

Describing post-Westphalia: Remarks on Umbrella Clauses and the Contract Claims / Treaty Claims Binomial

*Federico Lenzi*¹

Summary: 1. Introduction: some hints on the post-Westphalian international community. – 2. Scope, structure and purpose of the enquiry. – 3. Case study: Toto Costruzioni v. Lebanon. – 4. Lack of Party identity concerning BIT and contract: jurisdictional dualism vs. unity when the contract is entered into by a public entity. – 5. Fork-in-the-road clauses and parallel proceedings. – 6. Conclusive remarks.

1. Introduction: some hints on the post-Westphalian international community

The concept of territorial sovereignty constitutes a fundamental and useful legal fiction in public international law which corresponds, to a certain extent, to the legal fiction of what property is in private law. However, the relevant growth of human interconnections in many respects is causing a gradual erosion of the traditional territoriality principle in various international regimes: national legal orders are confronted with global phenomena, which they address in different manners. What seems to be almost indisputable is the fact that States are no longer able to cope with them by adopting the same instruments as before the passage into a new era, which may be called “global” or “post-Westphalian”.

The catch-all, fascinating and at the same time troublesome expression embracing the totality of these new facets is by some authors referred to as “Global Law”,² without it being a brand new independent legal order dominating all the existing legal ones, but rather the synthesis of

¹ Ph.D. Candidate in International Law, State University of Milan; visiting researcher at Sciences Po Law School, Paris. He can be contacted at federico.lenzi@unimi.it.

² In this perspective, see XIFARAS, *Après les Théories Générales de l'État: le Droit Global?*, Revue de droit politique, vol. 8, 2012, 5 (available at <http://www.juspoliticum.com/IMG/pdf/JP8-Xifaras.pdf>): “Le terme «Droit Global» ne désigne donc pas un ordre juridique indépendant qui planerait au dessus des ordres juridiques existants, quelque chose comme un droit universel planétaire, mais plutôt l'émergence de phénomènes juridiques *supra-* et *trans-* nationaux qui s'inscrivent dans un tissu de relations juridiques assez denses pour rendre indissociables les différents niveaux «sub-globaux» que sont les ordres juridiques régionaux (Union Européenne, Mercosur *etc.*), nationaux et *infra-* nationaux (États fédérés, villes, régions *etc.*); mais aussi les réseaux transversaux (églises, mafias, communautés linguistiques, anciennes colonies...) ou encore les flux sectoriels (flux migratoires, activités fortement intégrés — industrie automobile, internet *etc.*). C'est dans l'articulation de ces différents espaces que doivent être saisis les phénomènes juridiques planétaires”.

heterogeneous – perhaps increasingly privatised – cross-border aspects within the international community, whose articulation depends more on private actors than States. Not surprisingly, interdisciplinary approaches such as that of law and economics are contributing to gain knowledge in this respect.³

To enter further upon the matter of definition and analysis of Global Law – by the way, a rather impossible task except for those who cultivate encyclopaedic ambitions – would be to range outside the field this enquiry is intended to cover, namely some new developments of the binomial *contract claims / treaty claims* and the scope of umbrella clauses in international investment law, as will be indicated in detail below. Nonetheless, such a premise serves the purpose to suggest that the evolution of said relationship is inscribed within this enigmatic way of interpreting legal phenomena as part of the step towards transnational private ordering.

One of the assumptions of this paper is that in the post-westphalian society traditional distinctions are put under scrutiny, since they are no longer capable to describe global phenomena which have emerged in quite recent times. To use a metaphor, it might be said that the lenses through which the latter used to be interpreted seem to be broken or, at least, blurred. This article mainly focuses on the following polarized divides, in an attempt to contribute to the crossing of traditional disciplinary boundaries:

- international / national (a typical distinction within the myth of Westphalia);⁴
- subject / object;⁵

³ For the role of law and economics in a better understanding the public law / private law divide as far as private international law is concerned, see MUIR WATT, *Globalisation des marchés et économie politique du droit international privé*, in TERRÉ (ed.), *La mondialisation entre illusion et utopie*, Paris, 2003, 243: “Les thèses de l’analyse économique du droit en vue de déterminer les critères d’une allocation optimale des compétences étatiques sur le plan mondial ne sont pas nécessairement convaincantes au fond, mais elles ont le mérite de redéfinir les termes de la problématique du conflit des lois en brouillant les certitudes liées au compartimentage étanche du droit public et du droit privé”.

⁴ XIFARAS, *supra* footnote 2, 8-9, describes a further binomial therein: “Ces temps furent ceux, furieux et héroïques, du monde de l’avant du post – la Westphalie. On présente ordinairement la Westphalie comme un monde structuré par le binôme États nationaux / droit international inter-étatique. Ce n’est pas faux, à condition de préciser que cette division structurelle se reproduit sous la forme d’un chiasme au sein de chacun des termes du binôme: la souveraineté des États est interne et externe, le droit international est le droit inter-étatique qui unit entre elles les nations civilisées (droit international public) et l’entrelacs sans nom de rapports juridiques – colonies, protectorats, traités inégaux etc. – qui unit les nations civilisées aux nations à civiliser”.

⁵ See *infra*, footnote 9.

- public / private.⁶

Before proceeding with the presentation of this enquiry, two brief clarifications of the abovementioned global phenomena are indispensable, namely about when the turning point occurred (1) and the areas of law (2) involved in said evolution.

(1) Even though it would be simplistic to affirm that in a specific moment a new chapter of international law started to be written, since the birth of the “Westphalian era” has a traditional year (treaty of Westphalia, 1648) the same may be done for its own end: in this respect, an appropriate event could be constituted by the adoption by the UN General Assembly of one of the most political texts in world history, namely the Universal Declaration of Human Rights (10 December 1948).⁷ The reason for such a choice lies in the fact that it represented the very starting point of the international protection of human rights and, theoretically, the emergence of the individual as a participant in the international legal process. Less than twenty years afterwards, a new dispute settlement mechanism devoted to investments – named ICSID – was created,⁸ thus crystallising corporations as direct participants⁹ to the international community, beyond the paternalistic system of diplomatic

⁶ For an analysis of the binomial as far as international law *lato sensu* is concerned, see MILLS, *The Confluence of Public and Private International Law. Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge, 2009, 211; for an interesting characterisation of the binomial in international investment law, ID., *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, *Journal of International Economic Law*, Issue 2, 2011, 7: “The use of two public–private distinctions for the purposes of the analysis in this article is therefore not intended to imply a claim that the concepts of ‘public’ and ‘private’ are, or can ever be, entirely or objectively identifiable or distinguishable, and certainly not that such distinctions can be made without normative implications. The distinction is, however, still useful for present purposes, because it offers a convenient way of characterizing the competing perspectives on the legal and policy issues in this area of law. The argument is not that a public or private perspective has to be ‘chosen’, or that a decision has to be made as to which one is ‘correct’, but rather that international investment law inherently brings together apparently contradictory perspectives, and that it is the amalgamation of these oppositions, of these ‘public–private’ antinomies, which lies at its foundations”.

⁷ Available at <http://www.un.org/en/documents/udhr/index.shtml>. For a brief account on the Declaration see, *inter alios*, CANÇADO TRINDADE, *Universal Declaration of Human Rights*, United Nations Audiovisual Library of International Law, 2008, 1-4 (available at http://untreaty.un.org/Cod/Avl/pdf/ha/udhr/udhr_e.pdf).

⁸ See *infra*, 6.

⁹ The use of the term “participant” is preferred to that of “subject” or “object” of international law, following the teaching of the then recently appointed as the first woman judge on the International Court of Justice, HIGGINS, *Problems and Process: International Law and How We Use It*, Oxford, 1995, 49: “There are no ‘subjects’ and ‘objects’, but only participants. Individuals are participants, along with States, international organizations..., multinational corporations, and indeed private and non-governmental groups”; quoted by ALVAREZ, *Are Corporations “Subjects” of International Law?*, *Santa Clara Journal of International Law*, Vol. No. 9, Issue No. 1, 8. See also ALVIK, *Contracting with Sovereignty*, Oxford and Portland, 2011, 283.

protection.¹⁰

(2) Without any presumption of being able to describe a complete panorama of the areas of law which are witnessing said post-westphalian evolution, they can at least be indicated as follows:

- Commercial arbitration;¹¹
- Administrative Law;¹²

¹⁰ For the idea that the foreign investor (either an individual or a corporation) is a *sujet médiate* of international law, see MAYER, *Contract Claims et clauses juridictionnelles des traités relatifs à la protection des investissements*, Lalive Lecture, 22 mai 2008, Journal du Droit international, Issue no. 1, 2009, 73-74: “Que l’on retienne l’une ou l’autre analyse, que l’investisseur exerce les droits de son État national ou son droit propre, tout semble militer pour fonder sur le droit international les demandes qu’il est admis à présenter devant le tribunal du traité. Celui-ci est perçu, en quelque sorte, comme l’héritier des tribunaux qui naguère étaient saisis par l’État exerçant la protection diplomatique de son national; simplement on permet à ce dernier d’agir directement, puisque ce sont ses intérêts qui sont primordialement concernés: mais le litige mettrait toujours en jeu les droits de deux sujets du droit international; d’un côté ceux de l’État récepteur de l’investissement, défendeur, et de l’autre, selon l’analyse retenue, soit ceux de l’État national, sujet immédiat du droit international, mis en oeuvre médiatement par l’investisseur, soit ceux de l’investisseur, sujet médiate exerçant directement son droit propre”.

¹¹ See LUZZATTO, *International Commercial Arbitration and the Municipal Law of States*, Recueil des cours, Vol. No. 157, 1977, 9-120; consider, just as an indication of the most relevant theories in which the “global approach” to the subject is present, the fifty-year debate on the existence, meaning and content of the *lex mercatoria*, undoubtedly one of the most relevant doctrinal achievements of Professor Goldman. The bibliography on the *lex mercatoria* being vast, reference is made here only to the founding contributions: see GOLDMAN, *Les conflits de lois dans l’arbitrage international de droit privé*, Recueil des cours de l’Académie de Droit international de La Haye (hereinafter referred to as “Recueil des cours”), Vol. 109, 1963, 347; *contra* MANN, *Lex Facit Arbitrum*, in *International Arbitration. Liber Amicorum for Martin Domke*, Den Haag, 1967, 157; see also GAILLARD, *Aspects philosophiques du droit de l’arbitrage international*, Recueil des cours, Vol. No. 329, 2007, 49; FOUCHARD, GAILLARD, GOLDMAN, *Traité de l’arbitrage commercial international*, Paris, 1996, 825. See, for the theory of the arbitral legal order in international arbitration as an evolution of the former, GAILLARD, *supra* same footnote, 91; in english, ID., *Legal Theory of International Arbitration*, Leiden and Boston, 2010, 58; in spanish, ID., *Las representaciones del arbitraje internacional*, in GAILLARD, FERNÁNDEZ-ARROYO (eds.), *Cuestiones claves del arbitraje internacional*, Bogotá, 2013, 12; CLAY, *L’arbitre*, Paris, 2001, No. 257; BILLARANT, *Regard d’un internationaliste sur l’ordre juridique arbitral*, in CHAABAN (ed.), *L’arbitrage détaché des lois étatiques*, Le Mans, 2012, 105; for a critical remark of the negative aspects in terms of supervision of arbitral awards which this theory conveys, see MUIR WATT, “Party Autonomy” in *International Contracts: from the Makings of a Myth to the Requirements of Global Governance*, European Review of Contract Law, Vol. No. 3, 2010, 270-272: “That international arbitration thus benefits from a liberal recognition regime ensuring free movement of awards may well be desirable; this is not the issue here. What is clear, on the other hand, is that since arbitral awards are treated as quasi-judgments for purposes of facilitating their international recognition, they also call correlatively for some sort of analogous supervisory control. Of course, it is well known that the problem of arbitration is that it has no natural forum. However, it is not illegitimate to entertain a further fiction according to which an award is ‘attached’ to the place of the (freely chosen) seat, which will then be invested with a supervisory role. And if the vocation of the place of the seat does not convince, then it is probably no less illegitimate that the courts of the place (or places) of enforcement – which is not necessarily more predictable nor less accidental than the location of the proceedings – would be equally legitimate in exercising similar supervision”.

- Constitutional Law¹³;
- Contract Law.¹⁴

In such areas in particular cross-fertilisation has come up beside traditional national processes.

2. Scope, structure and purpose of the enquiry

Curiously indeed, one manifestation of the new relationships between traditional binomials – namely, international / national, public / private and subject / object¹⁵ – will be addressed (though not exclusively) through the use of another binomial: contract claims / treaty claims. The framework in which it operates is the international investment regime, an area of law whose integration in the public-international-law or private-international-law spheres is disputed for many reasons,¹⁶ that can be summarised as follows:

- first of all, it is a mixed dispute settlement mechanism, involving a subject of international law (the host State, i.e. the State in which the investment takes place) and a foreign private party (a natural or a legal person, whose international subjectivity is controversial);¹⁷

¹² For the idea that the investment arbitration regime has to be understood as a manifestation of global administrative law, see *inter alios* SCHILL, *The Multilateralization of International Investment Law*, Cambridge, 2009, 375; MONTT, *State Liability in Investment Treaty Arbitration – Global Constitutional and Administrative Law in the BIT Generation*, Oxford, 2009; VAN HARTEN, LOUGHLIN, *Investment Treaty Arbitration as a Species of Global Administrative Law*, European Journal of International Law, Vol. No. 17, Issue No. 1, 2006, 122; quoting KINGSBURY, KRISCH, STEWART, *The Emergence of Global Administrative Law*, Law & Contemporary Problems, Vol. No. 68, 2005, 15.

¹³ For recent theoretical and methodological bases of resolving constitutional questions through a comparative-law analysis, see AMAR, TUSHNET, *Global Perspectives in Constitutional Law*, New York, 2008.

¹⁴ For a brilliant analysis of the critical aspects of contractualisation of private international law in terms of lack of democratic accountability and transparency of the adjudication process, see MUIR WATT, *supra* footnote 11, 282: “[...] the extraordinary success encountered by the idea of ‘private legislation’ and in its wake, the market for judicial services, generates imbalance – between categories of private or collective interests, or between these and state policies, or indeed between the need for regulation and the pull towards private ordering in global trade. This is why the emancipatory effect of party autonomy and its exclusive focus on private interests calls for the application of principles of governance – that is, principles apt to provide democratic legitimacy for decision-making processes that bind participants to international trade”.

¹⁵ See *supra*, 2.

¹⁶ For an account of such debate within the Hague Academy of International Law see ALVAREZ, *The Public International Law Regime Governing International Investment*, Recueil des cours, Vol. No. 344, 2009, in pocketbook form (published in 2011), 93-94.

¹⁷ See *supra*, footnote 9.

- as a corollary, public vs. private interests are involved;
- the dispute settlement mechanism adopted is international arbitration, which in and of itself is a hybrid instrument since it is adopted in both “pure” spheres (State-to-State arbitration and international commercial arbitration).

The ICSID arbitral mechanism has undoubtedly become in recent years the most successful device in terms of cases filed with the International Centre for settlement of investment disputes (hereinafter referred to as ICSID or the Centre) as compared to other institutional bodies such as ICC, Stockholm Chamber of Commerce (SCC), LCIA¹⁸ or to *ad hoc* arbitration under UNCITRAL arbitration rules. The Centre has been established by art. 1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)¹⁹ in order to build a truly investor-friendly climate promoting international cooperation for economic development²⁰ through de-localized arbitration. As a matter of fact, it is a self-contained regime as it embodies its own rules of procedure; in addition, mandatory provisions of the *lex loci arbitri* – i.e., those of the state in which the seat of arbitration is placed – do not apply: therefore, it is a “non-national review system”.²¹

The ICSID system and the investment regime as a whole have not escaped structural, theoretical as well as specific critiques, whose analysis are not part of the present study,²² which focuses on some peculiar aspects concerning the topic of investor-State contracts. It constitutes a topic which legal doctrine has for more than fifty years struggled to describe and insert in comforting categorisations, with doubtful results despite – and perhaps even thanks to – the outstanding quality of the academic works it produced in this field. Such polarized categorisations may be listed as follows:

¹⁸ To name the most frequently indicated in MITs or BITs, generally as alternative *fora* to the ICSID Centre.

¹⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 United Nations Treaty Series 259, signed on 18 March 1965, entered into force on 14 October 1966, available at the ICSID institutional website: <http://icsid.worldbank.org>.

²⁰ See ICSID Convention, Preamble: “The Contracting States, considering the need for international cooperation for economic development, and the role of private international investment therein; [...] have agreed as follows: [...]”.

²¹ GIARDINA, *ICSID: A Self-Contained, Non-National Review System*, in LILICH, BROWER (eds.), *International Arbitration in the 21st Century: Towards “Judicialization” and Uniformity?*, New York, 1994, 199.

²² For a general discussion, see ALVAREZ, *supra* footnote 16, 75-93.

- municipal sphere of the host State or international-law one;
- public-international-law sphere or private-international-law one.

The reason for such difficulties consists in the fact that it seems to be an “unidentified legal object” resisting any sort of categorisations. In the words of Professor Jennings,

“The particular topic of State contracts impinges upon some of the hardest questions of international law. For it cannot be considered apart from the relationships of international law and municipal law; the relationship of public international law and private international law; the question of the subjects of international law; and the limits of domestic jurisdiction and the reserved domain. Moreover, the opinions of writers on the legal position of State contracts range from the view that the State contract is directly subject to the international law rule of *pacta sunt servanda* to the view that contracts cannot be the subject of international disputes since international law contains no rules respecting their form and effect”.²³

This work is not intended to categorise, but rather to show some recent developments of the binomial “contract claims / treaty claims” and the scope of umbrella clauses in international investment law. As it has been recently suggested by Professor Mayer, such clauses – or, rather, the different interpretations as to its scope provided by ICSID arbitral tribunals – have caused and are still causing more problems than they have solved in this relationship.²⁴

Said developments are mainly addressed through the analysis of an ICSID case in which many apparently different aspects of the treaty/contract divide are interrelated: therefore, this article combines the structure of a case study in that it aims at commenting it in a complete manner with that of focusing on some of the most complex jurisdictional issues in international investment arbitration, such as scope, functions and limits of the

²³ JENNINGS, *State Contracts in International Law*, British Yearbook of International Law, Vol. 37, 1961 (published in 1962), 156. On the topic of State contracts, see – *inter alios* – DOLZER, SCHREUER, *Principles of International Investment Law*, II ed., Oxford, 2012, 79 ff.; ALVIK, *supra* footnote 9; LEBEN, *La théorie du contrat d’État et l’évolution du droit international des investissements*, Recueil des cours, Vol. No. 302, 2003, 209-376; FOUCHARD, GAILLARD, GOLDMAN, *supra* footnote 11, 43 ff.; J.-F. LALIVE, *Contrats entre États ou entreprises étatiques et personnes privées. Développements récents*, Recueil des cours, Vol. No. 181, 1983, 9-234; WEIL, *Problèmes relatifs aux contrats passés entre un État et un particulier*, Recueil des cours, Vol. No. 128, 1969, 96-240; HYDE, *Economic Development Agreements*, Recueil des cours, Vol. No. 105, 1962, 270-374.

²⁴ MAYER, *supra* footnote 10, 77: “Ces clauses ont soulevé plus de problèmes qu’elles n’en ont résolu. Les tribunaux arbitraux se sont divisés, certains se refusant à leur faire produire quelque effet que ce soit, d’autres leur conférant la portée la plus large, d’autres encore leur attribuant une portée limitée, déduite de considérations variables d’une décision à l’autre”.

abovementioned binomial, umbrella clauses, fork-in-the-road clauses and parallel proceedings. In a nutshell, it starts with the case study (which, after the presentation of the factual background of the dispute, is divided into five parts, namely: investment, attribution, arbitration clause in the BIT, treaty breaches, umbrella clause), then it presents the problems related to fork-in-the road clauses and parallel proceedings, ending with conclusive remarks in particular on the topic of avoiding conflicts of jurisdictions pertaining to different legal orders.

3. Case study: *Toto Costruzioni v. Lebanon*

The dispute between Toto Costruzioni Generali s.p.a.²⁵ and the Republic of Lebanon (ICSID case No. ARB/07/12)²⁶ is an interesting example of the difficulties inherent to the problematic distinction between contract claims and treaty claims, to which this article tries to make some clarifications and proposals.

Due to the agreement of the Parties to bifurcate the arbitration proceedings, addressing firstly the issue of jurisdiction and secondly the merits of the case,²⁷ reference is made herewith to two judgments issued by the ICSID arbitral tribunal in this respect, namely:

- the decision on jurisdiction, dated 11 September 2009 and rendered by a tribunal composed of Professor Hans Van Houtte, Mr. Alberto Feliciani and Mr. Fadi Moghaizel;
- the award, dated 7 June 2012 and rendered by the same members of the tribunal, except for Mr. Alberto Feliciani – appointed by Toto – who resigned a few months before the end of the proceedings and was replaced on 16 March 2012 by Judge Stephen M. Schwebel;²⁸

As made evident by these first lines, the tribunal ruled positively on its jurisdiction to hear the merits of the claim. There are two indications thereof: 1) the term “decision” is adopted in all such cases, whereas if it finds that it lacks jurisdiction, the appropriate term is “award on jurisdiction”; 2) of course, the mere existence of an award following a judgment on

²⁵ Hereinafter referred to as Toto.

²⁶ For a case report see GAILLARD, *Chronique des sentences arbitrales CIRDI*, Journal du Droit international (Clunet), Issue No. 2, 2010, 502 ff.

²⁷ *Award*, para 12. All ICSID judgments discussed in this article are available at the ICSID website: <https://icsid.worldbank.org/ICSID/Index.jsp>

²⁸ *Ibid.*, paras. 22-23.

jurisdiction, as a natural effect of bifurcation.

3.1 Factual background of the dispute - The factual background that gave rise to the dispute can be summarised as follows. On 11 December 1997 the Lebanese Republic – Conseil Exécutif des Grands Projets (hereinafter, CEGP) entered into a contract with Toto for the construction of a section of the Arab Highway linking Beirut to Damascus.²⁹ The CEGP was later succeeded by another public entity: the Council for Development and Reconstruction (CDR), which became the universal successor to the CEGP and therefore also in relation to the contract the latter had entered into with Toto.³⁰

Between 1997 and 2003, some difficulties arose between the Parties in relation to alleged additional costs (due to changes in legislation and because the nature of soil did not meet the qualifications originally set in the contract), additional works (due to misleading information and damages caused by third parties on site) and delays.³¹

The contract provided for a quite complex *inter partes* mechanism, a sort of *cooling-off* step, for settling claims “amicably” before those who had not been resolved could be filed before the competent court specified in the contract, namely the Lebanese *Conseil d’État*. In 2001, two of the abovementioned claims were filed before it, since Toto requested to be indemnified for additional works it had to carry out due to discrepancies between the qualifications set in the contract – design of the project, nature of the soil – and the real activities which had to be performed. On 30 June 2004 Toto notified Lebanon of the invitation to settle the then pending disputes amicably as provided for by art. 7, para. 2, of the Italy-Lebanon BIT, entered into force during the contractual relationship between the Parties.³² After a period of six months – the so-called *cooling-off period* – without reaching a settlement, the investor could submit the dispute before various *fora*. Indeed, art. 7, para. 2, of the BIT reads as follows:

“If these consultations do not result in a solution within six months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:

²⁹ *Decision on jurisdiction*, para. 16.

³⁰ *Ibid.*, para. 54.

³¹ For a complete list see *decision on jurisdiction*, para. 19.

³² Agreement between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments, signed on 7 November 1997 and entered into force on 8 February 2000. The official version, equally authentic in the Italian and English languages, is available at the Italian Foreign Ministry’s website: <http://web.esteri.it/trattati/LIBANO038.pdf>.

- a) the competent court of the contracting Party in the territory of which the investment has been made; or
- b) the International Center (sic) for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of the Other States, opened for signature at Washington, on March 18, 1965, in case both Contracting Parties have become members of this Convention; or
- c) an ad hoc arbitral tribunal which, unless otherwise agreed upon by the Parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

The choice made as per subparagraphs a, b and c herein above is final”.

Negotiations between the Parties started, but later were interrupted in part because a new Lebanese government was formed. On 19 March 2007, Toto filed a request for arbitration against Lebanon to the ICSID Centre. In a subsequent exchange of letters, Toto specified that the dispute had arisen in June 2004.

3.2 The jurisdictional dispute before ICSID - Toto alleged that the Lebanese government, acting also through its public entities, had jeopardised in many manners Toto’s investment in the host State in violation of the Italy-Lebanon BIT, and consequently claimed damages for breaches thereof and payment for moral prejudice due to the negative impact on its reputation.³³ It submitted that breaches amounted to violations of FET (changing the regulatory framework, delaying or failing to carry out the necessary expropriations; failing to deliver sites; failing to protect Toto’s legal possessions; and giving erroneous design information and instructions). In addition to it, it claimed compensation for denial of justice and lack of transparency for the two cases then still pending before Lebanese *Conseil d’Etat*.³⁴ Lebanon, on the other hand, argued that the claims filed by Toto fell outside the jurisdiction of ICSID and the competence of the tribunal on different grounds, namely:

A - the building of the Arab Highway was not an investment as intended in the ICSID Convention;

B - Lebanon was not directly a party to the contract;

C - Toto was not entitled to invoke art. 7, para. 2 of the BIT;

³³ *Decision on jurisdiction*, para. 17.

³⁴ *Ibid.*, para. 25.

D - Lebanon had not committed breaches of the Treaty;

E - The dispute concerned contract claims, not treaty claims.³⁵

Such objections to the tribunal's jurisdiction will be presented in order, but not all of them will be addressed in detail, insofar as they are not directly related to the *contract claims / treaty claims* binomial and therefore outside the scope of the present study. In this sense, A and B will be treated briefly and without further comments to the decision of the tribunal.

A – The notion of investment

The tribunal took into consideration the points made by both Parties, which disagreed on:

- 1) the legal instrument(s) from which the elements of “investment” had to be derived.
- 2) The existence in the specific case of the element of risk;
 - 1) In Toto's view, the BIT was the only relevant basis;³⁶ Lebanon, on the contrary, argued that it was not sufficient: Toto had to prove that the dispute had arisen out of an investment as understood in the ICSID Convention.³⁷
 - 2) In this respect, Toto made reference to the *Salini v. Morocco* case,³⁸ contending that in general the risk flows from the nature of the contract. It also referred to *Saipem v. Bangladesh*³⁹ because of the analogous presence of exorbitant clauses that contributed to the element of risk.⁴⁰ Lebanon opposed such position, arguing that Toto's remuneration was guaranteed under the contract and therefore there was no risk whatsoever.⁴¹

Concerning point 1), the tribunal agreed with Lebanon that the notion of investment has to be determined on a case-by-case analysis and that the BIT is not a sufficient legal basis, since

³⁵ *Ibid.*, para. 28.

³⁶ *Decision on jurisdiction*, para. 61.

³⁷ *Ibid.*, para. 64.

³⁸ *Salini Costruttori s.p.a. and Italstrade s.p.a. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on jurisdiction dated 23 July 2001.

³⁹ *Saipem s.p.a. v. the People's Republic of Bangladesh*, ICSID case No. ARB/05/07, Decision on jurisdiction and Recommendation on provisional measures dated 21 March 2007, para. 110.

⁴⁰ *Decision on jurisdiction*, paras. 70-71.

⁴¹ *Ibid.*, para. 74.

also the meaning of investment under the ICSID Convention – even though it does not contain an express definition thereof – has to be evaluated.⁴² This being said, the tribunal found that the requirements provided for in art. 1, para. 2 of the BIT had been met by Toto, since the latter had established assets in Lebanon according to the laws of the host State, namely

“movable property (Article 1.2 a of the Treaty), claims to money which have been used to create an economic value or claims to any performance having an economic value (Article 1.2 c of the Treaty), and technical processes and know-how (Article 1.2 d of the Treaty).⁴³

In regards to the requirements deemed necessary under the ICSID Convention, the tribunal firstly made reference to the so-called *Salini test*,⁴⁴ according to which four criteria must be fulfilled by the overall economic operation in order to be included into the notion of investment:

- a financial contribution on the part of the foreign investor in order to carry out the operation;
- a certain duration (generally two years, but in particular instances a shorter period may be allowed);
- an element of risk (not only political, which is inherent in any transaction with a State, but also commercial in nature);
- a substantial contribution to the host State’s development.

⁴² *Ibid.*, paras. 66-87.

⁴³ *Ibid.*, para. 65. Art. 1, para. 2 of the BIT reads in relevant parts as follows: “The term “investment” means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and shall include particularly, but not exclusively:

- a) movable and immovable property as well as any other rights in rem, such as mortgages, liens, and pledges;
- b) ...
- c) claims to money which have been used to create an economic value or claims to any performance having an economic value;
- d) intellectual property rights, such as copyrights, patents, industrial designs or models, trade or service marks, trade names, technical processes, know-how and goodwill, as well as other similar rights recognized by the laws of the Contracting Parties;

[...]”.

⁴⁴ *Ibid.*, para. 69. For references to the judgment see *supra*, footnote 37.

The tribunal's line of reasoning was the following: it found that the criteria of the *Salini test* were met in the case at stake,⁴⁵ that nonetheless deemed it appropriate to deviate from such a commonly followed test in a way that had to be tailored to the specific case,⁴⁶ and finally that "Toto's construction project meets the requirements deemed necessary by this Tribunal, i.e., a contribution by the investor, a profitability risk, a significant duration and a substantial contribution to the State's economic development".⁴⁷

In this respect, it is respectfully noted that the latter requirements set forth by the tribunal appear to correspond exactly to the four *Salini* criteria, listed by the tribunal itself a few paragraphs above:⁴⁸ therefore, the tribunal's reasoning on the notion of investment under the ICSID Convention seems to be circular. Finally, the tribunal ruled that the road construction project carried out by Toto was an investment under the ICSID Convention and the BIT.⁴⁹

2) As partly already mentioned in point 1), the element of risk within an economic operation in the host State constitutes one of the four *Salini* criteria, on whose existence the parties disagreed. The tribunal linked this criterion with that of duration of the project by saying that

"A construction contract in which the execution of the works extends over a substantial period of time involves by definition an element of risk".⁵⁰

Furthermore, it disregarded Lebanon's assertion that the payment was guaranteed and therefore Toto had not incurred in any risk whatsoever by finding that advance payments are unable to cover costs due to unforeseen works; it referred to *Saipem v. Bangladesh*, which ruled that

"Bangladesh's argument appears to refer more to... the fact that did not incur any commercial risk because it received an advanced payment. The Tribunal cannot agree with this argument. In the

⁴⁵ *Ibid.*, para. 77: "Lebanon's argument that there is no element of risk in the present case is unconvincing. The tribunal finds, rather, that the criteria as set forth by legal scholars and jurisprudence following *Salini v. Morocco* are met in the present case".

⁴⁶ *Ibid.*, para. 81: "[...] the Tribunal wishes to make clear that it does not reach this conclusion strictly on the basis of the *Salini* test, even if it agrees with Toto that in the present case the test is met, as demonstrated above. The Tribunal deviates from this commonly followed test in a desire to delineate the necessary features of an investment in a way that it considers more appropriate to the present case".

⁴⁷ *Ibid.*, para. 86.

⁴⁸ *Ibid.*, para. 69: "These four criteria, sometimes called the *Salini* test, comprise a) duration, b) a contribution on the part of the investor, c) a contribution to the development of the host state, and d) some risk taking".

⁴⁹ *Ibid.*, respectively paras. 87 and 65.

⁵⁰ *Ibid.*, para. 78.

present case, the undisputed stopping of the works which took place in 1991 and the necessity to renegotiate the completion date constitute examples of inherent risks in long term contracts”.⁵¹

Consequently, it agreed with Toto and confirmed the existence of an element of risk as being inherent to the entire project.

B – Was Lebanon directly a party to the contract?

The investment contract had been entered into between Toto and the CEGP, which was later succeeded by the CDR.⁵² The issue consisted in whether or not the alleged acts and omissions performed by such public entities could be attributed to Lebanon. In this regard, the tribunal ruled that they had both exercised its governmental authority concerning the contract, therefore their alleged acts and omissions were attributed to the host State under article 5 of the International Law Commission’s (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001,⁵³ which reads as follows:

“Conducts of persons or entities exercising elements of governmental authority

The Conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the laws of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance”.

As a consequence, the international responsibility of Lebanon had to be evaluated in light of the alleged acts and omissions carried out by the CEGP and the CDR.⁵⁴

C – Scope and functions of the arbitration clause contained in the BIT

It is recalled that art. 7, para. 2 of the BIT sets the arbitration clause, providing that the investor may submit the dispute, at *his (sic)* choice, to the host State’s competent local court, to the ICSID *Center (sic, once again)* or to an *ad hoc* tribunal established – failing an agreement to the contrary between the parties – under UNCITRAL arbitration rules.⁵⁵

⁵¹ Cf. *supra* footnote 39, para. 109. It is a quote from *Toto v. Lebanon, decision on jurisdiction*, para. 80.

⁵² See *supra*, 9.

⁵³ Annex to General Assembly resolution No. 56/83 of 12 December 2001, corrected by document A/56/49(Vol. I)/Corr.4., available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

⁵⁴ *Decision on jurisdiction*, para. 60.

⁵⁵ See *supra*, 10.

Lebanon argued that Toto was not entitled to invoke said arbitration clause since the facts giving rise to the dispute before the tribunal fell outside such a jurisdictional offer *ratione temporis*:⁵⁶ indeed, the BIT had entered into force on 9 February 2000, when the basis of the two claims later submitted to the Lebanese *Conseil d'État* had already occurred.⁵⁷ On the other side, Toto objected to this argument through a distinction between *claim* and *dispute*, contending that the latter arose only when Lebanon made clear via the conduct of its entities that it would not abide by the provisions of the contract, thus jeopardising its investment in the host State.⁵⁸

The tribunal briefly addressed this issue, agreeing with Toto on the abovementioned distinction because the contract itself contained it.⁵⁹ Indeed, it is understood that the claim (or problem) would have been transformed into a dispute only after the public co-contractor's denial to compensate its counterparty for its claimed losses or expenses. Having failed to reply to Toto, the CDR unvoluntarily prevented Lebanon from succeeding on this point: as a matter of fact, the tribunal found that the dispute effectively arose on 30 June, 2004, i.e. when Toto notified Lebanon of the invitation to settle the then pending disputes amicably as provided for by art. 7, para. 2, of the Italy-Lebanon BIT, making clear that in the alternative it would have recourse to ICSID arbitration. The complex mechanism described above,⁶⁰ in and of itself, does not seem to be unreasonable but, combined with the CDR's failure to reply to Toto, caused the tribunal to affirm its jurisdiction under the arbitration clause contained in the BIT.

D – Treaty breaches

D.1 General problems and the issue of conflicting jurisdictions - Before addressing the issue in the specific case under consideration, it is deemed appropriate to present some critical aspects of the problematic – for some commentators, controversial⁶¹ and even artificial⁶² – distinction between contract claims and treaty claims, which constitutes a quite recent

⁵⁶ *Decision on jurisdiction*, para. 88.

⁵⁷ See factual background *supra*, 9.

⁵⁸ *Decision on jurisdiction*, para. 89.

⁵⁹ *Ibid.*, para. 90.

⁶⁰ See factual background *supra*, 9.

⁶¹ MAYER, *supra* footnote 10, 71.

⁶² FADLALLAH, *La distinction "Treaty claims-Contract claims" et compétence de l'arbitre (Cirdi: faisons-nous fausse route?)*, Les cahiers de l'arbitrage, 2004, Vol. no. 2, 5; DE LUCA, *L'arbitrato internazionale treaty-based sugli investimenti esteri*, Comunicazioni e studi dell'Istituto di Diritto internazionale e straniero dell'Università di Milano, Vol. No. 23, 2007, 1039; MAYER, *supra* footnote 10, 79.

creature of ICSID arbitral *jurisprudence*.⁶³ Such a distinction is based on the assumption – which is not grounded on any provision of the ICSID Convention nor of BITs, generally containing broad arbitration clauses like the one in art. 7, para 2, of the Italy – Lebanon BIT examined above, not limiting their scope only to disputes arising out of the treaty and therefore theoretically including also those arising out of the investor-State contract – that ICSID tribunals are *treaty judges* and consequently lack jurisdiction as far as contract breaches are concerned. As a mere example thereof, in the words of the *Saipem v. Bangladesh* tribunal,

“By accepting jurisdiction, this Tribunal does not institute itself as control body over the ICC Arbitration [the competent *forum* under the contract, *A/N*], nor as enforcement court, nor as supranational appellate body for local court decisions. This Tribunal is a treaty judge [emphasis added, *A/N*]. It is called upon to rule exclusively on treaty breaches, whatever the context in which such treaty breaches arise”.⁶⁴

Its main functions are those of guaranteeing at the same time:

- to host States, that their unilateral offer to arbitrate before ICSID does not extend to alleged breaches of contract, thus limiting the risks of having to pay compensation and the amount thereof;
- to foreign investors, that at least their disputes arising out of alleged treaty breaches are heard before an international tribunal increasing their chances to be confronted with a more impartial system of adjudication than that provided by local courts of the host State.

Of course, it would be difficult to deny its fictitious character from a practical point of view, since every *treaty* tribunal has inevitably to look at the contract and incidentally determine whether the latter has been breached in order to rule on the effective violations of the international obligations States accepted when they concluded their BIT (I). More importantly, the general terms of art. 25 of the ICSID Convention do not contain such a distinction. As it has been noted by the tribunal in the *SGS v. Philippines* case

“It is clear from the general language of Article 25(1) that ICSID jurisdiction may extend to disputes which are purely contractual in character. For example a dispute arising out of an investment contract

⁶³ For a detailed account, see DE LUCA, *supra* footnote 62, 1020 ff.

⁶⁴ See *supra* footnote 39, para. 158.

between a State or constituent subdivision or agency could be covered, and this could be the case even though the dispute exclusively concerns issues arising under the proper law of the contract. There is no distinction drawn in Article 25, or in Article 42(1), between purely contractual and other disputes (e.g. claims for breach of treaty)⁶⁵ (II)

In addition, the debate on the normative value of the *umbrella clauses* significantly affects the scenario of such binomial depending on the interpretation of each panel of arbitrators in each specific case, thus increasing inconsistency, legal insecurity, and so on and so forth (III). Furthermore, the boundaries of such a distinction are rather indefinite due to the existence of the *acte de puissance publique* theory, according to which the *treaty* tribunal is competent not only for treaty claims, but also for contract claims when the State – or public entities whose acts are attributed to it⁶⁶ – has acted in the exercise of its sovereign prerogatives and not as an ordinary contractor⁶⁷ (*State as a sovereign / State as a merchant* distinction) (IV).

Problems of conflicting jurisdictions (and, what is more complicate, potentially pertaining to two different spheres in light of the international / national divide) arise in case of parallel proceedings, i.e. in the typical situation in which the foreign investor files its claims before local courts or before the arbitral tribunal provided for in the arbitration clause contained in the contract, and later before ICSID: in such a scenario, which adjudication body has the true authority to determine – with effects *usque ad sidera, usque ad inferos* – the acts that in each specific case have to be subsumed under the notion of *acte de puissance publique*, therefore influencing the scope of both jurisdictions? It has to be underlined that even in cases in which there are no parallel proceeding, the theoretical problem remains intact, insofar as a tribunal may have the authority to determine the jurisdictional scope of other potentially conflicting tribunals, to which the investor may have recourse on a later stage. In the absence of a hierarchical system in this respect and of rules or guiding principles, is it acceptable to find that a tribunal is *more equal* than the other ones? Then, is it possible to avoid such a conflict, and how?

D.2 The case - Turning back to the case, Toto argued that the ICSID tribunal had jurisdiction over Lebanon's failure to enforce its international obligation to promote and protect Toto's

⁶⁵ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on objections to jurisdiction dated 29 January 2004, para. 29.

⁶⁶ See *supra* part B, 14.

⁶⁷ *Decision on jurisdiction*, paras. 103-104.

investment in the host State, as a breach of art. 2 of the BIT.⁶⁸ In particular, it presented four groups of violations, namely 1) delay in carrying out the necessary expropriations required under the contract in order to build the highway; 2) failure to remove Syrian troops – which were assisting Lebanon in providing security to a certain region - from the areas related to the construction project; 3) providing misleading information, wrong instructions and erroneous design in the contract; 4) change in the regulatory framework. Concerning points 1), 2) and 3), the condition of the existence of *actes de puissance publique* constituted the central element for the tribunal to have jurisdiction, and consequently was disputed between the parties. Not surprisingly, Lebanon opposed such view maintaining that said alleged violations, where existing *quod non*, amounted to breach of contract, not of treaty.

1) The tribunal simply limited its analysis by making reference to the difference between an ordinary contractor and the sovereign,⁶⁹ which is the only entity holding the *puissance publique*, and by affirming that

“the authority to expropriate is a typical example of a prerogative that can only be exercised by the State (or its emanation) as holder of the *puissance publique*”.⁷⁰

2) The same goes for the alleged failure to remove Syrian troops: the tribunal referred to the brief reasoning in point 1), and for this reason decided that it had jurisdiction.⁷¹

3) Since such a carelessness relates to simple violations of an ordinary contractor’s duties, the tribunal found that it had no jurisdiction on this point.

As a general comment to these three points, it is respectfully noted that the tribunal refrained from developing the issue of what constitutes an *acte de puissance publique*: such an analysis

⁶⁸ “1. Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

2. Each Contracting Party, in accordance with its laws and regulations, shall allow the investor to engage top managerial and technical personnel of his choice, regardless of nationality and grant the related permits.

3. Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments. In particular, each Contracting Party or its competent authorities shall issue the necessary permits mentioned in Paragraph 2 of this Article.

4. Each Contracting Party shall create and maintain, in its territory favourable economic and legal conditions in order to ensure the effective application of this Agreement”.

⁶⁹ For critical remarks on this aspect see FADLALLAH, *Toto Costruzioni Generali SpA c. Liban*, ICSID Review, Vol. No. 23, Issue No. 2, 2008, 320.

⁷⁰ *Decision on jurisdiction*, para. 106.

⁷¹ *Ibid.*, paras. 117-118.

may be seen as strongly recommended in this kind of circumstances, where there was a parallel proceeding pending before the Lebanese *Conseil d'État*, the competent court under the contract and therefore the “natural” forum of the abovementioned claims. In addition to it – even if this element does not seem to be crucial – the proceeding before the local court had been instituted prior to the one under the auspices of ICSID. There may be an explanation (though incomplete) to the fact that the tribunal did not set a general framework, by making reference to rules of international law and specifically – for example – to the distinction between *acta iure imperii* and *acta iure gestionis* in order to find comparisons and/or discrepancies but nonetheless inserting the *acte de puissance publique* to which it made reference within a more stable environment: simply, since in the case under consideration it may be unlikely to delimit the scope of this term in a different way, it did not consider it necessary to develop more elaborated reasoning and reference to international law. However, it is submitted that such an endeavour is important not only for concerns of consistency in the ICSID dispute resolution mechanism (if a reasoning is persuasive and well argued, it will more likely be followed), but also for reasons of limiting the negative effects of the conflicts between jurisdictions, which are not infrequently enshrined in different legal orders.

4) In regards to change in the regulatory framework, the tribunal decided that they amount to treaty breaches if they are “discriminatory, unreasonable or otherwise in violation of the Treaty”⁷², a condition which Toto failed to demonstrate.

Toto further submitted that Lebanon had breached its BIT obligations to ensure fair and equitable treatment under art. 3, para. 1 of the BIT⁷³ (by disrupting negotiations with the CDR,⁷⁴ denying justice before the *Conseil d'État* due to abnormal delays⁷⁵ and causing those two lawsuits to lack transparency)⁷⁶ and had committed acts amounting to indirect expropriation of Toto’s investment in violation of art. 4, para. 2 of the BIT.⁷⁷ The tribunal

⁷² *Ibid.*, para. 130.

⁷³ Art. 3, para. 1 of the BIT provides that “Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to the investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of any third State, if this latter treatment is more favourable”.

⁷⁴ *Ibid.*, para. 132.

⁷⁵ *Ibid.*, para. 140.

⁷⁶ *Ibid.*, para. 169.

⁷⁷ Art. 4, para. 2 of the BIT reads as follows: “Neither of the Contracting Parties shall take, either directly or indirectly, de jure or de facto, measures of expropriation, nationalisation or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the

disagreed with Toto on all these claims and therefore ruled that it lacked jurisdiction in these respects.⁷⁸

E – Scope of the umbrella clause

In order to thoroughly address Lebanon's general jurisdictional objection, according to which the dispute concerned contract claims and not treaty claims, the tribunal considered the normative value of the so-called *umbrella clause*. The umbrella clause is a provision contained in an investment treaty whereby the contracting States mutually commit themselves to observe the obligations assumed vis-à-vis the foreign investor.⁷⁹ However, the exact meaning, scope and effects of such a clause are highly controversial since the terms adopted in drafting it differ from a BIT to another and consequently – but not exclusively – arbitral tribunals interpreted it differently. The most famous example thereof has been given by the conflicting interpretations in the *SGS v. Pakistan*⁸⁰ and the *SGS v. Philippines*⁸¹ cases. Such a conflict is even more blatant if one considers that 1) the facts giving rise to the dispute bore many resemblances with each other; 2) the investor claiming compensation was the same in the two cases and 3) that the decisions on jurisdiction were issued at a very short time space.⁸²

Short of an analysis of the entire reasoning of the two tribunals,⁸³ it is nonetheless relevant to note that while in the first case a restrictive approach was preferred,⁸⁴ in the second one a

measures are taken in the public interest as established by law, on a non-discriminatory basis, under due process of law, and provided that provisions be made for effective and adequate compensation, according to the enforced national law without any kind of discrimination”.

⁷⁸ *Decision on jurisdiction*, paras. 138, 168, 173, 186.

⁷⁹ See *inter alios* DOLZER, SCHREUER, *supra* footnote 23, 166 ff.; CRAWFORD, *Treaty and Contract in investment Arbitration*, Arbitration International, Vol. No. 24, Issue No. 3, 2008, 351 ff.; SINCLAIR, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, Arbitration International, Vol. No. 20, Issue No. 4, 2004, 411; BEN HAMIDA, *La clause relative au respect des engagements dans les traités d'investissement*, in LEBEN (ed.), *Le contentieux arbitral transnational relatif à l'investissement*, Paris, 2006, 53; LEMAIRE, *Treaty Claims et Contract Claims: la compétence du CIRDI à l'épreuve de la dualité de l'État*, *Revue de l'arbitrage*, Issue. No 2, 2006, 383 ff.

⁸⁰ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on objections to jurisdiction dated 6 August 2003.

⁸¹ See *supra* footnote 65.

⁸² Respectively on 6 August 2003 and 29 January 2004.

⁸³ In this sense, see ALEXANDROV, *Breaches of Contracts and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, *Journal of World Investment and Trade*, Vol. No. 5, Issue No. 4, 555 ff.

⁸⁴ *SGS v. Pakistan* quoted *supra* footnote 80, para. 173: “The Tribunal is not saying that States may not agree with each other in a BIT that henceforth, all breaches of each State's contracts with investors of the other State are forthwith converted into and to be treated as breaches of the BIT. What the Tribunal is stressing is that in this case, there is no clear and persuasive evidence that such was in fact the intention of both Switzerland and

different panel of arbitrators opted for an extensive – or effective – one.⁸⁵ For the sake of completeness, the two relevant provisions are reported: art. 11 of the Switzerland – Pakistan BIT provides that

“Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party”.⁸⁶

Art. X (2) of the Switzerland – Philippines BIT, on the other hand, reads:

“Each Contracting Party shall observe any obligation it has assumed with regard to *specific investments* [italics added, *A/N*] in its territory by investors of the other Contracting Party”.⁸⁷

The tribunal in *SGS v. Philippines* found, *inter alia*, that the language of art. 11 of the Switzerland – Pakistan BIT was less clear and categorical than the one of the homologous provision before them, namely the presence of the expression “specific investments”.⁸⁸

In the *Toto v. Lebanon* case, the tribunal had to evaluate the normative value of the relevant “observance-of-obligations clause” (umbrella clause) contained in art. 9, para. 2 of the BIT, providing that

“Each Contracting Party shall observe any other obligation [emphasis added, *A/N*] it has assumed with

Pakistan in adopting Article 11 of the BIT [the observance-of-commitments clause, *A/N*]. Pakistan for its part in effect denies that, in concluding the BIT, it had any such intention. *SGS*, of course, does not speak for Switzerland. But it has not submitted evidence of the necessary level of specificity and explicitness of text. We believe and so hold that, in the circumstances of this case, *SGS*’s claim about Article 11 of the BIT must be rejected”.

⁸⁵ *SGS v. Philippines* quoted *supra* footnote 65, paras. 116-117: “116. The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended “to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other”. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments. 117. Moreover it will often be the case that a host State assumes obligations with regard to specific investments at the time of entry, including investments entered into on the basis of contracts with separate entities. Whether collateral guarantees, warranties or letters of comfort given by a host State to induce the entry of foreign investments are binding or not, i.e. whether they constitute genuine obligations or mere advertisements, will be a matter for determination under the applicable law, normally the law of the host State. But if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X(2)”.

⁸⁶ See *SGS v. Pakistan*, *supra* footnote 80, para. 163.

⁸⁷ See *SGS v. Philippines*, *supra* footnote 65, para. 115.

⁸⁸ *Ibid.*, para. 119.

regard to investments in its territory by investors of the other Contracting Party”.⁸⁹

In this respect, two opposed positions may have been assumed: 1) the clause is broad enough so as to cover under its umbrella all the contractual commitments (“any other obligation”) entered into by the host State – and its public entities, if their acts are attributed to it – with the investors; 2) the clause is too generic and therefore does not allow the interpreter to consider it as an “elevator”, upgrading contract claims as if they became treaty claims. The tribunal opted for the latter view. When it referred to the *SGS v. Philippines* case in order to distinguish it from the one before it, the tribunal erroneously took into consideration the observance-of-commitments clause contained in the BIT between the Philippines and the United Kingdom – instead of Switzerland – namely art. VII, which reads as follows:

“Each party shall observe any obligation arising from a particular commitment it may have entered into with regards to specific investment”.⁹⁰

It then went on saying that in that case the intent of the contracting parties was made evident by the use of the terms “particular commitment” and “specific investment”; however – as it has been underlined above⁹¹ – art. X (2) of the Switzerland – Philippines BIT only contains the term “specific investments”, which gives a slightly weaker indication of normative value to the clause, and a weaker opposition between the two cases.⁹² Since there are no indications of any objection whatsoever from the part of Toto, it is not possible to ascertain whether the correct comparison would have led the tribunal to rule any differently on the role of the clause in the case at stake.

According to the tribunal’s review of the case law on interpretations of the umbrella clause, there are four possible interpretations of the umbrella clause, namely:

- extensive (*SGS v. Philippines*);
- restrictive (*SGS v. Pakistan*);

⁸⁹ See *decision on jurisdiction*, para. 187.

⁹⁰ *Ibid.*, para. 193.

⁹¹ See *supra*, 21.

⁹² Paras. 193 and 194 are quite unclear: in the latter, there is a sentence in which the term “contract” is wrongly used instead of “treaty”, adding some uncertainties as to the reasoning.

- maximalist, or over-extensive (*Noble Ventures Inc. v. Romania*);⁹³
- over-restrictive;⁹⁴

The tribunal decided to follow the latter,⁹⁵ justifying its decision by referring to the

“unqualified commitment assumed by Lebanon to comply with “any other obligation it has assumed” as well as with the fourth paragraph of the Preamble to the Treaty which confirms the importance of the “contractual protection” of investments – again without further qualification”.⁹⁶

One may oppose to this the difference between “shall observe any obligation” – which indeed would seem unqualified – and “shall observe any other obligation” – emphasis added, *A/N*, which on the contrary seems to underline the respect of obligations other than those in the treaty, i.e. those contained in an investor-State contract – therefore interpreting less restrictively art. 9, para. 2, of the BIT. In line with its reasoning, however, the tribunal decided that it lacked jurisdiction over contract claims. It is worth noting that Judge Schwebel, appointed as a member of the tribunal at a late stage of the proceedings⁹⁷ (when the decision on jurisdiction had already been issued), wrote on his concurring opinion dated 24 May 2012 that “I do not necessarily share their interpretation of the legal effect of the “umbrella clause” of the Treaty which was a feature of the Tribunal’s judgment on jurisdiction”.⁹⁸ Undoubtedly, legal certainty is best achieved through drafting a very clear umbrella clause.⁹⁹

As a general matter of macroeconomic policy, legal-economic certainty – or security – through clear rules is a core element which has an enormous influence on the investment climate.¹⁰⁰ Conversely, it has been demonstrated that, when faced with high uncertainty, firms

⁹³ ICSID Case No. ARB/01/11, Decision on the Respondent’s request for rectification of the award dated 12 October 2005, paras. 46-52.

⁹⁴ *Decision on jurisdiction*, para. 200, referring to the view described by CRAWFORD, *supra* footnote 79, 351-374.

⁹⁵ Criticizing the use of umbrella clauses only as mere references to treaty obligations, FADLALLAH, *supra* footnote 69, 328.

⁹⁶ *Ibid.*, para. 201.

⁹⁷ See *supra*, 8.

⁹⁸ *Award*, page 67.

⁹⁹ SCHOKKAERT, HECKSCHER, *Investment Contracts between Sovereign States and Private Companies – Link between BITs and State Contracts*, Journal of World Investment and Trade, Vol. No. 11, Issue No. 6, 2010, 918.

¹⁰⁰ VANDEVELDE, *Bilateral Investment Treaties*, Oxford, 2010, 114: “By promoting rule of law principles such as security, reasonableness, nondiscrimination, transparency, and due process, BITs help establish the

reduce investment demand and delay their projects because they need to understand the environment which they have to deal with.¹⁰¹ Uncertainty refers to a framework in which the image is out of focus because information is lacking. In the majority of cases, the adjective which has to be added to the noun “information” is “legal”. It is suggested that clarity in drafting an investor-State contract through, for example, a “confirmation umbrella clause” upgrading *contract claims* to the level of *treaty claims* would be beneficial to both parties, limiting the effects related to political risks (on the side of the investor) and the hurdles to regulatory intervention (on the side of the State).

4. Lack of Party identity concerning BIT and contract: jurisdictional dualism vs. unity when the contract is entered into by a public entity

An issue related to that of the scope of the umbrella clause – and, more generally, to that of the way in which the BIT is drafted – consists in the consequences of the binomial when the relevant contract is entered into by a public entity, not by the host State itself. In such a circumstance, the basis for unifying all claims before the competent tribunal under the BIT (the treaty-based tribunal) is undoubtedly weaker because of the lack of identity between the public party to the BIT and the one to the investor-State contract: therefore, the jurisdictional dualism, *belle symétrie*,¹⁰² seems to resist any sort of objection.

This aspect is not directly addressed in *Toto v. Lebanon* due to the very narrow interpretation given to the quite narrow umbrella clause, where the margin between “very” and “quite” could have been evaluated differently by the arbitral tribunal, as Judge Schwebel seems to suggest in his concurring opinion to the award.¹⁰³ In combination with it, the arbitral tribunal decided that the two groups of (alleged omissions of) *actes de puissance publique* referred above – namely, 1) delay in carrying out the necessary expropriations required under the

institutional framework necessary for a modern, developed economy able to benefit from economic globalization”.

¹⁰¹ See IMF, *World Economic Outlook*. October 2012, 50-53, available at the IMF’s institutional website: <http://www.imf.org/external/pubs/ft/weo/2012/02/>

¹⁰² MAYER, *supra* footnote 10, 79: “Une certaine conception des rapports entre les ordres juridiques étatiques et l’ordre juridique international tend à les opposer radicalement: un tribunal statuant au nom de l’ordre international, entre sujets du droit international, devrait appliquer le droit international et seulement le droit international, tandis qu’un tribunal rattaché à un ordre juridique étatique, statuant entre l’investisseur pris comme personne privée et l’État, ou son émanation, pris comme administration (sujet de l’ordre interne), appliquerait seulement le droit de l’État. Il y a là une opposition terme à terme, qui flatte le goût des juristes pour les belles symétries”.

¹⁰³ See *supra*, 23.

contract in order to build the highway; and 2) failure to remove Syrian troops from the areas related to the construction project¹⁰⁴ – were attributed to the host State as they had to be carried out by its public entity under the contract: consequently, the tribunal maintained the dualism, limiting the contract-based jurisdiction to contract claims which did not amount to exercise of governmental authority, i.e. excluding acts and omissions allegedly in breach of art. 2 of the BIT.

A broader umbrella clause, or in general a truly investor-friendly – rather, certainty-friendly and consequently beneficial also to the host State itself – provision in a BIT may expressly indicate not only that contract claims are upgraded to the same level as treaty claims, but also that the same applies *even if the underlying contract is entered into by a State entity* with the foreign private investor. It is suggested that such a provision would overcome objections related to the lack of identity between a State and its emanation(s) in this respect.¹⁰⁵ In a nutshell, it would be able to leave no room for doubt thereupon and thus achieve the unification of all claims before the treaty-based tribunal, a cost-efficient solution which would avoid *lis pendens* issues and other difficulties related thereto.

5. Fork-in-the-road clauses and parallel proceedings

Finally, the tribunal dealt with three related issues, namely:

- scope of the fork-in-the-road clause;
- relationship between the “treaty judge” and the “contract judge” as far as jurisdiction is concerned;
- whether it should stay the proceedings or not.

Art. 7, para. 2, of the BIT *in fine* contains the so-called *fork-in-the-road clause*, according to which the choice made pursuant to the arbitration clause contained in the BIT is final (from the latin maxim *electa una via, non datur recursus ad alteram*). Since Toto had initiated two proceedings before the Lebanese *Conseil d’État*, Lebanon made the point that the ICSID tribunal lacked jurisdiction over the claims related thereto. The tribunal ruled that in this case the clause did not exclude the jurisdiction of any forum, due to the distinction between *treaty*

¹⁰⁴ See *supra*, 18.

¹⁰⁵ LEMAIRE, *supra* footnote 79, 385.

claims (ICSID tribunal) and *contract claims*¹⁰⁶ (*Conseil d'État*, to the extent the State had not acted as a *puissance publique*). Consequently, given that the two proceedings were truly parallel, in the sense that for the time being they had not obstructed each other since the claims before them were based on different causes of action, the tribunal also declined to stay its proceedings.¹⁰⁷

6. Conclusive remarks

As this article has attempted to show, the *contract claims / treaty claims* binomial constitutes a source of complex situations, in particular in terms of legitimacy of parallel courts to limit or expand their own jurisdictions, and conflicts which are likely to arise therefrom.¹⁰⁸ Short of depicting it like a sort of distinction without a difference, it is submitted that it is open to future tribunals to set a general framework drawing to rules of international law as far as the concept of *acte de puissance publique* is concerned, in order to contribute to the achievement of more consistency in such an unclear topic and avoid the negative consequences of conflicting parallel proceedings in distinct legal orders. As Professor Mayer put it very clearly

“Le système dualiste incite à la duplication des procédures, avec toutes les conséquences néfastes qui en découlent. La première est l’augmentation des coûts: deux procédures coûtent plus cher qu’une seule. Lorsque les intérêts en jeu sont considérables, cet inconvénient apparaît mineur. Mais les litiges qui surgissent entre États et investisseurs portent parfois sur des réclamations relativement modestes. C’est surtout la dualité des décisions qui est préoccupante. [...] Il est contraire au bon sens de limiter la compétence du tribunal du traité aux demandes fondées sur une violation des clauses matérielles du traité. L’investisseur, contrairement à son État national lorsque celui-ci exerçait la protection diplomatique, ne se pose pas essentiellement en victime d’une violation du droit international. Il vise à une réparation concrète de son préjudice, quel que soit le fondement de cette réparation. C’est la demande de réparation qui fonde l’unité du litige, et pour la respecter il faut, autant que possible, un tribunal unique pour les *treaty claims* et pour les *contract claims*”.¹⁰⁹

In order to avoid conflicts between jurisdictions, a solution may consist in a specific

¹⁰⁶ MAYER, *supra* footnote 10, 76, noted that “la jurisprudence a vidé de tout contenu de telles clauses [fork-in-the-road clauses, *A/N*] en recourant à la distinction entre *contract claims* et *treaty claims*: le fait d’avoir saisi la juridiction locale d’un *contract claim* ne priverait pas l’investisseur de la possibilité de porter un *treaty claim* devant le tribunal du traité, les deux demandes étant de nature différente”.

¹⁰⁷ *Decision on jurisdiction*, para. 220. For critical remarks related to different consequences, for the foreign investor and for the host State, depending on the existence of a fork-in-the-road clause in the BIT, see DE LUCA, *supra* footnote 62, 1038.

¹⁰⁸ See *supra*, 19.

¹⁰⁹ MAYER, *supra* footnote 10, 75-77.

provision in the investment contract itself, whereby the parties may agree that the competent investment treaty tribunal has the authority to determine which acts and omissions fall under the notion of *puissance publique* and consequently to exercise its jurisdiction thereupon. In cases like *Toto v. Lebanon*, in which the contract was entered into between the parties before the entry into force of the BIT, this would mean that the parties may amend their contract accordingly; such a scenario is more unlikely to occur because of resistances from the public party, be it the State itself or a public entity. In any manner, since the unification of the binomial appears to be almost unattainable in the short run, a reasonably satisfactory result would consist in the clarification at least of the tribunal holding the authority to delimit the grey area located around the notion of *puissance publique*.