer to the GSE Agreements.

[23] For instance, in *Gavrilovic v Croatia (Award) (n 2)* para 416, footnote 575: 'Article 11 of the Purchase Agreement reads: "The Regional Commercial Court in Zagreb will have jurisdiction over any dispute from this Agreement": Purchase Agreement (C-0047), Art 11.'

[24] *SGS v Paraguay (Award) (n 2)* para 36: 'Article 9 of the Contract contained a forum selection clause that stated that "[a]ny conflict, controversy or claim deriving from or in connection with this Agreement, breach, termination or invalidity, shall be submitted to the Courts of the City of Asunción under the Law of Paraguay."

[25] *Salini v Jordan (Decision on Jurisdiction) (n 2)* para 71: 'If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause.'

proceedings.[26] In one decision, the clause did not specify the competent tribunal directly, but merely instructed that the court shall be seized in accordance with the host state's legislation.[27]

Out of the 11 decisions wherein the forum selection clause was exclusive, in the great majority of cases, 9 in total,[28] the clause's reach could potentially encompass contract-related treaty commitments. These clauses employ language such as, *inter alia*, 'in connection with',[29] 'arises from or is produced in relation to',[30] 'deriving from or in connection with'[31] or 'in connection with or arising out of'.[32]

It appears that States consider the inclusion of these broadly worded forum selection clauses in their investment contracts to be standard practice. This finding also appears coherent with publicly available foreign investment contracts from the OpenLand database [33] and RessourceContracts[34] which have been examined.

Contracts were randomly selected among recent English and French language agreements uploaded on the database. For instance, in the 'Asset Sale Purchase Agreement' between Ghana and SACFINAF S.A. concluded in 2015, article 10.15 on 'Dispute Resolution' specifies that 'any dispute' 'arising out of or in connection with' the contract shall be resolved according to the LCIA-MIAC Arbitration Rules. Similarly, in a Production Sharing Contract between Chad and EWAAHS Investors Limited concluded in 2019 article 57 was dedicated to dispute settlement. All disputes which could arise in relation with the contract or within the framework

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[26] *Eureko v Poland (Partial Award) (n 2)* para 93; *Occidental v Ecuador (II) (Decision on Jurisdiction) (n 18)* para 63; *Garanti Koza v Turkmenistan (Award) (n 2)* (despite the decision on jurisdiction not having been made public) para 60;

[27] *Bosh v Ukraine (Award) (n 18)* para 255;

[28] See footnote above, with the sole exception of *Gavrilovic v Croatia (Award) (n 2)* para 416, footnote 575 and *Toto v Lebanon (Decision on Jurisdiction) (n 18)* para 204.

[29] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction) (n 18)* para 137.

[30] *BIVAC v Paraguay (Decision on Jurisdiction) (n 18)* para 159.

[31] *SGS v Paraguay (Award) (n 2)* para 36.

[32] *Salini v Jordan (Decision on Jurisdiction) (n 2)* para 71.

[33] OpenLandContracts is 'a repository of publicly available contracts and associated documents created to strengthen the growing campaign for information disclosure around land-based projects […]. […] 'OpenLandContracts was created and is managed by the Columbia Center on Sustainable Investment (CCSI). The site includes full text of contracts and related documents (in PDF form), summaries (or "Annotations") of each contract's key social, environmental, human rights, fiscal, and operational terms, and tools for searching, sharing and comparing contracts and their key terms. (available at https://www.openlandcontracts.org, accessed on 1 July 2022).

[34] 'ResourceContracts.org is a repository of publicly available oil, gas, and mining contracts. The repository features plain language summaries of each contract's key social, environmental, human rights, fiscal, and operational terms, and tools for searching and comparing contracts. ResourceContracts.org promotes greater transparency of investments in the extractive industries, and facilitates a better understanding of the contracts that govern them.' (available at https://resourcecontracts.org accessed on 1 July 2022).

of the contract shall be subject to a conciliation procedure. Article 57.4.1 clarifies that 'all disputes' will be arbitrated pursuant to ICC Arbitration Rules.

It is possible to draw a few implications from the foregoing study. First of all, the considerable majority of known clauses in investment contracts are exclusive. Secondly, the majority of exclusive forum selection clauses are not limited to contracts, but also include issues that relate, or are connected to, contractual claims or obligations. As a consequence, in most instances, forum selection clauses in investment contracts and offers to arbitrate umbrella clause claim as interpreted under the third camp, are indeed mutually exclusive.

The unknown factor in these instances would relate to whether the contract predates or postdates the investment treaty. This circumstance would have to be determined on a case-by-case basis by the appointed treaty tribunal.

It shall be underscored that waiving treaty protection does not deprive the investor of legal recourse. Based on jurisdictional internationalisation, treaty and contract claims only differ due to the forum of the dispute, not the nature, the scope or the law applicable to the claim. Even if treaty jurisdiction succumbs to the waiver (*i.e.* the forum selection clause in the contract), the jurisdiction of the contractually designated forum would still be available to the parties. For this reason, a gap in protection is not a significant risk. The quality and the enforceability of said protection could nevertheless be less favourable.

To conclude, a majority of, though not all, offers to arbitrate under the treaty could be waived, thereby preventing parallel proceedings. This is not, however, the whole story. The last chapter explained how preclusions to jurisdiction could result from the application of so-called fork-in-the-road provisions. Therefore, even if the contractual forum selection clause does not affect investment treaty jurisdiction, this latter could still be barred at the moment of filing.

The ensuing section explores current uncertainties with the application of fork-in-the-road clauses, especially in relation to cooling-off periods and how they are interpreted. Once more, parallel proceedings could still emerge as a viable option.

FORK-IN-THE-ROAD: ARE PARALLEL CLAIMS AN OPTION?

As underscored in the previous chapter, issues in relation to fork-in-the-road provisions are essentially jurisdictional as they pertain to the conditions attached to the consent to arbitrate of

the treaty Parties. Parallel proceedings, could nevertheless be plausible under certain circumstances.

Were the State to start proceedings before the forum designated in the relevant contract for a breach of said contract, this scenario would probably not engage the fork-in-the-road clause in the treaty. This type of clauses leaves the initiative in the hands of the investor. In such an instance, the availability of investor-State proceeding would once more depend on the formulation of the forum selection clause in the agreement. This latter, when broad, exclusive and expressed after the treaty's entry into force could have waived access to international investment jurisdiction before a claim could be filed.

A further scenario largely rests on the formulation of waiting periods, which are present, as of a study conducted in 2012, in the considerable majority of dispute settlement provisions.[35] The presence of these clauses shall therefore be regarded as the rule rather than the exception.

Their formulation varies considerably. Some mandate to try specific alternative dispute resolution solutions, such as conciliation or mediation, for a defined period of time before an investment claim can be filed. Others leave the duration unspecified or make no use of constraining language to indicate whether the cooling-off period is mandatory. Most do not explicitly indicate the consequences that would descend from not fulfilling this requirement.[36] While the uncertainties over the thinning line between jurisdiction and admissibility in this scenario have already been mentioned, here the concern is with parallel proceedings.

Interpreters and academics have yet to emerge with a consistent voice on the effects of non-compliance with waiting periods. The debate concerns whether the dispute could be allowed to proceed before an investor-State tribunal and, eventually, on what grounds it would not be. In other words, the uncertainty revolves around whether in the event of non-compliance, proceedings should be paused on admissibility grounds or the tribunal should declare its

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[35] Aravind Ganesh 'Cooling-Off Period (Investment Arbitration)' [2017] Max Planck Encyclopedia for International Procedural Law, Working Paper 7, available at https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/WPS7_2017_Ganesh_Cooling_Off_Period__Investment_Arbitration_.pdf. See also Pohl Joachim, Kekeletso Mashigo and Alexis Nohen (2012), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", OECD Working Papers on International Investment, 2012/02, OECD Publishing http://dx.doi.org/10.1787/5k8xb71nf628-en, 17. Catherine Kessedjian, Anne van Aaken, Runar Lie, Loukas Mistelis, 'Mediation in Future Investor-State Dispute Settlement' (2020) Academic Forum on ISDS Concept Paper 2020/16, 5, available at https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf, accessed on 27 August 2022. This latter indicates that the number of treaties currently displaying a cooling-off period are around 71%. See Annex I for the methodology utilised.

[36] Catherine Kessedjian and others (n 35).

incompetence for lack of jurisdiction. As an additional possibility, waiting periods could also be considered as merely hortatory provisions, devoid of constraining force.

The repercussion of this debate on umbrella clause claims has largely flown under the radar, despite its potential relevance. *Nulla quaestio* if the waiting period in the contract corresponds to the treaty's own requirements, or when the contract exceeds treaty requirements. In other scenarios, however, when exact compliance does not occur there is potential, at least in theory, for having parallel proceedings over the same dispute.

Assuming that 'sameness' between the two disputes is uncontested, treaty jurisdiction could be precluded if the investment tribunal interprets cooling-off periods as being merely hortatory or as an issue of admissibility. In these instances, when a claim for breach of contract is filed, the fork-in-the-road clause would display its preclusive effects regardless of compliance with waiting period requirements because jurisdiction would be regularly seized, regardless of whether it would have to be paused on admissibility grounds. Academics consider this interpretation to be prevalent in investment practice,[37] especially in the interest of judicial economy. In the light of a recent survey, it has become apparent investors echo this viewpoint over similar concerns.[38]

By contrast, if the language of the clause, or the interpretation of the tribunal of said clause, favour its obligatory nature, the scenario could change considerably. Tribunals which opted for the non-mandatory nature of the clause were quick to point out that their conclusion was fact-specific.[39] A newer line of awards has emerged deeming cooling off periods to be legal

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[37] Lucy Reed, Jan Paulsson, Nigel Blackaby 'Guide to ICSID Arbitration' (2nd edn, Wolters Kluwer, 2010) 97-98. Aravind Ganesh (Working Paper) (n 35) 7. Christoph Schreuer, 'Travelling the BIT Route: of waiting periods umbrella clauses and forks on the road' [2004] The Journal of World Investment & Trade 231, 239.

[38] School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London (QMUL) '2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS' (May 2020) 25, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf , accessed on 25 July 2022. Interviews showed that investors considered ADR 'not appropriate for all investment disputes', that they considered that mandatory mediation 'could undermine the position of investors and not encourage fruitful discussions.' 'Finally, it was stated that mandatory mediation would constitute an unnecessary step for the parties towards the resolution of their dispute which would potentially lead to an increase in time and cost.'

[39] *Ronald S. Lauder v The Czech Republic*, UNCITRAL (Final Award) (3 September 2001) para 190, specified that the conclusion depended upon the circumstances of the case. In *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1 (Award) (22 August 2012) para 187, the tribunal stated that '[l]ikewise, in each of the five other cases cited by the Claimant, the tribunals allowed claimants to skip prescribed waiting periods not as a general principle but rather on the basis of the peculiar factual circumstances of each case'. See also *Westwater Resources, Inc. v Republic of Turkey*, ICSID Case No. ARB/18/46 (28 April 2020) (Procedural Order no. 2) para 34.

obligations on the parties to try to negotiate for the stipulated period.[40] Relief from the obligation is obtained upon showing evidence of the futility of the effort.[41] As the obligation is considered to be part of how consent to arbitrate was shaped, non-compliance would tantamount to a question of jurisdiction.[42]

Not complying with this requirement if the circumstances were to so require could mean that the fork-in-the-road's preclusive affects would not be engaged. If a waiting period was to necessarily elapse or an attempt to negotiate conducted (or a different ADR procedure exhausted), before the irrevocable choice forum could be made, a question arises as to whether said choice would be valid, and its preclusive effect maintained, when the preconditions have not been complied with.

It could be argued that because the investor's choice of forum was not validly elected, jurisdiction under the treaty did not materialise. As the preclusive effects of the fork-in-the-road clause depend on selecting the jurisdiction of a tribunal over that of another, it is legitimate to question whether, under these circumstances, the clause would be engaged at all.

Parallel proceedings could, in theory, take place in this instance. If the waiting period requirement was not respected and the investor commenced proceedings for breach of contract pursuant to the contractual forum selection clause, it would not amount to a relevant 'choice' under the treaty. The option to select international investment treaty jurisdiction would therefore still be viable and proceedings could be initiated therein.

It shall also be underscored that the fork-in-the-road's preclusive effects are only engaged 'once the choice is made'.[43] Since the non-compliance with the waiting periods set in the treaty prevented, at least as far as treaty requirements are concerned, the initiation of valid proceedings before the forum designated in the contract, that could not constitute a 'choice'. A hypothetical subsequent choice of submitting the claim before an international investment tribunal would only bar other options after it has been made. Contractual proceedings commenced prior to the submission would therefore not be affected by it.

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[40] Arguably the 'sea change' was brought upon by *Murphy Exploration and Production Company International v Republic of Ecuador (I)* (ICSID Case No. ARB/08/4) (Award on jurisdiction) (15 December 2010) paras 131-133. See Aravind Ganesh (Working Paper) (n 35) 6.

[41] *Ibidem* 5-6.

[42] *Ibidem*, 5.

[43] Schreuer and others (n 17) 365.

It is here recognised that in the light of the main purpose of fork-in-the-road provisions, *viz* to avoid parallel proceedings, this result could be perceived as overly formalistic. The main aim of this section, however, is not to engage in the likelihood of a given interpretation of waiting periods, but to underscore how the issue could potentially lead to further uncertainty in whether parallel claims could be prevented.

Article 26 of the ICSID Convention would be unlikely to represent an obstacle to parallel proceedings. If it is true, on the one hand, that it states that ICSID proceedings shall exclude any other remedy, it also leaves the parties at liberty to 'otherwise state'.[44] Arguably, having agreed to a forum selection clause in a contract could be considered as evidence that the parties availed themselves of this exception. Further, article 26 does not work in reverse. ICSID jurisdiction, once agreed upon by the arbitrating parties, excludes other remedies, not vice versa.[45]

LIS PENDENS

This already extremely complex to navigate scenario shall also deal with the interaction between investor-State treaty arbitration and other forms of dispute resolutions. Article 26 of the ICSID Convention could be described as a means, together with fork-in-the-road provisions, to prevent parallel proceedings.

As neither of the remedies examined thus far, either singularly or jointly, is able to entirely uproot the risk of parallel proceedings is it worth looking into other potentially suitable mechanisms. The principle of *lis pendens* could still apply even if the requirements pursuant to article 26 of the ICSID Convention are not met, or no valid choice was formulated pursuant to the fork-in-the-road clause in the treaty.

The international legal order is, according to some, equipped with a principle of general applicability that could assist with the handling of parallel claims. This principle, known as *lis (alibi) pendens*, shall be looked into in order to ascertain whether, and to what extent, it could bear some significance to proceedings initiated before *fora* designated by the contract and the treaty.

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[44] *Ibidem* 355-380.
[45] *Ibidem* 355-356, paras 17-19. See also Kaj Hobér 'Res Judicata and Lis Pendens in International Arbitration' (volume 366) Collected Courses of the Hague Academy of Public International Law, 340-341.

Lis pendens is generally defined as a principle precluding the possibility to initiate, before another court or tribunal, a claim identical to the one that is already pending before a different forum.[46] The systemic concerns underpinning this principle are evident. L' *Institut de Droit International*, in a statement concerning parallel proceedings between national jurisdictions, states that parallel litigation taking place between identical or related parties, and concerning the same or related issues, may conduce to 'injustice, delay, increased expenses and inconsistent decisions.'[47]

These concerns are not dissimilar from the preoccupation emerging at international level.[48] *Lis pendens* nevertheless struggles to soundly affirm itself as a general principle of international law.[49]

Some academics have affirmed that '*lis pendens* is […] a rule of international law applicable in international proceedings.'[50] This statement was substantiated by pointing to its widespread use, as well as to the similarities borne by the concept of *lis pendens* across the national procedural laws of States, regardless of their legal traditions. Additionally, the substantial number of bilateral and multilateral agreements enshrining the principle is likewise adduced as evidence that it shall be considered as a general principle of law pursuant to article 38 of the ICJ Statute.[51] Further, a few investment tribunals have considered *lis pendens* as an applicable principle of law or, at the very least, have not openly contested its applicability.[52] Lastly, it is

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[46] Chiara Giorgetti, 'Horizontal and Vertical Relationships of International Courts and Tribunals - How Do We Address Their Competing Jurisdiction?' [2015] ICSID Review - Foreign Investment Law Journal 98, 105-106; See also See Jose Magnaye and August Reinisch, 'Revisiting Res Judicata and Lis Pendens in Investor-State Arbitration' [2016] Law & Practice of International Courts and Tribunals 264, 269.
[47] Francisco Orrego Vicuña, 'Lis pendens arbitralis' in Bernardo M Cremades and Julian Lew (eds), *Parallel state and arbitral procedures in international arbitration* (ICC Publishing 2005) 207. See Institut de Droit International, 'Resolution on the Principles for Determining when the Use of the Doctrine of Forum non Convenience and Anti-suit Injunctions Is Appropriate' (Session de Bruges 2003) 1, available at https://www.idi-iil.org/app/uploads/2017/06/2003_bru_01_en.pdf, accessed on 2 November 2021.
[48] Orrego Vicuña (n 46) 207.
[49] See for instance Niccoló Ridi 'Precarious Finality? Reflections on res judicata and the Question of the Delimitation of the Continental Shelf case' King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2018-02, 5. See also Son Tan Nguyen, 'The applicability of Res Judicata and Lis Pendens in World Trade Organisation dispute settlement [2013] Bond Law Review 123, 158. Salles Luiz Eduardo 'Forum Choice and Forum Shopping*'* [2020] Max Planck Encyclopedias of International Law, para 37.
[50] August Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' [2004] Law and Practice of International Courts and Tribunals 37, 48. This argument was re-proposed in a paper co-authored by Reinish. See Magnaye and Reinisch (n 46), 270.
[51] Reinisch (n 50), 48. This argument was re-proposed in a paper co-authored by Reinish. See Magnaye and Reinisch (n 46), 270.
[52] *Azurix Corp v Argentina, ICSID Case No ARB/01/12* (8 December 2003) (Decision on Jurisdiction) paras 88-89; *EDF v Argentine (Award) (n 2)*; *Gavrilovic v Croatia (Award) (n 2)* para 1132; *Sanum Investments Limited v Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13 (Award on Jurisdiction) (13 December 2013) para 366.

averred that this principle applies as a direct implication of the principle of *res judicata*. The coherence of the system would arguably be compromised if parallel proceedings, sharing the same parties and subject-matter, were to be permitted to proceed before different dispute settlement bodies until one of them 'crossed the finish line'. Final adjudication would, in turn, prevent the slower forum from proceeding as a result of *res judicata.*[53]

Crucially, however, this conclusion is not devoid of controversy. It is argued that authors considering *lis pendens* as a general principle of international law define it as a strict first-in-time rule. In other words, the principle would prevent the commencement of new proceedings when 'litigation between the same parties and involving the same dispute is already pending'.[54] Some commentators highlight that not all national procedural laws of States from all legal traditions converge on this solution. Countries belonging to the common law tradition, at least, do not mechanically obey by the first-in-time rule.

The alignment between civil and common law traditions resides exclusively in the near universal opposition to the phenomenon of parallel proceedings within the same legal system in reason of it being perceived as a duplicative process which may lead to a waste of resources, as well as to legal certainty and predictability being undermined.[55] Legal techniques, though, may vary across legal traditions. Given that *lis pendens,* in the form of the first-in-time rule, does not enjoy unanimous support across legal traditions, some affirm that it does not meet the threshold of a general principle of international law pursuant to article 38(1)(c) of the ICJ Statute.[56]

The argument that would have the *lis pendens* principle descend from *res judicata* is also contested. The *res judicata* principle means that, in any event, the dispute between the parties would lead to one valid judgment. Nonetheless, if jurisdiction is declined on the premise that another proceeding is pending, there is no automatic guarantee that this other proceeding will

[53] Hanno Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (OUP 2013) 195, para 6.96. The author describes this view as being 'predicated on the assumption that applying the *res judicata* principle also justifies the application of the *lis pendens* mechanism. In particular, […] *lis pendens* would need to be applied so as to avoid the dangers of a race to judgment between two tribunals.'
[54] Reinisch (n 50), 43-44.
[55] Son Tan Nguyen (n 49), 154.
[56] *Ibidem*, 158-159. See also Hanno Wehland (n 53) 196 para 6.99. Crawford also appears sceptical on this matter. See Crawford James 'Chance, Order, Change: The Course of International Law' Collected Courses of the Hague Academy of Public International Law, 224 para 384 (footnotes omitted): 'The concepts of *lis alibi pendens* […], flexibly applied, could provide a means to prevent duplication of proceedings. But despite attempts by some scholars to argue that a general principle of *lis pendens* exists in international law, no court or tribunal has yet pronounced on its scope.'

ultimately reach a decision on the dispute. Therefore, arguably the right to have a dispute adjudicated by a competent court is better preserved when *res judicata* rather than *lis pendens* is applied. Consequently, it is argued, compelling reasons might suggest to apply *res judicata* but not *lis pendens*.[57]

International tribunals also appear to be cautious to express themselves in favour of *lis pendens* graduating to the status of a general principle of international law. In the case of *Certain German Interests in Polish Upper Silesia*[58] the PCIJ evaluated the applicability of *lis pendens*. Germany had alleged that Poland illegally took property from German nationals. Poland countered that, given that the German-Polish Mixed Arbitral Tribunal had already been seized with the dispute, the PCIJ lacked competence to rule on the case on grounds of *lis pendens*.[59]

Before ultimately rejecting the argument because the actions and the parties were not identical in both disputes,[60] the PCIJ cautioned on the applicability of *lis pendens* in transnational proceedings:

> It is a much disputed question in the teachings of legal authorities and in the jurisprudence of the principal countries whether the doctrine of litispendance, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations, in the sense that the judges of one State should, in the absence of a treaty, refuse to entertain any suit already pending before the courts of another State, exactly as they would be bound to do if an action on the same subject had at some previous time been brought in due form before another court of their own country.[61]

Even admitting that *lis pendens* shall be given a spot among general principles of public international law, its applicability has generally been limited to the same legal system.[62] This remark adds a layer of complexity to the analysis conducted herein. Contractual choice of

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[57] Son Tan Nguyen (n 49), 158-159. See also Salles Luiz Eduardo 'Forum Choice and Forum Shopping*'* [2020] Max Planck Encyclopedias of International Law, para 37.
[58] *German Interests in Polish Upper Silesia (Germany v Poland)* [1925] PCIJ series A No 6 (Aug. 25).
[59] *Ibidem*,19-20.
[60] *Ibidem* 20 para 55.
[61] *Ibidem* 20 para 54. See also *American Bottle Company Case (Mexican-US General Claims Commission)*, Decision of 2 April 1929, 4 U.N.R.I.A.A. 435, 437: 'There is […] no rule in international law, nor no provision in the Conventions entered into between the United States and Mexico or in the rules of this Commission, that precludes the United States from presenting a claim to this Commission because of its having been previously filed by Memorial before the Special Claims Commission.' For further cases law, including minority opinions that seem to have accepted lis pendens as a general principle of international law, see Hanno Wehland (n 53) 195-196 paras 6.97-6.99.
[62] Hanno Wehland (n 53) 196, footnote 202.

forum clauses could refer the dispute, *inter alia*, to domestic arbitration or to municipal courts. If the principle is of dubious application within the international legal order, it is generally accepted that domestic proceedings, thereby including domestic arbitration, would not bring prejudice to international *fora*, thereby including investment tribunals.[63]

Lis pendens, if applicable, rests on the assumption that parallel proceedings take place before *fora* of equal status. The *lis pendens* principle finds no application between supra-national tribunals and domestic courts, and the supra-national court is not mandated to suspend its proceedings. When treaties between States sets up a court or arbitral tribunal, the international tribunal is hierarchically superior to any national court or private arbitral tribunal. Such supranational tribunals will generally hold that their jurisdiction takes priority and is not affected by the litispendence principle.[64]

Furthermore, the sameness of the dispute being litigated before the various *fora* would have to be proven for the *lis pendens* principle to apply.[65] The criteria to assess sameness mirror those in place in the context of the *res judicata* principle and, therefore, in the interest of avoiding duplication the requirement will be assessed in the section dedicated to this latter principle.

What shall nevertheless be underscored herein is that the cause of action, one of the elements of the identity test, might differ between treaty and contract claims.[66] *Lis pendens* would have to be assessed not between international investment tribunals which are similarly concerned with treaty claims, but between a forum vested with adjudicating on a claim for breach of contract, and a forum seized to decide on a treaty violation, *viz* a violation of the umbrella clause. The fact that under third camp interpretation the law applicable to decide the treaty

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[63] See, *inter alia*, Magnaye and Reinisch (n 46), 271(footnotes omitted): […] *[R]es judicata and lis pendens* will be examined in the context of parallel/multiple proceedings before international tribunals. Given that the conduct of any State organ is considered an act of that State under international law, decisions of and proceedings before domestic courts would not fall under the scope of both principles in relation to disputes before international tribunals. *Res judicata and lis pendens* are therefore applicable only when both tribunals operate within the same legal order.' See also Hanno Wehland (n 53) 196, footnote 202.

[64] See also De Ly J M Filip and Sheppard Audley William, 'ILA Final Report on Lis Pendens and Arbitration' (72nd International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4–8 June 2006) 18. See also Kaj Hobér (n 45) 313. Though it concerns *res judicata* it is arguably also relevant in this instance. McLachlan Campbell 'Lis Pendens in International Litigation' (volume 336) Collected Courses of the Hague Academy of Public International Law, 412. Magnaye and Reinisch (n 46), 271-272.

[65] See for instance *Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No. ARB/03/11) (6 August 2004) (Award on Jurisdiction) para 75; *Enron v Argentina (Decision on Jurisdiction on Ancillary Claim) (n 2)* para 49. Jacomijn J Van Haersolte-Van Hof, Anne K Hoffmann, 'The Relationship between International Tribunals and Domestic Courts' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 967-968.

[66] McLachlan Campbell (n 64), 399-400.

violation would coincide with the law applicable to the contract fails to erase this reality. Therefore, even if credit was given to a certain scholarship, and *lis pendens* was indeed recognised as a general principle of international law, it would still be doubtful whether it could find application to the umbrella clause debate. The answer would depend on whether this distinction could be considered formalistic.

Absence of true parallelism has thus far largely prevented the insurgence of the litispendence issue in the field of investment arbitration. Claims open to an investor under investment treaties are grounded upon a different cause of action than those created by contract. The pursuit of both claims would therefore not lead to true inconsistencies. However, the umbrella clause disturbs the neat distinction between breach of treaty, governed by international law, and breach of contract, governed by the law applicable to this latter.[67] The third interpretive camp in particular has the breach of treaty, i.e. the breach of the umbrella clause, be decided under the law applicable to the underlying contractual commitment.

RES JUDICATA AND COMITY

Avowing that parallel proceedings over the same claim could arise, and that the principle of *lis pendens*, even admitting it belongs to the international legal order, is of nebulous application, is different than acknowledging that all proceedings could result in a final judgment or award.

As, pursuant to third camp interpretation, there is substantial identity between contract and treaty claims, it is interesting to see whether and how the principles of *res judicata*, and its corollary the *ne bis in idem*, could intervene in the relation between a final decision which has attained the status of *res judicata* and a pending dispute. Lastly, the role of comity shall also be examined.

RES JUDICATA AND HIERARCHICAL PROBLEMS: A DIFFICULT COEXISTENCE

In order to consider the aforementioned issues and their implications to the umbrella clause debate the concept of *res judicata* shall first be defined. *Res judicata*, is a Latin expression which could be literally translated as ‘a matter that has already been judged’. This principle

[67] *Ibidem*.

fosters the finality of judgments[68] and, *inter alia*,[69] shields defendants against the risk of having to shoulder multiple proceedings over the same matter, and can therefore be likened to the cognate *ne bis in idem* principle.[70]

The *ne bis in idem* corollary is often referred to as the negative effect of *res judicata*, implying that the judgment is final and a claim may not be disputed anew between the same parties.[71] Unlike *lis pendens*, this general principle of law applies uncontroversially to the international law domain,[72] thereby including the sub-genre investment arbitration.

Not all decisions, however, are born equal. The principle of *res judicata* warrants a separate analysis on the basis of the different courts or tribunals which have issued the decision. The impact on other *fora* would arguably differ based on whether the decision or award is issued by an ICSID tribunal, a non-ICSID tribunal or a domestic forum.

ICSID PROCEEDINGS

In the context of ICSID arbitration, convention drafters seem to have codified a reinforced version of this principle in order to have it apply not only to subsequent judgments or decisions on the same matter, but also, more generally, to 'remedies.' The *res judicata* principle and its corollary shall be declined into a useful precept for our purposes.

Moving from the impact of ICSID awards on domestic proceedings or judgments, it is doubtful whether the special binding status of awards rendered under the ICSID Convention, which pursuant to article 53 shall not be subject to appeal or to any other remedy not contemplated in the letter of the Convention itself,[73] is compatible with other proceedings taking place on the same subject-matter, or perhaps even on a closely related subject-matter. This last statement is justified below when looking into the meaning of the expression 'any other remedy'.

[68] Ridi (Research Paper 2018) (n 46), 2. Hanno Wehland (n 53) 197: '[…] The principle of *res judicata* only applies to final decisions.'

[69] This principle is underpinned by several public policy considerations. It ensures that litigation will eventually end, prevents divergent decisions on the same matter thereby advancing considerations of legal security, and fosters the economic efficiency of courts. See Ridi (Research Paper 2018) (n 46), 2.

[70] Ridi (Research Paper 2018) (n 46), 2.

[71] Silja Schaffstein 'The Doctrine of Res Judicata before International Arbitral Tribunals' PhD thesis, University of London Queen Mary and University of Geneva (2012) 84, available at https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/8665/Schaffstein_S_PhD_Final.pdf?sequence=1.

[72] Ridi (Research Paper 2018) (n 46), 2. See also Magnaye and Reinisch (n 46), 265.

[73] Schreuer and others (n 17) 1096-1155. Giovanni Zarra, *Parallel Proceedings in Investment Arbitration* (Giappichelli 2016) 176-177.

The letter of article 53 of the ICSID Convention shall be reported in its entirety:

> (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
> (2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

The term 'award' shall first be defined as to its scope. Pursuant to article 53, it only targets final decisions. The term 'final' underscores not only a chronological aspect to mean the 'last', but also signifies 'definitive', to indicate the decision that disposes of the dispute.[74] Such decision shall provide conclusions 'on all questions submitted to the tribunal and decided before the final award, to ensure that it is not *infra petita*, i.e. it must incorporate all 'decisions'.'[75] It does not include decisions on provisional measures or procedural orders rendered during the proceedings.[76] This signifies that if parallel proceedings on the same dispute become a reality, the problem of their interaction could arise after a final award is rendered.[77]

The wording 'any other remedy' replicates the expression employed at article 26 of the ICSID Convention. Based on the rules of interpretation, identical expressions shall bear the same meaning throughout the treaty unless there is a good reason to think otherwise. The term 'remedy' is wide enough to encompass attempts made before any other forum to pursue the same claim,[78] not just appeals or challenges brought against a decision, as indicated in the letter of article 26, which lists local administrative or judicial proceedings among those remedies.

This view is confirmed in the language of article 53 which mentions appeals in addition to 'any other remedy', thereby implying a difference between the two. Proceedings taking place in the

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[74] Schaffstein (n 71) 76 and 79.
[75] Catharine Titi, '*Res Iudicata* and Interlocutory Decisions under the ICSID Convention: Antinomies over the Power of Tribunals to Review*'* [2018] ICSID Review: Foreign Investment Law Journal 358, 362.
[76] Schreuer and others (n 17) 1114.
[77] Although the term 'award' under articles 53, 54 and 55 encompasses decisions supplementing or rectifying the award pursuant to Art. 49(2), these are likely to be rendered after the award has been rendered, and therefore after potential conflict has already arisen. See *Ibidem*1114.
[78] *Ibidem* 380.

background of an already adjudicated ICSID claim could therefore fit into the definition of 'remedy'.

Furthermore, it would not be unreasonable, in my view, to interpret the term 'any other remedies' as reaching beyond identical claims. A 'remedy' is defined by the online Oxford Dictionary as 'a means of counteracting or eliminating something undesirable'. Proceedings for a breach of contract would arguably meet this definition, regardless of whether their cause of action differs from umbrella clause claims. Under the third camp, the breach of the umbrella clause is decided according to whether the contract was violated, and compensation is eventually given on this ground. Proceedings which are capable of 'remedying' the result of the ICSID award by allocating compensation differently over the same contractual violation shall be considered as remedies.

The ICSID Convention has its own self-contained system for reviewing awards.[79] Unlike article 26 on the exhaustion of local remedies, which admits that the arbitrating parties could reach a different agreement, article 53 opens no loopholes.[80] The self-contained and exhaustive nature of review procedures is one of the features that sets the Convention apart from other like instruments. Finality of awards is better preserved,[81] representing a clear advantage over other arbitration mechanisms. ICC, the American Arbitration Association ('AAA') or UNCITRAL awards could be subject to lengthy and costly review procedures by the courts of the arbitration forum.[82]

This interpretation of article 53 of the ICSID Convention has implications on pending proceedings. Moving from the scenario wherein court-based or (international) arbitral proceedings are yet to produce a final decision, the exclusion of 'any other remedies' means that a party to ICSID proceedings that is dismayed by the final decision may not seek relief in a different forum.

[79] *Ibidem* 1102. See also *Maritime International Nominees Establishment v Republic of Guinea*, ICSID Case No. ARB/84/4 (22 December 1989) (Decision of the Ad hoc Annulment Committee) para 4.02.: '[…]The post-award procedures (remedies) provided for in the Convention, namely, addition to, and correction of, the award (Art. 49), and interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52) of the award are to be exercised within the framework of the Convention and in accordance with its provisions. It appears from these provisions that the Convention excludes any attack on the award in national courts. The award is final in that sense.'
[80] Schreuer and others (n 17) 1103.
[81] Zarra (n 73) 176-180.
[82] Schreuer and others (n 17) 1103.

Once rendered, the ICSID award, and eventually exhausted the review options offered under the Convention, the decision becomes *res judicata*. The *ne bis in idem* principle bars access to any national or international judicial remedy,[83] thereby including proceedings that were already in course. As a consequence, an ICSID award is shielded against any action on the same matter, or on a related matter, before other *fora* that could be described as a remedy. This would be the case even if a court or tribunal would otherwise be vested with jurisdiction over the matter.[84]

Decisions from the contractually appointed tribunal or court which are rendered ahead of the ICSID award are also potentially threatened as to their validity. While no issue would arise if the two decisions were in harmony with each other, in case of diverging awards, or decisions, conflict could arise. Let us imagine, for example, the case of a non-final domestic court decision on a breach of contract. Pending appeal, an ICSID award on the same subject-matter, but differing from the domestic judgement as to its content, is issued. Several questions surface around whether the *res judicata* principle would impinge on the domestic appeal process. The validity of what could now be legitimately considered a 'remedy' could be compromised in reason of the higher standing of the ICSID award.

Not dissimilarly, it is legitimate to ask ourselves what would be the repercussions of a final ICSID award on a final domestic decision which is yet to be executed. The first sentence of article 54 (1) of the ICSID Convention places an award issues under the convention on the same footing as the final judgment of a court of a Member State[85]:

> 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. […]'

Although the two decisions enjoy equal status, there is room to argue, once against, that the term 'remedy' is wide enough to encompass the enforcement of judgments which would be susceptible of revisiting the allocation of compensation over the same contractual violation. In this sense, it is doubtful whether, despite its seemingly equal footing with respect to the final ICSID award, the domestic decision could be enforced.

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[83] Bernardo Cremades and Ignacio Madalena, 'Parallel Proceedings in International Arbitration' [2008] Arbitration International 507, 519.

[84] Schreuer and others (n 17) 1105-1106.

[85] Schreuer and others (n 17) 1142, para 88.

It would be interesting to see whether domestic proceedings could, through the principle of *res judicata*, impinge on ICSID, or non-ICSID, international investment treaty proceedings. Let us imagine the final decision of a domestic court on breach of contract that has attained the internal status of *res judicata*.[86] It would be interesting to look into whether such decisions could impact treaty proceedings for a violation of the umbrella clause standard.

National courts issue judgments holding no binding effects before arbitral tribunals established pursuant to an international agreement.[87] The Annulment Committee in *Lucchetti v Perú* drew a clear line between *res judicata* at the international and national level:

> While an international judgment which is *res judicata* will in principle constitute a legal obstacle to a new examination of the same matter, *res judicata* at national level produces its legal effects at national level and will in international judicial proceedings not be more than a factual element. This must be so, because it cannot be left to each individual State to create, through its own rules of *res judicata,* obstacles to international adjudication. The Committee refers in this respect to the case of *Inceysa Vallisoktana S.L.* v *Republic of El Salvador,* in which the tribunal stated that the decision on the legality of an investment could not be left up to the courts of the host State, since that would give the possibility to redefine the scope and consent of its own consent to ICSID jurisdiction unilaterally and at its complete discretion.[88]

This decision confirms that the *res judicata* effect of a domestic decision has the nature of a factual element, not that of a legal obstacle. Domestic decisions hold a *res judicata* effect within the municipal legal system. Interpreting BITs, as well as other International Investment Agreements ('IIA'), is a matter governed by international law.[89] Domestic proceedings,

[86] Cremades (n 83), 520: '[…] [O]nly final decisions can have the force of material *res judicata* […]'.
[87] *Ibidem*, 521. Magnaye and Reinisch (n 46), 271-272.
[88] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v The Republic of Peru*, ICSID Case No. ARB/03/4 (also known as: Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v The Republic of Peru) (5 September 2007) (Decision on the Application for Annulment) para 87.
[89] Magnaye and Reinisch (n 46), 272. See, *inter alia*, *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No. ARB/05/19 (Award) (3 July 2008) para 123. The tribunal draws a line between the *res judicata* effect in the national and international legal order: '[…] [W]hatever would be the basis for such recognition of the Cairo Award within one or more national legal orders other than the Egyptian one, it would not make it part of the international legal order.' See also *Urbaser SA. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia, Ur Partzuergoa v Argentine Republic*, ICSID Case No. ARB/07/26 (Decision on Jurisdiction) (19 December 2012) para 78: '[…] [A] decision rendered by a domestic court has no *res judicata* effect on an arbitral tribunal

therefore, do not legally prevent non-domestic proceedings from taking place over the same matter. Although, as it will become evident when addressing comity, it would be a mistake to assume that domestic judgments hold no influence over treaty proceedings.

Academics have likewise confirmed that decisions of national courts or tribunals do not bind international dispute settlement organs. Several reasons have been advanced to explain the non-applicability of the *res judicata* principle. First of all, international tribunals frequently evaluate the international legality of domestic decisions. For instance, in the context of human rights, international judicial and quasi-judicial bodies, such as the ECtHR or the UN Human Rights Committee, are often called upon to review the judgements rendered by the courts of States which are members to the relevant treaties.[90] Secondly, this result can also be inferred from article 4 of the Articles on State Responsibility for Internationally Wrongful Acts,[91] pursuant to which a State may be responsible as a consequence of acts of its judiciary.[92]

A further issue would be whether the claim adjudicated before the domestic forum could be considered the same, in terms of subject-matter, as the one litigated before the relevant international investment tribunal. As in the case of the fork-in-the-road and *lis pendens* analyses, the answer to this issue is remanded to the section devoted to sameness and to the triple identity test used to assess it.

NON-ICSID INTERNATIONAL INVESTMENT TREATY ARBITRATION

This section looks into the *res judicata* effects of final non-ICSID investment treaty awards, thereby including Additional Facility awards, on proceedings eventually brought pursuant to the investment contract. In order to explore this topic, it is important to underscore the differences with ICSID awards.

Before looking at the *res judicata* effects of domestic proceedings on investment treaty arbitration over the last sub-section, this chapter looked into the, rather extensive, *res judicata*

not withstanding compliance with the test that would otherwise cause *res judicata* effect to attach under the domestic law of the Host State.'

[90] Reinisch (n 50), 51, footnote 66.

[91] Article 4 states that '[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions […]'.

[92] Reinisch (n 50), 51.

effects of ICSID awards pursuant to article 53 of the ICSID Convention. Non-ICSID awards do not, however, enjoy the same degree of inviolability.

The situation of commercial arbitration is comparable to the instance of non-ICSID awards in investment treaty arbitration. Recognition is governed by the law at the seat of arbitration.[93] If not challenged, or unsuccessfully challenged, the award acquires *res judicata* status in that jurisdiction.

Commercial arbitral awards, unlike ICSID awards which possess the legal effect of a final and binding decision issued by the courts of a State member to the ICSID Convention,[94] do not enjoy quasi-automatic recognition[95] in other countries. There is thus no need to file to local courts for permission to enforce an ICSID award, nor to have it recognized in jurisdictions which are Parties to the ICSID Convention.[96] In the instance of non-ICSID awards, however, until recognition is obtained in a specific foreign jurisdiction, the award is not able to produce *res judicata* effects in that legal system.

This view appears to find indirect confirmation in the letter of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention'). Absent international treaties or conventions dealing explicitly with *res judicata* and *lis pendens* in international arbitration, it could be argued that the New York Convention, though indirectly, regulates the issue of *res judicata*.[97] Article III of the New York Convention, which widely applies to the context of international commercial arbitration, dictates the criteria for recognition and enforcement:

> '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following argument.'[98]

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[93] Kaj Hobér (n 45), 379; Hanno Wehland (n 53) 169, para 6.08.
[94] Kaj Hobér (n 45), 377.
[95] Pursuant to article 54 (2) of the ICSID Convention some formalities still apply: 'A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary- General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.'
[96] Schreuer and others (n 17) 1123-1125, paras 23-29.
[97] Kaj Hobér (n 45), 262-263.
[98] *Ibidem*.

Article III in dealing with the recognition, as well as the enforcement, of international arbitral awards provides that member States shall recognize arbitral awards as binding and enforce them. The term 'recognition' is not defined in the New York Convention. It nonetheless presumably includes giving *res judicata* effect to an arbitral award. It could be averred that the New York Convention dictates the conditions for according *res judicata* effect to arbitral awards which are covered by it.[99]

Unlike for ICSID awards, the finality of other investment treaty awards could be challenged and the recognition and enforcement procedure in foreign jurisdictions could be resisted. Annulment for non-ICSID awards is available on limited grounds either through challenge procedures brought before the tribunals of the arbitral seat, or through resisting the recognition and enforcement of foreign awards on the grounds made available under Article V of the New York Convention. Challenges are brought primarily for violation of due process, to which a limited number of other narrow exceptions shall be added.[100]

As is the case under the ICSID Convention, no rule prevents award creditors from filing multiple enforcement requests before courts of Contracting States. Such proceedings are susceptible of taking place in as many countries as there are assets which could satisfy the relief granted in the award.[101]

Aside from the triple identity test discussed below, one additional hurdle shall be overcome before it could be argued that a decision or award could have *res judicata* effect, *viz* both decisions shall belong to the same 'legal order'.

Generally, no objection is raised that investment treaty arbitration does not hold *res judicata* effect with regard to international commercial arbitration, and vice versa.[102] Municipal proceedings similarly fail this test.[103]

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[99] *Ibidem*.

[100] Caterine Yannaca-Small, 'Parallel proceedings' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1040.

[101] Gaillard Emmanuel 'Parallel Proceedings: Investment Arbitration' [2019] Max Planck Encyclopedias of International Law, para 16.

[102] Kaj Hobér (n 45), 263. See also August Reinisch (n 50), 52-53.

[103] Kaj Hobér (n 45), 311: 'under international law the proceedings must be, or must have been, conducted before courts and tribunals in the international legal order. As a starting point, this means that decisions and judgments of municipal courts do not have *res judicata* effect on the international level.'

Non-ICSID treaty proceedings, and by extension non-ICSID treaty awards, belong to the international legal order. The conditions based on which the arbitral tribunal has jurisdiction to hear treaty claims are established pursuant to the relevant investment treaty, i.e. an international law instrument. Furthermore, tribunals are called upon to adjudicate on the violation of the umbrella clause, *viz* on the violation of a standard enshrined in a treaty which is a public international law instrument.

The fact that the award is subject to the *vacatur* rules of the country of the seat or that recognition is asked before the competent national courts of a foreign State, and that recognition is essential to any *res judicata* effect, does not change the nature of the award. As a consequence, even if the analysis below was to conclude that the dispute being litigated does indeed meet the criteria of sameness, valid reservations could still be raised on applicability of the *res judicata* principle.

Sameness of the dispute, and in particular sameness of the *causa petendi,* could represent a challenge to the application of the *res judicata* principle.[104] The circumstances of non-ICSID awards are unlike the instance of ICSID awards. The expression 'any other remedy' in the ICSID Convention was, arguably, spacious enough to encompass a wider array of measures capable of lessening the effect of the ICSID award, thereby seemingly including awards issued pursuant to the forum selection clause in the investment contract.

Conflict between an award issued by a non-ICSID international investment treaty tribunal and proceedings before the forum selected under the contract would be based on a more classical formulation of the *res judicata* principle. This formulation requires for the assessment of the identity of the claim.

In other words, the *res judicata* principle only unfolds its effects to prevent the same claim from reoccurring. The first question to be answered, therefore, consists of whether claims arising for breach of contract, and breach of the umbrella clause would indeed constitute 'the same claim' or 'matter'.

SAMENESS: THE TRIPLE IDENTITY TEST

[104] See for instance, Hanno Wehland (n 53) 203-205.

Some words shall be spent to fully explain what is meant for 'same matter' in the context of *res judicata*, though this test would also apply to litispendence and to conflicts under fork-in-the-road provisions. The sections devoted to those legal challenges did not undertake an in-depth assessment of the issues that could be encountered when establishing 'sameness', essentially delegating this task to the section below.

Specifically, the *res judicata* principle produces its preclusive effects exclusively upon the 'same matter.' A matter is indeed the same when identity of parties, object and *causa petendi*, between a prior judgment and a new claim is found to exist.[105]

International judicial authority seems to converge on this point. In the *Chorzów Factory* case, Judge Anzilotti interpreted article 59 of the PCIJ Statute[106] as referring to 'the three traditional elements for identification [of a dispute], *persona*, *petitum*, *causa petenti*, for it is clear that 'that particular case' (*le cas qui a été decidé*) covers both the object and the grounds of the claim".'[107]

Assuming here that parties are indeed the same in both proceedings, a determination on 'sameness' would depend on defining both the 'object' (*petitum*) and the 'ground' (*causa petendi*).[108] This choice shall not be interpreted as an implied statement that the identity of the parties is unlikely to represent an issue, but rather as a choice to focus on what has thus far been identified as the crucial characteristic of the third camp interpretation of the umbrella clause, *viz* to have what is substantially, though perhaps not formally, the same claim litigated before two different *fora*.

Identity of 'object' relates to the relief being sought.[109] Investors could indeed seek different sorts of relief in different *fora* over the same set of facts. In the case of a contract, specific performance and damages could be claimed in response to the same violation. Although this

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[105] Schaffstein (n 71) 85. Cremades (n 83) 523.

[106] Under article 59 of the Statute of the Permanent Court of International Justice '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'.

[107] PCIJ, Interpretation of Judgments Nos 7 and 8 (The Chorzów Factory), Dissenting Opinion by M. Anzilotti, Ser. A., No. 13, p. 23 para 57, available at http://www.worldcourts.com/pcij/eng/decisions/1927.12.16_judgments7and8.htm. See also *Trail Smelter Case (US v Canada)* 11 March 1941, RIAA, Vol. 3, p. 1952, available at https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf, where the tribunal relied on Anzilotti's aforementioned opinion in the Chorzów Factory case to argue that res judicata was indeed present due to parties, object and cause being the same. See also Reinisch (n 50) 47, 50.

[108] Reinisch (n 50) 61-62.

[109] Schaffstein (n 71) 88.

could also represent a potential issue, it would not be specific to the issue of umbrella clause interpretation. For this reason, the focus of this section will not rest on this specific ground.

Moving forth to the *causa petendi* requirement, identity can be found when 'the same rights and legal arguments are relied upon in different proceedings.'[110] A potential hurdle in relation to umbrella clause claims could arise in relation to the legal grounds underpinning the relief being sought, which could technically differ. On the one hand, the claim would be initiated over a breach of contract. On the other hand, the same claim would embrace the violation of a treaty standard, *viz* the umbrella clause. The mere fact that, under third camp interpretation, the umbrella clause claim is based on the same facts and applicable law as the treaty claim does not erase this formal distinction.

The fact that the investor can raise a treaty claim would not, if the sameness requirement were to be interpreted strictly, preclude him from also initiating a contract-based claim, either in commercial arbitration or in court, depending on the stipulations of the dispute settlement clause in the contract. Since treaty and contract claims are rooted on different legal grounds, *viz* a different *causae petendi*, the investor cannot be prevented on the basis of *lis pendens* and *res judicata* from engaging in the pursuit of a contractual claim.[111]

It shall nevertheless be underscored that, pursuant to jurisdictional internationalisation, the treaty does not create a right to compensation that is independent of the contract. Both claims would have their roots in the same injury, *viz* the violation of a contractual commitment, and seek a remedy for that very injury.

It would not, hypothetically, be unreasonable to consider this distinction as artificial. International *fora* have, in the past, warned against the risks of interpreting criteria too restrictively. Claimants who filed separate claims over closely related objects sometimes had their requests rejected.

In 1876 the umpire in the US-Spanish Claims Commission in the *Delgado* arbitration dismissed the request for damages against Spain for the seizure of a property in Cuba. Subsequently, the same applicant submitted a purportedly different claim, this time over the value of the property seized.[112] The arbitrator invoked the *res judicata* principle to dismiss the claim on the ground

[110] Reinisch (n 50) 62.
[111] Kaj Hobér (n 45), 373.
[112] Reinisch (n 50), 63.

that a new claim over a previously unexpressed, though accessible, request of relief could not be granted.[113]

The same Commission adopted an even wider approach in the *Machado* case. Whereas the first claim requested damages arising for the seizure of a house, the second one made demands that the house be restored and the payment of rent and damages over its detention be imposed. The umpire dismissed this latter claim on *res judicata* grounds. It stated that the existence of a 'new' claim shall be assessed on the basis of whether both claims 'are founded on the same injury', *viz* the seizure of the house. Since the same injury, the umpire averred, was the foundation of the previous claim, this second claim would amount to the relabelling of a previous issue.[114]

Tribunals also seem to have extended some flexibility to instances related to the *causa petendi*. Claimants have availed themselves of what was essentially the same rule to initiate separate claims under different legal instruments. In *Southern Bluefin Tuna*[115] an UNCLOS arbitral tribunal had to determine whether a dispute resulting from some Japanese fishing practices shall be assessed pursuant to the Convention for the Conservation of Southern Bluefin Tuna ('CCSBT') of 1993 or under UNCLOS.

The UNCLOS tribunal ruled that the dispute shall be settled under the CCSBT. In its consequent decision to decline jurisdiction, the tribunal also expressed its view on the identity of the dispute over fishing practices pursuant to the CCSBT and UNCLOS rules:

> The Tribunal accepts Article 16 of the 1993 Convention as an agreement by the Parties to seek settlement of the instant dispute by peaceful means of their own choice. It so concludes even though it has held that this dispute […] also implicates obligations under UNCLOS. It does so because the Parties to this dispute […] are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising

[113] *Ibidem*, 63.
[114] *Ibidem*, 63-64.
[115] In the instance of the *Southern Bluefin Tuna* case, it shall be noted that the *res judicata* principle, strictly speaking, did not apply. Article 281(1) of the UNCLOS (United Nations Convention on the Law of the Sea 1833 UNTS 397, 21 ILM 1261 (1982)) provides that when State Parties to 'a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.' The parallel with the *res judicata* principle is nevertheless justified in the words 'a dispute' employed in the aforementioned article 281. Arguably, the assessment of whether the disputes are indeed one and the same employs the same criteria and reflects the same policy rationale that underlies the effort to avoid parallel dispute settlement proceedings. See Reinisch (n 50), 67-68.

> under both Conventions. 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.[116]

By analogy, the findings mentioned above could extend some flexibility to the triple identity test in relation to umbrella clause claims. Both claims would have to be assessed on what are formally two distinct legal instruments, *viz* the treaty and the contract. This distinction is, however, highly artificial. In the treaty claims, the legal ground for compensation would consist of a rule of international law, i.e. the umbrella clause, mandating the respect of the commitments undertaken pursuant to a contract and under the law applicable to that same contract. In the contract claim, the legal ground for compensation would directly consist of the letter of the contract itself.

This perspective, however, is not free of controversy and other international tribunals have adopted a stricter approach when confronted with this problem. For instance, in the *Mox Plant* case, opposing the Republic Ireland to the United Kingdom, the tribunal held that the international rules on the interpretation of treaties may yield diverging results when asked to interpret identical or similar provisions enshrined in different treaties. Divergences may result from, *inter alia*, 'the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.'[117]

This argument is not devoid of merits. Article 31 of the VCLT refers laconically to 'treaty' interpretation, and so do the criteria of 'object', 'purpose', 'context' and 'good faith'. The entirety of the treaty is therefore relevant to the interpretation of its individual provisions.

It would not, however, be unreasonable to argue that this reasoning would be less compelling in the context of umbrella clause claims as interpreted under the third camp. Once agreed that the purpose of the clause is to bestow upon investors greater protection in the form of access to investment arbitration, the tribunal's assessment of the breach of the umbrella clause would essentially depend on the underlying contract as governed by its applicable law. It would therefore not be implausible to conclude that, in this case, it is the contract to which the tribunal

[116] *Southern Bluefin Tuna case (Australia and New Zealand v Japan)* Award on Jurisdiction and Admissibility, 4 August 2000, Vol XXIII, 42 para 54, available at https://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf. See also Reinisch (n 50), 65-66.

[117] *ITLOS, The Mox Plant Case (Ireland v United Kingdom)* Request for Provisional Measures, Order of 3 December 2001, para. 51.

is redirected, rather than treaty. Said contract holds greater importance than the treaty in the interpretation of the umbrella clause violation.

Important principles of public policy lied behind the loosening of the criteria listed above. It is averred that the principle of *res judicata* would become moot if the parties were permitted to engage in what has been classified as 'claim splitting'. This practice consists of engaging in the behaviour described in the above paragraph, thereby eluding the *res judicata* effect of a previous award 'by seeking a different sort of relief or by raising new grounds in support of the same claim for relief.'[118]

Regardless of public policy considerations it is doubtful whether the *res judicata* principle would find application, especially outside the *sui generis* rules of the ICSID Convention. Its application would heavily depend on the discretion of the relevant court or tribunal. This scenario is likely to foster uncertainty.

Arguably, the widespread recourse to comity, is symptomatic of this reality. Tribunals do not feel at ease with the idea of what is essentially the same dispute being litigated in several *fora*, but are not prepared to pause or dismiss proceedings over the litispendence or *res judicata* principles.

COMITY

The outcome reached in the foregoing paragraphs fells unsatisfactory and for a good reason. Let us imagine the case of a claim for breach of contract commenced before the competent local court under the auspices of the choice of forum clause in the contract. At the same time, under the relevant treaty, proceedings are commenced before the competent municipal court for breach of the umbrella clause. It is not infrequent for domestic courts to be included among the available *fora*.[119] Given that under the third camp interpretation the treaty breach shall be assessed under the law applicable to the contract, the same court could be asked to answer what is essentially the same question twice. Formally, because the *causa petendi* differs it would not be unreasonable to argue that these claims could proceed on parallel and independent tracks. Though this example is, no doubt, extreme, it is not impossible.

[118] Reinisch (n 50), 62.
[119] See for instance article 26(2)(a) of the Energy Charter Treaty.

One could argue that *litispendence* and *res judicata*, should, therefore be flexibly applied in order to prevent the proliferation of what are, in essence, identical proceedings. They are not, however, the only option available. Tribunals have sometimes voluntarily abstained from exercising jurisdiction over a dispute in the interest of judicial comity.

Comity consists of an exercise in discretion performed by a court or tribunal. *Fora* weigh their 'own jurisdiction against the interests of the parties and the conflicting jurisdiction, actual or anticipated, of other courts or tribunals.'[120]

This remedy serves the important function of minimising inappropriate and unreasonable outcomes. It constitutes a flexible doctrine fostering the cooperation of tribunals within the international legal order. In this sense, international *fora* may decline jurisdiction or stay proceedings if they esteem that the matters before them would be more appropriately heard elsewhere.[121]

The evaluation of appropriateness is a discretionary one. No legal requirement or reading of the letter of a court or tribunal's constitutive instrument or procedural rule mandates its use.[122] It is a discretionary power that stems from the inherent power of international courts and tribunals to preserve the integrity of the judicial process.[123] For instance, article 44 of the ICSID Convention, while stating that the agreement of the parties and the relevant Arbitration Rules shall govern the proceedings, also clarifies that the tribunal shall decide on questions which are not covered therein.

Ample use of this remedy has been made in the investment field. An ICSID tribunal in the so-called Pyramids case declined to exercise jurisdiction until a prior ICC award regarding the same contractual dispute had been annulled. On discretionary grounds, and based on the principle of comity, it stayed ICSID proceedings awaiting for the French court to eventually vacate the ICC award:

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[120] Crawford (n 56), 222 para 379.
[121] *Ibidem* para 380.
[122] *Ibidem*. See to this effect, the Report of the Appellate Body, *Mexico - Tax Measures on Soft Drinks and Other Beverages* -WT/DS308/AB/R (6 March 2003) para 44: […] [T]he issue before us in this appeal is not whether the Panel was legally precluded from ruling on the United States' claims that were before it, but, rather, whether the Panel could decline, and should have declined, to exercise jurisdiction with respect to the United States' claims under Article III of the GATT 1994 that were before it.'
[123] Crawford (n 56), 222 para 380. See for instance *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (Decision on Preliminary Objections to Jurisdiction) (27 November 1985) para 87.

> When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of international judicial order, either of the tribunals may. in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.[124]

CONCLUSIONS

The significance of the above findings is considerable. Waiving the offer to arbitrate under the treaty *via* a subsequent and overlapping forum selection clause requires a conflict between the two that would cause the two dispute settlement provisions to clash. For a waiver to be effective, contractual jurisdiction needs to be exclusive and cover matters that 'relate or are connected to' the contract, *viz* umbrella clause claims as interpreted under the third camp.

The above exercise shows that contractual forum selection clauses are not unlikely to fulfil both requirements. Premised that waivers are only possible after a right or benefit has been given, *i.e.* after the conclusion of the treaty, cases whereby parallel claims would be possible appear to be a minority. Parallel proceedings could nevertheless arise.

Further implications arise from the scenario where the 'waiver' is enshrined in the treaty, and actioned through the investor's own filing choice which would, in turn, preclude other previously available options, *viz* fork-in-the-road provisions. In this context, parallel proceedings could indeed take place, for instance because the fork in the road provision is not actioned due to the mandatory waiting periods not having been fulfilled.

Several options to prevent parallel proceedings under the treaty and the contract could be explored. Remedies such as article 26 of the ICSID Convention and litispendence would be available before the rendering of an award or decision before the contractual or treaty tribunal.

While article 26 would be inapplicable, due to the choice of forum made under the contract, the principle of *lis pendens* is of dubious application in public international law. Moreover, even admitting it were applicable, the fact that the proceedings do not belong to the same legal

[124] *SPP v Egypt (Decision on Preliminary Objections to Jurisdiction)* (n 119) para 84.

order, as well as doubts around whether the 'sameness' requirement around the *causa petendi* could be fulfilled, constitute valid concerns around its practical relevance in this scenario.

Once an award is rendered in one of the two competing jurisdictions several possibilities shall be considered. First of all, a separation shall be drawn between ICSID and non-ICSID investment treaty awards. Pursuant to article 53 of the ICSID Convention, once rendered, an ICSID award excludes 'any other remedy'. As the term remedy is susceptible of being defined as 'anything that could prejudice the effectiveness of the award', it is not unreasonable to argue that proceedings taking place over the same, or even over a closely related matter, could meet this definition. One could therefore argue that preclusion would not be an unreasonable outcome.

Leaving aside the *sui generis res judicata* rules under the ICSID Convention, it is doubtful whether the *res judicata* principle, in its classical formulation, would find application in the event of a non-ICSID investment treaty award to preclude proceedings under the contract. Conversely, a decision or award rendered pursuant to the contract would, arguably, be ill-placed to affect investment treaty proceedings. Concerns over the 'sameness' of the dispute, coupled with doubts on whether the two disputes would belong to the same legal order, represent obstacles to the applicability of the *res judicata* principle.

The unsatisfactory results that would derive from having what is essentially the same dispute heard before multiple tribunals, and potentially produce contrasting awards, has motivated courts and tribunals to seek a different solution. In this context, they have appealed to the discretionary principle of 'comity' in order to stay their proceeding pending the examination in another forum of a closely related matter.

It is not unreasonable to observe that the extent to which discretion and arbitrariness decide whether parallel proceedings and awards could take place is troubling. Further, the system appears fragmented. ICSID awards, with their *sui generis* rules on *res judicata* would be better place to prevent the proliferation of decisions. Non-ICSID investment treaty awards would not yield comparable benefits. There is room to question the reasonableness, or even the desirability, of this outcome.

Closing the loop from chapter 4, finding that the right to arbitrate umbrella clause claims has been waived by way of a contract is not devoid of concrete consequences. Aside from the argument that decisions on jurisdiction, as opposed to admissibility, can more easily be

annulled, the main implication concerns the position of the host State. The latter bore to other treaty parties an obligation to keep an offer open for the investor to eventually accept. The offer encompasses all treaty standards, thereby including the umbrella clause. Arguably, agreeing to a forum selection clause which waived that offer constitutes a violation of said commitment. The following chapter moves from this last observation to draw some conclusions on the function of umbrella clauses.

Concerns over fork-in-the-road provisions are somewhat different. There are no implications of State responsibility if jurisdiction is barred. Additionally, parallel proceedings could, not infrequently, occur.

There is, however, a legitimate concern over the interpretive conundrums caused by the third camp interpretation. The reliance on discretion in the application of the international law principles which would prevent parallel proceedings has the potential to foster arbitrary results.

Arguably, the potential 'sameness' of the dispute, and all the interpretive challenges that assessing it would entail, is the reason causing potential conflicts between international investment proceedings and other remedies. Sameness, substantial when not formal, is a by-product of third camp interpretation according to which treaty disputes for breach of the umbrella clause shall be decided under the law applicable to the underlying obligation, *viz* the contract.

Once more, it is legitimate to question whether an interpretation that would lead to such arbitrary, wasteful, and potentially inconsistent outcomes is reasonable, and therefore legitimate, under the VCLT general rules of interpretation.

CHAPTER 6

WHAT DOES IT MEAN FOR THE FUNCTION OF THE UMBRELLA CLAUSE?

INTRODUCTION

In previous chapters it has been argued how the forum selection clause in the contract, if exclusive and wide enough to include obligations connected, related to or arising from the contract can prevent treaty jurisdiction on umbrella clauses.[1] It has also been seen how this formulation of forum selection clauses is prevalent.[2] Additionally, it has been averred that, by way of agreeing to said forum selection clause, the host State *ipso facto* violates its commitments under the treaty *vis-à-vis* the other State Party, in particular the obligation to keep an offer open to the investor allowing for investment claims to be brought before an international investment tribunal.[3] These conclusions were nevertheless limited to umbrella clauses as interpreted under the third camp, *viz* jurisdictional internationalisation.

Further, always in relation to third camp interpretation, it was explained how fork-in the road provisions could, though this terminology is perhaps improper, also act as waivers. It was highlighted how this particular preclusion on jurisdiction works on different assumptions. The act of filing, not the consent of the parties, carries prejudice to the jurisdiction of international investment tribunals. Additionally, the contract does not need to be subsequent with respect to the treaty. The time at which the dispute arises constitutes the relevant date and shall be subsequent to the treaty's entry into force.[4]

Both jurisdictional impediments, however, share some common traits. First of all, they are not entirely effective at preventing parallel proceedings. Secondly, both preclusions or waivers are engaged in reason of the 'sameness' or the 'relation' or 'connection' between the treaty and contract disputes. 'Sameness' is also essential to subsequent remedies which would prevent parallel proceedings or awards, such as litispendence or *res judicata*.

[1] See Chapter 4, in particular 'Impact of Forum Selection Clauses on Umbrella Clauses'.
[2] See Chapter 5, in particular 'Contractual Clauses Formulation'.
[3] See Chapter 4, in particular 'Binding Offer of Consent'.
[4] See Chapter 4, in particular 'Focusing on the Treaty: the Fork-in-the-Road' 'Fork-in-the-Road Preclusion'.

'Sameness' is, in turn, a by-product of the third camp interpretation of the umbrella clause. Pursuant to this latter, a breach of contract inherently violates both the contract and the treaty, despite obligations under the contract not being reproduced at treaty level. The international investment tribunal may adjudicate whether the umbrella clause has been breached, but the assessment will be carried out under the municipal law governing the contract since, unlike in the fourth camp, obligations specified in the contract remain contractual in nature. Forum remains the only discernible distinction between treaty and contractual proceedings.

What remains to be explored is the implications from the point of view of treaty interpretation, in particular the interpretation of function, of these findings. The first part of this chapter reassesses the plausibility of the third camp interpretation in the light of what has been argued in the 2 previous chapters.

Chapter 3 averred that this interpretation was a *prima facie* plausible one, as it appeared respectful of both ordinary meaning and purpose. The complex to navigate labyrinth of preclusions and go-aheads which has been described in previous chapters has arguably stripped jurisdictional internationalisation of the attribute of plausibility.

The first part of the chapter challenges the compatibility of the third interpretive camp with the purpose of the treaty and the good faith requirement. The subsequent practice of the treaty Parties also arguably militates against upholding third camp interpretation.

The second part of this chapter explores potential remedies available, and their feasibility if third camp interpretation was to be employed. Inter-State proceedings under the treaty are considered, and rejected, as an effective remedy against the violation of the treaty that would be committed by agreeing to an exclusive forum selection clause.

A more suitable remedy could be indirect and consist in the investor-State tribunal ruling the forum selection clause to be void. It is not unreasonable to affirm that a State should not be entitled to rely on a treaty violation as its line of defence. Conversely, municipal courts or other contractually designated *fora* could refuse to hear the claim on the ground that the forum selection clause is invalid in reason of being a violation of the international law commitments of the State. Arguably, however, this approach would lead to undesirable, or unreasonable, outcomes.

In the final part of the chapter, it is argued that the more sensible solution would be to amend the fashion in which the function of the clause is interpreted. Both the abovementioned

solutions are only viable if the obligation of the State could not be interpreted in a fashion compatible with its subsequent actions. As it will be shown, the fourth camp of interpretation would prevent a great deal of pain, avoiding conflicts between decisions and jurisdictions. The crux of the argument is that fourth camp interpretation allows for 'peaceful coexistence' because it removes the problem of 'sameness', or in the case of contractual waivers the close 'connection' or 'relation' between disputes.

IS THERE A WAY OUT OF THE QUICK SAND?

Looking back at chapter 3, the overfly of the umbrella clause conundrum seemed to have landed in the mud. The enquiry on the function of the clause had yielded measly returns. The research was only able to show that 2 of the 3 currently employed interpretations of the clause's effect appear, *ictu oculi*, equally plausible pursuant to the international rules on interpretation.

In the light of what has been argued at chapters 4 and 5 the foregoing statement is, arguably, no longer justified. It was shown how third camp interpretation would cause the investment hosting State to be in breach of the obligation to keep an offer open for the investor to accept owed to the other treaty Party. This scenario would be relatively common due to frequency of exclusive and broadly-worded choice of forum clauses in investment contracts.

Furthermore, drawing a distinction between contract and treaty claims which boils down to the *locus procedendi* means that contract and treaty claims could be considered as one and the same from the perspective of the preclusive effects entailed by fork-in-the-road provisions. In turn, this would cause all sorts of preclusions and go-aheads that would hardly be compatible with the letter of the treaty and cause uncertainty and arbitrariness.

'Sameness' could also be a justification for the application of the *res judicata* and litispendence principles, although as chapter 5 has shown their applicability is far from uncontroversial. Tribunals, no doubt, also considers the identity of potentially conflicting proceedings when taking a decision on comity.

Similarly, issues of reasonableness extend to instances wherein parallel proceedings are allowed. Once an ICSID award has been rendered, proceedings over what is essentially the same dispute would arguably constitute 'remedies' not listed under the ICSID Convention and would therefore be incompatible with the letter of article 53 of the same Convention.

The abovementioned reasonableness concerns, as well as the purported violation of the treaty commitments on the part of the host State hold some significance from the perspective of treaty interpretation pursuant to the VCLT general rule. The following sections are devoted to showing how the purpose of the treaty, as well as the principle of good faith would not be compatible with such scenario. Arguably, the subsequent practice of the treaty Parties also militates against this interpretation of the effect of the umbrella clause.

PURPOSE

Third camp interpretation would cause the jurisdictional precedence concern to be interpreted in a fashion which is incompatible with the purpose of the treaty. It is useful to venture on this terrain by first explaining how jurisdictional precedence could supply further ammunitions to interpreters longing to establish the function of the umbrella clause. To this end, it is appropriate to recall an observation from the *SGS v Philippines* decision on jurisdiction on the purpose of the treaty:

> […] The question is whether Article VIII (2) [on controversies between one of the treaty Parties and investors from the other treaty Party] was intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned.
>
> Two considerations lead the majority of the Tribunal to give a negative answer to this question. […] The second consideration derives from the character of an investment protection agreement as a framework treaty, intended by the States Parties to support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State.[5]

Regardless of whether the answer to the question was correct, and even of whether the question itself was posed in the right terms, the tribunal delivers an observation on the purpose of the treaty that holds general validity and will be useful to retain. It highlights the ancillary position of the treaty in relation to the parties' choices and agreements. The treaty adds, without subtracting, to the provisions that they were able to negotiate for themselves. Following this logic, together with other arguments, the tribunal majority ruled that it could not proceed to the

[5] *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (ICSID Case No. ARB/02/6) (29 January 2004) (Decision on Jurisdiction) paras 140-141.

merits, as this choice would disregard the exclusive forum selection clause negotiated by the contracting parties, and the 'supplementary' role of the treaty.[6]

This interpretation of the treaty's purpose arguably finds confirmation within the treaty itself. The logical starting point in a quest to define the treaty's object and purpose is in what the Parties have said about it, *viz* the text of the treaty itself. The preamble, where Parties often deliver their keynote address on their motivations for entering the treaty, has in countless occasions assisted in this task.[7] In searching a confirmation to the argument advanced by the *SGS v Philippines* tribunal, however, preambles have not been particularly useful.

The entirety of investment treaties was analysed in order to glean useful elements that could assist in defining their purpose.[8] Sometimes treaties contain a clause declaiming the treaty's purpose.[9] It is nevertheless uncommon for these clauses to list the furthering of the 'negotiated investment arrangements of the contracting Parties' amongst their objectives.

It is, however, plausible to argue that the *SGS* tribunal's reasoning is embedded in some commonly found treaty clauses. For instance, article 7 of the 1995 Switzerland-Pakistan BIT which goes under the heading '[m]ore favourable provisions' states that notwithstanding the provisions of the treaty, more favourable arrangements agreed upon by either treaty Party with an investor will be applicable. Similarly, pursuant to article 10 of the US-Argentina BIT the treaty shall not derogate from, *inter alia*, '(c) obligations assumed by either Party, including

[6] *Ibidem* para 155. See also Alvik Ivar, *Contracting with Sovereignty State: Contracts and International Arbitration* (Hart Publishing 2011) 148. Other decisions have also argued that the purpose of the treaty is to stimulate private initiative, not replace it. In *Siemens A.G. v The Argentine Republic* (ICSID Case No. ARB/02/8) (Decision on Jurisdiction) (3 August 2004) para 81: 'It is a treaty "to protect" and "to promote" investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries.'

[7] Gerard Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–54: Treaty Interpretation and Other Treaty Points' [1957] British Yearbook of International Law 203, 228: '[a]lthough the objects of a treaty may be gathered from its operative clauses taken as a whole, the preamble is the normal place in which to embody, and the natural place in which to look for, any express or explicit general statement of the treaty's objects and purposes. Where these are stated in the preamble, the latter will, to that extent, govern the whole treaty.' Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 71. Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing 2016) 158. Rudolf Dolzer 'Interpretation and Intertemporal Application of Investment Treaties' in Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer (eds), Principles of International Investment Law (3rd edn OUP 2022) 37.

[8] Weeramantry (n 7) 72.

[9] For instance, article 2 of the ECT.

those contained in an investment agreement […], that entitle investments or associated activities to treatment more favourable than that accorded by this Treaty in like situations.'

The umbrella clause itself is arguably a provision susceptible of confirming that the purpose of the treaty is to advance, not replace, party autonomy. The clause is sometimes referred to as *pacta sunt servanda* clause. What pacts would it be conceived to preserve if not those negotiated between a treaty Party and investors from the other treaty Party?[10]

If a given interpretation of the umbrella clause would make it so that party autonomy would be considerably restrained in relation the possibility to insert a forum selection clause, or at least an exclusive one, in their contract, it is doubtful whether this would comply with the object and purpose of the treaty. The frequency of these provisions in investment contracts also seem to indicate that this does not mirror the intent of the treaty parties.[11]

To borrow the reasoning of floodgates counterarguments, minor contractual claims would be unlikely to flood the BIT arbitration system as this latter is expensive and even successful claimants are all but guaranteed to recoup costs.[12] Contractually designated *fora* might be the only viable resort to claimants who are not able to afford the expenses of investment litigation[13] or, else, are preoccupied to maintain a good business relationship with their counterparty and wish to avail themselves of the more conciliatory nature of non-investment arbitration.[14] It is therefore not unreasonable to affirm that under certain condition the contractually designated forum could indeed represent the better suited alternative.

GOOD FAITH

A further argument is grounded on good faith. Good faith is an overarching legal principle which is difficult to define in absolute terms.[15] Although thus far good faith has been depicted

[10] See Chapter 2: 'Summary of the results of the Original Study' concerning 'Scope'; See also in the same chapter 'The Follow-up Study' concerning 'Scope', as well as the 'Emerging Trends, Dissipating and Confirmed Patterns'.
[11] See Chapter 5 'Contractual Clause Formulation'.
[12] James Crawford, 'Treaty and contract in investment arbitration' [2008] Arbitration International 351, 369. See also Hein-Jürgen Schramke, 'The Interpretation of Umbrella Clauses in Bilateral Investment Treaties' [2007] Transnational Dispute Management 1, 24.
[13] Anthony Sinclair, 'Standards of Protection: Umbrella clause' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (Bloomsbury T&T Clark 2015) 928.
[14] Neil Hodge 'Arbitration increasingly on the table for in-house teams', available at https://www.ibanet.org/arbitration-increasingly-on-the-table-for-in-house-teams, accessed on 11 July 2022.
[15] Steven Reinhold, 'Good Faith in International Law' [2013] UCL Journal of Law and Jurisprudence, 40, Bonn Research Paper on Public International Law No. 2/2013, available at SSRN: https://ssrn.com/abstract=2269746 ;

herein as a criterion for treaty interpretation, and mainly as a facet of the principle of effectiveness, it is also an accountability mechanism for the treaty interpreter requiring it to act reasonably and fairly:[16]

> '[…] [W]hat is to be avoided by applying the principle of good faith is set out in Art 32 lit b, ie that interpretation of a treaty should lead to a result, which is manifestly absurd or unreasonable. Thus, the ordinary meaning, if established in its context, must always be submitted to the test of reasonableness.'[17]

It is reasonable to question whether this principle would be respected if between two valid alternatives, one that could cause the respondent State to breach an international law obligation over an ordinary contractual clause and one that does not, the interpreter could, in good faith, select the former. In *Hrvatska Elektroprivreda v Slovenia*[18] tribunal member Ian Paulson penned an individual opinion contesting the majority's good faith interpretation:

> [The] majority's natural desire to reach a result that they consider fair and reasonable leads them to imply terms that are not in the Treaty, to ignore terms that are in the Treaty, and to give retroactive effect to a Treaty when neither its express terms nor its object require retroactivity.[19]

The dissenting arbitrator in *Elektroprivreda v Slovenia* averred that the majority had disregarded the principle of 'good faith': the tribunal had moved from the view that instruments shall be 'read starting from one's perception of their object and purpose and requirements of good faith, and the express terms are secondary'.[20]

Emily Sipiorski, 'Interpretation in Good Faith and Its Relevance in International Investment Law: Additions to Justice or Ensuring Justice?' [2021] International Community Law Review 57, 66-67.

[16] De Brabandere Eric and Van Damme Isabelle, 'Good Faith in Treaty Interpretation' in Andrew D Mitchell, M Sornarajah, and Tania Voon (eds), *Good Faith and International Economic Law* (OUP 2015) 38. See also Sipiorski (n 16) 75-77.

[17] Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: a Commentary* (2nd edn, Springer 2018) 588. See also De Brabandere and Van Damme (n 16) 39. See also Filip Černý, 'Short Flight of the Phoenix: A Few Thoughts on Good Faith, the Abuse of Rights and Legality in Investment Arbitration' in Alexander J Bělohlávek and Naděžda Rozehnalová (eds), *Czech Yearbook of International Law-Public Policy and Ordre Public* (Juris 2012) para 10.05.

[18] *Hrvatska Elektroprivreda d.d. v Republic of Slovenia,* ICSID Case No. ARB/05/24 (Decision on the Treaty interpretation at issue) (12 June 2009).

[19] Individual Opinion of Jan Paulson (pursuant to Article 48(4), ICSID Convention) on *Hrvatska Elektroprivreda d.d. v Republic of Slovenia*, ICSID Case No. ARB/05/24, para 5. See also paras 40-48.

[20] *Ibidem* para 5. See also paras 40-48.

Arguably, this case presents similarities with the challenges faced by tribunals in the interpretation of umbrella clauses. Translating the gist of this opinion into a useful precept to qualify third camp proponents as having abused the good faith principle is nevertheless difficult. Tribunals *prima facie* did not ignore the letter of the treaty. It is, however, not unreasonable to affirm that certain parts of their reasonings were dictated by an urge to produce what they considered as reasonable results, over than by a careful examination of the text of the treaty. In *SGS v Philippines* the tribunal could not 'accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims'.[21]

The distortion arguably came from the desire to give effect to the forum selection clause in the contract without questioning the compatibility of this outcome with the interpretation assigned to the function of the umbrella clause. This led the tribunal to declare the inadmissibility of the proceedings in a fashion that glosses over the text of the treaty and the letter of the contract while ignoring that jurisdiction in investment arbitration is often a matter of arbitration without privity:[22]

> In the Tribunal's view, this principle is one concerning the admissibility of the claim, not jurisdiction in the strict sense. The jurisdiction of the Tribunal is determined by the combination of the BIT and the ICSID Convention. It is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest. Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract. […][23]

Issues of good faith are also visible in relation to the preclusions resulting from fork-in-the-road clauses. This clause allows for access to international investment arbitration to be forfeited

[21] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction)* (n 5) para 153.
[22] See Chapter 4 'Jurisdiction and Admissibility'. Christoph H Schreuer and others, The ICSID Convention (2nd edn, CUP 2009) 190-191. See generally Jan Paulsson, 'Arbitration Without Privity' [1995] ICSID Review - Foreign Investment Law Journal 232. Catherine Amirfar and Nelson Goh, 'Tribunal Jurisdiction and the Relationship of Investment Arbitration with Municipal Courts and Tribunals' in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore 2020) 948-949. Alvik (n 6) 123.
[23] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction)* (n 5) para 153 (footnotes omitted).

by way of filing the same claim before a different forum. A preclusion that materialises under this premise complies with the treaty. Even in treaties which contemplate this option, however, the offer to arbitrate before an investment tribunal could be waived before filing by way of agreeing to an exclusive and broadly worded forum selection clause. In this latter instance, the host State would have violated its treaty commitment *vis-à-vis* the investor's home State to keep an offer open for the investor to accept. It is doubtful whether this difference would be reasonable, considering that the treaty itself would, legally, allow for a similar outcome through its *out out* structure.

Uncertainty is an additional concern. If the investor fails to respect the waiting periods requirements enshrined in the treaty, a question could be raised as to whether the forum would be validly selected, and its preclusive effect maintained. Unfortunately, tribunals have been inconstant on whether the issue would amount to one of jurisdiction or admissibility of the claim, or even on whether waiting period requirements shall be considered as hortatory.[24] Only in these two latter instances jurisdiction would be correctly seized, thereby allowing for the fork-in-the-road provision to exert its preclusive effects.

When present, contractual waiting period requirements that do not match the treaty's own formulation would increase the uncertainty as to how the question would be interpreted. Further, it would cast doubts on whether the parties to the contract designed this instrument to be complementary to the investment treaty and on whether it would be desirable to have the two instruments interfere with one another. In turn, this calls into question the reasonableness of an interpretation of the umbrella clause that, by allowing for the 'sameness' of the dispute, has the two instruments interfere.

Further, preclusions under fork-in-the-road provisions, not unlike the applicability of the *lis pendens* and *res judicata* principles, rely on establishing 'sameness'. The formally distinct *causa petendi* could foster parallel proceedings and conflicting awards. Case law is unclear on this point, with some decisions pointing to the relaxation of this standard.

[24] See generally, Samuel Wordsworth, 'Abaclat and Others v Argentine Republic: Jurisdiction, Admissibility and Pre-conditions to Arbitration' [2012] ICSID Review 255. Gary Born and Marija Šćekić, 'Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford 2015) 227. See also Aravind Ganesh 'Cooling-Off Period (Investment Arbitration)' [2017] Max Planck Encyclopedia for International Procedural Law, Working Paper 7, available at https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/WPS7_2017_Ganesh_Cooling_Off_Period__Investment_Arbitration_.pdf.

'Comity', a discretionary and voluntarily applied principle, could arguably be the only viable option to prevent potentially conflicting decisions in non-ICSID treaty proceedings if sameness is not established. The compatibility of this degree of discretion with 'reasonableness' is doubtful.

The impact of ICSID awards on litigation pending before the contractually designated forum would likewise be, arguably, incompatible with the good faith principle. If, on the one hand, waiving jurisdiction via a choice of forum clause in a contract would amount to a treaty violation, parallel proceedings could cause other interpretive issues. After an ICSID award has been rendered, proceedings pending, or decisions waiting to be executed, over the same matter would qualify as a remedy, and therefore they would go against the letter of article 53 of the ICSID Convention.[25] The principle of judicial economy, often invoked by tribunals longing to avoid an in-depth analysis of umbrella clause claims,[26] would not be respected in such scenario.

SUBSEQUENT PRACTICE

Lastly, subsequent practice could also help in discerning between the two alternative interpretive camps. Pursuant to article 31(3)(b), the interpreter shall consider the subsequent practice in application of the treaty that proves the Parties' agreement on its interpretation.[27]

This subparagraph motions to acknowledge the manifestation of their intention, expressed through their conduct, to interpret the treaty in a certain fashion.[28] The interpreter shall be respectful of manifestations which occur after the conclusion of the treaty. According to the tribunal in *HICEE v Slovak Republic*, article 31(3) (b) refers 'to processes that amount to a form of agreement between the treaty parties. […] [I]n sub-paragraph (b) it arises by implication from the parties' action. A further […] feature is that the agreement […] is

[25] See Chapter 5 'Res Judicata and Hierarchical Problems: a difficult coexistence'.
[26] See Chapter 2 'Relevant Decisions and Interpretive Concerns'; 'Emerging Trends, Dissipating and Confirmed Patterns'.
[27] Gazzini (n 7) 186.
[28]ILC 'Yearbook of the International Law Commission (1966-II)' A/CN.4/SER. A/1966/Add. 1, 221 para 15 available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf, accessed on 15 June 2022: '[t]he importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals […]'. See also Gazzini (n 7) 186-187.

'subsequent', which must in this context mean that it supervenes after the conclusion of the treaty itself.'[29]

The gist of subsequent practice as an interpretive criterion has, arguably, been immortalised by the WTO Appellate Body as:

> a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.[30]

It is not unreasonable to read in the subsequent conduct of the treaty Parties a form of 'concordant, common and consistent' practice. There is no prescribed form the so-called 'practice' should conform to.[31] It could be argued that the practice of the treaty Parties to conclude agreements with the other treaty Parties' investors which contain an exclusive forum selection clause,[32] subsequent to the conclusion of investment treaties containing an umbrella clause, constitutes 'subsequent practice' pursuant to article 31(3)(b) of the VCLT.

Similarly, the failure to flag any violation of treaty rights as a consequence of exclusive forum selection clauses being included in investment contracts could be included within the definition of 'practice'. Subsequent practice shall be 'concordant, common and consistent', but there is no indication that it should consist of the same actions. Shared intent can be communicated through different types of conduct. Therefore, including the aforementioned clause on the one hand, and not giving any indication that said action shall be considered as breach of the treaty on the other, could be viewed as 'common' and 'concordant' practice.

Additionally, there is also no requirement that practice should consist of 'actions' as opposed to 'inactions.' Acquiescence, rather than active conduct, is as capable of conveying the common intentions of the Parties on a given interpretation.[33] For this reason, the absence of reactions from the other treaty Party over the presence of an exclusive forum selection clause,

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[29] *HICEE B v v The Slovak Republic* (PCA Case No. 2009-11) (Partial Award), para 134.

[30] *Japan-Taxes on Alcoholic Beverages*, AB-1996-2, WT/DS8,10 &11/AB/R (1996) para 106.

[31] Gazzini (n 7) 201.

[32] See See Chapter 5 'Contractual Clause Formulation'.

[33] Gazzini (n 7) 206-207.

even after the contract's content became known as part of investment litigation proceedings, could be reasonably interpreted as relevant. Though not frequently, States have in the past contested interpretations which, in their view, did not accurately portray their intentions as drafters.[34] Failure to do so could therefore be interpreted as conveying a different message.

REMEDIES AGAINST TREATY VIOLATION

PARALLEL RIGHTS OF THE STATE

In the previous chapter, a case was crafted in favour of the possibility for investors to waive their right to accept an offer to arbitrate. The purpose of this section is to understand whether a valid waiver of jurisdiction should be interpreted as a *cul-de-sac* for a dispute or alternative solutions could be envisaged.

To this end, it is time to pull a loose thread from earlier in this thesis. Focusing on the right of the investor to accept the offer to arbitrate has meant that the parallel question of whether the host State could disregard a treaty commitment to keep an offer open to the investor was briefly mentioned, but immediately neglected thereafter.

The focus now shifts to the parallel rights of the home State. The purpose of this section is to assess the options open to the investor's home State in relation to the alleged violation of its treaty rights.

THE SCOPE OF INTER-STATE PROCEEDINGS

A typical BIT inter-State dispute settlement clause provides that any dispute between the treaty Parties concerning the interpretation and/or application of the treaty, which cannot be resolved *via* consultations or diplomatic means, shall be submitted to arbitration at the request of either State.[35]

[34] See, the letter Switzerland published after the rendition of the *SGS v Pakistan* decision. Letter from Swiss Secretariat for Economic Affairs to Antonio R. Parra, ICSID Deputy Secretary-General (1 October 2003) Mealey's International Arbitration Reports, 19 (2004), E1–2.
[35] Michele Potestà, 'State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?' in Nerina Boschiero, Cesare Pitea, Tullio Scovazzi and Chiara Ragni (eds), *International Courts and the Development of International Law* (Springer 2013) 755; Giorgio Sacerdoti 'Bilateral Treaties and Multilateral Instruments on Investment Protection' Collected Courses of the Hague Academy of International Law, 104; Hazarika Angshuman, *State-to-State Arbitration Based on International Investment Agreements: Scope, Utility and Potential* (Springer 2021) 25-28.

While the investor-State mechanism gives standing to the investor and the host State, carving out the home State,[36] the inter-State track enables BIT Parties.[37] Jurisdiction, and in particular the meaning of 'dispute', shall nevertheless be looked into prior to considering this as a viable option.

The reason behind the enquiry is apparent. In previous chapters it was argued that the treaty violation occurred when a contract was concluded that run against previously incurred treaty commitments to keep the offer to arbitrate open. It is less clear, however, whether and at what point this violation is susceptible of creating a dispute. The first step to respond to this question is looking into the meaning of 'dispute'. Because only disputes can be litigated, it shall be determined how they can be defined and at what point, if any, a dispute would arise in this instance.

MEANING OF 'DISPUTE'

Drawing a perimeter for the scope of the term 'dispute' is not easy. The party invoking the inter-State mechanism first has to prove the existence of a dispute as a precondition for establishing jurisdiction.

The meaning of the term 'dispute' has been the object of several decisions from both the PCIJ and the ICJ. In the *Mavrommatis Concessions case* the PCIJ defined a dispute as a 'disagreement on a point of law or fact, a conflict of legal views or interests between two persons.'[38] In a later advisory opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, a dispute was defined as 'a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.'[39] In the *Texaco v Libya* preliminary award the term was given a broader definition so as to encompass 'present divergence of interests and opposition of legal views.'[40] In practice, however, simple definitions struggle to capture complex issues such as

[36] W. Michael Reisman, *Republic of Ecuador v United States of America* (PCA Case No 2012-5) Expert Opinion with Respect to Jurisdiction, paras 3-4, available at https://www.italaw.com/sites/default/files/case-documents/ita1061.pdf, accessed on 7 May 2021.
[37] Jarrod Wong, 'The Subversion of State-to-State Investment Treaty Arbitration' [2014] Columbia Journal of Transnational Law 6, 39.
[38] *Mavrommatis Palestine Concessions (Greece v UK),* Jurisdiction, 1924 PCIJ (ser. A) No. 2, (Aug. 30), 12;
[39] *Interpretation of Peace*, Advisory Opinion*: ICJ Reports* 1950, p. 65, 74.
[40] *Texaco Overseas Petroleum Co and California Asiatic Oil Co v Libyan Arab Republic*, Preliminary Award (1975), 53 ILR 389, 416 (1979);

the burden of proof to be satisfied by the party invoking the jurisdiction or the necessity of positive disagreement on interpretation or application of a treaty clause (as opposed to mere silence or failure to respond).[41]

Cases on the matter, generally speaking, indicate that no specific level of intensity or acrimony is needed for a dispute to arise, the formulation of opposing views being sufficient. In the *Interpretation of Peace Treaties* case the ICJ faced the question of whether diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand, and certain Allied and Associated Powers signatories to the Peace Treaties on the other, could fit the definition of dispute. The Court's reasoning focused on whether the parties had expressed clearly opposing views concerning the performance or non-performance of treaty obligations.[42]

The outcome was similar in the *Certain Property* case, where bilateral consultations had taken place between Germany and Liechtenstein. Germany asserted the view that 'a discussion of divergent legal opinions' shall not be presented as evidence of the existence of a dispute in the sense of the Court's Statute unless a certain threshold was reached.[43] The Court disagreed arguing that as 'complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter', Germany's denial was sufficient to cause a dispute to arise.[44] One party could acknowledge the position of the other and fail to implement remedial actions, or fail to engage at all in the process. A dispute would still be found to exist insofar as the party fails to accede to its demands.[45]

In a thus far unique decision shedding some light on the affirmative *versus* silent opposition conundrum, Ecuador sought for an authoritative interpretation of the obligation to provide investors with 'effective means' for asserting claims and enforcing rights under the US-Ecuador BIT.[46] The tribunal dismissed the claim, identifying no positive opposition to the

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[41] Christoph Schreuer, 'What is a Legal Dispute' in Isabel Buffard, James Crawford, Alain Pellet, Stephan Wittich (eds), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Springer 2008) 959-961.
[42] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* Advisory Opinion, 30 March 1950, ICJ 65, 74.
[43] *Certain Property (Liechtenstein v Germany)*, Preliminary Objections, Judgment of 10 February 2005, ICJ Rep. 6, para. 23.
[44] *Ibidem* para. 25.
[45] Schreuer (n 41) 965.
[46] This case was brought in the aftermath of a BIT arbitration commenced by Chevron, a US investor, against Ecuador, over a delay exceeding 13 years by Ecuadorian courts in adjudicating 7 separate contract disputes against Ecuador. Ecuador was found liable for failing to provide Chevron with 'effective means' for asserting claims and enforcing rights, after the *Chevron v Ecuador* tribunal defined the 'effective means' standard as constituting a different and 'potentially less demanding' standard than denial of justice under customary international law.

interpretation proposed by Ecuador: for a 'dispute' to exist the treaty Parties shall place themselves 'in positive opposition concerning a concrete set of facts affecting the parties' legal rights and obligations as required under international law'.[47]

The US response to Ecuador's diplomatic note, consisting in the acknowledgement that the views therein were being reviewed, followed by the declared intent to keep in touch on the matter was not enough to create 'positive opposition'. The fact that the note by Ecuador specified that in the absence of confirmation on the agreed meaning 'an unresolved dispute' shall 'exist concerning the interpretation and application of the Treaty' was likewise deemed insufficient.[48]

Some justify this reasoning by analogy with the rule under English contract law as expressed in the *Feltonhouse v Bindley* case.[49] One party cannot unilaterally impose that the other's silence in response to an offer equals acceptance. Similarly, Ecuador could not impose that silence be equated to disagreement.[50]

WHEN AND WHETHER ARE 'OPPOSING VIEWS' PRESENT

Concerning investment arbitration, the first obstacle resides in the fact that in order to have 'opposing views' on the interpretation or application of a clause, it would first be necessary to identify 'views.' The home State would likely hear of the contract and its forum selection clause when an argument against an investment tribunal's jurisdiction or admissibility is brought up.

A hurdle in the formation of 'opposing views' regarding a revocation of the offer to arbitrate is the communication process, *i.e.* the process by which the issue is taken up to the other Party which in turn manifests opposition to the views therein, either directly or indirectly.[51] The reason behind this issue is in the structure common to investor-State disputes, whereby the

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[47] *Statement of Defense of Respondent United States of America, Republic of Ecuador v United States of America*, PCA Case No 2012-5 (29 March 2012) 2, 9-10. The decision was contested with the dissenting arbitrator reportedly concluding that there was a dispute concerning the 'effective means' standard and that its resolution would have enabled the clarification of the parties' mutual obligation to provide 'effective means', see Clovis J Trevino, 'State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration under the Same Treaty' [2014] Journal of International Dispute Settlement 199, 203-204.

[48] Clovis J Trevino (n 47) 202-204.

[49] *Paul Feltonhouse v Bindley* [1862] EWHC CP J 35.

[50] Dapo Akande 'Ecuador v United States Inter-State Arbitration under a BIT: How to Interpret the Word "Interpretation"?'31 August 2012, available at https://www.ejiltalk.org/ecuador-v-united-states-inter-state-arbitration-under-a-bit-how-to-interpret-the-word-interpretation/, accessed on 17 May 2021.

[51] Schreuer (n 41) 959-961.

jurisdictional challenge in investor-State proceedings, generally speaking, would likely be the first occasion where the host State conveys it interpretation of the 'obligation to offer' in relation to the umbrella clause.

The question therefore becomes whether the legal arguments provided in the course of investment proceedings could express a legal view to the other State Party regarding the obligation to hold an offer in place. Looking at State practice it is tempting to answer in the affirmative. When a non-disputing State Party submission confirms the interpretation of the respondent State, it constitutes evidence of interpretive agreement that the tribunal shall consider pursuant to the VCLT.[52] For instance, in the *Bilcoin v Canada* case, Mexico filed the following non-disputing party 1128 submission:

> Mexico concurs with Canada's submission that decisions of arbitral tribunals are not themselves a source of customary international law and that the *Bilcon* tribunal's reliance on *Merrill & Ring* [on the minimum standards of treatment] was misplaced.[53]

In another instance, the *Metalclad v Mexico* case, the US, as the investor's home State, sided both with the claimant and the defendant on separate issues. It concurred with *Metalclad* in arguing that the actions of municipalities were subject to NAFTA standards and that the wording 'tantamount to expropriation' in Article 1110 included measures of indirect expropriation. At the same time, the US sided with the host State in rebuking the claimant's assertion that the expression 'tantamount to expropriation' designated a new type of expropriation not previously recognized under customary international law.[54]

This interpretation is confirmed by the use of unilateral non-disputing party interventions pursuant to article 37(2) of the ICSID Convention Arbitration Rules.[55] Although less frequent

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[52] Article 31(3)(a) of the Vienna Convention on the Law of Treaties 'there shall be taken into account together with context' […] 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;'.

[53] *Mesa Power LLC v Government of Canada* (PCA Case no 2012-17) Second Submission of Mexico Pursuant to Article 1128, para 10, available at https://www.italaw.com/sites/default/files/case-documents/italaw4359.pdf, accessed on 6 May 2021.

[54] Rodrigo Polanco *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (CUP 2018) 178.

[55] ICSID Convention Arbitration Rules (as amended and effective 10 April 2006), article 37(2) of the ICSID Convention Arbitration Rules: 'After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party

and more often directed against the tribunal's decision than against the defendant State's arguments and declarations,[56] unilateral non-disputing party submissions have sometimes been used to oppose a view presented by defending States in the course of an investor-State dispute. For instance, in *Siemens v Argentina* the US filed a submission to the *ad hoc* annulment committee in response to a prior letter from Mr Osvaldo Guglielmino procurador del Tesoro de la Nacion of the Government of Argentina addressed to the same committee[57] regarding the interpretation of Articles 53-54 of the ICSID Convention.[58]

Non-disputing Party submissions, as well as the respondent State's, may be relied upon to establish the Parties' subsequent agreement, or disagreement, on interpretation.[59] Mexico being able to rely on and agree with on Canada's filings during the *Bilcoin* dispute indicates that it regarded Canada's declarations as a viable mean to convey views on a treaty standard. The same reasoning applies for Argentina's letter during the *Siemens* proceedings.

If the respondent's submissions pending investor-State proceedings are a medium to communicate a State's view on the interpretation and application of a treaty, they are susceptible of being opposed by the other treaty Party. Such disagreement could amount, in principle, to a 'dispute'.

By analogy, a State's argument pending an investor-State dispute on jurisdiction that an umbrella clause shall be given a certain interpretation and/or that a forum selection clause agreed upon with the investor has waived the tribunal's jurisdiction, can communicate the State's views. Being these views susceptible of being opposed, a dispute may arise.

Avowing that it is theoretically possible for a dispute to arise once the jurisdiction of the treaty tribunal has been challenged is not reflective of the likelihood of this scenario. First of all, if contractual forum selection clauses are common practice, as it is their exclusivity and extensive formulation,[60] the home State of the investor could have concluded investment contracts that

submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding.'

[56] Letter from Swiss Secretariat (n 34). In *SGS v Pakistan*, Switzerland, the investor's home State, sent a letter to the ICSID Secretariat as a non-disputing State. In the letter it expressed its alarm concerning the award's narrow interpretation of Article 11 of the 1995 Pakistan–Switzerland BIT, i.e. the umbrella clause.

[57] Submission by the United States of America to the ad hoc Annulment Committee regarding Arts. 53 and 54, available at https://www.italaw.com/sites/default/files/case-documents/ita0792.pdf, accessed on 14 May 2020.

[58] Polanco (n 54)188.

[59] Catharine Titi 'The Timing of Treaty interpretations' EJIL: Talk! (18 August 2020), available at https://www.ejiltalk.org/the-timing-of-treaty-party-interpretations/, accessed on 6 May 2021; Polanco (n 54)180.

[60] See results of the study conducted in the previous chapter about forum selection clauses and their formulation.

have it, as well as investment treaties that contain an umbrella clause. This seems confirmed by the drafting standards recommended by experts:

> As a general rule, it is wise to draft international arbitration clauses as broadly as possible to encompass all disputes having any connection with the parties' dealings. It is usually better to avoid – except in fairly unusual and compelling circumstances – efforts to exclude particular types of disputes from arbitration.[61]

It appears, also by looking at the study conducted in the previous chapter, that States have behaved as if adding broad and exclusive forum selection clauses to State contracts was perfectly legal. Even if a challenge could theoretically be brought against the investment hosting State, this is unlikely to happen because the views of the treaty Parties could be aligned, not 'opposed', in relation to this practice.

Additionally, most tribunals have held parallel proceedings to be unproblematic.[62] The fact that this conclusion is challenged in this paper, at least in relation to third camp interpretation, does not erase the fact that States might be unwilling to step up for a problem that could remain theoretical.

As it has been seen, third camp interpretation of the umbrella clause and exclusive and broad forum selection clauses are incompatible because they violate the commitment made to the investor's home State. The better course of action, however, so far seems to adopt a different interpretation of the umbrella clause rather than to dispute the conformity of forum selection clauses.

OTHER OPTIONS

Arguably, inter-State proceedings are not the only remedy. Other indirect remedies could still be viable at two points in time. First of all, the forum selected by the contract has to retain, or decline, jurisdiction. Secondly, the investment tribunal has to issue a ruling, explicit or implicit, on jurisdiction. Potentially, at both stages tribunals could intervene on the international law breach.

[61] Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (6th edn, Kluwer Law International 2021) 37- 40.

[62] See Chapter 2 on the restatement of the findings of Jude Anthony's original study, as well as the findings of the study whose results on jurisdictional precedence are reported therein.

As it is often the case the law applicable to proceedings under the contract will likely be the law of the host State, which in turn mandates the respect of binding international commitments. For instance, in the Italian juridical system treaties, once ratified, occupy a peculiar position in the hierarchy of legal sources, between constitutional norms and other legislation approved by parliament (*norme interposte*).[63] The arbitral tribunal could, in theory, declare the forum selection clause invalid because it runs against a prior international law obligation of the State and is therefore *contra legem*.

The investment tribunal could reach a similar conclusion. The forum selection clause in the contract is a breach of the investment treaty. It could not therefore be argued that it successfully prevents the jurisdiction of the investment tribunal in relation to umbrella clause breaches. Were the investment tribunal to legitimise this argument it could be considered as indirectly rewarding a treaty violation.

Treating the forum selection clause as a treaty violation is arguably an extreme measure. The commitment of the State to leave an offer of international arbitration open to the investor in relation to violations of 'any commitment' or 'undertaking' is broad, but not absolute. After all an offer is just an offer. The investor has no obligation to accept it by initiating investment proceedings. In fact, it is unlikely that investors will start expensive and time-consuming litigation for minor breaches with the risk of disrupting the business relation. In this light, forum selection clauses could help preventing the commencement of investment disputes by providing dispute settlement options better suited to the needs of the parties.

It is doubtful that intent of the treaty Parties when drafting the umbrella clause and the investor-State dispute settlement clause was to prevent the parties in state contracts from selecting a dispute settlement method suited to their needs. The widespread use of forum selection clauses supports this view.[64]

Lastly, before such measures are considered, interpreting the relevant international obligation, *viz* the umbrella clause, in a fashion that is compatible with the contract, appears to be a more sensible course of action. This observation leads back to fourth camp interpretation, which is the option explored hereinafter.

[63] Benedetto Conforti, *Diritto Internazionale* (11th edn, Editoriale Scientifica 2018) 365.
[64] See Chapter 5. See also Chapter 3 'Is There a Way out of the Quicksand?' on the importance of subsequent practice to treaty interpretation. See also *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction)* (n 5) para 141. The tribunal underscored the importance of supporting not replacing the contracting parties' choices on jurisdiction.

FOURTH CAMP INTERPRETATION: A MORE SUITED ALTERNATIVE

Solutions explored thus far appear unsatisfactory for a number of reasons. The most evident being perhaps that while remedies could be at hand in the event of treaty violations, the inconsistent outcomes that, though legal, could emerge from the application of the third camp interpretation of the umbrella clause, would not be addressed. Issues of reasonableness related to this result have already been underscored.[65]

Both inter-State proceedings and the other option explored ignore the reality of how choice of forum clauses in investment contracts are formulated. The overwhelming evidence suggests that States consider broad and exclusive forum selection clauses to be unproblematic, even after the conclusion of a treaty with an umbrella clause.[66]

It is hereinafter averred that the better option would be to adhere to a different interpretation of the umbrella clause. At Chapter 3 it was argued that VCLT rules on interpretation could, in theory, support 2 different interpretations of the function of umbrella clauses: one under the third camp, the other under the fourth camp.

It was explained in the prior section that third camp interpretation risks limiting the parties' options to agree on contractual forum selection clauses which could hardly square with the practices generally followed by the treaty Parties to include exclusive and broad forum selection clauses in State contracts. Parties to the contract long to shape dispute settlement proceedings according to their needs.[67] Further, inconsistencies and coordination problems created by forum selection clauses or fork-in-the-road provisions could be described as unreasonable over arbitrariness and uncertainty concerns.[68]

The question now shifts to whether fourth camp interpretation is better equipped to avoid similar issues. Under the third camp, forum selection clauses were problematic to the extent that their exclusivity and scope overlapped with the offer to arbitrate made to the investor pursuant to the investment treaty. Additionally, concerning fork-in-the-road provisions, it was the potential 'sameness' of the dispute being filed which engaged the preclusive effects. These

[65] See Chapters 4 and 5.
[66] See Chapter 5, in particular 'Contractual Clauses Formulation'.
[67] See above 'Is There a Way out of the Quicksand?'. See also *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction)* (n 5) para 141.
[68] See Chapters 4 and 5.

realities, as well as other issues in relation to *res judicata* and *lis pendens*, are facets of what will hereinafter be referred to as the problem of 'sameness'.

The argument advanced hereinafter consists of affirming that if the umbrella clause' function was interpreted according to the fourth camp, sameness, or in the instance of contractual waivers the 'closeness' or 'strict relation', would not represent a concern and parallel proceedings would then become the logical (and unproblematic) outcome.

The investment arbitration offer would concern a treaty standard to be decided according with international law. Contractual forum selection clauses, on the other hand, would focus on contractual commitments, or issues arising thereof, to be decided in accordance with the law selected in the contract, most commonly the law of the host State.[69]

Similarly, in the case of fork-in-the road provisions, the cause of action, or the 'fundamental basis of the claim', would differ.[70] In one instance, it would be a violation of the law governing the contract, in the other a violation of international law. The two claims would remain separate. Parallel proceedings would thus be unproblematic.

This argument has been adopted by the majority of investment tribunals. Turning back at the categorisation drawn up in Chapter 2 and adding the findings of the original study to those of the new study, it was possible to verify how tribunals adopting fourth camp interpretation decided on jurisdictional precedence. In 6 decisions[71] tribunals adhering to fourth camp interpretation also ruled on jurisdictional precedence. In 5 instances,[72] tribunals upheld parallel proceedings.

[69] Rudolf Dolzer, 'Investment Contracts' in Ursula Kriebaum, Christoph Schreuer, Rudolf Dolzer (eds), *Principles of International Investment Law* (3rd edn, OUP 2022) 124-125.

[70] Depending on the test utilised, these criteria help determine the 'sameness' of the dispute. See Chapter 4 on 'Sameness of the 'dispute''.

[71] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC v Republic of Paraguay* (ICSID Case No. ARB/07/9) (29 May 2009) (Decision on Jurisdiction) para 159; *Siemens v Argentina* (*Decision on Jurisdiction)* (n 6) para 180; *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20 (Award) (19 December 2016) (despite the decision on jurisdiction not having been made public) paras 245- 246; *Greentech Energy Systems A/S, et al v Italian Republic* (*Greentech Energy Systems v Italy)*, SCC Case No. V 2015/095 (23 December 2018) (Final Award) para 220; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italian Republic* (ICSID Case No. ARB/16/5) (Award) (14 September 2020) para 376; *Sun Reserve v Italy* (SCC Case No. 132/2016) (Final Award) (25 May 2020) paras 576-577.

[72] See footnote above with the exception of *BIVAC v Paraguay (Decision on Jurisdiction)* (n 71) para 159. In this decision the tribunal found jurisdiction but declined to exercise it on inadmissibility grounds.

Motivations were similar across all rulings. Tribunals reasoned that the violation of a treaty standard to be decided according to international law cannot be affected by an exclusive forum selection clause.[73] The *Greentech* tribunal[74] put it in particularly explicit terms:

> It is clear also that Claimants are not making a claim for breach of contract in the present arbitration. Claimants have claimed for violations of the ECT and international law.

Critics of this model acknowledge this point indirectly. They ascribe this aspect among the criticisms of the fourth camp interpretation. They argue that this interpretation would open up to 'the possibility that an umbrella clause might enable an investor to evade agreed-upon exclusive jurisdiction arrangements in the investment contract, whether these provide for domestic courts or local or international arbitration.'[75] The *SGS v Pakistan* tribunal was unpersuaded 'that Article 11 of the BIT' entitled 'a Contracting Party's investor, like SGS, in the face of a valid forum selection contract clause, to 'elevate' its claims grounded solely in a contract with another Contracting Party [...] to claims grounded on the BIT, and accordingly to bring such contract claims to this tribunal for resolution and decision.'[76] Through their criticism, they concede that the fourth camp model would allow for both contractual and treaty claims to proceed in parallel under their respective governing laws.

The possibility of 'transforming' contractual claims in claims pursuant to the BIT and international law is an asset not a liability of fourth camp interpretation. If the connection or relation to the contract is severed, or better loosened up, the forum selection clause can no longer waive the right, or benefit, to accept investment arbitration for contract-related breaches. The breach would remain a treaty one, but it would be adjudicated according to international law and independently of both the contract and eventual changes to its applicable law. Similarly, it would remove the problem of 'sameness' that causes the application of the fork-in-the-road clause's preclusive effects and interpretive issues.

If the waiver is not engaged, the host State did not violate its obligation under the treaty vis-à-*vis* the investor's home State. In other words, it is argued that third camp interpretation is not

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[73] *Garanti Koza v Turkmenistan (Award)* (n 71) (despite the decision on jurisdiction not having been made public) para 245.

[74] *Greentech Energy Systems v Italy (Final Award)* (n 71) para 220; *ESPF v Italy (Award)* (n 71) paras 369-370; *Sun Reserve v Italy (Final Award)* (n 71) para 575.

[75] Crawford (n 12) 369.

[76] *SGS Société Générale de Surveillance SA v Pakistan,* Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, ICSID Case No ARB/01/13, para 165.

compatible with broad and exclusive forum selection clauses that are standard practice in investment contacts.[77] The better course of action would be to interpret the umbrella clause in a fashion that aligns with both the language of the treaty and the practice of State Parties.

Further, keeping matters separated is more reasonable and simplifies the various coordination and interpretive problems that would emerge between designated dispute settlement options in both the treaty and the contract. Two separate proceedings with independent causes of action could represent a desirable alternative over navigating the labyrinth of preclusions and green lights described in Chapters 4 and 5.

This argument seems to have been indirectly acknowledged by investment tribunals. If on the one hand, the function of umbrella clauses is interpreted with a great degree of inconsistency, the same cannot be said in case of jurisdictional precedence. The study conducted at Chapter 2 confirmed the high degree of consensus showed by tribunals around this interpretive issue.[78]

Although common in umbrella clause cases, the idea that breach of a treaty standards shall enjoy a certain degree of separation from coexisting contractual breaches, is not exclusive to this type of claims. The intent is to demonstrate that tribunals consistently developed arguments around the issue of 'sameness' in order to preserve the function of ICSID tribunals from the preclusive effects of fork-in-the-road provisions.[79]

A choice pursuant to a fork-in-the-road clause requires the parties, the relief sought and the causes of action in the two sets of lawsuits to be identical. Loss of access to international arbitration is only a concern if the same dispute between the same parties has previously been filed to the domestic *fora*.[80] In *Middle East Cement v Egypt*, article 10.2 of the Greece-Egypt BIT of 1993 stated that investment disputes between the Contracting Parties may be initiated either before the competent local courts or "an international arbitral tribunal".[81]

The claim did not concern an umbrella clause, but expropriation.[82] The Respondent averred that the investor had forfeited its right to international arbitration by way of contesting the

[77] See Chapter 5, in particular 'Contractual Clauses Formulation'.
[78] See Chapter 2, in particular 'Emerging Trends, Dissipating and Confirmed Patterns'.
[79] Christoph H Schreuer and others (n 22) 365.
[80] *Ibidem* 366. See also at Chapter 4 ''Sameness' of the Dispute'.
[81] *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/99/6 (12 April 2002) (Award) para 71.
[82] *Ibidem* para 104.

validity of the auctioning procedure for a ship belonging to the Claimant before the Egyptian courts. The Tribunal reasoned that the case before local Egyptian courts did not and could not refer to Egypt's obligations under the treaty, but only the validity of the auction under Egyptian law.[83] Accordingly, the Claimant's conduct in the proceedings could not be considered a waiver under Art. 10.1 of the BIT, *viz* the fork-in-the-road provision.[84]

A similar conclusion was reached in *Azurix v Argentina*. Objections to the Tribunal's jurisdiction were grounded on the fork-in-the-road provision of the Argentina-US BIT. ABA, the local company in which Azurix had invested, had cast administrative appeals, as well as other court proceedings against the Province of Buenos Aires over the termination of a concession agreement.[85] The Tribunal stressed that submission of a claim for breach of contract to the local courts did not preclude submission of a treaty claim to arbitration under a BIT, particularly due to the difference between the two disputes.[86] '[T]here could only be a case of *lis pendens* where there was identity of the parties, object and cause of action in the proceedings pending before both tribunals'.[87]

A key ruling on the relation between ICSID jurisdiction, as grounded on a BIT, and a contractual choice of forum clause is the original *Vivendi* v. *Argentina* award,[88] as well as the Decision on its partial annulment.[89] ICSID jurisdiction was based on Article 8(2) of the Argentina-France BIT. Argentina cast an unsuccessful jurisdictional challenge by relying on the choice of forum clause in a Concession Contract with the Argentinian province of Tucumán, specifically article 16.4:

> For purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán.[90]

[83] *Ibidem* para 71.
[84] *Middle East Cement Shipping v Egypt* (*Award)* (n 81) para 72.
[85] *Azurix Corp v Argentina, ICSID Case No ARB/01/12* (8 December 2003) (Decision on Jurisdiction) para 86.
[86] *Ibidem* para 89.
[87] *Ibidem* para 88.
[88] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*,* ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v Argentine Republic) (21 November 2000) (Award).
[89] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic,* ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v Argentine Republic) (July 3 2002) (Decision on annulment).
[90] *Vivendi v Argentina (Award)* (n 88) para 27.

The tribunal held that Article 16.4 of the Concession Contract did not waive the Claimant's rights to pursue investment claims pursuant to the France-Argentina BIT:

> 53 [. . .] The claims filed by […] [the Claimant] 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.[91]

In dealing with the merits, however, the tribunal found it impossible to decide on BIT claims till the claimant had asserted its rights in the domestic courts.[92] The *ad hoc* Committee tasked with deciding on the annulment found it 'evident that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract'.[93] It held, however that this would not impinge upon the jurisdiction of the ICSID tribunal.

Concerning the relation between breach of contract and treaty violation, the *ad hoc* Committee highlighted that these were related, though independent, standards and that a 'state may breach a treaty without breaching a contract, and *vice versa*.' Therefore, the tribunal argued whether the BIT was breached and whether the contract was violated are different questions.[94] This reasoning led the *ad hoc* Committee to conclude 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 jurisdictional clause in a contract between the

[91] *Ibidem* paras 53-54.
[92] *Ibidem* para 81.
[93] *Vivendi v Argentina (Decision on annulment)* (n 89) para 60.
[94] *Ibidem* paras 95-96.

claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.'[95]

These tribunals emphasised differences between the two claims in order to avoid the trap of 'sameness' which could have precluded their jurisdiction. This trait is, arguably, common to tribunals that upheld their jurisdiction via drawing a distinction between contract and treaty claims in the context of umbrella clauses.[96]

This argument is one for which both tribunals and commentators have shown remarkable fondness, even in relation to umbrella clauses as interpreted under the third camp. An example of this is clearly the *SGS v Paraguay* decision on jurisdiction.[97] The tribunal voiced repeatedly, throughout the award, the argument that treaty and contractual claims shall be kept separated.[98] Quoting the *Vivendi I* annulment, the tribunal reasoned that a State may breach the contract without necessarily violating the treaty and *vice versa*.[99]

In the context of the umbrella clause claim, however, the tribunal itself seems to creep back a few inches on this statement, though unwillingly.[100] The tribunal acknowledges that due to the umbrella clause violation being 'premised on a failure to observe a *contractual* commitment', one cannot aver that the 'fundamental basis of the claim' resides in a treaty laying down an independent standard against which the conduct of the parties shall be measured. For that type of claim the treaty, it was acknowledged, applies no legal standard that is independent of the contract.[101]

The tribunal is nevertheless quick to add that this argument is oblivious to 'the source in the treaty of the State's claimed obligation to abide by its commitments, contractual or otherwise.'[102] According to the *SGS v Paraguay* tribunal, even admitting that the alleged treaty breach depends upon demonstrating that a contract, or another qualifying commitment, has

[95] *Ibidem* para 101.
[96] Ole Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties' [2004] Arbitration International 179. See also Christoph H Schreuer and others (n 22) 370.
[97] *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29) (12 February 2010) (Decision on Jurisdiction).
[98] *Ibidem* paras 128-132, 135-142, 166-167, 171.
[99] *Ibidem* para 131.
[100] *Ibidem* para 142. The tribunal affirms that this rule 'applies with equal force in the context of an umbrella clause.'
[101] *Ibidem*.
[102] *Ibidem*.

been breached, the source of the obligation cited by the claimant, and hence the source of the claim, resides in the treaty itself.[103]

The argument introduced by the *SGS v Paraguay* tribunal is not entirely convincing. Under the third camp, the contract is at once the fundamental basis and the source of the commitment. As explained extensively at Chapters 4 and 5, one of the reasons giving exclusive contractual forum selection clauses the potential to act as waivers is their inclusive formulation. Often, choice of forum clauses are not just directed to contracts, but to claims 'connected to', 'originating or stemming from' contracts. There is little doubt that the contract is the point of origination of the umbrella clause claim.

Surely, a breach of the umbrella clause is a breach of treaty, as the umbrella clause figures among treaty provisions. The argument that the source of the umbrella clause claim is the treaty is, however, incorrect. The connection with the contract is never severed under the third camp, the existence of the claim is dependent upon the contract, which therefore remains its primary source.

More of direct interest to the argument advanced herein is the strenuous defence of their jurisdiction which tribunals have built on the distinction between umbrella clause claims and treaty claims. At Chapter 2, this thesis showed that jurisdictional precedence, in particular the fashion in which parallel proceedings were permitted under both the treaty and the contract, represents the only area of true consistency in the interpretation of the umbrella clause.[104]

It is argued that tribunals adopting this solution, *viz* the great majority of tribunals tasked with interpreting the clause, reached the right destination but took the wrong route. In other words, allowing for parallel proceedings sidesteps a web of arbitrary preclusions and avoid potential implication on the host State for violating the commitment to keep an offer open for the investor to accept is the reasonable way to proceed. The reasonable way to proceed is also, pursuant to the VCLT rules on treaty interpretation, the correct way to proceed.

These conclusions on jurisdictional precedence allowing parallel proceedings to be kept in place are, however, often incompatible with third camp interpretation and the preclusions it entails. Tribunals, as they have done in *SGS v Paraguay*, re-proposed the distinction between

[103] *Ibidem*.
[104] See Chapter 2, in particular 'Summary of the Results of the Original Study' in relation to 'Jurisdictional Precedence'. See also in relation to the new study 'Jurisdictional Precedence', 'Overall Findings'.

treaty and contract, which had already worked in the case of other treaty standards, in the context of umbrella clauses.[105]

Tribunals advocating for third camp interpretation of function, which have also maintained the separation between contract and treaty in order to allow for separate proceedings, ignore, in my view, the grounds on which such distinction was preserved for other treaty standards. The distinction was possible because the fundamental basis of the claim was in an independent treaty standard.[106] Independence was assured because of the difference in the applicable law. International law would apply to treaty breaches, while contractual ones would be assessed through the lenses of the law applicable to the contract. Not all violations of the contract would arise to the level of a treaty violation.

This point is especially clear looking back at the example of the FET standard. Although they could be both based on a breach of contract, any contractual violation does not *ipso facto* violate the FET.[107] One of the limbs that make up the FET standards, e.g. non-arbitrariness or due process, has to be violated in order for a breach of contract to also negatively affect the investment receiving State's BIT obligation to provide FET. This concern is not reproduced in case of alleged umbrella clause violations. In this latter instance, 'a breach of contract in and of itself is sufficient to activate protection under an umbrella clause.'[108] For example, in *SGS v the Philippines*, where it was held that umbrella clauses enabled investment treaty tribunals to assess a contractual violation by applying the law of the contract, protection was engaged by a breach of contract. The manner of the breach was immaterial.[109]

When the distinction is removed because the law applicable to determine both treaty and contract violations is the law applicable to the contract, the separation between the two claims becomes artificial and hard to justify. The *SGS v Philippines* tribunal found itself in this predicament, unwilling to concede that a jurisdictional problem would arise because the extent

[105] *SGS v Paraguay (Decision on Jurisdiction)* (n 97) para 142.
[106] *Ibidem* para 131. *Vivendi v Argentina (Decision on annulment)* (n 89) para 95- 101.
[107] Christoph Schreuer, 'Fair and Equitable Treatment (FET): interaction with other standards' [2007] Transnational Dispute Management 18, 20.
[108] Jean Ho, *State responsibility for breaches of investment contracts* (CUP 2018) 260.
[109] *SGS v Philippines (Decision of the Tribunal on Objections to Jurisdiction)* (n 5) para 128.

and content of the contractual commitment is not turned into a question of international law,[110] it halted the proceedings on admissibility grounds.[111]

This interpretation of function in turn causes the issue of jurisdictional precedence to be interpreted in a fashion which is arguably unreasonable. A system of complicated preclusions and go-aheads would determine whether the investment tribunal has jurisdiction over the claim.[112] In order to prevent this scenario from materialising, investment tribunals have kept in place a distinction that would only be viable if the clause's function were interpreted in accordance with the fourth camp.

The argument advanced herein is that the distinction between treaty and contract shall be kept in place by adopting an interpretation of the function of the umbrella clause which is coherent with it, *viz* fourth camp interpretation. This interpretation while respecting the letter of the treaty allows to bring back some degree of independence between treaty and contract claims. As per other treaty standards, such as expropriation or FET, umbrella clause claims would be decided according to international law.

Contractual violations would be assessed on the basis of the municipal law applicable to the contract. Having internationalised contractual obligations, it would be irrelevant to the merits of umbrella clause claims whether the host State has, by way of example, approved a law removing any wrongdoing in relation to a breach of contractual commitment. The claim is decided according to international law and is therefore based on an independent standard. The fundament basis of the claim would indeed, in this instance, be separate, thereby justifying separate and independent proceedings.

Separation consents to avoid 'sameness'. In turn, stepping away from 'sameness' allows for a reasonable interpretation of the clause's jurisdictional precedence requirement. Tribunals have to some extent indirectly acknowledged this aspect by consistently resolving the problem of jurisdictional precedence in favour of parallel proceedings. The innovation brought about in this thesis consists of showing that this interpretation of jurisdictional precedence, however correct, would not be plausible under the third camp interpretation of the clause's function. In

[110] *Ibidem* paras 127-128.
[111] *Ibidem* para 154. See Chapter 4 for a complete analysis of the tribunal's reasoning.
[112] See Chapters 4 and 5.

spite of its *prima facie* feasibility, this interpretive camp blurs the line between treaty and contract claims.

CONCLUSION

Third camp interpretation is implausible pursuant to the VCLT criteria on treaty interpretation. Requirements such as 'purpose' and 'good faith' would not be respected if this interpretation were adopted. The treaty's purpose is to enhance, not replace, the guarantees that the investor and the host State were able to negotiate between themselves. If their ability to agree to a choice of forum clauses in investment contracts was considerably reduced, this outcome would not be respectful of the treaty's purpose.

Further, the interpreter's good faith, *viz* its duty to interpret the treaty reasonably, could be called into doubt if between two valid alternatives, one that could cause the respondent State to breach an international law obligation over an ordinary contractual clause and one that does not, the interpreter selected the former.

Solutions that could preserve the feasibility of third camp interpretation are not viable. The investor's home State has little to no interest in intervening over the alleged violation of the obligation to keep an offer open. Further, declaring the choice of forum clause in the contract to be void because it violates the treaty commitments of the host State is not aligned with the purpose of the treaty, *viz* to supplement not replace the rights that they were able to negotiate for themselves.

The argument advanced herein is that tribunals have built the right conclusion on a false premise. Allowing treaty and contract proceedings to continue in parallel would not be possible if the third camp interpretation of the umbrella clause were to be adopted. This interpretation of jurisdictional precedence, as shown at Chapters 4 and 5, is nevertheless instrumental to remain clear from a web of arbitrary and, to some extent, unreasonable preclusions to the jurisdiction of investment tribunals and to avoid interferences between the proceedings under the contract and the treaty.

This chapter proposed a shift in the premises. Fourth camp interpretation of the clause, while coherent with the letter of the treaty and therefore the general rule of interpretation under the VCLT, would keep in place the separation between contract and treaty claim by differentiating the law which would apply to each breach.

Under fourth camp interpretation, parallel, though separate, proceedings would be allowed to march ahead on their respective rails. This solution, as acknowledged indirectly by tribunals which have reached a good degree of consensus in this area, and only this area, of interpretation of the clause. Fourth camp interpretation shall therefore be preferred as it fosters a reasonable interpretation of the clause.

CONCLUSIONS

Designed to increase the protection enjoyed by foreign investors, the umbrella clause is a provision whereby the investment hosting State is bound to respect the undertakings it has assumed with a foreign investor and/or with regard to its investments. Since the first attempts at interpretation, however, the umbrella clause's plain wording has proven to be an uneasy terrain for investment tribunals.

Evidence suggests that the debate is far from exhausted and the umbrella clause has remained and will remain, at least in the foreseeable future, a topic of conversation. Umbrella clauses have, in the past, been a common feature of investment treaties and, despite evidence of dwindling numbers, they remain a fairly common treaty standard to this day.

In recent years they suffered from a steep decline in popularity. Between 1959 and 2000 about 44% of treaties contained an umbrella clause. This percentage increased to 53% in treaties concluded from 2001 to 2010, only to drop sharply to 25% in treaties signed between 2011 and 2016. In 2018 the UNCTAD found that out of the 29 treaties finalised over that year, only 1 contained an umbrella clause.[1]

The marked decline in the popularity of umbrella clauses has, however, thus far failed to translate into a prejudice in the number of umbrella clause claims filed over the last decade. In between 2003 and 2012, over a period of approximately 9 years, 68 decisions were found to discuss umbrella clauses. Considering decisions rendered from 1 May 2012 to February 7 2022, this thesis identified 101 instances wherein an umbrella clause breach had been alleged.

Over a roughly comparable time frame cases concerning umbrella clauses have considerably increased. The lower number of treaties signed in recent decades has meant that older treaties, where umbrella clauses still represent a fairly popular occurrence, made up a sizeable share of the treaties currently in force. Claimants have likewise resorted to creative paths to include umbrella clause claims regardless the absence of an actual umbrella clause in the relevant treaty. Mostly, they used the MFN clause to attempt to import the standard from other treaties.[2]

These observations, despite confirming the current relevance of the umbrella clause debate, shall not cast a shadow over the reality of the declining importance of the clause. Tribunals

[1] See Chapter 2, 'Emerging trends, dissipating and confirmed patterns'.
[2] See *ibidem*.

have been increasingly avoidant around interpreting umbrella clauses. Between 2003 and May 2012, 18 of the cases classified as inconsequential were decided on 'other grounds' and an in-depth discussion of umbrella clause claims was deemed unnecessary. In 1 instance the tribunal motivated its decision by arguing that deciding on the umbrella clause claim would not add further elements for determining compensation.

After a decade, the percentage of claims foregoing an in-depth discussion on umbrella clauses is considerably higher. Out of the 65 instances classified as inconsequential, in 34 decisions tribunals reached their conclusions on 'other grounds' and an in-depth discussion was deemed unnecessary.

This upward trend to summarily dispose of umbrella clause claims could be symptomatic of the persisting disagreements in the interpretation of the clause and, arguably, increases the importance of a debate on this matter. Tribunals, eager to sidestep a contentious topic and funnel their efforts towards more established treaty standards, could be reluctant to volunteer their interpretation of the clause.[3]

Mindful that the interpretation of the clause is both a current topic of debate, and one that could affect the survival of the clause itself, this thesis has sought to partake in the debate. 'Function', 'jurisdictional precedence', 'scope' and 'privity (or attribution)' have been identified as the four main concerns whose interpretation tribunals have struggled to reconcile.

'Function' has been the main subject-matter of this thesis' enquiry. 'Jurisdictional precedence' has played a supporting role or, in other words, its interpretation has been instrumental to the development of arguments on the interpretation of function.

Other interpretive concerns have not received independent attention beyond a brief recount of the current status of debate and the itemising of the interpretations which tribunals have given of them thus far. Strictly dependent on the clause's formulation, a generalisation on their interpretations has been judged as ill-advised. Additionally, their interpretation was not closely linked with the fashion in which the clause's function was, in turn, interpreted. For these reasons, aside from some general remarks in the two introductory chapters, scope and privity (or attribution) have not been further scrutinised.

[3] See *ibidem*.

What shall be underscored, however, is that the different interpretations of each concern have been reached by employing, with a few additions, the same criteria, *viz* the VCLT rules on treaty interpretation. This thesis has adopted the same choice in order to further its interpretation of the clause. In particular, it is argued, 'good faith', 'purpose' and 'subsequent practice' are of particular relevance in ruling out the third interpreting camp, or jurisdictional internationalisation, as a viable interpretation of the clause.

The function, or effect, of the umbrella clause is the purpose that the clause fulfils within the treaty structure, *viz* adding an extra layer of protection to commitments voluntarily undertaken by investment hosting States in relation to foreign investors or their investments. Jurisdictional precedence, on the other hand, is the interference between forum selection clauses in contractual instruments, or the *fora* otherwise selected by the parties to those very instruments, and the jurisdiction of the investment tribunal to adjudicate the umbrella clause claim. The issue, however, has sometimes been presented as concerning the admissibility of the claim before an investment tribunal, rather than jurisdiction.

Out of the four interpretations of function tribunals have given over time, it was concluded that only two seem *prima facie* plausible pursuant to the VCLT rules on interpretation. The interpretation of the umbrella clause as an 'aspirational statement', serving as little other than a reinforcement to the general principle of *pacta sunt servanda*, despite being a very popular topic of debate in the discussion which ensued the first decision on the matter, has remained an isolated instance. No publicly known tribunal has followed this interpretive path.

This interpretation is also difficult to reconcile with the VCLT interpretive rule. Firstly, the ordinary meaning of a classically-worded clause would not support this conclusion. Peremptory expressions such as 'shall observe' are indicative of a direct obligation on State parties to fulfil commitments specifically undertaken with a foreign investor or in relation to an investment. Secondly, the tribunal arguably did not respect the letter of article 31 of the VCLT when it held that the 'far-reaching consequences' of a different interpretation shall be supported through clear evidence of the 'shared intent of the parties.' Thirdly, the applicability of the principle of '*in dubio pars mitior est sequenda*', commending that when treaty provisions are open to more than one interpretation, or are otherwise unclear, the view placing the smaller obligation on sovereign States shall be preferred, is doubtful. Lastly, the far-reaching consequences fathomed by the first SGS tribunal appear, at a closer scrutiny, not to enjoy

factual support. The scope of umbrella clause claims is not wide enough to replace other treaty standards.

Non-dissimilar motivations also militate against the plausibility of *iure imperii* internationalisation, *viz* the interpretive camp which recognises umbrella clauses as operational only when the host State exercises sovereign powers. This line of reasoning is still credited in some recent decisions. In between the cases reviewed in a previous scholarly work and the findings of the study conducted at Chapter 2, 10 decisions held that the clause was only operational when the State exercised its sovereign powers, but not when it acted in a commercial capacity.[4]

This interpretation is unsubstantiated pursuant to the VCLT rules. The ordinary meaning of the text is disregarded, as no mention of this distinction can be traced back to the clause's wording. Reliance on precedents is misplaced as its 'supplementary' character is not respected. The *effet utile* of the umbrella clause, pursuant to which treaty elements shall have a purpose or utility, is muted. Indeed, if another treaty standard has to be violated in order for the umbrella clause to be operational, it is legitimate to question whether the clause ads any guarantee which was not already in place under a different provision. Furthermore, tribunals have not introduced a reliable test for separating contract and treaty violation thereby creating the potential for arbitrary results. Lastly, even if a test existed it would require an analysis of the merits of the dispute.

Early signs of convergence in investment decisions, which have largely vanished over the last decade, pointed towards third camp interpretation gaining the upper hand. Pursuant to jurisdictional internalisation, a breach of contract violates *ipso facto* both the contract and the treaty, regardless of the fact that obligations under the contract are not being reproduced at treaty level.

The international investment tribunal vested with jurisdiction may adjudicate the matter based on whether the umbrella clause has been breached. The assessment shall be carried out under the municipal law governing the contract since the nature of the obligations enshrined in the contract is, and remains, contractual. Pursuant to third camp interpretation, umbrella clauses'

[4] See Chapter 3, 'Operational when the state exercises sovereign powers.'

function is essentially jurisdictional, as the claim could be heard before an international investment tribunal.

This choice is not, at least apparently, unreasonable. International investment jurisdiction, especially under the auspices of the ICSID Convention, presents some considerable advantages compared to proceedings under the contract, especially in terms of finality and enforcement.

Another seemingly plausible interpretation some tribunals agreed upon is the so-called internationalisation effect of umbrella clauses. Pursuant to this interpretation, known as fourth camp or full internationalisation, contractual or other domestic law obligations are ‘elevated’ to the level of treaty commitments directly cognizable under international law. Under this camp, the violation of a protected commitment would entail a breach of treaty, *i.e.* a breach of the umbrella clause, which would be discussed before an international investment tribunal and adjudicated according to international law, rather than the law applicable to the contract.

Under both of the aforementioned interpretive camps the VCLT rules *prima facie* appear to have been respected. Moving from the ordinary meaning of the words in their context, third camp interpretation does not unduly stretch, or ignore, the letter of the treaty. Being bound by a treaty to observe the obligations entered into with foreign investors or with regard to their investments translates in a treaty obligation to honour the undertakings *vis-à-vis* a foreign investor. The text of the treaty stays silent on the law applicable to those obligations, which might *prima facie* be the law applicable to the commitment.

The object and purpose of the treaty appear likewise to have been respected if third camp interpretation is adopted. The clause protects investors from violations, *viz* purely contractual violations, which would not normally be protected by other treaty standards. Protection is here intended as access to the jurisdiction of an investment tribunal. Undeniable advantages are associated with this option, both with respect to local courts or non-investment arbitration as well as in relation to diplomatic protection, in terms of finality, independence, expedience and control over the proceedings. This interpretation furthers the purpose of the treaty, *viz* to advance the prosperity of the treaty Parties by attracting foreign investments through a friendly regulatory environment.

Although historical evidence showed that the umbrella clause had been intended to ensure the removal of State contracts from the domain of the host State’s legal framework, this argument is not decisive. Commentators avow that the circumstances surrounding the conclusion of the treaty take the back seat in the task of interpreting the letter of the umbrella clause, which

remains the primary duty of any investment tribunal. Further, however useful to get a grip of the parties' intention at the time of the treaty conclusion, this argument provides little information on how the Parties interpret that clause now, which is the main question the general and supplementary rules on interpretation are there to address.

Repeating the same test in relation to fourth camp interpretation yields very similar results. Starting from the ordinary meaning of the words in their context, this interpretation does not appear to unduly stretch, or ignore, the terms of the treaty. Once more a treaty-enshrined commitment to observe the obligations entered into with the foreign investor or with regard to its investment translates in a treaty obligation to honour the undertakings *vis-à-vis* a foreign investor.

The treaty does not leave instructions concerning the law applicable to those obligations. The umbrella clause being part of a treaty, governed by international law, it is not unreasonable to affirm that international law would also apply to obligations internationalised as part of an international law commitment.

Similarly, the object and purpose of the treaty seem not to pose particular issues. The clause protects investors from violations, *viz* purely contractual violations, which would not under normal circumstances be protected by other treaty standards. The level of protection is comparatively higher than it would have been under the third camp: a contractual violation would trigger the responsibility of the State under international law.

Surely, the scale is tipped markedly in favour of the investor. In itself, this fact is not a sign that this interpretation shall be ruled out. States may deem that larger concessions are necessary in order to widen the stream of foreign investments.

The principle of effectiveness is also, *ictu oculi*, fulfilled. The clause serves a unique function within the treaty, *viz* affording protection to investors for violations of contractual obligations which would have not been captured under other treaty standards.

With the aid of the jurisdictional precedence concern, however, it is not unreasonable to argue that the *prima facie* plausibility of the third interpretive camp can be called into question. Jurisdictional internationalisation would lead to interpreting jurisdictional precedence in a fashion that would not be respectful of the VCLT rules on interpretation.

If interpreted according to the third camp, the offer to arbitrate umbrella clause claims expressed under the treaty could be waived. Broadly worded, exclusive and subsequent forum selection clauses in investment contracts designating a different forum for the resolution of contractual disputes could have this effect.

The preconditions for the waiver to be effective are potentially present. Investors enjoy a direct right, or benefit, to accept the offer to litigate the dispute before an international forum. Other interpretations of the position of investors are hard to reconcile with the almost unchecked liberties that they enjoy in the course of international investment proceedings.

Rights and benefits can be waived by way of contract. No formal requirement is demanded of waivers under international law, aside that they unequivocally convey the parties' intentions. Choice of forum clauses in contracts could fulfil this requirement and act as waivers under certain conditions. Firstly, the clause shall be broad enough in scope to include claim 'related', 'arising from' or 'connected to' the contract. This formulation would encompass umbrella clause claims as interpreted under the third camp. Secondly, they shall be exclusive so that other options would be precluded once the forum selection clause is agreed upon. Evidence suggests that this type of clauses is common practice. Lastly, the contract shall be concluded after the treaty, as it would not be possible to give up a right, or a benefit, that is yet to be received.

Investors are entitled to turn down a right or benefit bestowed upon them by the treaty Parties, *viz* the right to accept the offer to bring its claim before an international investment tribunal. Just because they have been granted a right or benefit by the treaty Party, this does not translate into an obligation to accept said right or benefit.

This reasoning, however, becomes more problematic when examined from the perspective of the investment receiving State. If the investor has the option to accept the offer to have its dispute heard before an international investment tribunal, the host State, conversely, has an obligation under the treaty to keep an offer open for the investor to accept. This means that by virtue of entering into a contract whose forum selection clause precluded said option, the host State would find itself in breach of its treaty commitments vis-à-vis the other treaty Party, i.e. the investor's home State.

In this instance, a few options could be contemplated to preserve jurisdictional internationalisation as the correct interpretation of function. First of all, the home State could file a claim before the competent international forum for breach of its treaty rights. Secondly,

the investment tribunal designated under the treaty, as well as the forum selected under the contract, could respectively retain and reject jurisdiction on the ground that acting in a different fashion would endorse a treaty violation.

All options, however, are unsatisfactory. Exclusive and broad forum selection clauses are considered common practice and are unlikely to be contested. Additionally, tribunals have consistently held parallel proceedings to be unproblematic. The fact that this conclusion is herein contested in relation to third camp interpretation of umbrella clauses is no licence to forget that States are unlikely to react to a treaty violation whose consequences are likely to remain largely theoretical.

Creating the potential for a treaty violation is not the only issue with third camp interpretation. Its interaction with other treaty standards such as fork-in-the-road provisions is as problematic. According to such clauses, once a forum from the alternatives listed therein has been selected no recourse can be had to others or, as the Latin maxim puts it, '*una via electa non datur recursus ad alteram'*.

Frequently, both the choice of forum clause in the contract and the fork-in-the-road provision designate, *inter alia*, domestic courts. Assuming the identity of the disputing parties, interference between proceedings could take place only if the matters discussed before either forum overlapped.

Third camp interpretation would arguably ensure the 'sameness' of the dispute. Depending on the test that one ends up adopting, contractual claims might have the potential to carry forward the same object, parties, cause of action as treaty claims if the third camp interpretation were to be accepted. Discretion in this respect is once more a sensitive issue, and one which is susceptible of creating arbitrary results.

Preclusions resulting from the fork-in-the-road provision would arguably produce some unreasonable and arbitrary outcomes. First of all, the requirement of 'sameness' that is associated with the dispute also applies to its forum. In other words, if the contract and the fork-in-the-road provision do not designate the same forum, identical claims could be allowed to proceed on parallel paths.

Additionally, the indecisiveness over whether waiting periods shall be considered as hortatory, compulsory or as a matter of admissibility (not jurisdiction) arguably impacts arbitrarily the applicability of the fork-in-the-road clauses' preclusive effects. Oftentimes, treaties require that

the arbitrating parties undergo a period of negotiations, preliminary conciliation, mediation or other procedural steps before a dispute can be filed.

The question of whether the forum would be validly selected, and its preclusive effect therefore maintained, if the investor did not respect said waiting period, or did not undergo the entirety of the activities requested, is one that has yet to be firmly settled. On the one hand, some tribunals and interpreters view waiting periods as a hortatory provision without constraining force. Others, esteem that they shall be interpreted as a compulsory requirement, especially when language such as 'shall' or 'should' is utilised, or precise requirements of conduct are otherwise imposed.

To complicate this scenario further, parallel proceedings also remain a possibility under jurisdictional internationalisation. There is no denying that the great majority of tribunals has allowed for parallel proceedings to continue before their respective contractual and treaty *fora*. Although this result is challenged herein as to its frequency and likelihood, especially when the third camp interpretation of the umbrella clause is adopted, parallel proceedings nevertheless remain a possibility also in relation to this interpretive camp. The majority, but not the entirety, of choice of forum clauses in investment contracts seems to adopt the exclusive and broad formulation required of waivers. Additionally, some contracts may simply pre-date the treaty.

Similarly, in relation to fork-in-the-road provisions, even if the 'sameness' criterion is fulfilled, there are still circumstances where parallel proceedings could materialise. Firstly, only the investor's filing of a claim would trigger this provision. Secondly, there is no guarantee that the contract would designate one of the alternative *fora* listed in the fork-in-the-road provision. When this eventuality does not materialise the fork-in-the-road provision, together with its preclusive effects, are not engaged. Thirdly, if the interpretation or the language of waiting periods were to favour their obligatory nature, and their fulfilment was considered as a precondition of the consent to arbitrate, non-compliance would tantamount to a question of jurisdiction. As a corollary to this conclusion, absent compliance with waiting periods, no valid 'filing' or 'submission' of the claim to one of the *fora* could take place. If the claim was not properly filed, then the fork-in-the-road provision, and its preclusive effects, would not be engaged.

Arguably, however, even parallel proceedings, if the third camp interpretation of the umbrella clause is adopted, would present their own set of challenges. Avowing that parallel proceedings

could arise is no admission that they could both result in a valid award and no interference could occur between them. After ruling out the applicability of article 26, the thesis considers whether *lis pendens* could prevent parallel claims under the treaty and the contract.

Answering on the applicability of the *lis pendens* principle is not straightforward. It is debated whether *lis pendens*, unlike *res judicata*, constitutes a principle of international law. Further, even admitting that litispendence is a principle of international law other requirements in relation to its application might be difficult to fulfil.

It is doubtful whether the sameness requirement, as identified according to the triple identity test, and in particular the requirement of identity of the *causa petendi*, would be fulfilled. The investment treaty claim is filed for a violation of a treaty standard, *viz* a violation of the umbrella clause. By contrast, the contractually designated forum is concerned with a contractual breach. Similarly, it might be argued that interference is not possible, due to the proceedings belonging to different legal orders. Both of these issues are also common to *res judicata*.

Once the award has been rendered, the issue shifts from managing parallel claims to understanding what, if any, could be the effect of a decision, either under the contract or pursuant to the treaty, on ongoing proceedings. To this effect it is appropriate to conceptually distinguish between ICSID awards, non-ICSID awards and decisions rendered by the contractually designated forum.

The special status accorded to ICSID awards could encroach on the path of other tribunals which have been tasked with ruling, or have already ruled on the same dispute or on a closely related dispute. Pursuant to article 53, ICSID awards shall not be subject to appeal or to any other remedy not contemplated in the letter of the Convention itself. The wording 'any other remedy' mirrors the expression employed at article 26 of the ICSID Convention, where the term 'remedy' encompasses attempts made before any other forum to pursue the same claim, not just the appeals or challenges brought against it. This interpretation is supplemented by the language of article 53 which mentions appeals in addition to 'any other remedy', thereby implying a difference between the two concepts. Parallel proceedings continuing after an ICSID claim has already been adjudicated could fit into the definition of 'remedy', and therefore be in contrast with the ICSID Convention.

Additionally, even if 'sameness' between the two proceedings is not recognised, there in still room to argue that the preclusive effects of article 53 would apply. After all a 'remedy' could

be defined as something that could undermine a given state of affairs as previously established. Therefore, if the outcome of the proceedings has the potential to lessen, or simply to modify, the impact of an ICSID award, for instance by way of awarding damages to the losing party, it could arguably fit the definition of 'remedy'.

Non-ICSID awards and decisions rendered under the contract rely on the general principle of *res judicata* in order to determine whether conflict would be possible. Once more, the fact that the proceedings belong to two different legal orders, as well as the difficulties in establishing the 'sameness' of decisions which have been rendered pursuant to different instruments, has the potential to deny the applicability of this principle, at least when it is interpreted in a strict fashion.

Discretion is likewise important in relation to 'comity'. Comity is the faculty that some *fora* exercise to stay their own proceedings when a closely related matter is debated elsewhere. Investment tribunals, often unable to rely on other international law principles, made frequent recourse to this option. Once more, as there in no obligation in relation to comity, problems of arbitrariness might arise.

Previously, it was mentioned how the third camp was a *prima facie* reasonable interpretation of the umbrella clause. In the light of the reasoning sketched above, the thesis finds it appropriate to revisit this initial statement.

If third camp interpretation is upheld, broad and exclusive forum selection clauses would have to be erased from contracts concluded after the entry into force of the investment treaty. Adopting a different approach would signify that the investment hosting State would find itself in breach of its treaty obligations.

The implications of this interpretation of function from the perspective of compliance with the VCLT interpretive criteria shall be underscored. The purpose of the investment treaty is to 'support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State.'[5]

Looking at the entire treaty framework, it is plausible to argue that some clauses of common usage underpin this reasoning. For instance, pursuant to article 10 of the US-Argentina BIT, the treaty shall not deviate from, *inter alia*, '(c) obligations assumed by either Party, including

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[5] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6) (29 January 2004) (Decision on Jurisdiction) para 141.

those contained in an investment agreement […], that entitle investments or associated activities to treatment more favourable than that accorded by this Treaty in like situations.' The umbrella clause itself is arguably a provision susceptible of confirming that the purpose of the treaty is to advance, not replace, party autonomy. The clause is sometimes referred to as *pacta sunt servanda* clause. The pacts the clause is conceived to preserve are no others than those negotiated between a treaty Party and investors from the other treaty Party.

The idea that contractually designated *fora* are in some circumstances a more favourable, better suited alternative, that shall be supported by the treaty is not unreasonable. Firstly, party autonomy would be considerably restrained in relation the possibility to insert a forum selection clause, or at least an exclusive one, in their contract. Secondly, the frequent use of these provisions suggests that their elimination does not reflect the intent of the treaty Parties.

Minor contractual claims are unlikely to crowd the dockets of the international investment arbitration system. This latter is expensive and even successful claimants are all but guaranteed to recoup costs. Contractually designated *fora* might be the only viable route to claimants who are unable to afford such expense, or are preoccupied to maintain a workable business relation with their counterparty and therefore wish to avail themselves of other, more conciliatory, means.

A further argument against upholding jurisdictional internationalisation is grounded on good faith. The role of good faith in treaty interpretation is not entirely captured as a facet of the principle of effectiveness. It is also an accountability mechanism for the treaty interpreter requiring it to act reasonably and fairly. Good faith prevents the interpretation of a treaty from leading to a result which is manifestly absurd or unreasonable, as suggested by article 32 lit b of the VCLT.

The identification of the ordinary meaning shall always yield to the test of reasonableness. It is not unreasonable to question whether an interpretation that would cause a contractual clause of very common usage to be turned into a potential treaty violation and cause all sorts of arbitrary compatibility issues in the relation between treaty and contract claims meets this demand.

Additionally, subsequent practice also helps in discerning the viability of third camp interpretation. Pursuant to article 31(3)(b), the interpreter shall consider the subsequent practice in application of the treaty that proves the parties' agreement on its interpretation.

It is plausible to read in the subsequent conduct of the treaty Parties a form of 'concordant, common and consistent' practice, as there is no manual detailing what shape the so-called 'practice' should take. Entering into agreements with the other treaty Party' investors which contain an exclusive forum selection clause after the conclusion of investment treaties containing an umbrella clause arguably constitutes 'subsequent practice' pursuant to article 31(3)(b) of the VCLT.

Not dissimilarly, the failure to flag any violation of treaty rights as a consequence of exclusive forum selection clauses being included in investment contracts could also befit the definition of 'practice'. Subsequent practice shall be 'concordant, common and consistent', but shared intent can be communicated through different kinds of conduct. Therefore, agreeing upon the aforementioned clause on the one hand, and not giving any indication that said practice shall be considered as breach of treaty on the other, could be viewed as 'common', 'concordant' and 'consistent' practice.

Lastly, there is also no requirement that practice should consist of 'actions' as opposed to 'inactions.' Acquiescence, rather than active conduct, is as apt to communicate the shared intentions of the Parties on a given interpretation. Though uncommon, States have in the past contested interpretations which, in their view, did not accurately portray their intentions as drafters. Failure to do so could therefore be interpreted as conveying a different message.

The solution proposed in this thesis is to resort to a different interpretation of the clause's function. Fourth camp interpretation, or full internationalisation, would reinstate a firmer distinction between contract and treaty claims.

The legal basis for contact and treaty disputes would differ. Investment arbitration would concern a treaty standard to be adjudicated pursuant to international law. Contractual forum selection clauses, on the other hand, would focus on contractual commitments, or issues arising thereof, to be decided in accordance with the law selected in the contract, most likely the law of the host State.

The issues of reasonableness encountered as a result of jurisdictional internalisation would cease to constitute a concern. The choice of forum clause in the contract could not waive the offer to arbitrate. It would no longer be plausible to affirm that the treaty commitment 'arises of' or 'relates to' the contract, as their applicable laws would keep them apart.

The criterion of 'sameness', which actions the preclusive effects of fork-in-the-road provisions would not be fulfilled. Similarly, in case of parallel proceedings there would be no potential for interference between *res judicata* from international investment awards and the proceedings for breach of contract. Issues in relation to litispendence would follow a similar route.

Unconnected parallel proceedings under their respective applicable laws would become the logical outcome of fourth camp interpretation. The main shift in paradigm promoted in this thesis is the connection between this largely agreed upon outcome in relation to the jurisdictional precedence concern on the one hand and the interpretation of function according to the fourth camp on the other hand. Logically, it is argued, parallel proceedings could only be a universally valid option if this interpretation of the clause's function was adopted.

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