FORK IN THE ROAD IN INVESTMENT DISPUTES

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Abstract

*Some investment treaties provide that once the dispute has been submitted to the court of the host State or to international arbitration, the choice of one of these procedures will be final. Such provisions are called 'fork in the road' ["**FITR**"] provisions. In this paper, based on a review of the major cases dealing with FITR provisions, the author suggests some thoughts on the nature of the FITR concept and practical methods of addressing FITR-based arguments in investor-State disputes. In the author's view, ideally the 'triple identity test' and the 'same fundamental basis' test should be jointly applied to the analysis of case-specific FITR issues. Apparently, the most tenable decision would be if both tests show the same result. While the triple identity test with all its formalism, has clear criteria, the same fundamental basis test needs clarification. Based on some arbitral decisions, the author considers that the fundamental basis should include both the factual and the legal/normative basis for the claims to be considered essentially the same.*

I. The rationale and interest served by FITR

Forum selection provisions in investment treaties indicate the routes for claimants to protect their investment rights by way of domestic litigation or international arbitration. Some investment treaties say that if the dispute has been submitted to the court of the host State or to arbitration provided in the treaty, the choice of one of these procedures will be final.[1] Such provisions are called "*fork in the road*" provisions, and they reflect the Latin maxim *electa una via, non datur recursus ad alteram*.

As held by one tribunal, "*[t]he right to choose once is the essence of the 'fork-in-the-road' rule*".[2] Therefore, once the way has been selected, "*the party waives its right to seek relief through the unchosen fora*".[3]

At the outset, it is crucial to understand the rationale behind the FITR concept, and whose interests, i.e. the investor's or the host State's, it serves.

Apparently, an FITR clause is a protective tool used by host States against claimant-investors. Some tribunals consider the FITR clause a matter of public policy of the host State.[4] Moreover,

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1 *E.g.*, Agreement on the promotion and reciprocal protection of investments, S. Afr.-Zim., art. 7(3), Nov. 27, 2009 ("If the investor submits the dispute to the competent court of the host Party or to international arbitration mentioned in sub-Article (2), the choice shall be final.").

2 M.C.I. Power Grp. L.C. & New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, ¶ 181 (July 31, 2007) [*hereinafter* "M.C.I. Power Grp."].

3 INT'L BAR ASS'N, CONSISTENCY, EFFICIENCY AND TRANSPARENCY IN INVESTMENT TREATY ARBITRATION 18 (2018).

4 *See* Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 63 (Jan. 25, 2000); Toto Costruzioni Generali S.p.A. v. Republic of Leb., ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 207 (Sept. 11, 2009) [*hereinafter* "Toto"].

since re-litigation of matters is not in line with established general principles of law such as *res judicata* and *lis pendens*, FITR provisions are intended to ensure that a single forum adjudicates a particular issue.

At the same time, a pro-claimant negotiator on an investment treaty would hardly support an FITR approach as it is too rigid and inflexible for investors who might prefer having various litigation routes, rather than a single route, for protecting their rights in a host State. As shown below, the modern treaty practice knows of more liberal waiver-based clauses.[5] This seems to be a matter for discussion between States in a treaty-making process.

Commentators note that one of the main purposes of investment arbitration is to avoid the use of domestic courts which are not an attractive forum for investors due to potential partiality by the host State judiciary.[6] However, it is not unusual for a local company of the investor to apply first to domestic courts, for example, to challenge an administrative action (e.g. revocation of license or termination of concession) before the commencement of the investor-State arbitration.

As mentioned above, it is usually argued that the purpose of FITR is to avoid multiple/parallel proceedings in various fora on the same dispute.[7] This approach is based on the presumption that multiple proceedings are perceived as having negative consequences for investment arbitration.[8] However, it may be reasonably asked whether multiple proceedings always have a negative effect (such as abuse of process[9] or inconsistent arbitral decisions on the same

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5 *See infra* Part II on "no-U-turn" or "waiver" clauses which generally state that the right of an investor to have recourse to arbitration is subject to the condition that the investor discontinues its domestic court proceedings on the same subject matter.

6 *See, e.g.*, Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts in Investment Law*, *in* 4 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 71 (Arthur W. Rovine ed., 2010).

7 H&H Enters. Inv., Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/09/15, Excerpts of Award, ¶ 367 (May 6, 2014) [*hereinafter* "H&H Enterprises"] (wherein the Tribunal noted that the purpose of the FITR provision is "to ensure that the same dispute is not litigated before different fora"); Supervision y Control S.A. v. Republic of Costa Rica, ICSID Case No. ARB/12/4, Award, ¶¶ 294, 297 (Jan. 18, 2017) [*hereinafter* "Supervision y Control"] (wherein the Tribunal noted that FITR and similar provisions are used "to avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions" and "to avoid conflicting decisions and eliminate the possibility of obtaining double recovery for the same acts.").

8 *See* Olesya V. Kryvetska, Multiple Proceedings in the Disputes between Foreign Investor and State 55, 72 (2019) (unpublished thesis, Taras Shevchenko National University of Kyiv); Supervision y Control, ICSID Case No. ARB/12/4, Award, ¶ 293 (Jan. 18, 2017) (wherein the Tribunal stated that "[t]he existence of national courts and international arbitration as mechanisms for resolving disputes can generate a significant risk of duplication of claims and a problem in determining what is the proper dispute resolution mechanism for disputes that may arise during the investment period.").

9 Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction, ¶ 331 (Feb. 1, 2016) (wherein the Tribunal took the following view on abuse of process with respect to parallel proceedings: "[i]n the Tribunal's opinion, while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallise in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals. However, the Tribunal wishes to make it very clear that this resulting abuse of process is in no way tainted by bad faith on the part of the Claimants as alleged by the Respondent. It is merely the result of the factual situation that would arise were two claims to be pursued before different investment tribunals in respect of the same tranche of the same investment.").

subject),[10] or by providing investors with additional possibilities to defend their rights in host States, multiple proceedings may in some instances have a positive effect for doing justice?

If a choice has to be made between an investor-State claim and a domestic court claim, an investor would plausibly consider initiating a less expensive and time-consuming domestic claim (e.g. an administrative claim challenging the revocation of a license);[11] even realising that the chances for success of such a claim against the host State may be quite limited. If it turns out within a rather short period (e.g. one year) that such claim is unsuccessful, but an international claim, with all its burdens and risks, still has chances for a better result, the question arises – whether it is fair to prohibit the disappointed investor to make further attempt towards bringing an international claim.

Alternatively, it is very unlikely that an investor would first file an expensive international claim, and if it fails after several years of the proceedings, initiate a domestic claim.

Professor Schreuer reasonably suggests that the FITR provision "*does not apply to every legal action taken in domestic courts that relates to the investment dispute before the international tribunal*".[12] Otherwise, "*[t]he investor would have to sit still and endure any form of injustice passively on pain of losing its access to international arbitration. In particular, the investor would have to forego appeals against administrative action that are subject to preclusive time limits under domestic law*".[13]

A balanced approach to the interests of investors and host States in investment treaties dictates a more flexible concept of the forum-selection clause. The use of earlier mentioned waiver-based provisions in some investment treaties seems to be a reasonable reflection of this approach.

The next part of this paper will discuss the various approaches to interpretation of the FITR clauses and similar treaty provisions.

II. FITR and similar clauses in investment treaties

The variety of treaty formulations gives ground for the classification of FITR and similar provisions into several types.[14] For instance, a traditional FITR clause says that once an investor has made a choice between the competent court of the host State and international arbitration, such choice is final.[15]

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10 *See* Mark Friedman, *Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 545 (Albert Jan Van den Berg ed., 2007).

11 *See* Alex Genin, E. Cred. Ltd., Inc. & A.S. Baltoil v. Republic of Est., ICSID Case No. ARB/99/2, Award, ¶¶ 47, 58 (June 25, 2001) [*hereinafter* "Alex Genin"].

12 Christoph Schreuer, *Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 248–249 (2004).

13 *Id.*

14 *See, e.g.*, Markus A. Petsche, *The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches Clash Between Formalistic and Pragmatic Approaches*, WASH. U. GLOBAL STUD. L. REV. 391, 397–398 (2019) (for suggested classification of the FITR clauses).

15 *E.g.*, Agreement on the promotion and reciprocal protection of investments, Leb.-It., art. 7, Nov. 7, 1997, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1688/download. Article 7 reads as follows:
"In case of disputes regarding investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the Parties concerned with a view to solving the case, as far as possible, amicably.

On the other hand, unlike a traditional FITR clause, some more flexible forum selection provisions of investment treaties say that the right of an investor to have recourse to arbitration is subject to the condition that the investor discontinues its domestic court proceedings on the same subject matter. Such provisions are called "*no-U-turn*" or "*waiver*" clauses.[16]

For example, Article 13(4) of the Turkey-Australia Bilateral Investment Treaty ["**BIT**"] envisages: "*As a precondition to electing arbitration under paragraph 13(2), the investor must waive any right it may have to initiate or continue proceedings on the same matter before judicial or administrative bodies of either Party*". Similarly, Article 8(4) of the Israel-Ukraine BIT provides: "*Unless otherwise agreed, an investor who has submitted the dispute to national jurisdiction may have recourse to the arbitral tribunals mentioned in paragraph 2 of this Article so long as a judgement has not been delivered on the subject matter of the dispute by a national court. For the sake of clarification, the right of an investor under this paragraph shall apply provided that the investor discontinues the proceedings on the subject matter before the national court*". The Netherlands Model BIT of 2018 also provides that domestic court proceedings relating to the same measures must be withdrawn or discontinued prior to a claim to arbitration.[17]

In *Supervision y Control S.A.* v. *Republic of Costa Rica*, a forum selection provision of this type was characterised as a provision based on the concept of waiver. The Tribunal found that Article XI(3) of the Spain-Costa-Rica BIT[18] stipulated a waiver provision.[19] The Tribunal explained that to avoid the risk of having contradictory decisions, investment treaties use two methods: the FITR and the concept of waiver. Under the second method, once the investor chooses international arbitration, the exercise of any claim before another dispute resolution mechanism must be waived.[20]

If these consultations do not result in a solution within six months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:
the competent court of the Contracting Party in the territory of which the investment has been made; or
the International Center for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of the other States, opened for signature at Washington, on March 18, 1965, in case both Contracting Parties have become members of this Convention; or
an ad hoc arbitral tribunal which, unless otherwise agreed upon by the Parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
The choice made as per subparagraphs a, b, and c herein above is final."

16 *See*, *e.g.*, UNITED NATIONS CONF. ON TRADE & DEV., *Scope And Definition*, 2 SERIES ON INTERNATIONAL INVESTMENT AGREEMENTS 89 (2011).

17 *See* Joep Wolfhagen & Natalie Sheehan, *New model BIT goes beyond consultation draft and introduces sweeping changes for investors*, INT'L L. OFF. (Nov. 22, 2018), *available at* https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Netherlands/Freshfields-Bruckhaus-Deringer-LLP/New-model-BIT-goes-beyond-consultation-draft-and-introduces-sweeping-changes-for-investors?utm_source=ILONewsletter&utm_medium=email&utm_content=Newsletter2018-11-22&utm_campaign=Arbitration&ADRNewsletter.

18 Agreement on the promotion and reciprocal protection of investments, Costa Rica-Spain, art. XI(3), July 8, 1997, 2079 U.N.T.S. 413 ("Once an investor has submitted the dispute to an arbitral tribunal, the award shall be final. If the investor has submitted the dispute to a competent court of the Party in whose territory the investment was made, it may, in addition, resort to the arbitral tribunals referred to in this article, if such national court has not issued a judgment. In the latter case, the investor shall adopt any measures that are required for the purpose of permanently desisting from the court case then underway.").

19 Supervision y Control, ICSID Case No. ARB/12/4, Award, ¶ 297 (Jan. 18, 2017).

20 *Id.* ¶ 294; *See also* Javier Ferrero, *Tribunal dismisses investor's claims because of breach of admissibility requirements under the applicable BIT in the ICSID case Supervisión y Control S.A. v. Republic of Costa Rica*, GLOB. ARB. NEWS (June 20, 2017), *available at* https://globalarbitrationnews.com/tribunal-dismisses-investors-claims-because-of-breach-of-admissibility-requirements-under-the-applicable-bit-in-the-icsid-case-supervision-y-control-s-a-v-republic-of-costa-rica-06202017/.

A similar forum selection provision was considered in *Infinito Gold Ltd.* v. *Costa Rica*. The Respondent highlighted the "*unusual*" provision in Article XII(3)(d) of the Canada-Costa Rica BIT, which was "*similar to (but broader than)*" an FITR clause.[21] The relevant part of the provision reads as follows: "*An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: ... (d) in cases where Costa Rica is a party to the dispute, and no judgement has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement*".[22]

The Respondent noted that Article XII(3)(d) was asymmetric: "*It only applies to cases in which Canadian investors contest measures regarding which a Costa Rican court has issued a judgment, not cases brought by Costa Rican investors against measures taken by Canada. This shows that this provision was specifically negotiated with the Costa Rican judiciary in mind*".[23] In turn, the Claimant insisted that Article XII(3)(d) was not an FITR provision, on the grounds that it was not designed to make investors choose between domestic and international remedies, but simply encouraged without mandating the exhaustion of local remedies.[24]

The Tribunal did not characterise the provision of Article XII(3)(d) either as an FITR or a waiver-based clause, but, after the analysis of the terms "*judgment*" and "*measure*" against the facts of the case, found that the Claimant's claims were not barred by Article XII(3)(d) of the BIT.[25]

Both a traditional FITR clause and a waiver-based clause are aimed at avoiding duplication of litigations on the same matter in domestic courts and international arbitration. The difference is that a traditional FITR is more restrictive in relation to an investor's choice of route, while a waiver clause is more flexible and gives more possibilities to protect an investor's rights.

On the other hand, a different approach altogether is used in the Energy Charter Treaty ["**ECT**"]. The forum selection clause of the ECT does not expressly say that a choice of the procedure is final. Instead, a Contracting State may submit a special declaration having an FITR effect.[26] Such Contracting States are listed in Annex ID entitled "*List of Contracting Parties Not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage under Article*

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21 Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Decision on Jurisdiction, ¶ 256 (Dec. 4, 2017).

22 *Id.* ¶ 144.

23 *Id.* ¶ 258.

24 *Id.* ¶ 278.

25 *Id.* ¶ 298.

26 Energy Charter Treaty, art. 26(2)–(3), Dec. 17, 1994, 2080 U.N.T.S. 100. Article 26(2) and 26(3) read as follows:

"(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: (a) to the courts or administrative tribunals of the Contracting Party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b). (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41."

26".[27] In one case, such a written Statement by Italy was called "*Italy's 'fork-in-the-road' declaration*".[28]

Another variation of a forum selection clause can be gauged from Article 26 of the International Centre for Settlement of Investment Disputes ["**ICSID**"] Convention, which 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*" (emphasis added). In other words, once the ICSID is seized, other remedies including domestic litigation on the same matters are excluded. The exclusive character of consent to ICSID arbitration may give rise to a debate on whether the matters before ICSID are the same as the matters before the domestic court of the host State.[29]

Lastly, some FITR provisions in BITs reflect modern trends observable in investment treaty disputes. For instance, an FITR clause in the 2017 Columbia Model BIT refers to the "*same fundamental basis*" of judicial and arbitration claims.[30] The approach of various tribunals considering this concept has been discussed in the next part of this paper.

III. Methods applied by arbitral tribunals

Conceptually, the known case law divides between the pro-investor position of the tribunals mostly based on a strict interpretation of the *triple identity test*[31] and the tribunals' support of respondent States based on the "*same fundamental basis*" approach.[32] However, each case has its specific circumstances, and it would be an oversimplification to say that a tribunal should either apply the triple identity test or the same fundamental basis approach. Probably, the most tenable decision would be if both tests show the same result.

A. The triple identity test

The traditional triple identity test verifies whether the legal actions in domestic court and international arbitration have the same parties, object, and cause of action. In one of the early

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27 *See* Khan Resources v. Mongolia, Case No. 2011-09, Decision on Jurisdiction, ¶ 387 (Perm. Ct. Arb. July 25, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw4268.pdf [*hereinafter* "Khan Resources"] (wherein the Tribunal noted that Mongolia was listed in Annex ID of the ECT as one of the States that had restricted their unconditional consent to submit disputes to international arbitration to those disputes that had not been previously submitted to the courts of the Contracting Party).

28 Greentech Energy Sys. A/S, et al. v. Italian Republic, SCC Case No. V (2015/095), Final Award, ¶ 201 (Dec. 23, 2018), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw10291.pdf [*hereinafter* "Greentech Energy"].

29 *See, e.g.*, *infra* Part IV(R) the analysis in United Util. (Tallinn) B.V. & Aktsiaselts Tallinna Vesi v. Republic of Est., ICSID Case No. ARB/14/24, Award (June 21, 2019), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw10648.pdf [*hereinafter* "United Utilities"].

30 Colombia Model Bilateral Investment Treaty 2011, arts. 3, 4, *available at* http://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx. Articles 3 and 4 read as follows:
"A claim may not be submitted to a Court of Law or Arbitration under this Article when a Claimant Investor is either directly or indirectly through its Investment in the case of an Enterprise, party to judicial or arbitral proceedings within the Host Party, that refer to the same fundamental basis, or could result in the same reparation to the claimant.
Once the Claimant Investor has submitted the dispute to a competent tribunal of the Host Party or any of the arbitration proceedings stated above, the choice of the procedure shall be final."

31 *E.g.*, Khan Resources, Case No. 2011-09, Decision on Jurisdiction, ¶¶ 390–396 (Perm. Ct. Arb. July 25, 2012).

32 *E.g.*, Pantechniki S.A. Contractors & Eng'rs v. Republic of Alb., ICSID Case No. ARB/07/21, Award, ¶¶ 61–62 (July 30, 2009) [*hereinafter* "Pantechniki"].

ICSID cases, *Benvenuti & Bonfant* v. *Congo*, "*the Tribunal declared that there 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*".[33] In some cases, "*legal basis*" is used instead of "*cause of action*,"[34] and "*issues*" instead of "*object*".[35]

In a number of cases favourable to the claimants, only some elements of the triple identity test were found sufficient by the tribunals to reach a conclusion. For example, if the object of the claims is clearly not identical, it may be futile for a tribunal to analyse other elements of the test.[36]

The opponents may say that the triple identity test is too formalistic and may disregard that the claims in question are substantially identical, due merely, to the formalistic difference of the parties or normative sources. For instance, in one case, the Respondent State argued that "*to assess whether there is identity of the parties, the Tribunal should analyse the economic reality of the corporate structure of the different entities present in the various procedures in question. Indeed, if this was not the case 'any Claimant company could modify its corporate structure, using intermediary companies, subsidiaries, and ultimately restructuring its participation in the corporate chain, to justify inapplicability of the triple identity test with regard to the identity of the party'*".[37]

On this point, one tribunal notes that "*[a] strict application of the triple identity test would deprive the fork in the road provision of all or most of its practical effect*".[38]

Similarly, another tribunal, is of the view that the strict application of the triple identity test "*removes all legal effects*" from FITR clauses, "*which contravenes the effect utile principle applicable to the interpretation of treaties*". What ultimately matters for the application of FITR clauses "*is that the two relevant proceedings under examination have the same normative source and pursue the same aim*".[39]

In order to make the relevant test more flexible, it was suggested to use a kind of double identity test when "*the sameness of a dispute would be determined – in addition to the identity of the parties – either by reference to the object of proceedings, or else by the proceedings' 'equivalence in substance'*".[40]

B. The same fundamental basis test

On the other hand, the advantage of the triple identity test is that the borderline between claims is made on clear criteria, unlike the other more liberal, but likely more vague approach[41] which focuses on fundamentally the same factual and normative bases.

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33 S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award, ¶ 1.14 (Aug. 8, 1980).

34 *E.g.*, Charanne & Constr. Inv. v. Kingdom of Spain, SCC Case No. V (062/2012), Final Award, ¶ 399 (Jan. 21, 2016) [*hereinafter* "Charanne and Construction Investment"].

35 *E.g.*, M.C.I. Power Grp., ICSID Case No. ARB/03/6, Award, ¶ 176 (July 31, 2007).

36 *E.g.*, Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 443 (Dec. 27, 2010) [*hereinafter* "Total S.A."].

37 Charanne and Construction Investment, SCC Case No. V (062/2012), Final Award, ¶ 406 (Jan. 21, 2016).

38 Chevron Corp. & Texaco Petrol. Co. v. Republic of Ecuador (II), Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, ¶¶ 4.76-4.77 (Perm. Ct. Arb. Feb. 27, 2012) [*hereinafter* "Chevron Corporation"].

39 Supervision y Control, ICSID Case No. ARB/12/4, Award, ¶ 330 (Jan. 18, 2017).

40 *See, e.g.*, Vid Prislan, Domestic courts in Investor-State Arbitration: Partners, Suspects, Competitors 377, ¶ 10.2.2 (June 27, 2019) (Doctoral thesis, University of Leiden), *available at* https://openaccess.leidenuniv.nl/bitstream/handle/1887/74364/10.pdf?sequence=16.

This more liberal test means that if a domestic claim and an international claim are "*fundamentally same*" claims, this would be sufficient to support the jurisdictional objection of a respondent State based on the FITR clause. The same fundamental basis test as applied in *Pantechniki* v. *Albania* ["**Pantechniki**"] split the case law on FITR.[42]

The Pantechniki tribunal held that the relevant test was expressed by the America-Venezuela Mixed Commission in the Woodruff case in 1903 i.e. "*whether or not 'the fundamental basis of a claim' sought to be brought before the international forum is autonomous of claims to be heard elsewhere*". The Tribunal noted that "*the same facts can give rise to different legal claims*," while "*the similarity of prayers for relief does not necessarily*" indicate an identity of causes of action. The Tribunal believed that to determine whether claims have the same normative source is necessary. However, the Tribunal warned against rapid decisions based on "*abstract*" statements, by observing as follows: "*The frontiers between claimed entitlements are not always distinct. Each situation must be regarded with discernment.*"[43]

The "*fundamental basis*" test raises several questions. *First*, whether the basis under consideration is legal or factual, or both? *Second*, what comprises the *essence of claims*: the facts, the relief, the cause of action? *Third*, in what way should it be established that the claim before an arbitral tribunal has an "*autonomous*" existence from the claim brought before a domestic court? The author has searched the answers to these questions in the arbitral decisions discussed below and summarised his understanding in the last part entitled '*Conclusions'*.

C. Other approaches

Tribunals also apply other methods for establishing whether the compared claims are identical. For instance, a dividing line between breaches of contract and breaches of the treaty is often suggested. It is quite usual for claimants to say that the claims brought to domestic court are related to the breaches of contract, while the claims submitted to international arbitration are relating to the breaches of the treaty, in an attempt to avoid being barred by virtue of FITR provisions.[44] The tribunal in one case noted: "*A purely contractual claim will normally find difficulty in passing the jurisdictional test of treaty-based tribunals, which will of course require allegation of a specific violation of treaty rights as the foundation of their jurisdiction*".[45] However, contractual claims may be interlinked with treaty claims, which makes the differentiation practically difficult.[46]

Another dividing line may be drawn between a breach of the treaty and a dispute related to the investment under the treaty, which is considered to be broader.[47] The ad hoc committee in

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41 Petsche, *supra* note 14, at 391 (wherein it is also noted that the clash is "between formalistic and pragmatic approaches."); Petsche, *supra* note 14, at 394–395 ("However, they have also (and rightly so) pointed out that the fundamental-basis test is vague and that it does not therefore ensure a high degree of legal certainty and predictability.").

42 Pantechniki, ICSID Case No. ARB/07/21, Award, ¶¶ 61–62 (July 30, 2009).

43 *Id.*

44 *See, e.g.*, Toto, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 208 (Sept. 11, 2009).

45 Occidental Expl. & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, ¶ 52 (July 1, 2004), 12 ICSID Rep. 59 (2007) [*hereinafter* "Occidental Exploration"]; *see also* Joy Mining Mach. Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 58 (Aug. 6, 2004).

46 *See, e.g.*, Occidental Exploration, LCIA Case No. UN3467, Final Award, ¶ 81 (July 1, 2004), 12 ICSID Rep. 59 (2007).

47 *See* Compañiá de Aguas del Aconquija S.A. & Vivendi Universal S.A.v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 55 (July 3, 2002).

Vivendi v. *Argentine Republic* took the view that the initiation of proceedings in the administrative courts would prima facie constitute a choice of forum under the FITR clause of the France-Argentina BIT "*if that claim was coextensive with a dispute relating to investments made under the BIT*".[48] The Committee in particular held: "*Article 8 deals generally with disputes 'relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party.' It is those disputes which may be submitted, at the investor's option, either to national or international adjudication. 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*".[49] This analysis has been based on the textual interpretation of the particular FITR provision.

Below is a brief analysis of the major cases: (i) supporting investor interests and (ii) where the respondent States have been successful on the FITR issue. By this time, statistically, investors have prevailed. However, the *Pantechniki* award and further similar decisions in favour of host States, while still in the minority, have brought more intrigue to the FITR analysis.

IV. Selected cases favourable to investors

There are several cases where claimants have been successful as far as the interpretation of FITR clauses is concerned. While in some cases, the analysis by tribunals was limited to identifying parties, objects or claims as not identical, this does not take away from the importance of the findings,[50] as most cases clearly concerned different factors.

A. Olguín v. Paraguay

In *Olguín* v. *Paraguay*, the Tribunal did not find evidence that the Claimant had irrevocably elected to bring a claim to the courts of the host State similar to the ICSID claim. The Claimant's request for a declaratory judgment of bankruptcy and liquidation of a commercial corporation, mentioned by the Respondent, could not, in the view of the Tribunal, "*have the same juridical effect as a claim against the Republic of Paraguay*".[51] Therefore, the Respondent's jurisdictional objection was dismissed.

B. Champion Trading v. Egypt

The Tribunal in *Champion Trading* v. *Egypt* rejected the Respondent's defence based on the FITR clause solely due to the different parties (the Egyptian company and its shareholders) in the

48 *Id.*

49 *Id.*

50 With reference to the triple identity test, three tribunals have dismissed the Respondents' FITR objections: Hulley Enters. Limited (Cyprus) v. Russian Federation, Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, ¶¶ 597–599 (Perm. Ct. Arb. 2009) [*hereinafter* "Hulley Enterprises"]; Hulley Enterprises, Case No. 2005-03/AA226, Final Award, ¶¶ 1271-1272 (Perm. Ct. Arb. 2014); Yukos Universal Ltd. (Isle of Man) v. Russian Federation, Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, ¶¶ 598–600 (Perm. Ct. Arb. 2009) [*hereinafter* "Yukos Universal"]; Yukos Universal, Case No. 2005-04/AA227, Final Award, ¶¶ 1271–1272 (Perm. Ct. Arb. 2014); Veteran Petro. Ltd. (Cyprus) v. Russian Federation, Case No. 2005-05/AA228, Interim Award on Jurisdiction and Admissibility, ¶¶ 609-611 (Perm. Ct. Arb. 2009) [*hereinafter* "Veteran Petroleum"]; Veteran Petroleum, Case No. 2005-05/AA228, Final Award, ¶¶ 1271-1272 (Perm. Ct. Arb. 2014). The *ad hoc* committee, in one known ICSID case, briefly mentioned that the Tribunal, based on the triple identity test, dismissed the FITR challenge of the Respondent State to its jurisdiction (Victor Pey Casado & President Allende Found. v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶¶ 43-45 (Dec. 18, 2012)).

51 Eudoro Armando Olguín v. Republic of Para., ICSID Case No. ARB/98/5, Decision on Jurisdiction, ¶ 30 (Aug. 8, 2000), 6 ICSID Rep. 156 (2006) (unofficial translation from Spanish).

domestic and ICSID proceedings, holding that the treaty should be interpreted "*in good faith in accordance with the ordinary meaning expressed therein*". It was further held that this interpretation in good faith "*excludes from ICSID arbitration only those disputes where the ICSID claimant is also the claimant in the national proceedings*".[52]

C. Azurix v. Argentina

In *Azurix* v. *Argentina*, which dealt with the termination of a concession contract, the Tribunal noted that neither of the parties to arbitration was a party to the proceedings before the local courts, and added that Argentina was not a party to any domestic proceedings in question.[53] Also, the Tribunal noted "*the differentiation of the claims*," such as the administrative appeals to domestic court over the termination of the concession agreement, on the one hand, and the ICSID claim concerning investment in an Argentinian subsidiary, on the other hand, and rejected the FITR objection of the Respondent State.[54]

D. Enron v. Argentina

In *Enron* v. *Argentina,* the Claimants argued that the parties and the subject matter of the claims before the local courts and before ICSID were different. The Tribunal held that "*even if there was recourse to local courts for breach of contract this would not prevent resorting to ICSID arbitration for violation of treaty rights, or that in any event, as held in Benvenuti & Bonfant, any situation of lis pendens would require identity of the parties*". The Tribunal also noted that, in the present case, the Claimants have not made submissions before local courts and "*[t]he conditions for the operation of the principle electa una via or 'fork in the road' are thus simply not present*".[55]

E. Total S.A. v. Argentina

In *Total S.A.* v. *Argentina*, the Claimant objected to the FITR-based argument of the Respondent State "*because the present arbitration was initiated before the domestic litigation so that its claim concerning this issue must be viewed as predating the domestic proceedings*". The Claimant explained that *"its specific claim against Argentina's demand for the tax payment at issue is ancillary to [its] initial arbitration request, to which it was added when Argentina requested payment of those taxes in 2006, while these proceedings were pending*".[56] The Tribunal had no difficulty in finding that the two proceedings had a different object, and held as follows: "*The object of the arbitration before this Tribunal is the alleged breach of the [France-Argentina] BIT by Argentina's demand for retroactive tax payment; the claim before Argentina's domestic courts is that the demand is in breach of Argentina's law. Further, the Claimant in the domestic proceedings for amparo is Total's subsidiary, Total Austral, and not Total itself. It is the Tribunal's view therefore that Article 8.2 of the BIT is not applicable*".[57]

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52 Champion Trading Co., Ameritrade Int'l, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, ¶ 3.4.3 (Oct. 21, 2003), 10 ICSID Rep. 400 (2006).

53 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, ¶ 90 (Dec. 8, 2003), 10 ICSID Rep. 416 (2006) [*hereinafter* "Azurix Corporation"].

54 *Id.* ¶ 92.

55 Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶¶ 95-98 (Jan. 14, 2004), 11 ICSID Rep. 273 (2007).

56 Total S.A., ICSID Case No. ARB/04/1, Decision on Liability, ¶ 443 (Dec. 27, 2010).

57 *Id.*

F. Charanne and Construction Investments v. Spain

In *Charanne and Construction Investments* v. *Spain*,[58] the Respondent referred to "*a flexible interpretation of the triple identity test developed by some recent decisions of international tribunals*".[59] The Tribunal dismissed the Respondent State's objection that the Claimants, by bringing local administrative proceedings and a proceeding before the European Court of Human Rights ["**ECHR**"], triggered the FITR provision of the ECT and were precluded from bringing the case before an investor-State tribunal. The Tribunal considered, in particular, that there was no substantial identity of parties in the local proceedings and the ECHR as required under the triple identity test.[60] Consequently, it was unnecessary "*to examine the arguments of the Parties as to the subject identity and identity of legal basis, since it would not change the decision of the Arbitral Tribunal in this respect*".[61]

G. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania

The Tribunal's finding, in *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation* v. *Romania*,[62] was based on grounds different from the identity of the parties or objects of claims. In the Tribunal's view, the FITR provision "*is meant to avoid that by resorting initially to the State courts and then to arbitration under the BIT, the investor tries its case a second time should it be not satisfied with the outcome of the first attempt before the local courts*".[63] Noting that the local court proceeding was annulled due to the Claimants' failure to pay court fees and pleadings did not happen before the domestic courts, the Tribunal rejected Romania's challenge and found that there was no parallel litigation, and hence no room for application of the FITR provision.[64]

While the above decisions provide an insight into the issue, other tribunals have provided a more detailed analysis of FITR.

H. Alex Genin v. Estonia

In *Alex Genin* v. *Estonia*, the Estonian Innovation Bank ["**EIB**"] filed a claim to national court and then its shareholders brought their claim to arbitration.[65] Estonia argued that, by electing to litigate their disputes in the Estonian courts, the Claimants had exhausted their right to re-litigate the same disputes in the other forum.[66]

The Tribunal did not expressly mention the triple identity test, but actually applied this approach. Two questions were analysed: *first*, to what extent the issues litigated in domestic courts were identical to those raised in the ICSID arbitration and *second*, was it proper to consider EIB and

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58 Charanne and Construction Investment, SCC Case No. V (062/2012), Final Award, ¶¶ 398-410 (Jan. 21, 2016).

59 *Id.* ¶ 404.

60 *Id.* ¶ 408 (the tribunal concluded that "[w]hile it is true that the Claimants are part of the same group of the company Grupo T-Solar and of the company Grupo Isolux Corsan S.A., this is insufficient to consider that there is a substantial identity of the parties, even under a flexible interpretation of the triple identity test. For that to be the case it would have been necessary to demonstrate that the Claimants enjoy decision-making powers in Grupo T-Solar and Grupo Isolux Corsan S.A. in such a way that these companies have been in reality intermediary companies. This demonstration has not been provided. Neither has it been alleged that the corporate structure of the group of the claiming parties has been designed or modified with a fraudulent purpose to allow the Claimants to avoid the fork in the road provision of the ECT.").

61 *Id.* ¶ 410.

62 Hassan Awdi, Enter. Bus. Consultants, Inc. & Alfa El Corp. v. Rom., ICSID Case No. ARB/10/13, Award (Mar. 2, 2015).

63 *Id.* ¶ 203.

64 *Id.* ¶¶ 204–205.

65 Alex Genin, ICSID Case No. ARB/99/2, Award, ¶¶ 47, 58, 321, 333 (June 25, 2001), 6 ICSID Rep. 241 (2006).

66 *Id.* ¶ 321.

the Claimants "*as a 'group' and to view EIB's legal acts in Estonia as an 'election of remedy' for the group as a whole?*"[67]

The Tribunal found that the lawsuits undertaken by EIB in Estonia, relating to the purchase by EIB of the branch of another bank and to the revocation of EIB's license, were not identical to the Claimants' "*cause of action in the 'investment dispute' that they seek to arbitrate in the present proceedings*".[68] The Tribunal also indicated the distinction between the causes of action brought by EIB in Estonia and by the Claimants in the "*investment dispute*" in the ICSID.[69] The Tribunal held that certain aspects of the facts that gave rise to the dispute in ICSID "*were also at issue in the Estonian litigation*". However, "*the 'investment dispute' itself was not*," and the Claimants, therefore, were not "*barred from using the ICSID arbitration mechanism*".[70]

As to the second question, the Tribunal concluded that the actions taken by EIB in Estonia regarding the losses suffered by EIB due to the alleged misconduct of the Bank of Estonia "*certainly affected the interests of the Claimants, but this in itself did not make them parties to these proceedings*".[71]

I. CMS v. Argentina

In *CMS* v. *Argentina*, the Respondent State contended that the Claimant triggered the FITR provision of the respective BIT.[72] The Claimant submitted that the parties and the subject matter of the local and ICSID disputes were different, as the local claim concerned the contractual arrangements under the license while the investor's claims related to the affected treaty rights. The Tribunal noted: "*Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration*".[73] The Tribunal also noted that, "*[b]oth the parties and the causes of action under separate instruments were different. Had the Claimant renounced recourse to arbitration, for example by resorting to the courts of Argentina, this would have been a binding selection under the BIT*".[74]

J. Middle East Cement v. Egypt

In *Middle East Cement* v. *Egypt*, the Claimant brought a case before the Egyptian courts regarding the alleged nullity of an auction and then referred the dispute to ICSID for arbitration. The Tribunal rejected the Respondent's argument on the forum selection clause because the dispute before the Egyptian courts and the one before the Tribunal were different.[75] In particular, the Tribunal noted that the FITR provisions of the respective BIT refers to "*such disputes*" as were specified in paragraph 1 of Article 10 of the BIT i.e. disputes "*between an investor of a Contracting*

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67 *Id.* ¶ 330.
68 *Id.* ¶ 331.
69 *Id.* ¶¶ 330-332.
70 *Id.* ¶ 333.
71 *Id.* ¶ 331.
72 CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 77-82 (July 17, 2003), 7 ICSID Rep. 494 (2005).
73 *Id.* ¶ 80.
74 *Id.* ¶¶ 80–81.
75 Middle E. Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶¶ 71–72 (Apr. 12, 2002), 7 ICSID Rep. 178 (2005).

Party and the Other Contracting Party concerning an obligation of the latter under this Agreement".[76] The case brought by the Claimant before the Egyptian courts regarding the alleged nullity of the auction was not and could not be '*concerning*' Egypt's obligations under the BIT but only the validity of the auction under Egyptian national law.[77] The Tribunal's argument referring to the precise definition of an investor-State dispute under the BIT seems to be useful to Claimants in other arbitrations. For example, if an FITR clause expressly indicates that a treaty claim is a claim "*brought by an investor*," a claim brought to the host State court by a domestic legal entity connected with the investor will not trigger such an FITR clause.

K. Occidental v. Ecuador

An interesting analysis of the FITR issue can be seen in the London Court of International Arbitration ["**LCIA**"] award, in *Occidental* v. *Ecuador*.[78] Ecuador argued that the Claimant had submitted four separate lawsuits to Ecuadorian courts that constituted an irrevocable choice to submit the dispute to the courts of the Respondent State in accordance with the FITR provision of the United States-Ecuador BIT. The Claimant relied on the triple identity test and further argued that the relief requested in the two separate disputes is different. It must be noted that, unlike some other cases under consideration, in this case, the Claimant had not submitted any contractual claims to either forum. It submitted the claims on its rights under the BIT to arbitration, while the claim to the courts of the Respondent State concerned an issue of interpretation of the tax legislation.

The Tribunal focused on the nature of the submitted dispute and took the view that if the nature of the dispute submitted to arbitration is treaty-based, "*the jurisdiction of the arbitral tribunal is correctly invoked*".[79] This situation, in the Tribunal's view, occurred where treaty-based issues came to arbitration and non-contractual domestic law questions were dealt with by local courts in Ecuador. The decisions adopted by Ecuadorian courts on matters of interpretation of the Ecuadorian Tax Law were "*of great help to this Tribunal in its own interpretation of both the Treaty and the relevant provisions of Ecuadorian law … It follows that the causes of action might be separate and the nature of the disputes different, yet they may both have cumulative effects and interact reciprocally*".[80]

There was one more reason for the Tribunal in this case to find that the FITR mechanism was not triggered in that dispute. The FITR clause, by its very definition, assumed that the investor had made a choice between alternative avenues. In the Tribunal's view, such a choice was required to "*be made entirely free and not under any form of duress*". In the present case, the local tax law required the taxpayer to apply to the courts within the brief period of 20 days following the issuance of the resolution on value-added tax, which becomes final and binding if this is not done.[81] The Tribunal was of the view that in this case, "*the investor did not have a real choice. Even if it took the matter instantly to arbitration, which is not that easy to do, the protection of its right to object to the*

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76 *Id.* ¶ 71.
77 *Id.*
78 Occidental Petro. Corp. & Occidental Expl. & Prod. Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶¶ 37(a), 38–63 (Oct. 5, 2012), 12 ICSID Rep. 59 (2007).
79 *Id.* ¶ 57.
80 *Id.* ¶ 58.
81 *Id.* ¶ 60.

adverse decision of the SRI [tax authority] would have been considered forfeited if the application before the local courts were not made within the period mandated by the Tax Code".[82]

L. M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador

In *M.C.I. Power Group L.C. and New Turbine, Inc.* v. *Ecuador*, the Tribunal dismissed the Respondent's FITR based objection due to the specific circumstances of the case.[83] The Claimants alleged that they had not triggered the FITR clause because "*the claim before the Ecuadorian tribunals involved different parties and different issues and that the claim was not a free election of forum and was annulled without a decision being made on the Merits*".[84] The Tribunal held that the FITR issue was irrelevant in view of the fact that the suits to the Ecuadorian courts "*related to disputes that arose prior to the entry into force of the BIT. Thus, in accordance with the principle of the non-retroactivity of treaties, those disputes remain outside the temporal Competence of this Tribunal*".[85]

In this case, one more aspect is of interest. The Claimants argued that they had not triggered the FITR mechanism because the proceedings were annulled before the court could make a decision on the merits of the case.[86] The Tribunal found this argument irrelevant for purposes of determining jurisdiction because if a right to choose an option had been exercised in that case that would have been "*irrevocable, whether or not there had been a final decision on the Merits*".[87]

M. Toto v. Lebanon

In *Toto* v. *Lebanon*,[88] the Respondent State argued that the claims submitted to both the Lebanese Conseil d'Etat and the ICSID have the same aim of obtaining compensation for the extra costs incurred in the execution of the contract. The parallel proceedings could result in conflicting decisions.[89] The Tribunal applied the triple identity test and rejected the objection of the Respondent. It stated that claims arising out of the contract and treaty claims do not have the same cause of action.[90] Moreover, in this case the Claimant had recourse to domestic litigation based on the contractual forum selection clause. In the Tribunal's view, this could not exclude the jurisdiction of the Tribunal based upon the respective BIT.[91] The Tribunal also held that the contractual jurisdiction clause and the treaty jurisdiction clause "*are not mutually exclusive clauses*". The contractual jurisdiction clause applies to actions and matters that are violations of the contract; the treaty jurisdiction clause applies to actions and matters that constitute violations of the substantive treaty provisions "*even if the same actions and matters may give rise to breach of contract*".[92]

N. Chevron Corporation and Texaco Petroleum Company v. Ecuador (II)

In *Chevron Corporation and Texaco Petroleum Company* v. *Ecuador (II)*,[93] the same "*fundamental basis*" of two claims was under discussion. The Respondent submitted that "*in a situation where a claim in a*

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82 *Id.* ¶ 61.
83 M.C.I. Power Group, ICSID Case No. ARB/03/6, Award, ¶¶ 171–189 (July 31, 2007).
84 *Id.* ¶ 175.
85 *Id.* ¶ 189.
86 *Id.* ¶ 177.
87 *Id.* ¶ 182.
88 Toto, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶¶ 203–217 (Sept. 11, 2009).
89 *Id.* ¶ 206.
90 *Id.* ¶ 211.
91 *Id.* ¶ 213.
92 *Id.* ¶ 214.
93 Chevron Corporation, Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, ¶¶ 4.72–4.89 (Perm. Ct. Arb. Feb. 27, 2012).

local court is contract-based and a claim in an arbitration is treaty-based, a tribunal should only exercise jurisdiction where the 'fundamental basis' of the contract and treaty claims are different".[94] The Claimants argued that these claims are "*fundamentally different,*"[95] and the "*investment dispute*" before the arbitral Tribunal had not been submitted to another forum. Further, the dispute in the domestic court was characterised by the Claimants as an "*environmental damage dispute*" rendering the FITR provision inapplicable.[96]

The Tribunal analysed what was required to establish "*sameness*" of two disputes.[97] It was clear to the Tribunal that the Claimants had not themselves submitted the dispute before this Tribunal to any other court.[98] This, due to the specific words of the FITR provision in this case, did not allow the FITR clause to be applied.[99] The Tribunal also concluded that the prayer for relief and the matters before the domestic courts and the Tribunal were not the same[100] and rejected the Respondent's FITR case.

O. The ideal test in AES Corporation and Tau Power B.V. v. Kazakhstan

The ideal case on the FITR provision would be the one in which the tribunal's finding satisfies both the triple identity test and the fundamental basis test. In *AES Corporation and Tau Power B.V.* v. *Kazakhstan* ["**AES Corporation**"],[101] the Respondent State relying on the *Pantechniki* award, argued that it was impermissible to bring claims before ICSID having the same "*fundamental basis*" as disputes which had already been submitted and ruled upon by the domestic courts.[102] The Claimants stated that the FITR clause did not operate to bar the Claimants' claims, because the dispute presented to this arbitral Tribunal was different from the disputes which were submitted to the Kazakh courts by the AES Entities affiliated to the Claimants.[103] The Tribunal took the view that the Claimants' claims, as submitted in the ICSID arbitration, although based on the same facts and on the same alleged basic wrongdoings by the Respondent, were different from the claims filed by the entities affiliated with Claimants with the Kazakh courts. This conclusion and the further finding that the claims in ICSID were not barred by any FITR provision, in the view of the Tribunal, satisfied both the triple identity test and the "*fundamentally the same [normative] basis*" test.[104] Importantly, the Tribunal emphasised that "*fundamentally the same*

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94 *Id.* ¶ 3.80.
95 *Id.* ¶ 3.185.
96 *Id.* ¶¶ 3.131–3.132.
97 *Id.* ¶ 4.74.
98 *Id.* ¶ 4.79.
99 *Id.* ¶¶ 4.78, 4.80.
100 *Id.* ¶¶ 4.81–4.88.
101 AES Corp. & Tau Power B.V. v. Republic of Kaz., ICSID Case No. ARB/10/16, Award, ¶¶ 225–230 (Nov. 1, 2013).
102 *Id.* ¶ 176.
103 *Id.* ¶ 179.
104 *Id.* ¶ 227–229. Paragraphs 228 and 229 read as follows:
"228. The key difference between the claims is as follows: through the court proceedings before the Kazakh courts, Claimants mainly sought to invalidate decisions of the competition authorities with regard to the listing of the AES Entities on the Monopoly Register and to challenge orders through which fines and penalties were imposed on the AES Entities for allegedly anti-competitive behavior. Claimants did so mainly by arguing that the relevant authorities had misapplied the relevant Kazakh competition law.
229. Claimants' claims in the present proceeding have a different dimension and meaning: While the implementation by the Kazakh authorities of the new Kazakh competition law plays an important role in the present proceedings, it does so only from a factual perspective in the sense that it is one of the factual causes for Claimants' treaty claims in the present ICSID proceedings. In other words, it is the result of the Kazakh court proceedings, i.e. the

basis" means normative basis, rather than merely factual basis. Apparently, this approach puts stricter requirement to the notion of "*fundamental basis*".

P. Mobil Exploration v. Argentina

Certain elements of the triple identity test were used in *Mobil Exploration* v. *Argentina*, wherein the Claimants argued that the FITR clause applies only when the disputes before international tribunals and before local courts "*are between the same parties and involve the same purpose as well as the same cause of action*".[105] The objection to the admissibility of claims on the basis of FITR concerned the claims in relation to the so-called "*amparo* actions" which is a brief summary trial in the Argentine court with a limited purpose, "*to obtain the Statement of unconstitutionality or illegality of norms or a regulation*".[106] The Tribunal found "*it obvious that the sole purpose of the amparo actions was to declare Argentina's export restrictions and re-routing measures as unconstitutional and void under Argentine law*," and these domestic claims were not "*based on violations of the US-Argentina BIT*".[107] In the Tribunal's view, an ICSID tribunal does not have the power to declare an Argentine law unconstitutional or to grant an *amparo*. *Amparo* is not a precondition to claim damages which are sought in the ICSID proceedings. Thus, the *amparo* actions have a different cause of action, a different purpose, and object than the ICSID arbitration.[108] Accordingly, the Respondent's objection was dismissed.

Q. Greentech Energy Systems A/S, et al. v. Italian Republic

In *Greentech Energy Systems A/S, et al.* v. *Italian Republic,* the Respondent raised the FITR issue in the context of "*unconditional consent*" to arbitration under Article 26(2)-(3) of the ECT.[109] The Respondent contended that several Italian administrative court actions were brought by "*parties, including companies owned by Claimants*" regarding the matter at issue. The Respondent argued that a proper application of Article 26(3)(b)(i) would "*focus on the real substance of the underlying rights as opposed to the form of the legal action*".[110] Alternatively, as argued by the Respondent, the triple identity test would here be met, since the domestic cases were instituted by the Claimants' subsidiaries, the "*measures at stake are exactly the same as in these proceedings*", and the grounds include alleged violations of Article 10 of the ECT.[111] In response, the Claimants asserted that they have not commenced domestic litigation in Italy and are not participating in any domestic Italian case. The Tribunal found that the Respondent has not shown that the Claimants have previously submitted the present dispute to Italian courts or administrative tribunals and thus rejected the Respondent's FITR objection.[112] In particular, the Tribunal stated that it "*has not been persuaded to adopt a non-literal interpretation of ECT Article 26(3)(b)(i)*" and that "*the Italian subsidiaries of Claimants*

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confirmation by Kazakh courts that the Kazakh competition law was applied correctly by the administrative authorities, which led Claimants to file a claim for breach of the protection allegedly afforded to Claimants under the ECT, BIT and 1994 FIL in connection with legitimate expectations arising out of and other assurances made in the Altai Agreement. Had the Kazakh courts decided differently, the treatment of Claimants under the law would have been different and the effect on Claimants' alleged legitimate expectations would also have been different."

105 *See* Mobil Expl. & Dev. Inc. Suc. Argentina & Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, ¶ 139 (Apr. 10, 2013).

106 *Id.* ¶¶ 139, 141.

107 *Id.* ¶¶ 144–145.

108 *Id.* ¶ 145.

109 Greentech Energy Sys., SCC Case No. V (2015/095), Final Award, ¶ 195 (Dec. 23, 2018).

110 *Id.* ¶ 197.

111 *Id.*

112 *Id.* ¶ 205.

in this arbitration cannot be understood to be 'Investors' but are, instead, to be treated as 'Investments' which are located 'in the Area of' Italy".[113]

R. United Utilities v. Estonia

In *United Utilities* v. *Estonia,*[114] the Tribunal considered whether it was necessary to engage in an exercise of construction of Article 26 of the ICSID Convention. The Tribunal concluded that the ICSID proceeding and the matter before the Estonian court were "*not substantially the same*". As a result, Article 26 of the ICSID Convention on the exclusion of non-ICSID remedies, in the Tribunal's view, did not enter into play.[115] Further, the Tribunal held that the remedies sought in this arbitration derived from a different normative source than those before the domestic courts. The Tribunal did not have difficulty in establishing that the Estonian courts had considered facts that were also before the Tribunal. However, the Estonian courts considered ASTV's (one of the Claimants) and the Estonian Competition Authority respective rights and obligations solely through the prism of Estonian law, and not the rights of ASTV as a foreign investor in Estonia pursuant to the relevant BIT and international public law.[116] Interestingly, the "*same factual basis*" of the domestic and ICSID proceedings did not prevent this Tribunal from upholding its jurisdiction.

V. Selected cases favourable to respondent States

A. Pantechniki v. Albania

In *Pantechniki,* the dispute arose from the severe civil disturbances in Albania in 1997, which caused damages to the Claimant which was forced to abandon its contractor's road work site. Albania argued that Article 10(2) of the Greece-Albania BIT, which provided for FITR, precluded the investor's claims filed in the ICSID arbitration because it had brought the "*same claim*" before the Albanian court.[117] Unlike the cases where a domestic claim is made by a local company and an international claim is brought by an investor, *Pantechniki* itself filed both claims: *first*, to the domestic court, which was dismissed, and *second*, to the ICSID. In the course of the ICSID proceedings, the Claimant stated that it abandoned its challenge before the Supreme Court of Albania.[118]

In the defence, the Claimant stressed the difference between a contractual claim in the Albanian court and a treaty claim in the ICSID.[119] However, the Tribunal concluded that it was not sufficient for the Claimant to assert merely that the claim was founded on the treaty. The Tribunal noted that the domestic claim was clearly based on the contracts which "*allocated loss from incidents*" of 1997.[120] At the same time, the Tribunal had to determine whether the claim truly had "*an autonomous existence outside the contract*".[121] The Tribunal found that there was no such autonomous existence, as to the extent that the prayer to the local court "*was accepted it would grant*

113 *Id.* ¶ 204.
114 United Utilities, ICSID Case No. ARB/14/24, Award (June 21, 2019).
115 *Id.* ¶ 464.
116 *Id.* ¶ 465.
117 Pantechniki, ICSID Case No. ARB/07/21, Award, ¶ 50 (July 30, 2009).
118 *Id.* ¶ 27.
119 *Id.* ¶¶ 54–55.
120 *Id.* ¶ 63.
121 *Id.* ¶ 64.

the Claimant exactly what it is seeking before ICSID – and on the same 'fundamental basis'".[122] The Tribunal held that both claims concerned payment for contractual losses and were essentially the same. As the Claimant chose to take this matter to the Albanian courts, in the Tribunal's view, it could not later "*adopt the same fundamental basis as the foundation of a Treaty claim*".[123]

With all its innovative effect, the *Pantechniki* award has been criticised by some commentators. For example, it is argued that the same fundamental basis test and the related inquiries (as to the same normative source of the claims and an autonomous existence of the later claim) are "*inherently vague and ambiguous;*" as none of them is based on established legal terminology. It is also suggested that the sole arbitrator did not provide any explanations as to the meaning of these terms, and his approach lacked "*legal certainty and predictability*".[124] However, a similar approach was also used in several further cases, particularly, in *H&H Enterprises Investments, Inc.* v. *Egypt* and *Supervision y Control S.A.* v. *Costa Rica.*[125]

B. H&H Enterprises Investments, Inc. v. Egypt

In *H&H Enterprises Investments, Inc.* v. *Egypt*,[126] the Respondent State prevailed on the basis of its FITR objection. Egypt strongly relied on the methodology applied by the *Pantechniki* tribunal arguing that (a) the treaty claim has the same fundamental basis as the claim submitted to the local courts; (b) the factual components of a treaty cause of action have already been brought before the local courts; and (c) the treaty claim does not truly have an autonomous existence outside the contract. The Respondent also submitted that the triple identity test deprives the FITR provision of genuine meaning and practical effect.[127]

In turn, the Claimant argued that its claims were fundamentally treaty claims not barred by the FITR clause.[128] The triple identity test was not met, "*even though the local proceedings and this arbitration involve the same parties, the causes of action are not the same, as the present arbitration involves treaty claims and not contract claims*".[129] The Claimant also argued that the factual basis of the claims and the relief being sought were different.

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122 *Id.* ¶ 67.

123 *Id.*

124 Petsche, *supra* note 14, at 418.

125 *See also* Transglobal Green Energy, LLC & Transglobal Green Panama, S.A. v. Republic of Panama, ICSID Case No. ARB/13/28, Award, ¶¶ 86–88 (June 2, 2016) (the Respondent State strongly relied on Pantechniki and H&H Enterprises arguing that Claimants were precluded from pursuing their claims before ICSID under (i) the FITR clause of the BIT and (ii) Article 26 of the ICSID Convention. Panama argued that as the Claimants had already sought recourse for their claims in various domestic fora on the same fundamental basis as the claims brought before ICSID i.e. challenging the legality of the decision on termination of concession in domestic administrative litigation, the Claimants were not permitted to consent to ICSID arbitration. On the question of which test the Tribunal should apply to determine whether the FITR clause had been breached, Panama stated that the Tribunal should employ the "fundamental basis" test, rather than the triple identity test. In Panama's view, the triple-identity test would deprive the FITR clause of the BIT of practical effect in violation of Article 31 of the Vienna Convention on the Law of International Treaties). *See also* ¶118 (ultimately the Tribunal did not consider the FITR objection, as it upheld the other Respondent's objection to jurisdiction "on the ground of abuse by Claimants of the investment treaty system by attempting to create artificial international jurisdiction over a pre-existing domestic dispute.").

126 H&H Enterprises, ICSID Case No. ARB/09/15, Tribunal's Decision on Respondent's Objections to Jurisdiction (June 5, 2012).

127 *Id.* ¶¶ 70–71.

128 *Id.* ¶ 74.

129 *Id.* ¶ 78.

The Tribunal noted that in order to decide whether the Claimant's treaty claims were barred by the FITR clause, the Tribunal had to determine whether the treaty claims had "*the same fundamental basis as the claims submitted before the local fora*".[130] The Tribunal concluded that the basis for the Claimant's treaty claims and its contractual claims, which were founded, *inter alia*, on the option to buy, were *fundamentally the same*.[131]

The Tribunal further noted that the triple identity test does not apply in this case as Article VII of the United States-Egypt BIT did not expressly require that the triple identity test be met before the FITR provision could be invoked. The triple identity test raised by the Claimant "*is based on its reading of arbitral jurisprudence as opposed to the specific language of the US-Egypt BIT and/or its interpretation*".[132] The Tribunal noted that it should not be allowed that form prevail over substance. According to this Tribunal, the language of Article VII of the BIT did not require specifically that the parties be the same. What mattered, in the Tribunal's view, was the subject matter of the dispute.[133] The Tribunal concluded that the domestic claim and the ICSID claim on expropriation "*share fundamentally the same factual basis*".[134] The Tribunal's emphasis on fundamentally the same factual basis differs from the positions of the *Pantechniki* tribunal (which noted that the same facts can give rise to different claims) and of the Tribunal in *AES Corporation* (which considered that "*fundamentally the same basis*" meant normative basis, rather than a factual one).

C. Supervision y Control S.A. v. Costa Rica

In *Supervision y Control S.A.* v. *Costa Rica,* the Tribunal applied the "*same fundamental basis*" test with respect to the forum selection provision of the Spain-Costa-Rica BIT based on the concept of waiver.[135] The Tribunal concluded that "*the disputes in both fora must be identical or have a significant overlap for the forum selection clause to be applicable*".[136]

The Tribunal analysed two issues: regarding *first*, the parties that brought claims to the local proceeding and to ICSID, and *second*, the basis of the claims. On the first issue, the Tribunal found that the entity Riteve controlled by the Claimant "*is a corporate vehicle that acts according to the interests and instructions of Claimant,*" and "*that the proceeding initiated by Riteve before the Administrative Contentious Court must be considered as filed by Claimant*".[137]

On the second issue, the Tribunal concluded that what, in the end, matters for the application of FITR clauses is that the two relevant proceedings "*have the same normative source and pursue the same*

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130 H&H Enterprises, ICSID Case No. ARB/09/15, Excerpts of Award, ¶ 369 (May 6, 2014).

131 *Id.* ¶ 360.

132 *Id.* ¶ 364.

133 *Id.* ¶¶ 367–368 (it was also raised whether the dispute resolution provision without the FITR clause from the Germany-Egypt BIT could be imported through the most-favoured-nation (MFN) clause in the US-Egypt BIT. The tribunal agreed with the Respondent that the MFN clause contained in the US-Egypt BIT could not be used to avoid the application of the FITR clause contained therein).

134 *Id.* ¶ 378.

135 Supervision y Control*,* ICSID Case No. ARB/12/4, Award, ¶¶ 293–335, 308 (Jan. 18, 2017); *see also* the discussion of the waiver clause *supra* Part II.

136 Supervision y Control*,* ICSID Case No. ARB/12/4, Award, ¶ 295 (Jan. 18, 2017).

137 *Id.* ¶¶ 325, 329; Supervision y Control*,* ICSID Case No. ARB/12/4, Dissenting Opinion of Joseph P. Klock, ¶ 10 (the finding of the majority was strongly opposed in the dissenting opinion of arbitrator Klock who noted, among other things, that "[t]his case does not involve a frustrated litigant unhappy with a rejection of its relief in a local court who decides to try for a second bite at the apple.").

aim". The Tribunal found that this was exactly the case.[138] Consequently, the Tribunal concluded that the claim to ICSID was inadmissible since the Claimant had already submitted the same claim to the local courts.

VI. Conclusions

As could be gleaned from the analysis of various cases pertinent to the present discussion, certain aspects of FITR provisions have become clear.

First, if the system of investment arbitration gets more pro-State, investors as potential claimants would simply refuse to bring claims in highly costly investment cases. For the sake of balance of interests between investors and host States, a more flexible forum selection clause based on the concept of waiver should take preference over a traditional, more rigid FITR provision in investment treaties.

Second, the triple identity test and the same fundamental basis test should be jointly applied to the analysis of case-specific FITR issues. Apparently, the most tenable decision would be if both tests show the same result.

Third, it is likely, however, that in some cases application of these tests will arrive at different results, for example, the triple identity test saying that the claims are different, while the same fundamental basis test showing that the claims are essentially the same. It is always useful to verify whether a domestic claim and an international claim are investment claims by their nature.

Further, in order to have a successful FITR case, investors should have to prove more than that the parties to the domestic proceedings and the parties to investor-State arbitration are different. A mere lack of identity of the parties may be insufficient for a positive finding on jurisdiction in this case. The investors must prove that the object and the cause of action of these claims are substantially different and that the claims as such are substantially different.

Additionally, while the triple identity test with all its formalism has clear criteria, the same fundamental basis test needs clarification. Apparently, the fundamental basis should include both the factual and legal/normative bases for the claims to be essentially the same. The same underlying facts do not seem to suffice for a conclusion that the basis of claims is fundamentally the same. It is not unusual for the same facts to give rise to different claims.[139] The author finds it difficult to agree with an argument that the legal bases invoked in the different proceedings (violation of a treaty and violation of a contract governed by domestic law) should not be relevant for the purposes of the operation of FITR provisions due to potential "*overcompensation of claimants*".[140] As follows from many arbitral decisions, a legal/normative basis is one of the central criteria for establishing a "*sameness*" of claims which is a test for operation of FITR clauses. The risk of so-called "*overcompensation of claimants*" is a separate issue which may be resolved by courts and tribunals, for example, in the context of avoiding double recovery.

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138 *Id.* ¶ 330.

139 Pantechniki, ICSID Case No. ARB/07/21, Award, ¶ 62 (July 30, 2009) ("The same facts can give rise to different legal claims.").

140 Petsche, *supra* note 14, at 427.

Moreover, it is also advisable to verify whether the claim before an arbitral tribunal has an "*autonomous existence*" from the claim brought before a domestic court. A careful interpretation of a particular FITR clause may be useful for this purpose. For example, if an FITR clause expressly indicates that a claim in question is a claim "*brought by an investor*," there is no doubt that the claim brought by an investor has an "*autonomous existence*" from a claim brought by another person, such as a local subsidiary of the investor or other entities which act on behalf of the investor.

Lastly, relief sought in the proceedings under comparison has been argued in several cases as a distinctive feature of the claims. For example, a domestic claim is aimed at the annulment of a governmental decision, while a treaty claim, instead of this, requests solely a monetary compensation for the harm made by the breaches of the treaty, including such governmental decisions. Such difference of the relief sought is likely to be taken into account along with other features of claims.

Not only facts, normative sources and relief are of essence. The *nature of claims* is of fundamental importance. For example, a difference between an investment claim in ICSID and an administrative claim in domestic court can be clearly seen. Only the claims for protection of the investment rights under a particular investment treaty fall within the ambit of a specific FITR. If an investor or associated persons file a domestic claim having a different purpose, such a claim may not trigger the FITR mechanism.

Thus, keeping these factors in mind, it is possible that more certainty can be infused into the practice of interpretation of FITR provisions in investment treaty arbitration.