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Risks for Host States of the Entwining of Investment Treaty and Contract Claims:

Dispute Resolution Clauses, Umbrella Clauses, and Forks-in-the-Road

Fiona Marshall

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1.0 Introduction

A significant proportion of foreign direct investment into developing countries is made through contracts between investors and host State entities.[1] Such contracts are particularly common in sensitive public service sectors like water, energy, telecommunications and natural resource extraction. Investment contracts generally contain dispute resolution clauses providing for disputes between the parties to be resolved through arbitration or the courts of the host State. In addition, many investors have the right to bring their disputes with host States to international arbitration via one of the approximately 3,000 international investment agreements (IIAs) in existence worldwide.

The language used in many IIAs enables knowledgeable investors (or their lawyers) to turn these parallel tracks of redress to their tactical advantage. First, investors may unilaterally "internationalize" a dispute by bringing a claim that the host State is in breach of contract or its domestic legislation before an international arbitration tribunal constituted under the IIA. Such internationalization will be contrary to the host State's expectation that the dispute will be resolved at the national level. Second, investors can choose to commence proceedings in whichever domestic or international forum is most likely to decide in their favour—a tactic is known as "forum-shopping." Alternately, investors may prefer a "scatter-gun" approach in which they commence proceedings in various fora in the hope that they will succeed in at least one. Host States must then defend multiple legal proceedings, with the resultant cost implications and an increased risk of unfavourable and/or inconsistent decisions. Regarding the risk of inconsistent decisions, a recent tribunal considering an investment contract in the context of an investment treaty arbitration, held that it did not need to take into account the findings of the tribunal in the contractual arbitration.[2]

[1] For a more detailed analysis of investment contracts and their implications for sustainable development, see IISD's forthcoming publication on this issue.

[2] Biwater Gauff (Tanzania) Ltd v. Tanzania, award 24 July 2008, para 478: "Consistent with this Arbitral Tribunal's analysis of its own mandate as set out above, and in particular its duty to make its own determinations on all matters of fact and law, and given the extensive evidential record in these proceedings, the Arbitral Tribunal has not found it necessary to rely upon the UNCITRAL Award in its decision on the merits of this dispute."

2.0 *Trends in IIA drafting*

The drafting language in IIAs that enables investors to internationalize otherwise domestic disputes, to forum-shop or to initiate multiple proceedings in different fora includes broadly-worded dispute resolution clauses, the presence of umbrella clauses and the absence of effective fork-in-the-road clauses.

To illustrate, dispute resolution clauses in many IIAs give investors the right to refer to international arbitration "any dispute which may arise between a Contracting Party and an investor of the other Contracting Party." These words have been interpreted to permit investors to bring claims that the host State is in breach of an investment contract or domestic legislation before an international arbitral tribunal constituted under the IIA even though the host State has not breached a substantive provision of the IIA. In the process, the investor is able to forum-shop or to improve its chances through multiple proceedings.

Similar effects are achieved by the so-called umbrella clause. Like a broad dispute resolution clause, an umbrella clause in an IIA may result in the internationalization of commitments made by the host State in an investment contract or domestic law and the possibility for an investor to forum-shop or initiate multiple proceedings. A classic formulation of an umbrella clause states that "each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."

Some IIAs attempt to minimize the possibility of investors forum-shopping or running multiple proceedings through the inclusion of a fork-in-the-road clause. A typical fork-in-the-road clause might read "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 the procedures shall be final." This particular wording requires the investor to make a definitive election of forum at the time of initiating its first proceeding in respect of the dispute. Some clauses allow the investor to commence arbitration under the IIA on the condition that it discontinues any other proceedings regarding the dispute. Such clauses are sometimes called "no U-turn" clauses.[3]

The purpose of Part 2 of this Bulletin is to survey regional and temporal trends in IIA drafting with respect to these three IIA provisions to get a sense of how pervasive the risk to developing country host States of investor forum-shopping, multiple proceedings and unilateral internationalization of contract disputes might be. To this end, it looks at a number of IIAs between developing countries and the five most prolific IIA signatories. In decreasing order, the most prolific IIA-signing nations are Germany, China, Switzerland, United Kingdom and Egypt.[4]

2.1 Dispute resolution clauses

Sixty per cent of the IIAs examined in the current survey utilize a very broad definition of "dispute" in their dispute resolution clauses. For example, the 2000 China-Benin bilateral investment treaty (BIT) gives the investor the right to initiate arbitration proceedings in respect of "any dispute which may arise between a Contracting Party and an investor of the other Contracting Party." All the Chinese IIAs reviewed signed between 2000 and 2009 have broad dispute resolution clauses similar to the China-Benin BIT.[5] Likewise, most of the German IIAs with developing

[3] For simplicity, both "fork-in-the-road" clauses and "no U-turn" clauses will be referred to as "fork-in-the-road" clauses in this paper.
[4] As each of these countries have signed at least 100 IIAs, this survey assumes that collating IIAs based on these countries' models will provide the best representative sample overall. UNCTAD, *Recent developments in international investment agreements (2007-June 2008)*, figure 2, p3.
[5] China's IIAs with Benin, Bosnia, Iran, Korea DPR.

countries surveyed utilize a broad dispute resolution clause along these lines.[6] Almost all IIAs between Switzerland and developing countries employ a broad and general definition of "dispute" in their dispute resolution clauses.[7] A third of the IIAs considered between the United Kingdom and developing countries take an approach fairly similar to the China-Benin BIT[8] and over half of the Egyptian IIAs also use a very broad definition of dispute.[9]

The rest of the IIAs surveyed contain narrower dispute resolution clauses. About 30 per cent of the IIAs examined give the investor the right to bring disputes concerning an obligation of the host State under the IIA to international arbitration. For example, the 2003 China-Guyana BIT allows the investor recourse to arbitration in respect of "a dispute between a Contracting Party and an investor of the other Contracting Party, concerning an obligation of the former under this Agreement in relation to an investment."

The Egypt-Chile BIT employs a vaguer expression, encompassing "disputes, which arise within the terms of this Agreement, between a Contracting Party and an investor of the other Contracting Party." Such wording could conceivably lead to jurisdictional arguments over whether "disputes within the terms of this Agreement" means only disputes concerning a host State's breach of an obligation in the IIA or has a wider scope.

The 2003 Egypt-Botswana BIT and 2005 Egypt-Serbia BIT use a format similar to the more specifically-worded clause found in the China-Guyana BIT above. Half of the United Kingdom IIAs examined also contained similar dispute resolution clauses.[10] The United Kingdom-Mexico BIT was the most specific, requiring that in addition to the Contracting Party having breached an obligation set forth in the agreement, the investor must have incurred loss or damages by reason of the host State's breach:

> *"An investor of a Contracting Party may submit to arbitration a claim that the other Contracting Party has breached an obligation set forth in Chapter II of this Agreement, and that the investor has incurred loss or damages by reason of, or as a consequence of such breach."*

The 1998 Germany-Mexico BIT also stipulates that the investor must have suffered loss or damage as a result of the host State's breach to make a claim:

> *"...disputes between a Contracting State and a national or company of the other Contracting State, arising from the date the Agreement enters into force, concerning an alleged breach of an obligation of the former Contracting State under this Agreement, which causes loss or damage to the national or company of the other Contracting State."*

The 1995 Switzerland-Mexico BIT contains the most detailed dispute resolution clause of the IIAs surveyed:

> *"An investor of a Party, either on its own or on behalf of an enterprise of the other Party that is a legal person owned or controlled, directly or indirectly, by such an investor, may submit to arbitration a claim based on the fact that the other Party has breached an obligation under this Agreement, provided the investor has incurred loss or damage by reason of, or arising out of, that breach. An enterprise that is an investment may not submit a claim to arbitration under this Schedule."*

[6] Germany's IIAs with Zimbabwe, Botswana, Bosnia and Herzegovina, Trinidad and Tobago, United Arab Emirates, Cambodia, Thailand.
[7] Switzerland's IIAs with Botswana, Nigeria, Kazakhstan, Bosnia and Herzegovina, Guatemala, Iran, Lebanon, Thailand, Bangladesh.
[8] United Kingdom's IIAs with Kenya, Estonia, Peru.
[9] Egypt's IIAs with Uganda, Georgia, Jordan, Pakistan, Indonesia, Thailand.
[10] United Kingdom's IIAs with Angola, Bosnia and Herzegovina, Bahrain, Lao, Vietnam.

Lastly, a small number of the IIAs limit recourse to arbitration to the amount of compensation payable for an expropriation. Such an approach is taken in the 1996 Germany-Romania and all the Chinese IIAs dated 1990–1999.[11]

It is notable that a number of the IIAs that contain narrower dispute resolution clauses have one Contracting Party from Latin America. This could be due to greater awareness in that region of the risks of investor-State arbitration in light of the disproportionate number of claims submitted against Argentina, Mexico and other Latin American countries. However, as this survey has shown, broadly-worded dispute resolution clauses are the norm.

2.2 Umbrella clauses

Almost 70 per cent of the IIAs surveyed contain some form of umbrella clause. The most expansive versions of umbrella clause are found in some of the German and Swiss IIAs. Half of the German IIAs with developing countries reviewed[12] and just under half of the Swiss IIAs[13] contain an umbrella clause in the form used in the 2000 Germany-Botswana BIT:

> *"Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting State."*[14]

Very similarly, the umbrella clauses contained in two other Swiss IIAs require:

> *"Each Contracting Party shall observe all its obligations with regard to investments established in its territory by investors of the other Contracting Party."*[15]

The wording of the 2003 Egypt-Botswana BIT differs slightly though its effect may be much the same:

> *"Each Contracting Party shall observe the obligations under its laws and under this Agreement which bind the Contracting Party and its investors and the investors of the other Contracting Party in matters relating to investment."*[16]

The most commonly used form of umbrella clause in the IIAs surveyed is that found in the 2000 United Kingdom-Kenya BIT:

> *"Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."*[17]

This version of an umbrella clause differs from the Swiss and German examples set out above in that it applies to those obligations "entered into" by a Contracting Party. Such a clause is used in all but one of the IIAs between the United Kingdom and developing countries reviewed.[18] It is also used in several of the German IIAs reviewed[19] and one Swiss IIA.[20]

[11] China's IIAs with Ethiopia, Estonia, Argentina, Qatar, Cambodia. The China-Argentina BIT restricts the availability of dispute resolution in respect of investor disputes with China but not investor disputes with Argentina. Regarding investor disputes with Argentina, the dispute resolution clause covers "any disputes which arise within the terms of this Agreement concerning an investment."
[12] Germany's IIAs with Botswana, Bosnia and Herzegovina assumed, Cambodia, Thailand, Zimbabwe.
[13] Switzerland's IIAs with Nigeria, Bosnia and Herzegovina, Lebanon, Bangladesh.
[14] 2000 Germany-Botswana BIT, Article 8(2).
[15] 1998 Switzerland-Botswana BIT, Article 10(2). 2002 Switzerland-Guatemala BIT, Article 10(2). The quoted text is an unofficial translation of the French text which reads: "Chacune des Parties contractantes se conformera à toutes ses obligations à l'égard des investissements effectués sur son territoire par des investisseurs de l'autre Partie contractante."
[16] 2003 Egypt-Botswana BIT, Article 4(5).
[17] 2000 United Kingdom-Kenya BIT, Article 2(2).
[18] United Kingdom's IIAs with Kenya, Angola, Estonia, Bosnia and Herzegovina, Peru, Bahrain, Lao, Vietnam.
[19] 1979 Germany-Romania BIT, 2006 Germany-Trinidad and Tobago BIT.
[20] 1997 Switzerland-Thailand BIT.

All but one of the IIAs signed by China between 2000 and 2009 use the same formulation as that of the United Kingdom-Kenya BIT.[21] Only the 2000 China-Iran BIT employs a different format, requiring each Contracting Party to "guarantee the observance" of the commitments it has entered into with respect to investments:

> *"Either Contracting Party shall guarantee the observance of the commitments it has entered into with respect to investments of investors of the other Contracting Party."*[22]

The 1998 Switzerland-Iran BIT and the 1994 Switzerland-Kazakhstan BIT use the same formulation as that found in the 2000 China-Iran BIT.

The umbrella clause in the 2007 Germany-Jordan BIT covers obligations concerning capital investments only:

> *"Each Contracting Party shall observe any of its other obligations concerning capital investments of the citizens or companies of the other Contracting Party on its territory."*

The 1998 Germany-Mexico BIT takes a rather different approach. It requires the obligations be made in writing, and requires any disputes regarding those obligations to be settled under the terms and conditions of the contract:

> *"Each Contracting State shall observe any other obligation in writing, it has assumed with regard to investments in its territory by nationals or companies of the other Contracting State; the disputes arising from such obligations, shall be settled only under the terms and conditions of the respective contract."*

The remaining 30 per cent of IIAs surveyed do not contain any form of umbrella clause. This group includes one IIA from the United Kingdom and one from Germany.[23] All but one of the IIAs between Egypt and developing countries surveyed do not contain an umbrella clause.[24] Similarly, none of the IIAs between China and developing countries signed between 1990 and 1999 have an umbrella clause, although as noted above, those Chinese IIAs signed since the year 2000 do.[25] Extrapolating from the results of the survey, however, it appears that umbrella clauses may be found in the majority of IIAs signed by the major IIA-signing countries.

2.3 Fork-in-the-road clauses

Of the approximately 50 IIAs reviewed, less than 40 per cent contain some form of fork-in-the-road clause intended to prevent investors bringing multiple proceedings in different fora. The majority of IIAs surveyed thus place no restriction on investors from doing so.

Among those IIAs that do have them, the fork-in-the-road clauses differ in two key respects—first, as to the subject matter of the clauses and second, as to the point at which they are triggered. With respect to their subject matter the vast majority of the fork-in-the-road clauses surveyed focus on whether the investor has initiated another legal proceeding in respect of the same "dispute." One IIA looked at whether the investor had filed the same "case" with another body and another IIA looked at whether the investor had initiated any other proceeding in respect of the host State "measure" alleged to be a breach of the IIA.

[21] China's IIAs with Benin, Bosnia and Herzegovina, Guyana, DPR Korea.
[22] 2000 China-Iran BIT, Article 10.
[23] 2006 United Kingdom-Mexico BIT, 1997 Germany-United Arab Emirates BIT.
[24] Egypt's IIAs with Uganda, Georgia, Serbia, Chile, Jordan, Pakistan, Indonesia, and Thailand.
[25] China's IIAs with Ethiopia, Estonia, Argentina, Qatar, Cambodia.

Regarding the point at which the fork-in-the-road clauses are deemed to be triggered, most of the IIAs provide that this occurs at the time the investor submits its first proceeding regarding the dispute in any forum. A few IIAs are more lenient. One IIA allows the investor to refer the dispute to arbitration even if it has already been referred to the host State courts so long as the disputing parties agree and a final judgment has not been rendered. Two IIAs are less restrictive on multiple proceedings by investors from the developing country Contracting Party than their counterparts from the developed Contracting Party. Lastly, one of the IIAs reviewed contains a "no U-turn" clause, allowing the investor to submit a claim to arbitration on the condition that it waives the right to initiate or continue any proceedings in a court or tribunal of the host State. These different approaches are discussed in more detail below.

Only China contains a fork-in-the-road clause in all 10 of its IIA reviewed. Egypt does so in three IIAs,[26] Germany in two[27] and the United Kingdom[28] and Switzerland[29] do so in only one each of those reviewed. This may signify that reducing the multiplication of proceedings by investors is less of a priority for largely capital-exporting countries.

Although their exact wording differs somewhat, the majority of the fork-in-the-road clauses surveyed take a similar approach to the 1992 China-Argentina BIT, which provides:

> *"Where an investor has submitted a dispute to the aforementioned competent tribunal of the Contracting Party where the investment has been made or to international arbitration, this choice shall be final."*

Seven other Chinese IIAs reviewed contain fork-in-the-road clauses with different wording but broadly to the same effect.[30] Two of the Egyptian IIAs reviewed also take this approach.[31]

A slightly softer form of fork-in-the-road clause is found in the 2000 China-Iran BIT:

> *"A dispute primarily referred to the competent court of the host Contracting Party, as long as it is pending, cannot be referred to arbitration save with the parties' agreement, and in the event that a final judgement is rendered, it cannot be referred to arbitration."*

The only two German IIAs of those reviewed containing fork-in-the-road clauses also permit the investor to have recourse to arbitration even if it has commenced court proceedings, so long as the court's judgment has not been issued. Interestingly, both the German IIAs are with Latin American countries and the strictness of the clauses differs depending on whether the host State is Germany or its Latin American counterpart. Article 12 of the 1998 Germany-Mexico BIT provides:

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[26] Egypt's IIAs with Uganda, Botswana, Georgia, Serbia, Pakistan, Indonesia do not contain a fork-in-the-road clause.
[27] Germany's IIAs with Zimbabwe, Botswana, Romania, Bosnia and Herzegovina, United Arab Emirates, Cambodia and Thailand lack any form of forum election clause. The Germany-Jordan IIA does not provide for investor-State dispute resolution so its lack of a forum election clause is irrelevant.
[28] The other eight United Kingdom IIAs surveyed are with Kenya, Angola, Estonia, Bosnia and Herzegovina, Peru, Bahrain, Lao, Vietnam.
[29] Switzerland's IIAs with Botswana, Nigeria, Kazakhstan, Bosnia and Herzegovina, Guatemala, Iran, Lebanon, Thailand and Bangladesh do not contain a fork-in-the-road clause.
[30] 2004 China-Benin BIT, 2002 China-Bosnia and Herzegovina BIT, 1999 China-Qatar BIT, 1998 China-Ethiopia BIT, 1993 China-Estonia BIT, 1996 China-Cambodia BIT. The Chinese IIAs surveyed that were signed between 1990 and 1999 only provide recourse to arbitration to determine the amount of compensation payable for an expropriation. The 2005 China-Korea DPR BIT contains a rather complicated formulation. It entitles the host State to require the exhaustion of local administrative remedies as a pre-condition to arbitration but deems the investor's recourse to arbitration waived if the investor commences court proceedings.
[31] 1999 Egypt-Chile BIT, 2000 Egypt-Thailand BIT.

> *"(4) In case the national or company of a Contracting State or its investment has initiated proceedings before a national tribunal of the United Mexican States, the dispute may only be submitted to arbitration if the competent Mexican tribunal has not rendered a judgement in the first instance on the merits of the case.*
>
> *(5) If a national or company of a Contracting State submits a dispute to arbitration, neither he nor his investment that is an enterprise may initiate or continue proceedings before a national tribunal."*

The fork-in-the-road clause in the 2006 Germany-Trinidad and Tobago BIT requires a German investor to choose between courts and arbitration, but investors from Trinidad are not under the same constraint:

> *"A national or company of the Republic of Trinidad and Tobago holding an investment in Germany can seek international arbitration even after the dispute has been decided by a German court. A national or company of the Federal Republic of Germany holding an investment in Trinidad and Tobago may not seek international arbitration if a court of the Republic of Trinidad and Tobago has rendered a decision in substance on the dispute."*

In contrast to the majority of clauses surveyed that focus on whether the investor has filed another proceeding concerning the "dispute," the 1996 Egypt-Jordan BIT looks at whether the investor has filed another proceeding concerning the same "case":

> *"If a national of any of the two Contracting Parties chose to file a case with any of the two bodies mentioned in paragraphs 1 and 2 of this article it will be impossible for him to file the same with another body."*

Unlike the IIAs that look at whether the proceedings concern the same "dispute" or "case," the 1995 Switzerland-Mexico BIT does not specify which court proceedings will trigger the clause:

> *"If an investor submits a claim to arbitration under this Schedule, neither he nor his investment that is an enterprise may initiate proceedings before a national tribunal; if an investor or his investment that is an enterprise initiates proceedings before a national tribunal, the investor may not submit a claim to arbitration under this Schedule."*

The 2006 United Kingdom-Mexico BIT, the only United Kingdom IIA surveyed to contain a fork-in-the-road clause, differs from most of the other clauses examined in two respects. First, it is a "no U-turn" clause as the investor is not precluded from having brought the matter before the host State's court, but it must waive its right to continue those proceedings as a precondition to submit the claim to arbitration. Second, rather than looking at whether the investor has commenced another proceeding in respect of the "dispute" it focuses on whether the investor has commenced another proceeding in respect of the host State "measure" alleged to be in breach of the IIA:

> *"A disputing investor may submit a claim to arbitration, pursuant to paragraph 1 above, only if:...*
>
> *(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of the other Contracting Party that is a legal person that the investor owns or controls, the enterprise waive their right to initiate or continue before any administrative tribunal or court under the laws of a Contracting Party any proceedings with respect to the measure of the disputing Contracting Party that is alleged to be a breach of Chapter II of this Agreement, or any other dispute settlement procedure related thereto..."*[32]

[32] Article 11(6) of the United Kingdom-Mexico BIT contains a similar forum election clause for claims on behalf of an enterprise.

It is notable that over 60 per cent of the IIAs reviewed do not contain any form of fork-in-the-road clause to prevent investors running multiple proceedings. The IIAs that do contain such clauses vary in two key respects. First, they differ as to the way in which the clause is triggered, for example by the start of court or arbitration proceedings or the issue of a court judgment. Second, there are differences as to their subject matter. Most IIAs focus on whether the multiple proceedings relate to the same "dispute," although a smaller number look at whether the proceedings concern the same "case" or host State "measure." The implications of the clauses' stated subject matter will be considered in the analysis of arbitral jurisprudence in Part 3.

3.0 *Analysis of arbitral jurisprudence*

Part 3 of this Bulletin looks at how tribunals have interpreted the various wordings of the three types of clauses reviewed above—dispute resolution clauses, umbrella clauses and fork-in-the-road clauses—and considers the implications for host States of the ways in which tribunals have interpreted these clauses.

3.1 Dispute resolution clauses

Part 2 of this Bulletin found that the majority of IIAs reviewed use broadly-worded dispute resolution clauses that enable investors to bring "any dispute between a Contracting Party and an investor of another Contracting Party" or "any disputes concerning an investment" to international arbitration. The risk for host States is that such clauses may be wide enough to permit investors to bring pure contract claims to IIA arbitration, enabling investors to use the IIA's dispute resolution mechanism without having to allege that the host State has breached any of the IIA's provisions.

The narrow view is that purely contractual claims are not covered unless the IIA expressly provides so.[33] The wider view, and the more prevalent in the case law, is that purely contractual claims are covered so long as the State entity that is party to the investment contract is the same State entity that is party to the BIT.[34] Each of these approaches is considered in more detail below.

3.1.1 The narrow view

The leading case propounding the narrow view is the 2003 award in *SGS v. Pakistan*. The tribunal observed that it was required to address whether it had jurisdiction to determine claims grounded solely on contract, which do not include any element of violation of a substantive BIT standard.[35] The tribunal recognized that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of a contract, can both be described as "disputes with respect to investments."[36] However, it held that:

> *"...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. ...Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting ex hypothesi exclusively on contract..."*[37]

The tribunal concluded that it had no jurisdiction with respect to contractual claims which did not also amount to breaches of the substantive standards of the BIT.[38]

The tribunal in the 2005 award of *LESI Dipenta v. Algeria* took a similar view of the broad dispute resolution clause in the Algeria-Italy BIT. It held that the host State's consent to resolve disputes by arbitration did not necessarily imply that it endowed jurisdiction for any violation complained of by the Claimant:

[33] SGS Société Générale de Surveillance, S.A. v. Pakistan, ICSID Case No.ARB/01/13, decision on jurisdiction, 6 August 2003,, Consorzio Groupement L.E.S.I.- Dipenta v. People's Democratic Republic of Algeria, ICSID Case No.ARB/03/08, award, 10 January 2005.
[34] Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No.ARB/00/4, decision on jurisdiction, 23 July 2001; Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina, ICSID Case No.ARB/97/3, decision on annulment, 3 July 2002; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, decision on jurisdiction, 29 January 2004; Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, decision on jurisdiction, 22 April 2005.
[35] SGS v. Pakistan, para 156.
[36] SGS v. Pakistan, para 161.
[37] SGS v. Pakistan, para 161.
[38] SGS v. Pakistan, para 162.

> *"...consent is not given, extensively, for all rights and claims that could be related to an investment. It is a requirement that the measures complained of amount to a violation of the bilateral Agreement."*[39]

3.1.2 The wide view

The first known tribunal to directly consider the effect of a broadly-worded dispute resolution clause was the 2001 tribunal decision on jurisdiction in *Salini v. Morocco*.[40] The dispute resolution clause in the Italy-Morocco BIT gave the right to investors to resort to international arbitration in respect of "[a]ll disputes or differences, including disputes related to the amount of compensation due in the event of expropriation, nationalization, or similar measures, between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor on the territory of the first Contracting Party."[41]

The tribunal held the terms of the dispute resolution clause was very general and the clause's reference to expropriation and nationalization measures could not be interpreted to exclude a claim based in contract.[42]

The tribunal held, however, that its jurisdiction under the dispute resolution clause to consider claims based solely on contract did not extend to breaches of a contract to which an entity other than the State is a named party.[43] It noted that if the breaches of contract were to "constitute, at the same time, a violation of the Bilateral Treaty by the State" it retained jurisdiction even where the State was not party to the contract.[44]

In its 2002 decision on annulment in *Vivendi v. Argentina*, the annulment committee was required to decide *inter alia* whether Vivendi's contractual claims against the Argentinean province of Tucumán could be brought to international arbitration under the dispute resolution clause contained in Article 8 of the France-Argentina BIT. Article 8 covers disputes "relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party." The annulment committee held:

> *"...Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT. This may be contrasted, for example, with Article 11 of the BIT, which refers to disputes 'concerning the interpretation or application of this Agreement,' or with Article 1116 of the NAFTA, which provides that an investor may submit to arbitration under Chapter 11 'a claim that another Party has breached an obligation under' specified provisions of that Chapter."*[45]

However, as with the tribunal in *Salini v. Morocco*, the *Vivendi* annulment committee held that the dispute resolution clause in the BIT did not cover purely contractual claims arising out of a contract to which the State entity party to the BIT was not party.[46]

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[39] Consorzio Groupement L.E.S.I.- Dipenta v. People's Democratic Republic of Algeria, ICSID Case No.ARB 03/08, award, 10 January 2005, para. 25.
[40] Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No.ARB/00/4, decision on jurisdiction, 23 July 2001.
[41] Article 8, Italy-Morocco BIT.
[42] Salini v. Morocco, para 59.
[43] Salini v. Morocco, para 61.
[44] Salini v. Morocco, para 62.
[45] Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina, ICSID Case No.ARB/97/3, decision on annulment, 3 July 2002, para 55.
[46] Vivendi v. Argentina decision on annulment, para 96.

Also like the tribunal in *Salini v. Morocco*, the Vivendi annulment committee held that even though the province of Tucumán was not a party to the concession contract, the original tribunal was still entitled to take into account the terms of a contract when determining whether there has been a breach of the IIA.[47]

The tribunal in the 2004 *SGS v. Philippines* award held that the broadly-worded dispute resolution clause in the Switzerland-Philippines BIT, which covered "disputes with respect to investments," was *prima facie* "an entirely general provision, allowing for submission of all investment disputes by the investor against the host State."[48] In support of its view, the tribunal held:

> *"The general term 'disputes with respect to investments' may be contrasted with the more specific term '[d]isputes... regarding the interpretation or application of the provisions of this Agreement' in Article IX. If the States Parties to the BIT had wanted to limit investor-State arbitration to claims concerning breaches of the substantive standards contained in the BIT, they would have said so expressly, using this or similar language."*[49]

The tribunal accordingly concluded that it had jurisdiction with respect to a claim arising under SGS's investment contract, even though the claim might not involve any breach of the substantive standards of the BIT.[50]

3.1.3 Summary

From the above analysis it is apparent that the meaning of broadly-worded IIA dispute resolution clauses remains somewhat unsettled, in particular as to whether they can include claims based solely on contract. The more likely view is that they do, at least so far as the State entities that are party to the contract and the IIA are one and the same. However, regardless of whether the wider view prevails or whether vestiges of uncertainty remain, host States may prefer to entirely avoid the risk of investors internationalizing purely contract claims via the IIA. Possible ways to achieve this are considered in Part 4 of this Bulletin.

3.2 Umbrella clauses

As seen in Part 2, IIA umbrella clauses come in a variety of wording, but in essence they state that the IIA's Contracting Parties shall observe all their obligations with regard to investors of the other Contracting Party.

Although it is estimated that some form of umbrella clause is included in approximately 40 per cent of IIAs,[51] their exact meaning is not yet settled. In particular, the scope of the words "observe all obligations" has received a wide variety of interpretations by tribunals left to apply them. For example, some tribunals have held that these words mean exactly what they say—the host State is bound by the IIA to observe all its legal obligations towards the investor. Some tribunals have said that, without further elaboration in the text, these words could not possibly have such an expansive meaning. Still others find a middle approach, holding that the host State is bound under the IIA to observe all obligations towards the investor it has assumed in its sovereign capacity.

[47] Vivendi v. Argentina decision on annulment, para 105.
[48] SGS v. Philippines, para 131.
[49] SGS v. Philippines, para 132(b).
[50] SGS v. Philippines, para 169(3).
[51] Gill, J. M. Gearing and G. Birt (2004). "Contractual claims and bilateral investment treaties: A comparative review of the SGS cases," *Journal of International Arbitration*, vol. 21, no. 5, pp. 397–412, footnote 31.

Even tribunals taking the more expansive approach have differed slightly between themselves as to exactly how far these obligations extend. In general, it seems that the more recent the award, the more expansive its approach. In the two most recent awards, the clause has been interpreted to encompass all the host State's commitments to the investment, whether contractual, legislative or otherwise. Notably, some tribunals have interpreted this to even cover contractual commitments to which the claimant investor is not party, so long as the commitment is made with respect to the investment.

The effect of this wide approach is to convert the host State's obligations under contract or national legislation into international treaty obligations enforceable through the IIA's dispute resolution clause. In the process, the investor gains an additional cause of action in its investment treaty arbitration against the host State. This creates the potential for forum-shopping and multiplicity of proceedings as the investor will also retain its existing rights to redress provided under the contract or administrative law of the host State.

A number of tribunals have stressed that the specific wording of the relevant clause in each case is important. Notwithstanding this, tribunals have sometimes taken contradictory approaches to similarly-worded clauses.[52] Although the majority of recent awards appear to favour the wider approach, the issue is not yet settled. Examples of the three main approaches taken by tribunals to date are discussed below.

3.2.1 The narrow view

The first known tribunal to expressly consider an umbrella clause was the 2003 decision on jurisdiction in *SGS v. Pakistan*.[53] Article 11 of the Switzerland-Pakistan BIT provides that "[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party." The tribunal held that it could not be that the clause was intended to convert any host State commitment of any kind to a treaty obligation.[54] The tribunal remarked that "the scope of Article 11 of the BIT, while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion"[55] covering not just contractual commitments, but legislative, administrative and other unilateral commitments as well. It held that the legal consequences of this would be:

> *"...so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant ...that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan Investment Protection Treaty."*[56]

In contrast to *SGS v. Pakistan*, the umbrella clause at issue in *Joy Machinery Limited v. Arab Republic of Egypt* was in the classic broad form requiring each Contracting Party to observe "any obligation it may have entered into with regard to investments."[57] Notwithstanding the broadly-worded clause, the tribunal held:

[52] For example, the tribunal in Joy Machinery Limited v. Arab Republic of Egypt held a broadly-worded umbrella clause did not cover pure contract claims whereas the tribunal in Eureko B.V. v. Poland held that such a clause did.
[53] SGS Société Générale de Surveillance, S.A. v. Pakistan, ICSID Case No.ARB/01/13, decision on jurisdiction, 6 August 2003, para 166.
[54] The umbrella clause in Article 11 of the Switzerland-Pakistan BIT states: "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."
[55] SGS v. Pakistan, para 166.
[56] SGS v. Pakistan, para 167.
[57] Article 2(2) of the United Kingdom-Egypt BIT states: "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."

> *"...it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there 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."*[58]

3.2.2 The wide view

The second arbitration to deal with an umbrella clause was also initiated by SGS, this time against the Philippines under the Switzerland-Philippines BIT. The tribunal examined the award in *SGS v. Pakistan* in some detail. It noted that the umbrella clause in the Switzerland-Pakistan BIT was formulated in different and rather vaguer terms than the umbrella clause in Article X (2) of the Switzerland-Philippines BIT.[59] The tribunal held:

> *"Interpreting the actual text of Article X (2), it would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT."*[60]

The tribunal held that the object and purpose of the BIT supports such an interpretation. It held that the BIT was a treaty for the promotion and reciprocal protection of investments. According to the preamble it was intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other." It was legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.[61] The tribunal held that the umbrella clause covered not only contractual obligations, but also other legal obligations that the host State had assumed vis-à-vis the specific investment. It held that the clause did not cover legal obligations of a general character.[62]

Another example of a wide reading of an umbrella clause is the 2005 award in *Eureko B.V. v. Poland*, in which the tribunal, faced with the classic broadly-worded umbrella clause requiring each Contracting Party to observe "any obligation it may have entered into with regard to investments," held:

> *"the plain meaning—the 'ordinary' meaning—of a provision prescribing that a state 'shall observe any obligations it may have entered into' with regard to certain foreign investments is not obscure. The phrase 'shall observe' is imperative and categorical. 'Any' obligations is capacious; it means not only obligations of a certain type, but 'any'—that is to say, all obligations entered into with regards to investments of investors of the other Contracting Party."*[63]

The tribunal in the 2008 award in *Continental Casualty v. Argentina* extended the scope of the umbrella clause still further. It held that the clause "each Party shall observe any obligation it may have entered into with regard to investments" encompassed unilateral obligations such as those made in the host State's legislation, so long as the legislation addresses the investments with some degree of specificity. The *Continental Casualty* tribunal held:

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[58] Joy Mining Machinery Limited v. Egypt, ICSID Case No. ARB/03/11, award on jurisdiction, 6 August 2004, para 81.
[59] Article X(2) of the Switzerland-Philippines BIT states: "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." SGS v. Philippines, award 29 January 2004, para 119.
[60] SGS v. Philippines, award 29 January 2004, para 115.
[61] SGS v. Philippines, award, 29 January 2004, para 116.
[62] SGS v. Philippines, award, 29 January 2004, para 121.
[63] Eureko B.V. v. Poland, partial award, 19 August 2005, para 246. The tribunal in Siemens v. Argentina took similar view. Siemens v. Argentina, ICSID Case No. ARB/02/8, award, 6 February 2007, para 205.

> *"This can include the unilateral commitments arising from provisions of the law of the host State regulating a particular business sector and addressed specifically to the foreign investors in relation to their investments therein."*[64]

The tribunals in *LG&E v. Argentina* and *Enron v. Argentina* took a similar view. Both tribunals held that the tariff scheme guaranteed under Argentina's Gas Law constituted a commitment to a specific business sector and the abrogation of the tariffs was a violation of the umbrella clause.[65]

The *Continental Casualty* tribunal also held that the umbrella clause covered contractual obligations towards the investment even where the foreign investor was not party to that contract:

> *"The covered obligations must have been entered 'with regard to' investments... They are not limited to obligations based on a contract. Finally, provided 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."*[66]

The tribunal in the 2008 award in *AMTO v. Ukraine* held that while contractual obligations with respect to the investment are included even where the foreign investor is not party to the contract, the host State itself must be a party to the contract. In that case, the contractual obligations towards the investment had been undertaken by a separate legal entity of the host State, and the tribunal held that the umbrella clause had no direct application.[67]

From its beginnings with *SGS v. Philippines*, it appears that the wide view may now have evolved to encompass all contractual obligations entered into with regard to the investment, even including contracts to which the claimant investor is not a party, and all legislative commitments made towards that type of investment.

3.2.3 A middle approach

The tribunals in the 2006 awards of *El Paso v. Argentina and BP America Production Co v. Argentina* strongly criticized the wide approach taken in *SGS v. Philippines*. In identical language, the tribunals held:

> *"This Tribunal should like to stress... that the interpretation given in SGS v. Philippines does not only deprive one single provision of far-reaching consequences, but 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 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 have a so-called 'umbrella clause' and a dispute settlement mechanism, and no other articles setting standards of protection of foreign investments in any BIT."*[68]

[64] Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9,, award, 5 September 2008,, para 301. The tribunal in Duke v. Ecuador made similar findings: Duke v. Ecuador, ICSID Case No. ARB/04/19, ICSID Case No. ARB/01/8, award 18 August 2008, para 317-325. The need for specificity was also remarked upon by the annulment committee in CMS v. Argentina, decision on annulment, 25 September 2007, para 95(a).
[65] LGE v. Argentina, ICSID Case No. ARB/02/1, award 3 October 2006, para 174, Enron v. Argentina, ICSID Case No. ARB/01/3, award 22 May 2007, para 273-277.
[66] Continental Casualty v. Argentina, para 297.
[67] Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, final award, 26 March, 2008, para 110.
[68] Pan American Energy LLC and BP Argentina Exploration Company v. Argentina, ICSID Case No. ARB/03/13 and BP America Production Co. and Others v. Argentina, ICSID Case No. ARB/04/8, decision on preliminary objections, 27 July 2006, para 105, El Paso Energy International Co v. Argentina, ICSID Case No. ARB/03/15, decision on jurisdiction, 27 April 2006, para 76.

The umbrella clause at issue in each of the two cases was in the classic broad format requiring each Contracting Party to observe "any obligation it may have entered into with regard to investments." Both tribunals took a middle way, holding that an umbrella clause would not cover breaches of an ordinary commercial contract entered into by the State but would cover contractual protections agreed in its sovereign capacity—such as stabilization clauses—inserted in an investment agreement.[69]

3.2.4 Summary

As recently as September 2008, it was noted by the tribunal in Continental Casualty that the interpretation of umbrella clauses remains controversial and that there is a lack of consistency in practice among investment arbitral tribunals on the matter.[70] However, on the basis of the above analysis, it appears that of the three approaches—narrow, wide and the middle way—the majority of tribunals, particularly of late, have taken the wide view. Thus, it would seem that overall, tribunals are moving towards the more expansive view. This view sees the clause as encompassing all contractual obligations entered into with regard the investment, including contracts to which the investor is not a party, and all legislative commitments made towards that type of investment.

3.3 Fork-in-the-road clauses

Fork-in-the-road clauses are intended to prevent two of the three risks for host States addressed in this Bulletin—investor forum-shopping and multiple proceedings. As discussed in Part 2, their wording may differ, but many are along the lines of the fork-in-the-road clause in the China-Argentina BIT:

> *"Where an investor has submitted a dispute to the aforementioned competent tribunal of the Contracting Party where the investment has been made or to international arbitration, this choice shall be final."*

A weaker version of a fork-in-the-road clause, known as the "no U-turn" clause, entitles the investor to commence arbitration under the IIA on the condition that it discontinues any proceedings regarding the dispute in another forum.

Whether a fork-in-the-road clause will be effective to prevent an investor forum-shopping or initiating multiple proceedings will depend on whether the tribunal considers that the investor has triggered the clause. Tribunals to date have been remarkably consistent in their approach to deciding whether such clauses have been triggered. In essence, tribunals have identified two main requirements for this to occur. First, the parties in the other proceedings must be identical to the parties in the IIA arbitration. Second, the subject matter of the claim before the courts and the arbitral tribunal must be identical.

The majority of arbitrations to consider a fork-in-the-road clause to date have involved a clause along the lines of the China-Argentina BIT above. In particular, the subject matter of all the clauses considered to date has been the "dispute" to which both the court and arbitral proceedings relate. Tribunals have set the threshold for finding that the court and arbitral proceedings relate to the same "dispute" very high. As a result, only two of the decisions considered here held that the fork-in-the-road clause was triggered.[71] This would seem to indicate that fork-in-the-road clauses that focus

[69] El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, decision on jurisdiction, 27 April 2006, para 81. The El Paso approach was followed by the tribunal in Pan American Energy LLC and BP Argentina Exploration Company v. Argentina, ICSID Case No. ARB/03/13 and BP America Production Co. and Others v. Argentina, ICSID Case No. ARB/04/8; Decision on Preliminary Objections, 27 July 2006. Sempra Energy International v. Argentina, ICSID Case No.ARB/02/16, award 18 September 2007, para 310, took a similar approach.
[70] Continental Casualty v. Argentina, award, 5 September 2008para 296. A similar comment was made by the tribunal in Duke v. Ecuador, award 18 August 2008, para 319.
[71] Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina, ICSID Case No.ARB/97/3, Decision on Annulment, 3 July 2002; Pantechniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, Award 28 July 2009.

on whether the various proceedings relate to the same "dispute" are not an effective tool for host States to prevent investors forum-shopping or running multiple proceedings. A survey of some recent awards may help to illustrate why such fork-in-the-road clauses were ineffective.

In *Genin v. Estonia*, the tribunal was required to decide whether the investors' prior involvement in legal proceedings triggered the fork-in-the-road clause in the Estonia-United States BIT. The claimants, U.S. nationals, were the principal shareholders in EIB, an Estonian financial institution. The Estonian authorities subsequently revoked EIB's licence and EIB commenced various court proceedings, including proceedings before the Administrative Court to challenge the revocation. Estonia contended that the claimants' involvement in these court proceedings constituted an election under the IIA fork-in-the-road clause.[72] The tribunal took a different view. It held that EIB's proceedings to overturn the revocation of its licence were undertaken on behalf of all its shareholders (including minority shareholders), as well as on behalf of its depositors, borrowers and employees, all of whom were damaged by the cessation of EIB's activities. In contrast, the "investment dispute" submitted to arbitration by the claimants related to losses they alone had suffered arising from alleged breaches of the BIT.[73] The tribunal held that as neither the parties to the disputes nor the cause of actions were the same, the fork-in-the-road clause had not been triggered.

In *Lauder v. Czech Republic*, the Czech Republic contended that Mr. Lauder had triggered the fork-in-the-road clause because the same dispute had been submitted to arbitration under a different BIT by the company in which Mr. Lauder was the majority shareholder, as well as to various court proceedings.[74] The tribunal held that the dispute under the United States-Czech Republic BIT between Mr. Lauder and the Czech Republic had not been brought before any other arbitral tribunal or court and Mr. Lauder was not a party to any of the other proceedings.[75] Accordingly, the fork-in-the-road clause had not been triggered.

In *CMS v. Argentina*, Argentina argued that CMS had taken the fork-in-the-road since the local company in which the investor held shares had appealed a judicial decision to the Federal Supreme Court and had sought other administrative remedies.[76] The tribunal rejected Argentina's contention on the grounds that the proceedings had been taken by the local company rather than by CMS and the causes of action in the domestic proceedings were not the same as the one in the IIA arbitration.[77]

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[72] Article VI of the Estonia-United States BIT states:
1. For the purposes of this Article, 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 Party's foreign investment authority to such national or company;
or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment....
3.(a) Provided that the national or company concerned has not submitted 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;] and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration...

[73] Genin and others v. Estonia, ICSID Case No.ARB/99/2, award, 25 June 2001, para 332.

[74] The proceeding in Lauder v. Czech Republic was filed under the United States-Czech Republic BIT, which contains a dispute resolution clause and fork-in-the-road clause identical to that at issue in Genin v. Estonia. Lauder v.Czech Republic, UNCITRAL, final award, 3 September 2001.

[75] Lauder v.Czech Republic, UNCITRAL, final award, 3 September 2001. para 162.

[76] The claim was filed under the United States-Argentina BIT, which contained an identical dispute resolution and fork-in-the-road clause to that in *Genin and Lauder*.

[77] CMS Gas Transmission Company v. Argentina, ICSID Case No.ARB/01/8, decision on jurisdiction, 17 July 2003, para 80.

In *Azurix v. Argentina*, also under the United States-Argentina BIT, Argentina argued that Azurix had submitted the dispute to the Argentine courts, since the local company in which Azurix had invested had commenced proceedings against the Province of Buenos Aires in the Court of Justice of the Province over the termination of the concession agreement. Once again the tribunal held that the fork-in-the-road had not been triggered as this would require identity of parties and of cause of action in the various proceedings. It noted:

> *"Neither of the parties [to the IIA arbitration] is a party to the proceedings before the local courts. Even if Azurix had joined [the local company] as a plaintiff in those courts, there would not be party identity since Argentina is not party to any of those proceedings."* [78]

The tribunals in all four cases above show that in order for a fork-in-the-road clause to be triggered, it is necessary that not only the parties to the two proceedings be identical but also the subject matter. Regarding the identity of parties, the host State in the IIA arbitration must be the defendant in the domestic proceedings and the investor seeking IIA arbitration must be the party that has initiated the domestic proceedings in the courts or administrative tribunals of the host State. In respect of identity of subject matter, in all these cases, the subject matter was the "dispute." Tribunals interpreted identity of the "dispute" to mean that the causes of action in the various proceedings had to be the same. In all these cases, the court proceedings had been brought by parties other than the claimants and the causes of action were not identical. The fork-in-the-road clauses could thus not prevent the investors having recourse to arbitration.

Several tribunals have held that the definition of "dispute" in the IIA's dispute resolution clause is relevant to determining whether the dispute before the arbitral tribunal and the courts is the same. For example, if the IIA dispute resolution clause is broad enough to encompass both contract and treaty claims, for example, "any dispute between a Contracting Party and an investor of the other Contracting Party," then a contract claim before the host State courts might be considered as part of the same "dispute" as the treaty claim before the arbitral tribunal. Conversely, if the IIA dispute resolution clauses is more narrow and covers only claims relating to the host State's obligations under the IIA, for example, "any dispute concerning an obligation under this agreement," then a contract claim before the host State courts would not be considered as part of the same "dispute" for the purpose of the fork-in-the-road clause.

The IIA's definition of dispute was important in the 2002 case of *Middle East Cement v. Egypt*. That case concerned the seizure and auction of Middle East Cement's ship by the Egyptian authorities. Egypt claimed that Middle East Cement had triggered the fork-in-the-road clause in the Egypt-Greece BIT[79] because it also brought proceedings in the Egyptian courts alleging the nullity of the action. Interestingly, the clause of the Egypt-Greece BIT which Egypt claimed to be a fork-in-the-road clause, Article 10(2), is not in the form generally thought of as such a clause. Article 10(2) is simply the typical IIA dispute resolution clause which provides that the investor may submit an investment dispute "either to the competent court of the Contracting Party, or to an international arbitration tribunal."[80] It does not expressly state that the investor's choice is final. Notwithstanding this, the tribunal did not comment on whether such a clause could in fact act an effective fork-in-the-road clause. It held that the earlier court proceedings were not a "dispute" as defined in the BIT. Article 10(1) defines disputes as those "between an investor of a Contracting Party and the other Contracting

[78] Azurix v. Argentina, ICSID Case No. ARB/01/12, decision on jurisdiction, 8 December 2003, para 90.
[79] The dispute resolution clause in Article 10(1) of the Egypt-Greece BIT covers "disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former."
[80] The clause alleged by Egypt to be a fork-in-the-road clause, Article 10(2), states "If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent court of the Contracting Party, or to an international arbitration tribunal."

Party concerning an obligation of the latter under this Agreement." The tribunal held that Middle East Cement's case before the Egyptian courts was not "concerning an obligation" of Egypt under the BIT and thus did not exclude the admissibility of the arbitration proceeding.[81]

In the 2002 *Vivendi v. Argentina* annulment decision, the annulment committee criticized the Vivendi tribunal's earlier finding that referring the concession contract to Argentina's courts would not have triggered the IIA's fork-in-the-road clause. The annulment committee pointed out that the definition of "dispute" in Article 8(1) of the Argentina-France BIT (the dispute resolution clause) was extremely wide. Article 8(1) covers "any dispute relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party." The committee held that read literally, this did not necessitate that the claimant allege a breach of the BIT itself—it was sufficient that the dispute relate to an investment made under the BIT. The fork-in-the-road clause in Article 8(2) of the BIT provided that "[o]nce an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final." The committee held that the wide definition of dispute was carried through to the fork-in-the-road clause as well. Consequently, if a claim brought before a national court came within the meaning of dispute in Article 8(1), then the fork-in-the-road clause in Article 8(2) would apply. Applying this to the facts before it, the committee held that the claim brought before the contentious administrative courts of Tucumán by Vivendi against the Province of Tucumán for breach of its concession contract could be a dispute within the broad meaning of dispute in Article 8(1). The claim to the Tucumán courts could thus also trigger the fork-in-the-road clause in Article 8(2) and constitute a "final" choice of forum and jurisdiction.[82]

The most recent case to consider a fork in the road clause, *Pantechniki v. Albania*, held that part of the investor's claim was inadmissible because of the fork in the road clause in the Albania-Greece BIT.[83] The investor had been involved in road construction in southern Albania. In 1997, its work site was overrun and ransacked by looting rioters during the riots which swept the country after the failure of Ponzi pyramid selling schemes. The investor subsequently filed proceedings in the Albanian courts seeking to recover certain losses on the basis that the government "had recognized and admitted that this amount is due".[84] Its court proceedings were unsuccessful and in 2007, it commenced arbitration proceedings under the Albania-Greece BIT. In the BIT proceedings, the investor claimed that Albania had failed to honour an obligation to pay agreed compensation for its losses and had breached various BIT provisions. The sole arbitrator held that the investor's BIT claim that Albania had failed to honour an obligation to pay agreed compensation had the same "fundamental basis" as the investor's earlier court proceedings.[85] The arbitrator held that the 2001 court proceedings therefore constituted an election under the fork in the road clause in the Albania-Greece BIT and the investor's claim on this ground was inadmissible.[86] The arbitrator held that the investor's other claims under the BIT were not ousted by the fork in the road clause (although he ultimately held that these also lacked merit).

[81] Middle East Cement Shipping v. Egypt, ICSID Case No. ARB/99/6, final award, 12 April 2002, para 71.
[82] Vivendi v. Argentina, decision on annulment, paragraph 55.
[83] Pantechniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, award, 28 July 2009.
[84] *P*antechniki v. Albania, para 67. The dispute resolution clause in the Albania-Greece BIT stated that "If such disputes cannot be settled within six months from the date either party requested amicable settlement the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal…".
[85] Pantechniki v. Albania, para 67.
[86] Article 10(2) of the Albania-Greece BIT states "If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party, or to an international arbitration tribunal."

Notably, the clause considered by the *Pantechniki* arbitrator to act as an effective fork in the road clause was simply the typical IIA dispute resolution clause which allows the investor to bring a dispute before the national courts or an international arbitral tribunal.[87] The clause did not expressly stipulate that the investor's choice would be final. A similar clause was at issue in *Middle East Cement v. Egypt* above but was not considered to prevent the arbitration from proceeding. Given that comparable dispute resolution clauses are found in a large number of IIAs, it remains to be seen whether future tribunals will follow the *Pantechniki* arbitrator's broad reading of such clauses.

3.3.1 Summary

With the possible exception of *Pantechniki v. Albania*, the above jurisprudence demonstrates the high threshold that tribunals have generally set for the triggering of a fork-in-the-road clause.[88] First, the parties in the domestic proceedings must be identical to the parties to the IIA arbitration. The host State in the IIA arbitration must be the defendant in the domestic proceedings. The investor seeking IIA arbitration must be the party that has initiated the domestic proceedings in the courts or administrative tribunals of the host State. Second, the subject matter of the various proceedings must be identical. In all the cases decided so far, the subject matter of the fork-in-the-road clause has been the "dispute." The definition of "dispute" in the BIT's dispute resolution clause will be important here as a broad dispute resolution clause will make it more likely that the tribunal will consider the other proceeding to be the same dispute. However, as shown in the earlier discussion on such clauses, broad dispute resolution clauses have their own problems for host States.

Another way would be to recast the subject matter of fork-in-the-road clauses, e.g., to focus on the underlying host State measure alleged to have caused damage rather than the causes of action in the "dispute." In light of *Lauder v. Czech Republic* and *CMS v. Argentina*, the identity of parties that could trigger the fork-in-the-road clause might also be broadened to include affiliated companies within the investor's control. Recent IIA clauses that utilize such approaches are examined in Part 4.

[87] Ibid.

[88] Further awards that have made very similar findings are Middle East Cement v. Egypt, award April 2002, para 71; Enron v. Argentina, award January 2004, para 97-98.

4.0 Best practices in IIA drafting

Part 3 has highlighted the risks for host States of broadly-worded dispute resolution clauses, ineffective fork-in-the-road clauses, and expansive umbrella clauses. In short, these risks include investors' unilateral internationalization of contract and administrative disputes, investor forum-shopping and the cost of having to defend multiple proceedings.

The analysis of IIAs in Part 2 found that a minority of the IIAs between the major IIA-signing countries and developing countries are drafted to avoid these problems, although in light of the arbitral jurisprudence regarding fork-in-the-road clauses, only one of the IIAs surveyed would effectively address all three risks. Of the 48 IIAs between 1990 and 2009 reviewed, only the United Kingdom-Mexico BIT has a narrow dispute resolution clause, does not have an umbrella clause and contains a fork-in-the-road clause. The latter is triggered by any proceedings with respect to the host State measure, rather than any proceedings relating to the same dispute.

A small but increasing number of States have sought to draft their IIAs so as to better address these risks. Part 4 examines four recent IIAs that have taken steps to do so to assess the extent to which they may have succeeded. In chronological order, the four IIAs are the 2004 United States model BIT, the 2004 Canadian model BIT, the 2008 Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area (COMESA investment agreement) and the 2009 Comprehensive Investment Agreement of the Association of Southeast Asian Nations (ASEAN comprehensive investment agreement).

Before turning to consider these four IIAs, it should be noted that several IIAs—mostly older BITs—provide for State-State dispute settlement only or do not contain provisions on dispute settlement at all. Such treaties are therefore immune to the risk of investors unilaterally internationalizing contract disputes, forum-shopping or initiating multiple proceedings under the treaty. There are also more recent examples. For example, the 2005 Australia-United States Free Trade Agreement does not provide for investor-State dispute settlement.[89] Compared to the options discussed below, such an approach is clearly the most predictable for host States from a legal standpoint.

4.1 Dispute resolution clauses

The ASEAN comprehensive investment agreement, the COMESA investment agreement and the Canadian model BIT all strictly limit the scope of investor claims to breaches of specific obligations set out in the treaty and require the investor to have suffered damage as a result of that breach. The COMESA investment agreement provides:

> *"...a COMESA investor may submit to arbitration under this Agreement a claim that the Member State in whose territory it has made an investment has breached an obligation under Part Two of this Agreement and that the investment has incurred loss or damage by reason of, or arising out of that breach..."* [90]

[89] Article 11.16, Australia-United States Free Trade Agreement provides:
"If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate."

[90] Article 28(1) COMESA investment agreement.

The ASEAN comprehensive investment agreement states:

> *"...the disputing investor may, subject to this Section, submit to arbitration a claim:*
>
> *(a) that the disputing Member State has breached an obligation arising under Articles 5 (National Treatment), 6 (Most-Favoured-Nation Treatment), 8 (Senior Management and Board of Directors), 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers) and 14 (Expropriation and Compensation) relating to the management, conduct, operation or sale or other disposition of a covered investment; and*
>
> *(b) that the disputing investor in relation to its covered investment has incurred loss or damage by reason of or arising out of that breach."*[91]

The dispute resolution clause in the Canadian model BIT is similarly limited to:

> *"...a claim that the other Party has breached an obligation under Section B,*[92] *and that the investor has incurred loss or damage by reason of, or arising out of, that breach."*[93]

The United States model BIT takes a rather different approach. While it likewise lists the specific BIT provisions regarding which the investor can submit a claim to arbitration, it also entitles the investor to submit to arbitration a claim that the host State has breached an investment authorization or an investment agreement. The United States model BIT states:

> *"...the claimant, on its own behalf, may submit to arbitration under this Section a claim*
>
> *(i) that the respondent has breached*
>
> *(A) an obligation under Articles 3 through 10,*
> *(B) an investment authorization, or*
> *(C) an investment agreement; and*
>
> *(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach;"*[94]

In effect, the United States model BIT's dispute resolution clause acts as an umbrella clause. It enables investors to bring contract claims based on the investment agreement or administrative claims arising out of the investment authorization to arbitration under the BIT, without requiring that the claim allege any violation of a substantive BIT obligation.

Comparing the above IIAs, if the objective is to prevent investors from unilaterally internationalizing contract and administrative claims by limiting the types of claims that an investor can bring to international arbitration under the IIA, then the dispute resolution clauses used in the ASEAN and COMESA investment agreements and the Canadian model BIT are each satisfactory. The United States model BIT, however, would not be helpful in this respect.

[91] Article 32, ASEAN comprehensive investment agreement.
[92] Section B is entitled "Substantive Obligations."
[93] This wording is used in both Article 22 of the Canadian model BIT entitled "Claim by an Investor of a Party on Its Own Behalf" and Article 23 entitled "Claim by an Investor of a Party on Behalf of an Enterprise."
[94] Article 24(1)(a) United States model BIT.

4.2 Umbrella clauses

As noted just above, the dispute resolution clause in the United States model BIT is effectively an umbrella clause. In contrast, neither the ASEAN comprehensive investment agreement, the COMESA investment agreement nor the Canadian model BIT contain any form of umbrella clause. In this respect, they serve as useful models for host States seeking to avoid investors unilaterally internationalizing contract and administrative disputes via the IIA.

4.3 Fork-in-the-road clauses

The COMESA investment agreement requires the investor to make a definitive election of fora at the time of submitting a claim and precludes the investor from thereafter initiating another proceeding relating to the same host State measure:

> *"If the COMESA investor elects to submit a claim at one of the fora set out in paragraph 1 of this Article, that election shall be definitive and the investor may not thereafter submit a claim relating to the same subject matter or underlying measure to other fora."*[95]

The ASEAN comprehensive investment agreement likewise requires the investor to make a definitive election of fora. It entitles the investor to choose to submit a dispute covered by that treaty to either (a) the courts or administrative tribunals of the host State or the variety of international arbitral fora listed in sub-paragraphs (b)-(f) "provided that resort to any arbitration rules or fora under sub-paragraphs (a) to (f) shall exclude resort to the other."[96] However, the ASEAN agreement goes one step further than COMESA by also requiring the investor to give a written waiver if it chooses international arbitration rather than the host State's courts or administrative tribunals. Such arbitration will be conditional upon:

> *"...the notice of arbitration...being accompanied by the disputing investor's written waiver of the disputing investor's right to initiate or continue any proceedings before the courts or administrative tribunals of the disputing Member State, or other dispute settlement procedures, of any proceeding with respect to any measure alleged to constitute a breach."*[97]

The United States and Canadian model BITs also require an investor, as a precondition to its claim, to sign a written waiver of any right to initiate or continue any other proceeding in any other forum with respect to the measures alleged in its claim to constitute a breach. The United States model BIT stipulates:

> *"No claim may be submitted to arbitration under this Section unless:...*
>
> *(b) the notice of arbitration is accompanied,*
>
> *(i) for claims submitted to arbitration under Article 24(1)(a),98 by the claimant's written waiver, and*
> *(ii) for claims submitted to arbitration under Article 24(1)(b),99 by the claimant's and the enterprise's written waivers*

[95] Article 28(3) COMESA investment agreement.
[96] Article 33(1), ASEAN comprehensive investment agreement.
[97] Article 34(1)(c) ASEAN comprehensive investment agreement.
[98] Article 24(1)(a) deals with claims that the claimant itself has incurred loss or damage arising out of the host State's alleged breach.
[99] Article 24(1)(b) deals with claims that allege that an enterprise of the host State that the claimant owns or controls directly or indirectly has incurred loss or damage arising out of the host State's alleged breach.

> *of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24."*[100]

The Canadian model BIT provides:

> *"A disputing investor may submit a claim to arbitration under Article 22 (Claim by an Investor of a Party on Its Own Behalf) only if:...*
>
> *(e) the investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 22 (Claim by an Investor of a Party on Its Own Behalf..."*[101]

Although the fork-in-the-road clauses set out above are yet to be tested before a tribunal, they would appear to be fairly watertight barriers to multiple claims by the same investor in respect of the same host State measure. In particular, they should circumvent the difficulties for host States of establishing that the multiple claims relate to the same "dispute."

This being said, however, all four IIAs remain at risk of jurisdictional arguments by an investor trying to differentiate the host State measure it seeks to challenge under the IIA from the host State measure it has challenged in another forum. Moreover, the ASEAN investment agreement would not prevent an enterprise set up in the host State but owned by the investor from commencing its own proceedings against the host State, for example by claiming that the host State's measure was in breach of a concession contract.

The United States model BIT attempts to guard against this risk, but may not successfully achieve its aim. If the investor claims on behalf of the loss suffered by an enterprise it owns in the host State[102] then both the investor and the enterprise must give a written waiver of their right to initiate or continue any other proceeding in respect of that host State measure. However, it would seem a different story if instead of claiming under the BIT on behalf of its enterprise in the host State, the investor decides to claim on the basis of the loss the host State measure has caused to the value of its own shares in that enterprise. In that case, the enterprise in the host State is not required to give a waiver and will remain free to run its own proceedings, in contract or otherwise, against the host State in respect of the same host State measure. The Canadian model BIT closes this loophole by requiring the enterprise in the host State to also give a waiver in the prescribed form if the investor's claim is for loss or damage to its interest in the enterprise, i.e., its shares.[103]

From the above analysis, it appears that the fork-in-the-road clauses in all four IIAs will prevent an investor from commencing multiple proceedings in treaty and contract more effectively than the majority of IIAs discussed in Part 2 that either contain no fork-in-the-road clause at all or contain one that focuses on whether the various proceedings relate to same dispute. Of the four, however, the Canadian model BIT goes the furthest to close loopholes that would otherwise allow a knowledgeable investor to benefit from parallel proceedings in contract notwithstanding a fork-in-the-road clause in the IIA.

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[100] Article 26(2) United States model BIT.
[101] Article 26(1)(e) Canadian model BIT.
[102] See footnote 99 above.
[103] Article 26(1)(e) and article 26(3) Canadian model BIT.

5.0 Conclusion

This paper has considered three potential hazards that host States face as a result of the intertwining of international investment treaties with investment contracts and domestic legislation: (i) investors unilaterally internationalizing contractual and administrative disputes contrary to host State expectations; (ii) the risk of multiple proceedings; and (iii) investor forum-shopping. Three IIA provisions give rise to these hazards—broadly-worded dispute resolution clauses, ineffective or non-existent fork-in-the-road clauses, and the inclusion of umbrella clauses. The review of IIAs in Part 2 showed that all three of these clauses are found in the majority of IIAs of the most prolific IIA-signing nations. This leaves capital-importing States that are party to these IIAs highly exposed.

Part 4 of the paper examined four recent IIAs that each endeavour to address these risks.[104] All four IIAs make efforts to delimit the scope of potential disputes that may be brought to arbitration through the IIA's dispute resolution clause. Based on the analysis in Part 4, the dispute resolution clauses found in the COMESA and ASEAN investment agreements or the Canadian model BIT would seem sufficient to prevent an investor using the IIA to internationalize its administrative or contract claims contrary to the host State's expectations. In contrast, the dispute resolution clause in the United States model BIT operates effectively like an umbrella clause. None of the other IIAs examined in Part 4 included an umbrella clause. With respect to preventing investors forum-shopping or alternatively, commencing parallel contract and treaty proceedings, the Canadian model BIT's fork-in-the-road clauses would seem to be the most effective.

The survey of current IIA provisions in Part 2 and the review of arbitral jurisprudence in Part 3 may make unsettling reading for host States whose IIAs currently contain similar clauses. However, the positive message to take from this Bulletin is that it is possible, with relatively simple drafting, to construct IIA provisions so as to considerably reduce the risk of investors unilaterally internationalizing contract or domestic law claims, forum-shopping or commencing multiple proceedings. In any future IIA negotiations and renegotiations, negotiators may wish to pay heed to close these doors and windows.

[104] These were the 2004 United States model BIT, the 2004 Canadian model BIT, the 2008 Investment Agreement for the COMESA Common Investment Area, and the 2009 ASEAN Comprehensive Investment Agreement.

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