

**THE FORK IN THE ROAD REVISITED:
AN ATTEMPT TO OVERCOME
THE CLASH BETWEEN FORMALISTIC
AND PRAGMATIC APPROACHES**

MARKUS A. PETSCHÉ*

ABSTRACT

*This article revisits one of the most controversial issues of international investment law, namely the question of the effect of fork-in-the-road (FITR) clauses contained in investment treaties. It provides a comprehensive and detailed examination of the relevant arbitral case law, highlighting the co-existence of two formalistic approaches (based respectively on the distinction between treaty and contract claims and the lis pendens-related triple-identity test) with the more pragmatic fundamental-basis test established by the ICSID tribunal in *Pantechniki v. Albania* and subsequently endorsed in *H&H v. Egypt*. This contribution critically examines these two strands of case law, emphasizing both the interpretive flaws of formalistic approaches and the inherent vagueness and ambiguity of the fundamental-basis test. In an attempt to overcome the deadlock resulting from the clash between formalistic and pragmatic decisions, this article offers a functional analysis of FITR clauses, providing new insights and guidance to treaty drafters and interpreters.*

* Markus Petsche is an Associate Professor at the Department of Legal Studies of Central European University and Of Counsel with PetschePollak, Vienna. He can be contacted by email at petschem@ceu.edu.

I. INTRODUCTION	393
II. THE CONCEPT OF FITR	395
A. <i>Meaning and effect of FITR provisions</i>	395
B. <i>Types of FITR provisions</i>	397
III. ANALYSIS OF THE PROBLEM	398
A. <i>The question: Are the two disputes concerned the same?</i>	398
B. <i>Possible answers</i>	400
IV. FORMALISTIC APPROACHES	402
A. <i>Approach based on the distinction between treaty and contract claims</i>	402
B. <i>Approach based on the triple-identity test</i>	406
1. <i>The origins of the triple-identity test: the lis pendens principle</i>	406
2. <i>The first decision applying the triple-identity test: Benvenuti & Bonfant v. Congo (1980)</i>	407
3. <i>Subsequent decisions endorsing the triple-identity test</i>	408
4. <i>Decisions applying selected elements of the triple-identity test</i>	410
5. <i>Concluding observations</i>	412
V. A PRAGMATIC APPROACH: THE FUNDAMENTAL BASIS TEST	412
A. <i>The forerunner: The Vivendi v. Argentina annulment decision</i>	412
B. <i>Pantechniki v. Albania (2009)</i>	415
C. <i>H&H Enterprises Investments v. Egypt (2014)</i>	418
VI. EVALUATION OF FORMALISTIC AND PRAGMATIC APPROACHES FROM THE PERSPECTIVE OF TREATY INTERPRETATION	420
A. <i>Preliminary remarks</i>	420
B. <i>Approach based on the distinction between treaty and contract claims</i>	421
C. <i>Triple-identity test</i>	421
D. <i>Pragmatic approach</i>	422
VII. FUNCTIONAL ANALYSIS OF THE FITR	423
A. <i>The functions of FITR provisions</i>	423
B. <i>Conclusions based on functional analysis</i>	425
VIII. CONCLUSION	427

I. INTRODUCTION

Investor-state dispute resolution provisions contained in investment treaties frequently provide investors with a choice between different fora for the resolution of investment disputes. Those may include the domestic courts of the host State, contractually agreed arbitral or judicial fora, and, of course, treaty-based arbitral tribunals (these will hereinafter also be referred to as “investor-state arbitral tribunals”¹). For reasons which will be discussed in more detail below,² some investor-state dispute resolution clauses contain so-called “fork-in-the-road” (“FITR”) provisions, i.e., provisions that exclude, in one way or another, the possibility for an investor to submit one single investment dispute to more than one court or tribunal.

For many years, FITR provisions have been the sleeping beauty of international investment law. Indeed, until rather recently, arbitral tribunals invariably rejected jurisdictional objections based on FITR clauses.³ The principal reason for this constant rejection was the rather rigid or “formalistic” analysis of the question of whether the dispute brought before the investor-state arbitral tribunal and the dispute(s) submitted to another court or tribunal are the same. Virtually all tribunals have held that strict identity between the two disputes is necessary in order for a FITR provision to bar the initiation of investor-state arbitration proceedings. While some tribunals have focused on the legal bases of the claims at stake,⁴ others have applied the so-called triple-identity test (or rule), requiring identity of parties, causes of action, and relief sought.⁵

This situation changed completely when, in 2009, the sole arbitrator in *Pantechniki v. Albania*⁶ refused to follow the formalistic approach adopted in earlier decisions, opting instead for a more “pragmatic”⁷ test focusing

1 It should be noted, however, that not every investor-state arbitral tribunal is necessarily a treaty-based arbitral tribunal. In fact, investor-state tribunals may also be established under a contractual dispute resolution provision. For the purposes of this article, however, the concept of investor-state (arbitral) tribunal is understood in the narrow sense of a treaty-based arbitral tribunal.

2 See *infra* Section VII.

3 For a detailed examination of the relevant case law, see *infra* Section IV.

4 See *infra* Section IV.A.

5 See *infra* Section IV.B.

6 *Pantechniki S.A. Contractors & Eng'rs (Greece) v. Republic of Alb.*, ICSID Case No. ARB/07/21, Award (July 29, 2009), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C113/DC1133_En.pdf.

7 See Fiona Marshall, *Commentary: Pantechniki v. Albania Decision Offers Pragmatic Approach to Interpreting Fork-in-the-Road Clauses*, INT'L INST. FOR SUSTAINABLE DEV.: INV. TREATY NEWS (Sept. 2, 2009), <https://www.iisd.org/itn/2009/09/02/commentary-pantechniki-v->

on the “fundamental basis”⁸ of the claims concerned, their “normative source[s],”⁹ and the question of whether the claim brought before the investor-state arbitral tribunal has an “autonomous existence”¹⁰ from the claim submitted to the other court or arbitral tribunal. On the basis of this test, the sole arbitrator declined his jurisdiction, holding that the ICSID arbitration proceedings in which the claimant alleged violations of various treaty standards had the same fundamental basis as the breach-of-contract claim which it had brought before the Albanian courts.¹¹

Following the decision in *Pantechniki v. Albania*, three other arbitral tribunals have ruled on FITR objections to jurisdiction. While the tribunals in *Toto Costruzioni Generali v. Lebanon*¹² and *Total v. Argentina*¹³ followed the traditional formalistic approach,¹⁴ the tribunal in *H&H Enterprises Investments v. Egypt*¹⁵ adopted the test established in *Pantechniki*.¹⁶ *Pantechniki* thus cannot be regarded as an isolated incident. Rather, one has to conclude that two contrasting approaches currently co-exist as regards the requirements for the application of FITR clauses.

The fundamental contrast between these two types of rulings has not received a great deal of attention in the international investment law literature. The most compelling post-*Pantechniki* discussion of FITR provisions is a 2010 publication authored by Wegen and Markert.¹⁷ These authors have welcomed the more pragmatic approach inherent to the *Pantechniki* and *H&H* rulings.¹⁸ However, they have also (and rightly so) pointed out that the fundamental-basis test is vague and that it does not

albania-decision-offers-pragmatic-approach-to-interpreting-fork-in-the-road-clauses/.

8 See *Pantechniki*, ICSID Case No. ARB/07/21, Award, ¶ 61.

9 *Id.* ¶ 62.

10 *Id.* ¶ 64.

11 *Id.* ¶ 67.

12 *Toto Costruzioni Generali S.P.A. v. Republic of Leb.*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (Sept. 11, 2009), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C104/DC1191_En.pdf.

13 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (Dec. 27, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C30/DC7833_En.pdf.

14 *Toto Costruzioni*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 203; *Total S.A.*, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 443.

15 *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award (May 6, 2014), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C720/DC9652_En.pdf.

16 *Id.* ¶¶ 368-70.

17 Gerhard Wegen & Lars Markert, *Investment Arbitration – Food for Thought on Fork-in-the-Road – A Clause Awakens from Its Hibernation*, in *AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION* 269, 270 (C. Klausegger et. al. ed., 2010).

18 *Id.* at 277 (observing that “[t]he overall approach regarding the scope of fork-in-the-road clauses in the *Pantechniki v. Albania* award is convincing and the proposed solution points down the right road”).

therefore ensure a high degree of legal certainty and predictability.¹⁹ They have put forward interesting alternative solutions, primarily in the form of revisions of, and improvements to, the traditional triple-identity test.²⁰

This article seeks to take this analysis one step further. It examines formalistic and pragmatic approaches to the FITR issue, offering a detailed analysis of the relevant case law. It evaluates these conflicting views, both from an interpretive and from a normative point of view, and seeks to overcome the present clash between formalism and pragmatism by means of a functional analysis, i.e., an analysis based on the function or functions performed by FITR provisions. On the basis of this analysis, this article aims to identify solutions that are conducive to the effective performance of those functions.

This contribution is divided into six main sections (Sections II to VII). Section II discusses the meaning and effects of FITR clauses and reviews the different types of FITR provisions found in investment treaties. Section III analyzes the terms of the FITR problem and provides an overview of possible solutions. Sections IV and V respectively explore two sets of arbitral rulings: those that follow a formalistic approach and those, more recent ones, which adopt a more pragmatic stance. Section VI evaluates each of these approaches from the perspective of treaty interpretation. Section VII offers a functional analysis of the FITR problem.

II. THE CONCEPT OF FITR

A. *Meaning and effect of FITR provisions*

As has already been explained, FITR provisions are clauses that prohibit an investor from submitting an investment dispute to a particular court or tribunal if he has previously seized another court or tribunal of the same dispute. FITR provisions thus have a *preclusive* effect and deprive the second court or tribunal seized of its jurisdiction over the relevant dispute. When an investor opts for a particular dispute settlement mechanism available under an investment treaty, he is considered to have “taken the fork in the road,” with—in principle—no possibility of subsequently choosing a different path.

In practice, as is easily understood, FITR provisions are usually relied

19 *Id.* at 282 (noting that “the criterion ‘fundamental basis’ remains so vague that it hardly enhances legal certainty for investors”).

20 *Id.* at 283-91.

upon to challenge the jurisdiction of investor-state arbitral tribunals, rather than to object to the jurisdiction of a domestic court or contract-based arbitral tribunal.²¹ In a typical scenario, the respondent state argues that initiation by the investor (or by an entity owned or controlled by the investor) of domestic court proceedings or of contractually agreed arbitration proceedings precludes recourse to investor-state arbitration.

While the preclusive effect of FITR clauses is uncontroversial, the exact scope of this effect may raise interpretive questions. One such question relates to the effect of the discontinuance of the first proceeding by the investor. If, for example, an investor brings proceedings before the domestic courts of the host state and subsequently withdraws his claim, does this mean that the FITR clause no longer prevents him from initiating investor-state arbitration proceedings? Although there appears to be no case law on this particular point, a literal interpretation of typical FITR provisions would suggest that the discontinuance of the first proceeding does not have the effect of resurrecting the right to initiate investor-state arbitration proceedings.²²

Another question that may arise concerns so-called unilateral FITR provisions, i.e., provisions that only provide for the preclusive effect that the commencement of court or other proceedings has on the ability of the investor to resort to investor-state arbitration, without expressly dealing with the reverse scenario (i.e., the preclusive effect of the initiation of investor-state arbitration proceedings). Should such FITR clauses be interpreted—by analogy or extension—as preventing litigation or contract-based arbitration once the relevant dispute has been submitted to an investor-state arbitral tribunal? Similar to the issue discussed in the preceding paragraph, this question does not seem to have been decided by any court or arbitral tribunal. Under a literal interpretation of the clauses concerned, however, a negative answer (i.e., a solution precluding reasoning by analogy or extension) would appear to be justified.

21 There appears to be no reported case in which a state or state agency challenged the jurisdiction of a domestic court or contract-based arbitral tribunal on the basis of a FITR provision contained in an investment treaty. This may be due to several reasons. One likely reason is that domestic courts and contract-based arbitral tribunals may not be, or perceive themselves as being, bound by FITR provisions contained in investment treaties. Another reason has to do with the fact that, in practice, investor-state arbitration proceedings are typically initiated *after* the commencement of domestic court proceedings or contractually agreed arbitration proceedings. The invocation of the FITR provision before domestic courts or contract-based arbitral tribunals is thus often chronologically excluded.

22 See *infra* Section II.B. Under the two principal types of FITR clauses, the loss of the right to initiate investor-state arbitration proceedings appears to be irrevocable.

B. Types of FITR provisions

Treaty practice suggests that there are three main types of FITR provisions. First of all, there are clauses that provide that investors may only resort to investor-state arbitration if they have not previously submitted the dispute to another court or tribunal. The US-Argentina Bilateral Investment Treaty (“BIT”)²³ for example, allows investors to bring disputes before an investor-state arbitral tribunal, provided that the investor “has not submitted the dispute for resolution under paragraph 2(a) or (b) [of Art. VII of the treaty],”²⁴ which provide for the submission of investment disputes “to the courts or administrative tribunals” of the host State or “in accordance with any applicable, previously agreed dispute settlement procedures.”²⁵ A number of other BITs concluded by the United States, including, for example, those entered into with Estonia,²⁶ the Czech Republic²⁷ and Egypt,²⁸ contain similar FITR clauses.²⁹

Secondly, there are clauses that provide investors with a choice between several dispute settlement mechanisms, specifying that once the investor has made a choice, the choice is final. In such clauses, which can notably be found in the France-Argentina,³⁰ Chile-Spain,³¹ and Lebanon-Italy³² BITs, the preclusive effect of the relevant clauses derives from the reference to the finality (or irrevocability) of the investor’s choice.

Lastly, there are treaty provisions that may be regarded as implied FITR clauses. Similarly to the provisions referred to in the previous paragraph, these clauses offer investors a choice between several dispute

23 Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993) [hereinafter U.S.-Argentina BIT].

24 *Id.* art. VII(3)(a).

25 *Id.* art. VII(2)(a) and (b).

26 Treaty for the Encouragement and Reciprocal Protection of Investment, U.S.-Est., Apr. 19, 1994, S. TREATY DOC. NO. 103-38 (1994) [hereinafter U.S.-Estonia BIT].

27 Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Czechoslovakia, Oct. 22, 1991, S. TREATY DOC. NO. 102-31 (1992) [hereinafter U.S.-Czechoslovakia BIT].

28 Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Egypt, Mar. 11, 1986, S. TREATY DOC. NO. 99-24 (1988) [hereinafter U.S.-Egypt BIT].

29 U.S.-Estonia BIT, *supra* note 26, art. VI(3)(a); U.S.-Czechoslovakia BIT, *supra* note 27, art. VI(3)(a)(i); U.S.-Egypt BIT, *supra* note 28, art. VII(3)(a)(ii) and (iii).

30 *See* Agreement on the Reciprocal Promotion and Protection of Investments, Fr.-Arg., art. 8(2), July 3, 1991, 1728 U.N.T.S. 297.

31 *See* Agreement on the Reciprocal Protection and Promotion of Investments, Spain-Chile, Oct. 2, 1991, 1774 U.N.T.S. 24.

32 *See* Agreement on the Promotion and Reciprocal Protection of Investments, Leb.-It., Nov. 7, 1997, <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/2090>.

settlement mechanisms, without, however, stating that the choice made by the investor is final.³³ In light of the absence of any reference to the “finality” of the investor’s choice, it is debatable whether such clauses are properly regarded as FITR provisions.³⁴ However, considering that they require investors to choose *one* particular dispute settlement mechanism, it can indeed be argued that, by implication, the non-chosen options are no longer available once the investor has made his choice. At least one arbitral tribunal has endorsed such an approach.³⁵

III. ANALYSIS OF THE PROBLEM

A. *The question: Are the two disputes concerned the same?*

Jurisdictional objections based on FITR provisions pose one simple question: Is the dispute brought before a domestic court and/or contract-based arbitral tribunal the same as the dispute brought before the investor-state arbitral tribunal?

In practice, virtually all arbitral tribunals hearing FITR-based jurisdictional objections have, directly or indirectly, taken the view that “sameness” is the decisive question. The only apparent exception is the decision in *Middle East Cement v. Egypt*,³⁶ in which the tribunal adopted a slightly different approach. Indeed, it examined not the sameness of the disputes submitted to the Egyptian court and the International Centre for Settlement of Investment Disputes (“ICSID”) tribunal, but rather the question of whether the former dispute—in which the investor challenged the validity of an auction at which a ship owned by him was sold—could at all be qualified as an *investment dispute*.³⁷ The rationale underlying this approach is that, if the domestic dispute cannot be characterized as an

33 An example of such a clause can be found in art. 10(2) of the Albania-Greece BIT. *See* Agreement for the Encouragement and Reciprocal Protection of Investments, Alb.-Greece, Aug. 1, 1991, <http://investmentpolicyhub.unctad.org/IIA/treaty/18>.

34 The authors of a recent OECD survey take the view that such clauses do not constitute FITR provisions. *See* Joachim Pol et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 13 (OECD Working Papers on Int’l Inv., No. 2012/02, 2012), <https://doi.org/10.1787/5k8xb71nf628-en> (“About a third of the treaties [examined in the survey] do not clarify whether the initial choice made by investors is exclusive, thus suggesting that an investor could also choose both ways of dispute settlement.”).

35 *Pantechniki S.A. Contractors & Eng’rs (Greece) v. The Republic of Alb.*, ICSID Case No. ARB/07/21, Award (July 30, 2009), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C113/DC1133_En.pdf.

36 *Middle E. Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C182/DC595_En.pdf.

37 *Id.* ¶ 71.

investment dispute, then it cannot possibly be the same dispute as the investment dispute brought before ICSID. In the case at hand, the tribunal held that the domestic dispute did not constitute an investment dispute because it did not involve allegations of breaches of treaty standards,³⁸ as required under the applicable BIT.³⁹

In arbitral practice, the FITR-related question of the sameness of two disputes typically arises in either of two scenarios. In the first scenario, the investor challenges a state measure (generally an administrative decision) in the host state's domestic courts and subsequently initiates investor-state arbitration proceedings, alleging that the measure at stake violates the applicable investment treaty. In such cases, the host state will frequently rely on the treaty's FITR provision, arguing that the dispute brought before the investor-state arbitral tribunal is the same as the one that the investor previously submitted to the domestic court.

This type of scenario can be illustrated by the relevant facts of *Enron v. Argentina*.⁴⁰ In this case, the investors (Enron Corporation and Ponderosa Assets, L.P.) indirectly owned a significant portion of the shares of TGS, a major local network for the transport and distribution of gas.⁴¹ When several Argentine provinces imposed stamp taxes in connection with TGS's operations,⁴² TGS initiated proceedings in various Argentine courts, challenging the lawfulness of those tax measures.⁴³ Presumably because TGS's domestic claims had been unsuccessful, the claimants subsequently initiated investor-state arbitration proceedings under the US-Argentina BIT, arguing that the tax measures at stake were in violation of the applicable BIT, general international law, and Argentine law.⁴⁴ The relevant question in this scenario is whether the dispute brought before the investor-state arbitral tribunal is the same as the one heard by the Argentine courts.⁴⁵

In the second scenario, the investor and the host state enter into an

38 *Id.*

39 Art. 10(1) of the Egypt-Greece BIT defines investment disputes as “[d]isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement.” See Agreement for the Promotion and Reciprocal Protection of Investments, Egypt-Greece, July 16, 1993, 95 U.N.X.X. 11, <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/1349>.

40 *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Jan. 14, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0290.pdf>.

41 *Id.* ¶ 21.

42 *Id.* ¶ 25.

43 *Id.* ¶ 95.

44 *Id.* ¶ 25.

45 For the decision of the tribunal in *Enron v. Argentina*, see *infra* Section IV.A.

investment contract, and when a dispute arises in connection with that contract (for example, in relation to the host state's payment obligations or its decision to terminate the contract), the investor initiates court or arbitration proceedings in accordance with the contractual forum-selection or arbitration clause. The investor's claim in the contractual forum is unsuccessful (or, alternatively, no final decision is obtained during a prolonged time period) and the investor thus decides to initiate investor-state arbitration proceedings, generally claiming that the host state's alleged breach of contract amounts to a violation of one or several treaty standards.

A useful illustration for this scenario is provided by the facts of *Toto Costruzioni v. Lebanon*.⁴⁶ In this case, the claimant and Lebanon had entered into a contract for the construction of a portion of a highway.⁴⁷ A dispute arose between the parties when Lebanon refused to compensate the claimant for various additional costs allegedly incurred in connection with its performance under the contract,⁴⁸ and the claimant ultimately filed two breach-of-contract claims in the competent administrative court (the *Conseil d'Etat*).⁴⁹ Subsequently,⁵⁰ the investor initiated ICSID arbitration proceedings under the Italy-Lebanon BIT, arguing that Lebanon's conduct was in violation of several applicable treaty standards.⁵¹ The question in this scenario is, once more, whether this dispute is the same as the one(s) brought before the *Conseil d'Etat*.⁵²

B. Possible answers

When attempting to determine a suitable answer to the question of when two disputes can be regarded as the same for the purposes of the FITR problem, it is useful to start with an analysis of the key concept, i.e., the concept of dispute. Black's Law Dictionary defines the concept of dispute as a "conflict or controversy, esp. one that has given rise to a particular lawsuit."⁵³ In the specific context of public international law, the Permanent Court of International Justice ("PCIJ") famously defined

46 *Toto Costruzioni Generali S.P.A. v. Leb.*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (Sept. 11, 2009), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C104/DC1191_En.pdf.

47 *Id.* ¶ 16.

48 *Id.* ¶ 19.

49 *Id.* ¶ 20.

50 The outcome of the local proceedings is not discussed in the tribunal's decision.

51 *Toto Costruzioni*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 25.

52 For the decision of the arbitral tribunal, see *infra* Section IV.B(2).

53 *Dispute*, BLACK'S LAW DICTIONARY (9th ed. 2009).

the concept of dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”⁵⁴ A similar definition has been adopted by the ICJ in its advisory opinion in the *Peace Treaties* case⁵⁵ in which the Court ruled that a dispute had arisen between the parties concerned given that they “h[e]ld clearly opposite views” concerning certain treaty obligations.⁵⁶

Such general definitions of the notion of dispute are not particularly helpful for present purposes. First of all, these definitions merely explain what a (legal) dispute is, without offering any guidance as to the determination of whether two disputes brought before different courts or tribunals can be considered as the same. Also, as regards the PCIJ, its definition was adopted in the context of the Court’s examination of a particular jurisdictional requirement, namely the *existence* of a dispute,⁵⁷ which is a problem quite different from the one this article is concerned with (the sameness of two disputes).

For the purposes of the FITR problem, it is thus more appropriate to focus on the particular characteristics that define a dispute (and, presumably, distinguish it from other disputes). While the specific terminology may vary from one legal system to another, it is uncontroversial that a dispute is characterized by four primary features: (1) the particular parties to the dispute, (2) the relief or reliefs requested by the parties, (3) the factual bases upon which the parties’ requests rely, and (4) the relevant legal basis or bases, i.e., the legal provisions and authorities that the parties invoke in support of their respective claims.

Identifying the characteristic features of the notion of dispute is not, however, sufficient to provide an answer to the “sameness” question. In fact, it can be asked whether sameness requires identity of *all* relevant features or whether identity of some of these characteristics (and if so, of which ones) is sufficient. And if identity of a particular feature is required, what exactly does identity mean? What degree of identity must be present? Where, for example, a claimant brings two otherwise identical breach-of-

54 *Mavrommatis Palestine Concessions*, Collection of Judgments, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30). For commentary on the concept of dispute in the field of public international law, see Christoph Schreuer, *What is a Legal Dispute?*, in *INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION* 959 (Isabelle Buffard et al. eds, 2008).

55 *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania*, Advisory Opinion, 1950 I.C.J. 65. (Mar. 30).

56 *Id.* at 74.

57 *See Mavrommatis Palestine Concessions*, 1924 P.C.I.J. at 11. The specific question before the Court was whether a dispute existed under Article 26 of the Mandate for Palestine conferred upon the British monarch.

contract claims before two different courts, does asking for different amounts of compensation cause the two disputes not to be the same? Similar questions may be asked in connection with other characteristic features.

As has already been mentioned, arbitral practice has shown a strong preference for a formalistic approach requiring strict identity of some or all relevant features. Another approach, which rejects formalistic rules and which can be labeled as “pragmatic,” applies a less demanding, more flexible threshold. The following two sections provide a detailed analysis of the relevant case law.

IV. FORMALISTIC APPROACHES

A. *Approach based on the distinction between treaty and contract claims*

The distinction between treaty⁵⁸ and contract claims⁵⁹ is a fundamental distinction of international investment law.⁶⁰ It is of primary importance for the question of whether contractual forum-selection (or arbitration) clauses prevent treaty-based investor-state arbitral tribunals from hearing claims alleging treaty breaches where those alleged breaches are related to the underlying investment contract (and/or may be constitutive of contractual breaches). The generally accepted answer to this question is that, since contract and treaty claims are different, contractual forum-selection (or arbitration) clauses have no impact on the ability of treaty-based arbitral tribunals to hear claims alleging treaty breaches.⁶¹ As will be shown below, the distinction between treaty and contract claims is also relevant in the context of FITR decisions.

There are at least four FITR rulings in which investor-state arbitral tribunals have expressly relied on, or at least referred to, the distinction between treaty and contract claims. In *CMS v. Argentina*,⁶² for example,

⁵⁸ A treaty claim is a claim in which the claimant alleges that the respondent breached one or several provisions of the applicable treaty.

⁵⁹ In this particular context, a contract claim is a claim alleging a breach of the applicable investment contract.

⁶⁰ For commentary, see James Crawford, *Treaty and Contract in Investment Arbitration*, 24 *ARB. INT'L* 351 (2008).

⁶¹ See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 276 (2d ed. 2012) (noting that, according to a “consistent practice[,] the treaty-based jurisdiction of international arbitral tribunals to decide on violations of these treaties is not affected by domestic forum selection clauses in contracts”).

⁶² *CMS Gas Transmission Co. v. Republic of Arg.*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction (July 17, 2003), 7 *ICSID Rep.* 492 (2003).

CMS owned roughly thirty percent of the shares of TGN, a local Argentine company holding a license for the transportation of gas.⁶³ When a disagreement arose between the Argentine government, the gas regulator ENARGs, and TGN, the Argentine Ombudsman initiated proceedings in which TGN intervened as a third party.⁶⁴ The Argentine government, ENARGs, and TGN all appealed the decision rendered by the Argentine court. When CMS initiated ICSID arbitration proceedings under the US-Argentina BIT, Argentina argued that CMS was precluded from doing so under the treaty's FITR provision.⁶⁵

In its decision rejecting Argentina's objection, the arbitral tribunal observed that "several ICSID tribunals have held that as contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration."⁶⁶ In the case at hand, the rejection of Argentina's FITR defense was particularly unproblematic since "no submission [at all] [had] been made by CMS to local courts."⁶⁷

In *Azurix v. Argentina*,⁶⁸ ABA, a local Argentine company owned by Azurix, entered into a water and sewerage concession contract with the Province of Buenos Aires.⁶⁹ When the Province adopted a decree rescinding the concession contract, ABA brought proceedings in the local courts challenging the validity of the relevant decree.⁷⁰ Azurix subsequently initiated ICSID arbitration proceedings under the US-Argentina BIT, and Argentina invoked the treaty's FITR clause to object to the tribunal's jurisdiction.

In its decision rejecting Argentina's objection, the arbitral tribunal not only relied on the triple-identity-test,⁷¹ but also approvingly referred to the reasoning of the *CMS* tribunal and to its distinction between treaty and

63 *Id.* ¶ 19.

64 The tribunal's decision does not contain any details as regards these local proceedings. In particular, it is not known what their outcome was.

65 U.S.-Argentina BIT, *supra* note 23, art. VII(3)(a).

66 *CMS Gas Transmission Co.*, 7 ICSID Rep. 492, ¶ 80.

67 *Id.*

68 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (Dec. 8, 2003), 43 I.L.M. 262 (2004), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5/DC506_En.pdf.

69 *Id.* ¶ 22.

70 *Id.* ¶ 86.

71 *Id.* ¶ 88.

contract claims.⁷² Ultimately, the decisive consideration underlying the tribunal's decision appears to have been the fact that neither of the parties to the ICSID arbitration proceedings were parties to the proceedings in the local Argentine courts.⁷³

*Enron v. Argentina*⁷⁴ involved, as has already been explained, a dispute between TGS, a major local network for the transportation and distribution of gas partly owned by Enron,⁷⁵ and certain Argentine provinces. The provinces concerned had required TGS to pay stamp taxes on various operations,⁷⁶ and TGS brought proceedings in several Argentine courts to challenge the validity of these tax measures under Argentine law.⁷⁷ When Enron initiated ICSID arbitration proceedings under the US-Argentina BIT, Argentina objected to the tribunal's jurisdiction on the basis of the treaty's FITR provision.

In its decision, the arbitral tribunal reviewed earlier FITR cases, observing that those cases had highlighted "the difference between the violation of a contract and the violation of a treaty."⁷⁸ It therefore concluded 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."⁷⁹ The tribunal held that, since TGS had submitted claims arising under Argentine law to the local courts, Enron was not precluded from submitting treaty claims to an ICSID tribunal.⁸⁰ It should be noted that the tribunal also referred to the *lis pendens* rule,⁸¹ the requirements of which it held not to be met in the present case, notably because the claimants in the ICSID arbitration proceedings and the claimant in the local proceedings were different entities.⁸²

In *Occidental v. Ecuador*,⁸³ Occidental had undertaken the exploration and production of oil under a participation contract concluded with Petroecuador, a state-owned entity.⁸⁴ During a period of about two years,

72 *Id.* ¶ 89.

73 *Id.* ¶ 90.

74 *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Jan. 14, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0290.pdf>.

75 *Id.* ¶ 21.

76 *Id.* ¶ 25.

77 *Id.* ¶ 95.

78 *Id.* ¶ 97.

79 *Id.*

80 *Id.* ¶ 98.

81 *Id.* ¶ 97. For a discussion of this principle, see *infra* Section IV.B(1).

82 *Id.* ¶ 98.

83 *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, (London Ct. Int'l Arb. 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf>.

84 *Id.* ¶ 1.

Occidental had regularly applied and obtained the reimbursement of VAT on various purchases it made in connection with its operations. When, in 2001, the Ecuadorian tax authority adopted resolutions denying all further reimbursement applications and requiring the return of the amounts previously reimbursed,⁸⁵ Occidental filed a number of lawsuits in the Ecuadorian tax courts, challenging the validity of the relevant resolutions.⁸⁶ While those local proceedings were still pending, Occidental also initiated investor-state arbitration proceedings under the US-Ecuador BIT, alleging various breaches of this treaty.⁸⁷ Ecuador challenged the jurisdiction of the arbitral tribunal on various grounds, including on the basis of the treaty's FITR clause.

The UNICTRAL tribunal reviewed earlier decisions applying both the triple-identity test⁸⁸ and the distinction between treaty and contract claims, focusing in particular on the ruling in *CMS v. Argentina*.⁸⁹ However, it appears to have applied a more nuanced or complex rule, observing that it is necessary to take into account “the specific circumstances of the dispute”⁹⁰ and holding that a treaty-based arbitral tribunal has jurisdiction “[t]o the extent that the nature of the dispute submitted to arbitration is principally, albeit not exclusively, treaty-based.”⁹¹ On the basis of this test the tribunal rejected Ecuador's FITR defense.⁹²

The interpretive and normative merits of the decisions in *CMS v. Argentina*, *Azurix v. Argentina*, *Enron v. Argentina*, and *Occidental v. Ecuador* will be discussed below in Sections VI and VII. At this point, two comments are in order. First of all, it is interesting to note that at least three of these four cases did not involve any contract claims brought before domestic courts. *Enron* and *Occidental* involved challenges directed against administrative measures (tax impositions), while *CMS* did not involve any domestic claim filed by the investor (or any of his subsidiaries) at all. Strictly speaking, the distinction between treaty and contract claims should not, therefore, be applicable in the cases concerned.

Second, the test applied by these tribunals is far from clear. In three of these decisions, there are references to rules or concepts other than the

85 *Id.* ¶ 3.

86 *Id.* ¶ 4.

87 *Id.* ¶ 6.

88 *Id.* ¶ 52.

89 *Id.* ¶ 51.

90 *Id.* ¶ 57.

91 *Id.*

92 *Id.* ¶ 63.

distinction between contract and treaty claims. The decisions in *Azurix* and *Occidental* contain express references to the triple-identity test, and the *Enron* ruling relies on the essentially identical *lis pendens* principle. It is thus not clear what exact rule these tribunals have applied. Is it the distinction between treaty and contract claims, the triple-identity (*lis pendens*) rule, or both? The factual considerations relied upon by the tribunals in support of their decisions do not provide a conclusive answer to this question.

B. Approach based on the triple-identity test

1. The origins of the triple-identity test: the lis pendens principle

In the context of investor-state arbitration, the first decision in which an arbitral tribunal applied the triple-identity test was the decision of the ICSID tribunal in *Benvenuti & Bonfant v. Congo*.⁹³ It is important to clarify that this case did not involve any FITR-based jurisdictional objection, but an objection based on the principle of *lis pendens*. Interestingly, despite the differences in the applicable legal bases, a number of arbitral tribunals have applied the test established by the *Benvenuti & Bonfant* tribunal in the context of their FITR determinations. Since all of these cases are thus indirectly based on the principle of *lis pendens*, it is important to briefly elaborate on its meaning and, more particularly, on the requirements for its application.

Simply put, *lis pendens* is a principle that prevents a court from hearing a case that is already pending before a different court or tribunal. An insightful codification of this principle can be found in Art. 29 of the Brussels I Regulation.⁹⁴ Under this provision, a court of an EU member state is prevented from hearing a dispute whenever “proceedings involving the same cause of action and between the same parties” have already been brought before a court or tribunal of another EU member state.⁹⁵

While it is not necessary to provide a detailed analysis of the *lis pendens* principle, whether generally or with specific reference to the rule contained in the Brussels I Regulation, two observations are relevant for present purposes. First, it has to be noted that it is not entirely clear to

⁹³ *Benvenuti et Bonfant s.r.l. v. People’s Republic of the Congo*, ICSID Case No. ARB/77/2, Award (Aug. 8, 1980), 21 I.L.M. 740 (1982).

⁹⁴ Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351), art. 29 [hereinafter Brussels I Regulation].

⁹⁵ *Id.* art. 29(1).

what extent the triple-identity test applied by the *Benvenuti & Bonfant* and other investor-state arbitral tribunals matches the *lis pendens* rule, notably as laid down in the Brussels I Regulation. In fact, there appears to be some degree of inconsistency between the French and English versions of the relevant provision. While the English version suggests that the applicable requirement is *dual* identity of parties and causes of action, the French version,⁹⁶ which refers to the concepts of “object” and “cause” of the claims concerned, provides support for the view that triple identity of parties, causes of action, and relief sought is required. In fact, it is generally accepted that the term “cause” refers to the factual and legal basis of a claim, while the term “object” pertains to the relief requested or to “the ends [the parties] have in view.”⁹⁷

Second, it is important to highlight that both the European Court of Justice (“ECJ”) and the courts of the member states have interpreted the requirements of identity of parties and causes of action rather flexibly. For example, as far as the former is concerned, an English court has held that a wholly-owned subsidiary may be regarded as the same party as its parent.⁹⁸ Similarly, as regards identity of causes of action, the ECJ has adopted a particularly flexible approach in holding that a seller’s claim for the payment of the purchase price involved the same cause of action as the buyer’s request for a declaration of non-liability or contract termination.⁹⁹

2. *The first decision applying the triple-identity test: Benvenuti & Bonfant v. Congo (1980)*

In this case, Benvenuti & Bonfant entered into a contract with the Republic of Congo under which the parties agreed to establish a joint venture company (later incorporated as the PLASCO company) for the purposes of financing and commissioning the construction of a plant for the manufacture of plastic bottles.¹⁰⁰ When a dispute arose between the parties, Benvenuti & Bonfant initiated ICSID arbitration proceedings in

⁹⁶ The relevant part of art. 29(1) reads: “lorsque des demandes ayant le même objet et la même cause sont formées entre les mêmes parties.”

⁹⁷ See DICEY, MORRIS, & COLLINS, *THE CONFLICT OF LAWS* 494 (Sir Lawrence Collins et al. eds., 2006).

⁹⁸ *Berkeley Admin. Inc. v. McClelland* [1995] ILPr 201 (CA) (Eng.). It should be pointed out that this case was decided under the predecessor of the Brussels I Regulation, namely the Brussels/Lugano Convention. Also, it needs to be clarified that the issue of the identity of the parties did not arise under the applicable *lis pendens* rule but under the related *res judicata* principle.

⁹⁹ Case 144/86, *Gubisch Maschinenfabrik v. Palumbo*, 1987 E.C.R. 4871.

¹⁰⁰ *Benvenuti et Bonfant s.r.l. v. People’s Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 748 (Aug. 8, 1980), 21 I.L.M. 740 (1982).

accordance with the arbitration clause contained in the contract.¹⁰¹ The Congo raised a jurisdictional objection based on the principle of *lis pendens*, relying on the existence of proceedings which the Republic had initiated in the Revolutionary Court of Brazzaville against Mr. Bonfant in his capacity as agent of PLASCO.¹⁰²

Addressing the merits of the Republic's objection, the arbitral tribunal considered that a stay of proceedings required "identity of the parties, of the subject matter, and of the cause of the suits pending before the two tribunals."¹⁰³ On the basis of this threshold, the arbitral tribunal rejected the Congo's *lis pendens* objection, noting that the dispute before the Congolese court involved Mr. Bonfant, and not the company Benvenuti & Bonfant, claimant in the ICSID arbitration proceedings.¹⁰⁴

3. *Subsequent decisions endorsing the triple-identity test*

As has already been mentioned, a number of tribunals have based their FITR rulings on a combination of the triple-identity test and the distinction between treaty and contract claims. Indeed, references to the triple-identity test can be found in the aforementioned *Azurix*, *Enron*, and *Occidental* decisions.

In two more recent rulings arbitral tribunals have relied exclusively on the triple-identity rule, without referring to the distinction between treaty and contract claims. The first such decision is the award of the ICSID tribunal in *Pey Casado v. Chile*.¹⁰⁵ In this case, Mr. Pey Casado and the President Allende Foundation brought ICSID arbitration proceedings against the Republic of Chile under the Spain-Chile BIT, alleging various violations of that treaty. The Republic raised several jurisdictional objections, including an objection based on the FITR clause contained in the treaty. This objection was based on the initiation by the claimants of two proceedings in the Chilean courts: a claim for restitution of a specific asset confiscated by Chile, the so-called "GOSS" rotary,¹⁰⁶ and a claim for restitution of the shares of a company owned by the claimants,¹⁰⁷ which had also been confiscated by the State.¹⁰⁸

101 *Id.* at 741.

102 *Id.* at 744.

103 *Id.*

104 *Id.*

105 *Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (May 8, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0639.pdf>.

106 *Id.* ¶ 78.

107 *Id.* ¶ 77.

108 *Id.* ¶ 73.

Dealing with Chile's FITR-based jurisdictional objection, the arbitral tribunal unequivocally endorsed the triple-identity test. It held that the application of a FITR provision required that the claims brought before the domestic courts and the ICSID arbitral tribunal have the same object, are based on the same *fondement* (foundation) and involve the same parties.¹⁰⁹ Applying this test to the facts of the case, the arbitral tribunal held that the claim whereby the claimants requested the restitution of the rotary Goss had expressly been excluded from the scope of the ICSID arbitration proceedings¹¹⁰ and that, therefore, this claim did not involve the same cause of action as the ICSID arbitration proceedings.¹¹¹ Interestingly, though, the arbitral tribunal did not directly address the question of whether the initiation of the proceedings related to the allegedly confiscated company shares could be considered as a choice under the treaty's FITR provision.

Another case in which an arbitral tribunal exclusively applied the triple-identity rule is the aforementioned decision in *Toto Costruzioni v. Lebanon*.¹¹² As has already been explained, this case involved a dispute between an Italian contractor and the Lebanese Republic arising in connection with a contract for the construction of a segment of the highway linking Beirut and Damascus.¹¹³ *Toto Costruzioni* brought two breach-of-contract claims in the local administrative courts, claiming compensation for various additional costs incurred in connection with the performance of its work.¹¹⁴ It subsequently also initiated ICSID arbitration proceedings, arguing that the Lebanon's refusal to pay the amounts concerned constituted a violation of several treaty standards.¹¹⁵

Addressing the respondent's FITR objection, the arbitral tribunal held that it would only lack jurisdiction if "a claim with the same object, parties and cause of action (had) already (been) brought before a different judicial forum."¹¹⁶ In the case before it, the ICSID claim involved allegations of treaty breaches, while the claim brought before the Lebanese courts was based on the contract (and presumably Lebanese law as the governing

109 *Id.* ¶ 483.

110 *Id.* ¶ 487-88.

111 *Id.* ¶ 491.

112 *Toto Costruzioni Generali S.P.A. v. The Republic of Leb.*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (Sept. 11, 2009), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C104/DC1191_En.pdf.

113 *Id.* ¶ 16.

114 *Id.* ¶ 20.

115 *Id.* ¶ 25.

116 *Id.* ¶ 211.

law). The tribunal thus dismissed the Lebanon's FITR objection.¹¹⁷

4. *Decisions applying selected elements of the triple-identity test*

In a number of cases arbitral tribunals have failed to specify what FITR rule they chose to apply. Instead, they have simply stated the reasons for their rejection of the FITR-based jurisdictional objections raised by the respondents. Those reasons were almost always related to one or two of the criteria applied under the triple-identity test. However, absent an express recognition of this test, the legal significance of these decisions remains somewhat unclear.

Lack of identity of the parties appears to have been a relevant factor for the decisions in *Olguín v. Paraguay*,¹¹⁸ *Lauder v. Czech Republic*,¹¹⁹ *LG&E v. Argentina*,¹²⁰ *Pan American v. Argentina*,¹²¹ and *Total v. Argentina*.¹²² In *Lauder*, *LG&E*, and *Total*, the claimants in the domestic court/contractual arbitration proceedings were separate legal entities from the claimants in the investor-state arbitration proceedings, wholly or partly owned by the latter.¹²³ In *Olguín* and *Pan American*, there was a lack of identity of the respondents in the relevant disputes. In *Olguín*, the claimant had purchased bonds from a finance company, the payment of which was allegedly guaranteed by the Paraguayan government. The domestic proceedings in this case were brought against the finance company (*Olguín* sought a decision declaring the company bankrupt), and not against Paraguay.¹²⁴ Similarly, in *Pan American*, the domestic

¹¹⁷ *Id.* ¶ 212.

¹¹⁸ *Olguín v. Republic of Para.*, ICSID Case No. ARB/98/5, Decision on Jurisdiction (Aug. 8, 2000), 18 ICSID Rev. 133 (2003), 6 ICSID Rep. 156 (2004), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C171/DC574_Sp.pdf.

¹¹⁹ *Lauder v. Czech Republic*, UNCITRAL Award (Sept. 3 2001), 9 ICSID Rep. 66 (2002), <https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf>.

¹²⁰ *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction (Apr. 30, 2004), 21 ICSID Rev. 155 (2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C208/DC626_En.pdf.

¹²¹ *BP America Prod. Co. v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections (July 27, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0097.pdf>.

¹²² *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (Dec. 27, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C30/DC7833_En.pdf.

¹²³ *Lauder*, 9 ICSID Rep. 66, ¶ 143 (providing an overview of the court and arbitration proceedings initiated by entities owned, in whole or in part, by Mr. Lauder); *LG&E Energy Corp.*, 21 ICSID Rev. 155, ¶ 75 (explaining that it was the licensees and not the claimants in the ICSID proceedings that seized the Argentine courts of various disputes); *Total S.A.*, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 443.

¹²⁴ *Olguín v. Republic of Para.*, ICSID Case No. ARB/98/5, Decision on Jurisdiction (Aug. 8, 2000), 18 ICSID Rev. 133 (2003), 6 ICSID Rep. 156 (2004),

proceedings were initiated by one of the claimants against a third party that owned a piece of land on which the claimants conducted some of their oil and gas extraction operations, and not against Argentina.¹²⁵

In three of the five decisions mentioned above, the lack of either identical causes of action or identical legal bases was a decisive factor. In *Lauder* and *Total*, the tribunals based their decisions at least in part on the absence of identical legal bases. In *Lauder*, none of the judicial and arbitral proceedings initiated by corporations directly or indirectly owned by Mr. Lauder involved allegations of breaches of the BIT between the U.S. and the Czech Republic,¹²⁶ which was the legal basis of the dispute submitted to the arbitral tribunal. In *Total*, the challenge of the relevant tax measures in the Argentine courts was based on domestic Argentine law and not on the BIT between France and Argentina, which served as the legal basis for Total's ICSID claim.¹²⁷ In *Pan American*, the tribunal rejected the respondent's FITR-based objection at least in part on the grounds that there was no identity between the causes of action of the disputes concerned.¹²⁸

One arbitral tribunal, namely the tribunal in *Olguín v. Paraguay*, attached importance to the fact that the relief requested in the two proceedings was not the same. In the case before the tribunal, the respondent alleged that the claimant had initiated proceedings in the Paraguayan courts, seeking an order declaring the bankruptcy of the finance company whose obligations were allegedly guaranteed by Paraguay. As has been explained above, the lack of identical respondents in these two cases was one reason for the tribunal to reject Paraguay's FITR argument. Another reason was that the relief requested by the claimant in the domestic proceedings was not identical to the relief sought in the ICSID arbitration proceedings. The tribunal noted in this respect that the claimant had not commenced proceedings in the local courts "in order to collect [the] payment . . . which he is seeking to collect in the present arbitration case."¹²⁹

Finally, at least one decision refers to the requirement that the relevant legal *issues* in the two disputes must be identical. Such a reference can be

http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C171/DC574_Sp.pdf.

125 *BP America*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, ¶¶ 154-57.

126 *Lauder*, 9 ICSID Rep. 66, ¶¶ 163-65.

127 *Total S.A.*, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 443.

128 *BP America*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, ¶ 157.

129 *Olguín*, 6 ICSID Rep. 156, ¶ 30.

found in *Genin v. Estonia*.¹³⁰ In this case, EIB, a company owned by Mr. Genin and one of the claimants in the ICSID arbitration proceedings, purchased a branch of the state-owned Social Bank.¹³¹ Various difficulties arose in connection with this transaction, and EIB ultimately brought two separate proceedings in the Estonian courts: a breach-of-contract claim against Social Bank¹³² and administrative proceedings challenging the revocation of EIB's banking license.¹³³ In its decision rejecting Estonia's FITR defense, the arbitral tribunal notably relied on the fact that the ICSID arbitration proceedings and the disputes submitted to the Estonian courts did not involve the same issues.¹³⁴

5. *Concluding observations*

Three observations can be made to conclude this discussion of the triple-identity test. First of all, as has been explained, it is interesting to see that the triple-identity approach is not based on an interpretation of the FITR provisions. It has found its way into the FITR case law almost by accident, namely via a decision based on the principle of *lis pendens*. Second, only a few tribunals have expressly and exclusively referred to the triple-identity test, with a significant number of decisions referring to a combination of rules or fragments of the triple-identity test. Third, and lastly, arbitral tribunals applying the triple-identity test in the context of FITR rulings seem to have followed a much stricter and more formalistic approach than courts applying the *lis pendens* principle.

V. A PRAGMATIC APPROACH: THE FUNDAMENTAL BASIS TEST

A. *The forerunner: The Vivendi v. Argentina annulment decision*

*Vivendi v. Argentina*¹³⁵ did not (and could not) involve any FITR-based jurisdictional objection given that the claimants in the ICSID arbitration

¹³⁰ *Genin v. Republic of Est.*, ICSID Case No. ARB/99/2, Award (June 25, 2001), 17 ICSID Rev. 395 (2002),

http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C178/DC592_En.pdf.

¹³¹ *Id.* ¶¶ 43-44.

¹³² *Id.* ¶ 47.

¹³³ *Id.* ¶ 58.

¹³⁴ *Id.* ¶¶ 331-32.

¹³⁵ *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 [hereinafter *Vivendi*], Award (Nov. 21, 2000), 16 ICSID Rev. 641 (2001), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C159/DC548_En.pdf; *Vivendi*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002), 6 ICSID Rep. 340 (2004), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C159/DC552_En.pdf.

proceedings did not initiate any other proceedings prior to referring the case to ICSID. However, for reasons which will be explained below, both the ICSID arbitral tribunal and the ad hoc committee hearing the claimants' annulment claim ruled on the potential applicability of the FITR provision contained in the applicable treaty, the BIT between France and Argentina.¹³⁶ While the ruling of the arbitral tribunal endorses a formalistic approach to FITR clauses, the decision of the ad hoc committee expressly rejects such formalism, thus paving the way for the more pragmatic decisions rendered subsequently.

In this case, the claimants had entered into a water and sewage concession contract with the Argentine province of Tucuman.¹³⁷ Various disagreements arose in connection with the performance of this contract and the claimants ultimately commenced ICSID arbitration proceedings. They submitted two types of claims to the ICSID tribunal: (1) the "federal claims" in which the investors argued that certain conduct of the federal government amounted to breaches of the applicable BIT, and (2) the "Tucuman claims" that involved allegations of treaty breaches perpetrated by the province of Tucuman, arguably attributable to the Argentine Republic.

Argentina objected to the tribunal's jurisdiction, principally on the grounds that the dispute was a contractual dispute over which the courts of Tucuman had exclusive jurisdiction under the forum-selection clause contained in the contract.¹³⁸ The arbitral tribunal rejected this jurisdictional objection, holding that the forum-selection clause did not constitute a waiver on the part of the investors to bring treaty claims before an ICSID arbitral tribunal.¹³⁹ It thus endorsed the - at that point in time relatively novel - distinction between treaty and contract claims. On the merits, the arbitral tribunal rejected the federal claims.¹⁴⁰ As far as the Tucuman claims were concerned, the tribunal somewhat surprisingly—and in apparent contradiction with its jurisdictional holding—declined to examine them, stating that those claims should be heard by the competent administrative courts of Tucuman, and that an ICSID tribunal could only hear the relevant claims in the event that the claimants "have been denied their rights, either procedurally or substantively."¹⁴¹

136 France-Argentina BIT, *supra* note 30, art. 8(2).

137 *Vivendi*, 16 ICSID Rev. 641, Award, ¶ 25.

138 *Id.* ¶ 47.

139 *Id.* ¶ 53.

140 *Id.* ¶ 92.

141 *Id.* ¶ 78.

As far as the BIT's FITR provision was concerned, it was relied upon not by the respondent, but by the claimants in the context of their response to Argentina's jurisdictional objection. Specifically, the claimants explained that the reason for not submitting the dispute to the administrative courts of Tucuman was that the initiation of such proceedings would have triggered the FITR under Art. 8(2) of the France-Argentina BIT.¹⁴² The arbitral tribunal disagreed with the claimants' viewpoint, observing that "a suit by Claimants against Tucuman in the administrative courts of Tucuman . . . would not have foreclosed Claimant[s] from subsequently seeking a remedy against the Argentine Republic as provided in the BIT and ICSID Convention."¹⁴³ The tribunal based this conclusion on its analysis of the effect of the contract's forum-selection clause and the distinction between treaty and contract claims.

The claimants subsequently brought annulment proceedings, challenging the tribunal's decision not to examine the merits of the Tucuman claims. The ad hoc committee held that such refusal constituted a manifest excess of powers,¹⁴⁴ basing its finding in part on its disagreement with the tribunal's analysis of the FITR issue. In fact, the committee took the view that by initiating ICSID arbitration proceedings, the investors had "taken the 'fork in the road' under Article 8(4) [sic],"¹⁴⁵ and assumed the risk of "a tribunal holding that the acts complained of neither individually nor collectively rose to the level of a breach of the BIT."¹⁴⁶ It further observed that, "[i]n that event, [the investors] would have lost both [their] treaty claim and [their] contract claim."¹⁴⁷

It is not entirely clear what the rationale underlying the ad hoc committee's decision was, nor what specific FITR test the ad hoc committee believed appropriate. Indeed, in the paragraph immediately preceding its FITR conclusion, it examined an entirely different question, namely the obligation of the tribunal to decide the merits of the Tucuman claims. However, the ad hoc committee's reasoning becomes apparent when one studies its analysis of the scope of the treaty's investor-state dispute resolution provision. In light of the language of this clause (and, more specifically, the use of the broad expression "disputes related to investments"), the committee took the view that a breach-of-contract claim such as the one that the investors could have brought against Tucuman

142 *Id.* ¶ 42.

143 *Id.* ¶ 55.

144 *Vivendi*, 6 ICSID Rep. 340, Decision on Annulment.

145 *Id.* ¶ 113.

146 *Id.*

147 *Id.*

under the concession contract would fall within the scope of the treaty's dispute resolution provision.¹⁴⁸ It concluded that the initiation of such proceedings would prima facie constitute a choice of forum under the BIT's FITR clause.¹⁴⁹

*B. Pantechniki v. Albania*¹⁵⁰ (2009)

In this case, Pantechniki and the General Road Directorate of Albania entered into two contracts for works on bridges and roads.¹⁵¹ Riots broke out in Albania and led to the almost full destruction of Pantechniki's work site.¹⁵² Pantechniki claimed compensation for these losses,¹⁵³ relying on a clause in the contracts (the "Employer's Risk Clause") which allocated the relevant risks to the Directorate.¹⁵⁴ Following Pantechniki's request, a special commission established by the Directorate evaluated the losses sustained by Pantechniki, arriving at a figure significantly below the amount claimed by the investor. Pantechniki nevertheless expressed its willingness to accept this amount.¹⁵⁵ Writing to the Minister of Public Works, the Directorate recommended that the Minister make the necessary payment.¹⁵⁶ A few months later, the Minister of Public Works invited the Minister of Finance to make the necessary payment, citing budgetary obstacles.¹⁵⁷

Despite the apparent willingness of the two Ministers to compensate Pantechniki for its losses, no payment was ever made. According to Pantechniki, the Albanian Finance Minister recommended initiating proceedings in the Albanian courts in order to facilitate the relevant disbursement.¹⁵⁸ Pantechniki commenced proceedings in the district court of Tirana, arguing that the two letters mentioned above constituted, or at least evidenced, a settlement agreement which the Directorate and the Ministry of Public Works failed to honor (Pantechniki apparently did not

148 *Id.* ¶ 55.

149 *Id.*

150 *Pantechniki S.A. Contractors & Eng'rs (Greece) v. Republic of Alb.*, ICSID Case No. ARB/07/21, Award (July 29, 2009), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C113/DC1133_En.pdf.

151 *Id.* ¶ 12.

152 *Id.* ¶ 13.

153 *Id.* ¶ 14.

154 *Id.* ¶ 63 n.3.

155 *Id.* ¶ 15.

156 *Id.* ¶ 16.

157 *Id.* ¶ 17.

158 *Id.* ¶ 56.

argue a breach of the underlying road works contracts).¹⁵⁹ The district court denied Pantechniki's request on the grounds that the Employer's Risk Clause was void under Albanian law insofar as it created liability without fault.¹⁶⁰ This decision was affirmed by the court of appeal.¹⁶¹ Pantechniki appealed from the decision of the latter court but subsequently decided to discontinue those proceedings, claiming that it believed it would not be treated fairly in the proceedings before the supreme court.¹⁶²

Not having obtained a favorable judgment in the Albanian courts, Pantechniki chose to initiate ICSID arbitration proceedings under the Albania-Greece BIT. In those proceedings, the investor alleged that Albania's conduct violated various treaty standards and constituted a denial of justice.¹⁶³ The respondent challenged the jurisdiction of the arbitral tribunal on several grounds, including on the basis of the treaty's FITR provision.

Relying on two precedents, namely the *Woodruff* case decided by the American-Venezuelan Commission in 1903¹⁶⁴ and the annulment decision in *Vivendi v. Argentina* discussed above, the sole arbitrator held that the relevant test was whether "the fundamental basis of the claim" brought before the investor-state arbitral tribunal was "autonomous of claims to be heard elsewhere."¹⁶⁵ Elaborating further on the relevant test, he noted that it was "necessary . . . to determine whether [the] claimed entitlements have the same normative source."¹⁶⁶ Elsewhere, the sole arbitrator referred to the need to "determine whether the [ICSID] claim truly does have an autonomous existence outside the contract."¹⁶⁷

Applying this test to the facts of the case submitted to him, the sole arbitrator first examined the nature of the claim submitted to the Albanian courts. Unsurprisingly, he held that this claim was of contractual nature, emphasizing the fact that it was treated as such by those courts.¹⁶⁸ He further observed that if the claimant's claim in the Albanian courts had been successful, the claimant would have been granted the same relief that it requested in the ICSID arbitration proceedings, and, what is more, on

159 *Id.* ¶ 21.

160 *Id.* ¶ 3.

161 *Id.*

162 *Id.*

163 *Id.* ¶ 28.

164 *Woodruff Case*, 9 R.I.A.A. 213, 223 (1903).

165 *Pantechniki*, ICSID Case No. ARB/07/21, Award, ¶ 61.

166 *Id.* ¶ 62.

167 *Id.* ¶ 64.

168 *Id.* ¶ 66.

the same fundamental basis.¹⁶⁹ He concluded that under those circumstances *Pantechniki* was not entitled to have its claim heard by an ICSID tribunal.¹⁷⁰

The merits of the *Pantechniki* decision and other decisions adopting a similar approach will be discussed in some detail below in Sections VI and VII. Three comments are nevertheless called for at this stage of the analysis.

First, it has to be noted that the sole arbitrator presented his FITR ruling as being in line with well-established case law, observing that the applicability of the fundamental-basis test was “common ground”¹⁷¹ and that this test “has been confirmed and applied in many subsequent cases.”¹⁷² This is of course not true. As has been explained, the predominant and largely unchallenged approaches followed in earlier decisions are the triple-identity test and the approach based on the distinction between treaty and contract claims. The award in *Pantechniki* must be regarded as marking a significant departure from these earlier rulings.

Second, the sole arbitrator’s reliance on the *Vivendi v. Argentina* annulment decision is misconceived. In his award, the sole arbitrator claims that the fundamental-basis test was “revitalised”¹⁷³ in this decision, suggesting that the ad hoc committee considered this test to be relevant for the purposes of making FITR determinations. In reality, the ad hoc committee relied on this test in order to establish that the arbitral tribunal, once it had affirmed its jurisdiction over the Tucuman claims, had a duty to rule on the merits of those claims. The committee pointed out that where the fundamental basis of a claim is a treaty standard, the existence of a forum-selection clause cannot “operate as a bar to the application of the treaty standard.”¹⁷⁴ It concluded that an ICSID tribunal hearing a treaty claim could not decline to hear such a claim on the grounds that this claim “could or should have been dealt with by a national court” having jurisdiction under a contractual forum-selection clause.¹⁷⁵ It is thus clear that the ad hoc committee did not refer to the fundamental basis test in the

169 *Id.* ¶ 67.

170 *Id.*

171 *Id.* ¶ 61.

172 *Id.*

173 *Id.*

174 *Vivendi*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 101 (July 3, 2002), 6 ICSID Rep. 340 (2004),

http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C159/DC552_En.pdf.

175 *Id.* ¶ 102.

context of its examination of the FITR issue, as suggested by the sole arbitrator in *Pantechniki*.

Third, regardless of whether the rejection of the formalistic approaches followed by other tribunals is desirable as such, it has to be observed that the fundamental basis test advocated in *Pantechniki* and the related inquiries (Do the claims have the same normative source? Does the later claim have an autonomous existence?) are inherently vague and ambiguous.¹⁷⁶ None of these inquiries involves established legal terminology, nor has the sole arbitrator provided any explanations as to the meaning of these terms. The approach applied by the sole arbitrator thus lacks legal certainty and predictability.

C. *H&H Enterprises Investments v. Egypt*¹⁷⁷ (2014)

In this case, H&H Enterprises Investments and Grand Hotels of Egypt, a company owned by the government of Egypt, entered into a management and operation contract pertaining to a resort hotel.¹⁷⁸ According to H&H, Grand Hotels had granted it an option to buy the hotel and adjoining land.¹⁷⁹ Disagreements arose between the parties which, according to H&H, were due to (1) Grand Hotels' interference with H&H's ability to perform the contract by not accepting its development plans and by preventing it from obtaining a permanent operating license, and (2) Grand Hotels' failure to honor the investor's option to buy.¹⁸⁰

These disagreements gave rise to several judicial and arbitral proceedings. Grand Hotels initiated arbitration proceedings in Cairo (apparently in conformity with the contractual arbitration clause), claiming that H&H had breached the contract between the parties and that the contract was thus terminated.¹⁸¹ For its part, H&H commenced two proceedings in the Egyptian courts: the first one involved a breach-of-contract claim based on Grand Hotels' refusal to accept H&H's development plans and its alleged interference with the licensing process;

¹⁷⁶ See Wegen & Markert, *supra* note 17, at 282.

¹⁷⁷ *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award (May 6, 2014), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C720/DC9652_En.pdf; *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Decision on Jurisdiction (June 5, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1012.pdf>.

¹⁷⁸ *H&H Enters.*, ICSID Case No. ARB/09/15, Decision on Jurisdiction, ¶ 3.

¹⁷⁹ *Id.* ¶ 2.

¹⁸⁰ *H&H Enters.*, ICSID Case No. ARB/09/15, Award, ¶ 371.

¹⁸¹ *H&H Enters.*, ICSID Case No. ARB/09/15, Decision on Jurisdiction, ¶ 5.

the second one related to H&H's alleged option to buy.¹⁸²

In the ICSID arbitration proceedings which H&H filed following its eviction from the resort, Egypt raised a number of jurisdictional objections, including an objection based on the FITR provision contained in the applicable treaty, the US-Egypt BIT. Taking the view that this objection was "closely related to the merits of the case,"¹⁸³ the arbitral tribunal decided to deal with the respondent's FITR objection in its decision on the merits.¹⁸⁴ In its award, the arbitral tribunal rejected the application of the triple-identity test, noting that such a test was not expressly provided for in the treaty's FITR clause,¹⁸⁵ and that the application of this test "would defeat the purpose of Article VII of the US-Egypt BIT (the FITR clause), which is to ensure that the same dispute is not litigated in different fora."¹⁸⁶ The arbitral tribunal explained that "what matter[ed] [was] the subject matter of the dispute,"¹⁸⁷ expressly endorsing the fundamental basis test established in *Pantechniki*.¹⁸⁸

On the basis of this test, the arbitral tribunal compared the fundamental basis (or bases) of the claims brought before the Cairo arbitral tribunal and the Egyptian courts with the fundamental basis (or bases) of the various claims submitted to the ICSID tribunal (expropriation, fair and equitable treatment, and others).¹⁸⁹ It focused on the specific conduct relied upon in these different sets of claims, observing that the local arbitration and court proceedings and the ICSID arbitration proceedings both centered on the alleged violation by Grand Hotels of the management and operation contract (a claim raised by way of defense in the Cairo arbitration proceedings) and the alleged refusal by Grand Hotels to honor the option to buy granted to the investor. The tribunal concluded that these claims shared the same fundamental basis and that the investor was thus precluded from submitting the relevant claims to an ICSID tribunal.¹⁹⁰

182 *H&H Enters.*, ICSID Case No. ARB/09/15, Award, ¶ 374.

183 *H&H Enters.*, ICSID Case No. ARB/09/15, Decision on Jurisdiction, ¶ 79.

184 *Id.*

185 *H&H Enters.*, ICSID Case No. ARB/09/15, Award, ¶ 364.

186 *Id.* ¶ 367.

187 *Id.*

188 *Id.* ¶ 368-70.

189 *Id.* ¶ 378-80.

190 *Id.* ¶ 382.

VI. EVALUATION OF FORMALISTIC AND PRAGMATIC APPROACHES FROM THE PERSPECTIVE OF TREATY INTERPRETATION

A. *Preliminary remarks*

The approaches followed in the decisions examined in Sections IV and V above can be evaluated both from an interpretive and from a normative perspective. From an interpretive perspective, the relevant question is whether the different tribunals have correctly interpreted the applicable FITR provisions. The normative perspective, on the other hand, focuses on whether the various approaches provide an adequate solution to the FITR problem, regardless of the actual wording of the different FITR clauses. This Section offers a basic assessment of the interpretive merits of formalistic and pragmatic approaches.

Before undertaking such an assessment, it is necessary to clarify by reference to what rules of interpretation this assessment will be made. Given that FITR clauses are treaty provisions, the relevant rules of interpretation are those of the Vienna Convention on the Law of Treaties (“VCLT”)¹⁹¹ and other applicable rules of customary international law. Of particular relevance is the general rule contained in article 31(1) VCLT, which provides for a combination of literal, teleological, and contextual interpretation.¹⁹² The present evaluation of FITR rulings will emphasize literal interpretation, without addressing purpose and context. In fact, context does not appear to be of particular relevance for FITR determinations. As far as purpose (or intent) is concerned, it will be examined in the context of the functional analysis performed in Section VII. This is appropriate because of the significant overlap between the objective function of FITR provisions and the subjective aims pursued by treaty drafters when adopting such provisions.

It is also important to bear in mind that, in practice, not all FITR clauses are drafted in the same language. As has been explained above, there are different categories of FITR provisions and the respective interpretive implications may vary accordingly. However, all FITR provisions share a common core, namely the requirement of sameness of the disputes concerned, and the preclusive effect that arises when this requirement is met. In light of this common core, it is possible to make

¹⁹¹ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

¹⁹² VCLT, *supra* note 191, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

interpretive findings of general validity. These findings suggest that none of the existing approaches is (fully) convincing.

B. Approach based on the distinction between treaty and contract claims

From an interpretive perspective, the approach based on the distinction between treaty and contract claims is wholly inadequate. In fact, this approach does not actually seek to interpret FITR clauses. What it does is transpose a principle elaborated in relation to a different issue (the issue of whether a contractual forum-selection or arbitration clause deprives an investor-state arbitral tribunal of its jurisdiction over treaty claims) to the FITR context.

Such a transposition is of course not per se problematic or undesirable. However, the problem with this approach is that it only addresses situations where the investor brings a breach-of-contract claim in the local courts or before a contract-based arbitral tribunal and subsequently initiates investor-state arbitration proceedings. It does not deal with other possible scenarios, such as, for example, cases where the investor challenges an administrative decision in the local courts. In these cases, the distinction between treaty and contract claims is not helpful for the simple reason that there is no contract between the parties to the domestic proceedings. The scope of the distinction between contract and treaty claims is thus too narrow to deal with FITR issues adequately.

C. Triple-identity test

Similarly to the distinction between treaty and contract claims, the triple-identity test is not a convincing interpretive approach. Like its counterpart, it does not actually attempt to *interpret* the language of the relevant FITR clauses. Rather, as has been shown, it borrows an existing legal principle (*lis pendens*) and the applicable legal threshold and applies it to the FITR problem. And while such an approach may be justified in light of the functional similarity of the *lis pendens* rule and FITR provisions found in investment treaties,¹⁹³ it nevertheless fully disregards the specific language employed in FITR clauses.

In order to assess the triple-identity test from an interpretive perspective, it is thus necessary to examine whether, independently of any

193 See *infra* Section VII.

transposition of the *lis pendens* principle, the wording of FITR clauses justifies the application of this test. In this respect, it must be observed that the triple-identity test finds some support in a literal interpretation of FITR provisions. As has already been explained, the crucial issue in the FITR analysis is the question of the sameness of the disputes concerned. It appears reasonable to answer this question by reference to the characteristic features of a dispute (parties, cause of action, relief requested) and to require identity of these features. Simply put, only disputes that share the same characteristic features can be considered as being the same.

Under certain FITR provisions, a particularly compelling interpretive argument can be made in favor of one specific element of the triple-identity test, namely the requirement of identity between the parties. This is so because, as has been explained above, a number of FITR clauses provide that an investor is prohibited from initiating investor-state arbitration proceedings where *he*, i.e., the investor, has previously brought the dispute before a different court or tribunal.¹⁹⁴ In other words, the preclusive effect of FITR provisions is only produced if it is the investor himself who has initiated the earlier proceedings, and not a different legal entity (even if it is owned or controlled by the investor).

D. Pragmatic approach

While, as has been explained above, it is sensible to hold that two disputes are only the same if the relevant parties, causes of action, and relief sought are identical, it may be equally reasonable to adopt a less strict interpretation of the sameness requirement. Indeed, it could be argued that the concept of dispute should be distinguished from the related notion of claim, an argument that notably finds support in the definition of the term “dispute” provided in Black’s Law Dictionary.¹⁹⁵ As has already been mentioned, this definition expressly distinguishes between disputes in a broad sense (conflicts or controversies) and the lawsuits to which such disputes may give rise.¹⁹⁶ Accordingly, one could take the view that one and the same dispute can give rise to more than one claim which can be brought before more than one court or arbitral tribunal on the basis of more than one legal rule or standard.

The pragmatic approach also finds support in the interpretive principle

194 *See, e.g.*, the FITR provisions referred to in endnotes 24 and 29.

195 *Dispute*, *supra* note 53.

196 *See supra* Section III.B.

of effectiveness (or *effet utile*).¹⁹⁷ The importance of this principle in this particular context has notably been emphasized by Wegen and Markert.¹⁹⁸ The basic consideration is that the application of the triple-identity test would make it near to impossible for FITR provisions to apply. This argument is based on the observation that (1) investor-state arbitration proceedings are almost always based on treaty provisions (i.e., they generally involve allegations of treaty breaches) and that (2) domestic court or contractual arbitration proceedings are, in the vast majority of cases, based on domestic law (or a contract governed by domestic law).

VII. FUNCTIONAL ANALYSIS OF THE FITR

A. *The functions of FITR provisions*

Unsurprisingly, FITR provisions do not contain any indications as to the function (or functions) they are intended to serve. It is perhaps more surprising that a discussion of this function (or these functions) is also almost entirely absent from the relevant arbitral case law. This confirms the observation made above that most arbitral tribunals ruling on FITR-based jurisdictional objections (and especially those that apply a formalistic approach) do not actually *interpret* the relevant clauses, but merely apply rules or tests established in earlier decisions.

It is not difficult, however, to determine the actual role played by FITR clauses. As has been observed by the ICSID tribunal in *H&H v. Egypt*, the purpose of a FITR provision is “to ensure that the same dispute is not litigated before different fora,”¹⁹⁹ i.e., to avoid what is generally referred to as “parallel proceedings.” Although the expression “parallel proceedings” is not a term of art, it can be regarded as covering two types of situations: those in which proceedings in the same matter are pending before a different court or tribunal and those in which this court or tribunal has already decided the dispute.

The finding that FITR clauses aim to avoid parallel proceedings is, in and of itself, not helpful in answering the question of when two disputes

¹⁹⁷ For a discussion of the meaning and scope of the principle of effectiveness, see RICHARD K. GARDINER, *TREATY INTERPRETATION* 66-68 (2d ed. 2015).

¹⁹⁸ Wegen & Markert, *supra* note 17, at 280 (noting that “[i]f one made the identity of the legal bases of the claim the main criterion, a fork-in-the-road clause would often not be afforded an effective scope”).

¹⁹⁹ *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, ¶ 367 (May 6, 2014), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C720/DC9652_En.pdf.

can be considered as identical. In order to answer this question, it is necessary to determine what the particular detrimental effects of parallel proceedings are that FITR provisions seek to prevent. As has been pointed out in scholarly contributions, one problem of parallel proceedings is the unfair advantage conferred upon claimants in such proceedings.²⁰⁰ In fact, the claimant is given not one, but two or more opportunities (or “shots”) to prevail in one and the same lawsuit. The respondent on the other hand will have to prevail in both (or more) proceedings in order to escape liability. Hence, parallel proceedings unduly favor the claimant.

The second problem of parallel proceedings is that they create a risk of overcompensation of the claimant (assuming that no other legal tool is available to avoid such overcompensation). If, for example, in the *Pantechniki v. Albania* case discussed above Pantechniki had been awarded the requested compensation in the domestic courts and had subsequently also prevailed in the ICSID arbitration proceedings, it would have been overcompensated for the loss sustained. In fact, it would have been compensated twice for the same loss (the loss incurred in connection with the destruction of its work site).

A third undesirable effect of parallel proceedings is that they undermine the efficient, i.e., expeditious and cost-effective, resolution of investment disputes. It is not difficult to understand that efficiency requires that one and the same dispute be heard by one single court or tribunal. Indeed, where dispute resolution is fragmented and where several courts or tribunals hear one single dispute (or different aspects of the same dispute), additional costs are created for the parties to the dispute and a delaying effect may also result on all proceedings.²⁰¹

The fourth and last concern raised by parallel proceedings is that they may lead to conflicting decisions, i.e., different decisions on identical legal issues. Such lack of decisional harmony threatens an orderly resolution of disputes and may be a source of complications in the context of the enforcement of the decisions rendered. The need to avoid conflicting decisions has been expressly recognized in connection with the *lis pendens* rule contained in the Brussels I Regulation.²⁰² It has also been emphasized

200 See, e.g., Bernardo M. Cremades & Ignacio Madalena, *Parallel Proceedings in International Arbitration*, 24 ARB. INT’L 507, 508 (2008) (noting that claimants initiate parallel proceedings in order to “seek the widest legal protection or to increase their chances of success”); Emmanuel Gaillard, *Abuse of Process in International Arbitration*, 32 ICSID REV. 1, 6 (2017) (referring to parallel proceedings as an abusive practice aimed at maximizing a claimant’s chances of success).

201 See Gaillard, *supra* note 200, at 7 (observing that the introduction of parallel proceedings “fragments the parties’ disputes and leads to excessive costs and delays”).

202 Brussels I Regulation, *supra* note 94, Preamble recital no. 21 (referring to the need to “minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will

by academic writers.²⁰³

In light of the above, it can be concluded that the basic function of FITR clauses is to prevent the various detrimental effects of parallel proceedings, namely (a) the conferral of an undue advantage upon the claimant; (b) the risk of overcompensation of the claimant; (c) inefficiency; and (d) the risk of conflicting decisions. On the basis of this conclusion, it is possible to determine the basic contours of a suitable FITR rule and to evaluate, this time from a normative perspective, the existing formalistic and pragmatic approaches.

B. Conclusions based on functional analysis

Functional analysis of the FITR is not without limitations. One such limitation is that some of the factors outlined above are not particularly helpful in determining a specific FITR rule. The need to avoid granting claimants an unfair advantage, for example, raises the question of when such an undue advantage actually arises. Is it, generally speaking, unfair for the claimant to have two opportunities to obtain the same relief? Or is it only unfair to grant the claimant two such opportunities on the same legal basis? Under the first proposition, the FITR rule could apply even where the legal bases relied upon are different. Under the second approach, identity of legal bases would be required for the FITR clause to apply. In this author's opinion, there is no compelling argument in favor of one solution over the other. Essentially, the question is whether, from a procedural point of view, the legal protections provided for in investment treaties are *alternative* to the rights investors enjoy under domestic law, or whether, to the contrary, these protections *supplement* the domestic law rights.

Efficiency of the dispute resolution process is another factor that does not assist in designing a specific FITR rule. As has been explained, efficiency requires that one single dispute be heard by one single court or tribunal. But what exactly does this mean? Does inefficiency only arise where two claims based on the same legal basis (and thus raising identical legal issues) are brought before two separate courts or tribunals? Or is it already inefficient if two claims based on the same factual background and pursuing the same relief are submitted to different courts or tribunals, regardless of the relevant legal bases? Again, it is very difficult to choose

not be given in different Member States”).

²⁰³ See, e.g., Cremades & Madalena, *supra* note 200, at 507 (mentioning the “risk of conflicting decisions and awards”).

between these competing views.

Another limitation of functional analysis is that the function(s) performed by FITR clauses may vary depending on the availability of other legal rules performing the same or similar functions. Where, for example, the defense of *lis pendens* is available, there may be no need to rely on a treaty's FITR provision in order to prevent resubmission of an already pending investment dispute. Likewise, where the principle of *res judicata*²⁰⁴ is applicable, there may be no need to invoke a treaty's FITR clause to prevent the resubmission of an investment dispute that has already been decided by another court or tribunal.

Subject to these limitations, three observations can be made. First, the avoidance of the risk of overcompensation of claimants militates in favor of a flexible approach to the requirement of identity of the parties, with regard to both claimants and respondents. If, for example, a company owned by the investor receives compensation for the losses caused by an unlawfully imposed tax measure, compensation of the investor himself in separate proceedings would lead to overcompensation. This is so because the investor no longer suffers any loss where the immediately injured party (the investor's subsidiary) is already indemnified. Similarly, where the investor brings separate claims against the host state and a separate state-owned entity or territorial subdivision to obtain reparation for the same loss, the rendering of favorable decisions in the two distinct proceedings would also lead to him being overcompensated.

Second, prevention of the risk of overcompensation highlights the importance of the relief requested. In fact, where the nature of the relief requested is dissimilar (for example, an annulment of a particular measure by the competent administrative court versus a request for compensation for the loss suffered as a result of the application of the said measure), no risk of overcompensation exists. Where the nature of the relief sought is the same and relates to the same material facts or conduct attributable to the state (for example, separate requests for compensation for (1) breach of contract, and (2) breach of the fair and equitable treatment standard contained in the applicable treaty resulting from, or in connection with, the alleged breach of contract), favorable decisions may lead to overcompensation.

Third, the need to avoid conflicting decisions requires that one seek to prevent identical issues being decided by more than one court or tribunal.

204 *Res Judicata*, BLACK'S LAW DICTIONARY (9th ed. 2009) (“[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit”).

Since the violation of a treaty standard and of domestic law or of a contract governed by domestic law are different legal issues, the FITR would not, in principle, need to be applied in cases where the legal bases relied upon differ. However, not applying the FITR in these situations would compromise the ability of FITR clauses to avoid overcompensation of claimants. The legal bases invoked in the different proceedings should thus not be relevant for the purposes of the operation of FITR provisions.

The three observations made above are not only helpful for designing a meaningful FITR rule; they also allow a normative assessment of existing approaches to the FITR problem. More specifically, they suggest that the formalistic approaches are not suitable. The approaches based on the distinction between treaty and contract claims are not appropriate because, as has been explained, the criterion pertaining to the legal bases of the claims raised in the different proceedings should not be relevant. As regards the triple-identity rule, neither the strict requirement of party identity, nor the requirement of identity of the legal bases relied upon are suitable.

As far as the pragmatic fundamental-basis test is concerned, functional analysis shows that this approach rightly rejects the requirements of strict identity of the parties and of the relevant legal bases, which are at the core of the formalistic approaches. However, it also highlights that this approach fails to acknowledge the relevance of the relief requested in the proceedings concerned. In addition, as has already been explained, the fundamental basis test is simply too vague to ensure legal certainty.

VIII. CONCLUSION

This article has explored arbitral case law dealing with FITR-based jurisdictional objections. It has shown that two formalistic approaches (the distinction between treaty and contract claims and the triple-identity test) co-exist with the pragmatic fundamental-basis test. This article has evaluated these contrasting approaches, both from an interpretive and from a normative perspective. On the basis of a functional analysis, suggestions have been made as to how and when a suitable FITR provision should operate. As such, the findings of this contribution may offer useful insights to both treaty interpreters and drafters.

Building upon the analysis contained in this article, it may be interesting to examine the relevance of FITR provisions in current treaty

practice. Judging notably from the recent U.K.,²⁰⁵ German,²⁰⁶ and U.S.²⁰⁷ Model BITs, it would appear that FITR clauses (at least, express ones) are not standard treaty terms. While the U.K. and the German Model BITs contain clauses that could be considered as implied FITR provisions,²⁰⁸ the U.S. Model BIT does not contain any FITR clause. Instead, it addresses the problems caused by parallel proceedings through a waiver provision under which the claimant must waive its right to initiate or continue proceedings in the host state's courts pertaining to the same measure or measures.²⁰⁹

Also, as is easily understood, the analysis contained in this article has implications beyond the scope of the FITR issue. Indeed, the critical evaluation of the formalistic distinction between treaty and contract claims made in relation to the FITR issue can of course be transposed to the other context in which this distinction is currently applied: the question of whether a contractual forum-selection or arbitration clause contained in an investment contract deprives an investor-state arbitral tribunal of its jurisdiction over treaty breaches (allegedly) arising in connection with the performance of the investment contract. It may thus be in order to reflect on whether the current arbitral approach to this question is fully satisfactory.²¹⁰

205 UNCTAD, U.K. DRAFT MODEL TEXT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS [hereinafter U.K. MODEL BIT], <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847>.

206 UNCTAD, GERMAN MODEL TREATY-2008 [hereinafter GERMAN MODEL BIT], <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2865>.

207 U.S. DEP'T OF STATE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY [hereinafter U.S. MODEL BIT], <https://www.state.gov/documents/organization/188371.pdf>.

208 See U.K. MODEL BIT, *supra* note 205, art. 8(2) (offering investors several arbitration options (ICSID, ICC, UNCITRAL)); GERMAN MODEL BIT, *supra* note 206, art. 10(2) (offering investors a choice between several arbitration options (ICSID, UNCITRAL, ICC, LCIA) and contractually-agreed forms of dispute resolution).

209 U.S. MODEL BIT, *supra* note 207, art. 26(2)(b).

210 The two classical arguments relied upon by arbitral tribunals rejecting jurisdictional challenges based on contractual forum-selection or arbitration clauses are that (1) treaties and contracts belong to separate legal orders and are fully effective within those legal orders, and (2) contractual forum-selection or arbitration clauses do not amount to a waiver of the investor's right to initiate treaty-based investor-state arbitration proceedings. Neither of these justifications is particularly compelling.