ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS

A GUIDE TO THE KEY ISSUES

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Chapter 14

Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?

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INTRODUCTION

Foreign investments are often made by means of a contract between the foreign investor and an entity or instrumentality of the host State. In numerous cases, disputes between investors and host States under investment treaties arise out of breaches of underlying contracts. Claims for breaches of international legal obligations arising out of or relating to underlying contracts are nothing new in international arbitration. Recently, however, the question of how treaty-based tribunals should deal with claims arising out of the contractual relationship was brought into the spotlight because of the decisions on jurisdiction in *SGS v. Pakistan* and *SGS v. Philippines*. These decisions, often perceived as contradictory, both deal with the jurisdiction of treaty-based tribunals over claims for breach of the underlying contract.¹

Since the two SGS decisions, tribunals have carefully examined the issue and created jurisprudence that has provided useful guidance. With the exception of the jurisprudence relating to the umbrella clause, discussed in Chapter 19 of this book, tribunals have generally approached the analysis of their jurisdiction over breach of treaty and breach of contract claims in a consistent manner, each building upon prior decisions to

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establish a clearer analytical approach to jurisdiction over claims arising out of the contractual relationship.

The seeming confusion regarding the interplay between treaty claims and contract claims is largely dispelled; how to treat contract claims is no longer unknown territory.

TREATY-BASED TRIBUNALS' JURISDICTION OVER TREATY CLAIMS ARISING OUT OF AN UNDERLYING CONTRACT

Assuming all jurisdictional requirements are met (i.e., a foreign investor submits a legal dispute against a host State arising out of an investment and there is consent to arbitrate under an applicable investment treaty), a treaty-based arbitral tribunal has jurisdiction over claims asserting breach of the treaty. Should a tribunal adopt a different approach to assessing jurisdiction merely because the treaty claims arise out of an underlying contract? There are several reasons why this question should be answered in the negative.

Contract Protection Under Customary International Law

It is well established under international law that the taking of a foreign investor's contractual rights constitutes expropriation or a measure having an equivalent effect. As Brice Clagett has put it:

Customary international law has long regarded such elementary principles as respect for lawfully acquired property rights and respect for lawfully concluded agreements (pacta sunt servanda) as the cornerstones of relations between States and alien investors. It is believed that State liability for breach of these obligations has never been seriously questioned by any twentieth-century arbitral tribunal or other international adjudicatory authority. To the contrary, international tribunals have repeatedly held, in decisions spanning the last hundred years, that under customary international law, when a State takes an alien investor's property, the investor must be compensated.2

The Permanent Court of International Justice, in the landmark Chorzów Factory case, concluded that Poland's seizure of the factory in Chorzów and its machinery also constituted an expropriation by Poland of the patents and contract rights of the company managing the factory, even though the Polish Government had not purported to expropriate the intangible property.3

Early arbitration decisions followed the same reasoning. For example, in Company General of the Orinoco, the French-Venezuelan Mixed Claims Commission determined

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that the Government of Venezuela owed compensation for its unilateral repudiation of a concession agreement, which was to be "commensurate to the damages caused by the act of the respondent Government [Venezuela] in denying efficacy to the contract."\(^4\) In Shufeldt, the Government of Guatemala nullified a concession agreement that it had concluded with a U.S. investor. In considering whether Shufeldt had "acquire[d] any rights of property under the contract" for the purposes of pecuniary indemnification, the tribunal found that "[t]here can not be any doubt that property rights are created under and by virtue of a contract."\(^5\)

ICSID jurisprudence has followed the same reasoning. In SPP v. Egypt, an ICSID tribunal found that SPP was entitled to compensation for the Egyptian Government's expropriation of its contractual rights. The tribunal noted that "it has long been recognized that contractual rights may be indirectly expropriated"\(^6\) and that "contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefor."\(^7\) The Iran-U.S. Claims tribunal has also made numerous pronouncements to that effect. In Phillips v. Iran, for example, the tribunal found that "[e]xpropriation . . . of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present Case."\(^8\)

**Contract Protection Under Investment Treaties**

The overwhelming majority of the modern investment treaties define protected investments broadly and explicitly include contractual rights in that definition.

*Expropriation*. The fact that contractual rights are a protected form of investment under most treaties reinforces the conclusion that a taking of such rights is an expropriation under the relevant treaty. As the tribunal in Consortium RFCC v. Kingdom of Morocco noted, "any type of asset can be a priori subject to expropriation and thus


\(^7\) Id. at para. 164.

\(^8\) Phillips Petroleum Company Iran v. The Islamic Republic of Iran, Award 425-39-2 of June 29, 1989, at para. 76. See also SeaCo, Inc. v. The Islamic Republic of Iran, Award 531-260-2 of June 25, 1992, at para. 45 ("To prevail upon its contention that the Government of Iran expropriated contract rights . . . SeaCo must show that its contract rights were breached and that the breach resulted from 'orders, directives, recommendations or instructions' of the Government of Iran.") (citing Flexi-Van Leasing, Inc. v. The Government of the Islamic Republic of Iran, Award No. 259-36-1 of October 13, 1986, at 20); Starrett Housing Corporation v. The Government of the Islamic Republic of Iran, ITL Award 32-24-1 of December 19, 1983, at section IV(b).
protected by the provisions of the treaty." In *Impregilo v. Pakistan*, the tribunal relied on several cases for the notion that "the taking of contractual rights could, potentially, constitute an expropriation or a measure having an equivalent effect."\(^9\)

**Fair and Equitable Treatment.** Once contractual rights are covered by the definition of investment, they also fall within the scope of the other substantive protections of an investment treaty. Thus, not surprisingly, investor-State jurisprudence has recognized that a State’s failure to observe its contractual commitments to a foreign investor may constitute a violation of the international law standard of fair and equitable treatment. According to the European Communities’ Investment Protection Principles, the requirement of fair and equitable treatment is an "overriding concept" that encompasses various investment protection principles, including the observance of undertakings.\(^10\) The United Nations Conference on Trade and Development also concluded that the fair and equitable treatment standard includes the legal rules of *pacta sunt servanda* and respect for contractual obligations.\(^11\) In several recent cases tribunals have concluded that State actions repudiating contractual obligations, while not amounting to an expropriation, breached the fair and equitable treatment standard under the relevant investment treaty.\(^12\)

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11 See, e.g., News from ICSID, Vol. 11, No.1 (Winter 1994), at 5 (referring to the Investment Protection Principles adopted in 1992 by the Council of the European Communities to provide details for the application of the investment promotion and protection principles contained in the Fourth Lomé Convention on cooperation between the group of Asian, Caribbean, and Pacific countries and the EC and its Member States).

12 See UNCTAD, *FAIR AND EQUABLE TREATMENT 34–37* (UNCTAD Series on Issues in International Investment Agreements, 1999); see also World Bank, *Guidelines on the Treatment of Foreign Direct Investment*, 7 ICSID REV.–FILJ 297, 300 (Fall 1992) (Article III(2) states that "[e]ach State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines," which include protections regarding expropriation, currency transfers, licenses, etc.).

13 See CMS Gas Transmission Company v. Argentine Republic (ICISD Case No. ARB/01/8), Award of May 12, 2005, at paras. 264, 281; Azurix Corp. v. Argentine Republic (ICISD Case No. ARB/01/12), Award of July 14, 2006, at paras. 322, 374; Enron Corp. v. Argentine Republic (ICISD Case No. ARB/01/3), Award of May 22, 2007, at paras. 246, 268; LG&E Energy Corp. v. Argentine Republic (ICISD Case No. ARB/02/1), Award of October 3, 2006, at paras. 132, 200. Tribunals that found no breach of the fair and equitable treatment requirement in light of the circumstances of the specific case have also recognized that violations of

\textit{Other Treaty Protections.} Further, there is no reason why State actions in violation of contractual obligations could not breach treaty protections other than expropriation and fair and equitable treatment. In several cases tribunals have held that repudiating contractual rights also amounted to a breach of the treaty requirement to accord to investments full protection and security\footnote{\textit{See Azurix Corp. v. Argentine Republic} (ICSID Case No. ARB/01/12), Award of July 14, 2006, at para. 393. \textit{Id.} at para. 241.} or a breach of the prohibition on impairing the value of an investment through arbitrary or discriminatory measures.\footnote{\textit{See Azurix Corp. v. Argentine Republic} (ICSID Case No. ARB/01/12), Award of July 14, 2006, at para. 393. \textit{Id.} at para. 241.} The tribunal in \textit{Noble Ventures}, for example, held that the fair and equitable treatment standard includes the obligation to abide by contracts, along with the obligation to provide full protection and security, and the prohibition of arbitrary and discriminatory treatment. It stated:

\begin{quote}
[O]ne can consider this [the fair and equitable treatment standard] to be a more general standard which finds its specific application in \textit{inter alia} the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor.\footnote{\textit{See Azurix Corp. v. Argentine Republic} (ICSID Case No. ARB/01/12), Award of July 14, 2006, at para. 393. \textit{Id.} at para. 241.}
\end{quote}

\textbf{Investment Treaty Claims Arising out of Contracts}

Assuming all other jurisdictional requirements are met, there should therefore be little doubt that treaty-based tribunals have jurisdiction to decide claims for breach of the treaty, whether or not those claims arise out of or relate to an underlying contractual relationship. As the tribunal in \textit{Eureka} stated, it was required to “consider whether the acts of which Eureka complains, whether or not also breaches of [contract], constitute breaches of the Treaty.”\footnote{\textit{See Azurix Corp. v. Argentine Republic} (ICSID Case No. ARB/01/12), Award of July 14, 2006, at para. 393. \textit{Id.} at para. 241.} It further held that “[t]here is an amplitude of authority for the proposition that when a State deprives the investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation” of an investment treaty.\footnote{\textit{See Azurix Corp. v. Argentine Republic} (ICSID Case No. ARB/01/12), Award of July 14, 2006, at para. 393. \textit{Id.} at para. 241.}
In fact, while the *SGS v. Pakistan* and *SGS v. Philippines* decisions are generally perceived as inconsistent, it is often overlooked that both tribunals asserted jurisdiction over treaty claims without hesitation, regardless of the fact that those claims arose directly out of the underlying contracts. Both *SGS* tribunals, in line with ICSID jurisprudence, acknowledged the existence of independent treaty claims, even though the treaty claims were based upon the same sets of facts as the contract claims. They found jurisdiction over the treaty claims and only then addressed the separate issue of jurisdiction over the contract claims.

The *SGS v. Pakistan* tribunal stated that if Article 9 of the Switzerland-Pakistan bilateral investment treaty (the dispute settlement provision) “relates to any dispute at all between an investor and a Contracting Party, it must comprehend disputes constituted by claimed violations of BIT provisions establishing substantive standards.”\(^{20}\) In other words, if the BIT dispute settlement mechanism is to have any meaning, which it obviously must, it must cover disputes where treaty breaches are alleged. The tribunal concluded: “Any other view would tend to erode significantly those substantive treaty standards of treatment.”\(^{21}\) It is hardly possible to disagree with this conclusion. The *SGS v. Philippines* tribunal followed the same logic. It noted that a treaty-based tribunal should assert jurisdiction where the claims presented involve “allegations which, if proved, [are] capable of amounting to breaches” of the relevant BIT.\(^{22}\) Surely, then, the fact that treaty claims arise out of an underlying contract should not (and, in most cases, does not) alter a tribunal’s approach to determining jurisdiction over claims alleging breach of the treaty.\(^{23}\)

### TREATY-BASED TRIBUNALS’ JURISDICTION OVER “PURELY” CONTRACTUAL CLAIMS

Given the consensus that the jurisdiction of treaty-based tribunals over treaty claims is not in any way undermined by the fact that such treaty claims arise out of an underlying contract, the next question, logically, is whether treaty-based tribunals also have jurisdiction to decide claims asserted by investors not as treaty claims but rather as contractual claims.

According to one view, every breach by the State of a contract with an alien invokes the State’s international responsibility. As Brownlie notes, “[t]here is a school of

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21 Id.


23 One possible exception may be where a tribunal has interpreted a forum selection clause in an underlying contract as an explicit waiver of treaty-based jurisdiction and declined jurisdiction over a claim arising “essentially” out of the contract, even though characterized as a treaty claim. See discussion below, text accompanying notes 90–95.
thought which supports the view that the breach of a state contract by the contracting government of itself creates international responsibility.\textsuperscript{24}

Whether or not a contract breach falls within the jurisdiction of a treaty-based tribunal is, however, a question of the interpretation of the relevant treaty. Treaty-based tribunals have looked for specific guidance in the text of the relevant treaty to determine whether the treaty requires them to exercise jurisdiction over "pure" contract claims. There is no doubt that a treaty can provide a basis for consent to arbitrate "purely" contractual claims. One needs to look no further than the Iran-U.S. Claims tribunal; under the Claims Settlement Declaration, which is part of the Algiers Accords of 1981, private claimants brought numerous contractual claims against Iran\textsuperscript{25} (resulting in awards enforceable under the New York Convention). Likewise, several provisions in investment treaties have been invoked as a basis for jurisdiction over claims asserted only as contract claims.

**Umbrella Clause Provisions as a Basis for Jurisdiction over Contract Claims**

One such provision is the so-called "umbrella clause," a provision requiring that states observe obligations or undertakings they have entered into with respect to foreign investors or investments. The question that a number of tribunals have confronted is whether the umbrella clause "elevates" contractual breaches to the level of treaty breaches and, therefore, confers upon treaty-based tribunals jurisdiction to decide contractual—"elevated to the level of treaty"—claims. This question is discussed elsewhere in this book.

**Provisions Granting Jurisdiction over "Any Disputes"**

Many investment treaties include a narrow jurisdictional clause that provides only for the settlement of disputes relating to obligations under the treaty—in other words, disputes based on claims for breach of the treaty.\textsuperscript{26} Some, however, contain a clause


\textsuperscript{26} \textit{See, e.g., Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments, Can.-Costa Rica, Mar. 18, 1998, 1999 Can. T.S. No. 43 (Article XII(1) provides for the settlement of "[a]ny dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement . . . .")}

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providing for the settlement of "[a]ny disputes arising between a Contracting Party and the investors of the other" Contracting Party. An interpretation of such a clause "in accordance with the ordinary meaning to be given to [its] terms," as required by Article 31(1) of the Vienna Convention on the Law of Treaties, seems to suggest that disputes arising from contract breaches fall within its purview. After all, the clause refers to "any disputes" and makes no distinction between disputes arising from breaches of contract and disputes arising from breaches of the treaty. As Professor Christoph Schreuer has observed, "where a BIT provides for investor/State arbitration in respect of all investment disputes rather than disputes concerning violations of the BIT, the tribunal is competent even for pure contract claims."

The two SGS tribunals interpreted provisions similar to the "any dispute" provision discussed earlier and came to opposite conclusions, even though the two relevant treaties contained identically worded jurisdictional clauses. The tribunal in SGS v. Pakistan found that it did not have jurisdiction over SGS's direct claims for breach of contract, while the tribunal in SGS v. Philippines held that it did. The SGS v. Pakistan tribunal first appeared to accept the ordinary meaning of the jurisdictional clause found in Article 9 of the Switzerland-Pakistan BIT. The tribunal recognized "that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the [contract at issue in the case], can both be described as 'disputes with respect to investments,' the phrase used in Article 9 of the [Switzerland-Pakistan] BIT." The tribunal, however, concluded that, despite the ordinary meaning, "we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this tribunal with jurisdiction over claims resting ex hypothesi exclusively on contract," and, therefore, "without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9." Based on this

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30 The jurisdictional clauses in the Switzerland-Pakistan BIT and the Switzerland-Philippines BIT provide for the settlement of "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party." Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, Switz.-Pak., July 11, 1995, at Article 9(1); Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments, Switz.-Phil., Mar. 31, 1997, at Article VIII(1).
32 Id.
reasoning, the *SGS v. Pakistan* tribunal declined to assert jurisdiction over SGS’s claims for breach of contract.

By contrast, the ordinary meaning of the phrase "disputes with respect to investments" was accepted and given effect by the tribunal in *SGS v. Philippines*, which held that it had jurisdiction over SGS’s contract claims. Interpreting the jurisdictional clause in the Switzerland-Philippines BIT, the tribunal concluded:

*Prima facie*, Article VIII is an entirely general provision, allowing for submission of all investment disputes by the investor against the host State. The term "disputes with respect to investments" . . . is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be a "dispute with respect to investments"; so too would a dispute arising from an investment contract such as the [contract at issue in the case].

The *SGS v. Philippines* tribunal listed several factors that supported its interpretation of the jurisdictional clause in Article VIII. The tribunal found that the three fora available to resolve disputes under Article VIII—the host State’s domestic courts, ICSID panels, and *ad hoc* UNCITRAL tribunals—were all competent "to apply the law of the host State, including its law of contract." Moreover, according to the tribunal, a foreign investor’s ability to choose where to have its contract claims addressed was entirely consistent with a BIT’s general purpose of promoting and protecting foreign investment. Further, the tribunal recognized that "investments are characteristically entered into by means of contracts or other agreements with the host State and the local investment partner"; therefore, "the phrase ‘disputes with respect to investments’ naturally includes contractual disputes." Finally, the tribunal noted that the State parties to the Switzerland-Philippines BIT could have limited the jurisdictional clause only to "claims concerning breaches of the substantive standards contained in the BIT," as they did elsewhere in the BIT with respect to the settlement of disputes between the State parties, or that the State parties could have limited the clause to "claims brought for breach of international standards," as was the case with NAFTA, but that in each instance, the State parties did not impose any such limits.

The reasoning of the *SGS v. Philippines* tribunal is persuasive. There is no reason to decline jurisdiction in contravention of the clear language of a treaty simply because the grant of jurisdiction appears particularly broad and open-ended. Broad and open-ended consent is by no means unheard of. For example, consent to arbitrate disputes with foreign investors can also be found in a State’s domestic legislation, where States extend a general offer, or a standing invitation, to all foreign investors to submit to

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33 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/8), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, at para. 131 (internal citation omitted).
34 *Id.* at para. 132(a).
35 *Id.* at para. 132(c).
36 *Id.* at para. 132(d).
37 *Id.* at para. 132(b).
38 *Id.* at para. 132(e).
international arbitration (including to ICSID tribunals) any disputes relating to their investments. In one such example, the ICSID tribunal in SPP v. Egypt assumed jurisdiction over SPP’s claims based on consent to ICSID arbitration given by Egypt in its domestic legislation.\(^3\) Egyptian law provided that all investment disputes in respect of the implementation of the provisions of the Egyptian statute relating to foreign investment could be submitted by the investor to arbitration under the ICSID Convention.\(^4\) Kazakhstan’s 1994 Law on Foreign Investments provided an even broader scope of consent: the investor was entitled to submit to ICSID any “[d]isputes and disagreements arising in connection with foreign investments or activity connected therewith.”\(^4\) The scope of jurisdictional grants like those under Egyptian and Kazakh domestic law is even broader than the consent to arbitrate “any disputes” in an investment treaty, as those domestic grants of jurisdiction cover disputes with any foreign investors, not just the foreign investors from one specific country before an international arbitral tribunal should not be surprising.

Possible Limitation of Jurisdiction over Pure Contract Claims to Contracts with the State Itself. Nevertheless, several tribunals have applied the logic of the SGS v. Philippines tribunal more narrowly. They have concluded that in case of “purely” contractual disputes, the “any disputes” provision covers only disputes with the State itself, i.e., when the State is a direct party to the contract and that the provision does not extend to situations where the contractual relationship is between the investor and a State entity other than the State itself.\(^4\) This interpretation of the “any disputes” provision limits significantly the scope of its application: as a practical matter, the State itself, rather than its organs or other State entities, would rarely enter directly into a contract with a foreign investor. Not surprisingly, on the basis of this interpretation, tribunals have declined jurisdiction over “purely” contractual claims when such jurisdiction has been sought pursuant to the “any disputes” provision.

By contrast, the SGS v. Philippines decision, when giving effect to the ordinary meaning of the “any disputes” provision and finding jurisdiction over the contract claims at issue, did not discuss the distinction between contracts entered into directly


\(^4\) Id. at para. 70.

\(^4\) Law of the Republic of Kazakhstan on Foreign Investments (December 27, 1994), at Article 27(1)-(2). See also Article 16.2 of the 1996 Investment Law of the Republic of Georgia, providing that “disputes between a foreign investor and a government body, if the order of resolution is not agreed between them, shall be settled at the Court of Georgia or at the International Centre for the Resolution [sic] of Investment Disputes.” Both the Law of the Republic of Kazakhstan on Foreign Investments and the 1996 Investment Law of the Republic of Georgia have served as a basis for asserting jurisdiction by international arbitration tribunals.

by the State and contracts entered into by other State entities. The most logical conclusion to be drawn from the absence of such discussion is that the tribunal did not believe the distinction was relevant to its analysis. Given the fact that the contract at issue was approved by the president of the Philippines, it could also be argued that the tribunal considered it to be a contract entered into directly by the State. If that were the case, however, one might expect that the tribunal would have mentioned this point in its analysis.

**Principle of Attribution Distinguished.** It is important here to clarify the relationship between the principle of attribution on the one hand, and the jurisdiction of treaty-based tribunals to decide contractual disputes only when the contractual obligation is undertaken directly by the State, on the other.

Attribution requires that the conduct of a number of categories of domestic entities be treated as the conduct of the State for the purposes of responsibility under international law. In many situations, for example with respect to the conduct of State organs as defined in Article 4 of the International Law Commission’s Articles on State Responsibility, the conduct of such domestic entities is attributable to the State whether or not it is characterized as *jure imperii* or *jure gestionis*. The International Law Commission’s Commentary to Article 4 states: “It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or ‘acta iure gestionis’ . . . the breach by a State of a contract does not as such entail a breach of international law . . . But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might . . . amount to an internationally wrongful act.” Thus, attribution operates when the question posed is whether a State is responsible for a breach of an international obligation, such as an obligation in an investment treaty.

By contrast, the question posed in cases where tribunals considered whether they could assert jurisdiction over “pure” contractual claims is a question of interpretation of the scope of consent, i.e., the scope of the agreement to arbitrate. Where tribunals required that the contract be entered into directly by the State, they did not consider that ruling as involving a question of attribution; rather, they reasoned that the scope of consent to arbitrate under the relevant treaty extended only to disputes under such contracts and did not cover disputes under contracts with other entities. The *Consortium RFCC* tribunal, for example, put it this way: “That limitation of the jurisdiction of the arbitral tribunal, however, is only applicable to claims which rest solely on the violation of the contract. By contrast, the arbitral tribunal has jurisdiction over contract

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46 See generally Crawford, supra note 44, at 363.
violations which would also constitute violations of the bilateral treaty that are attributable to the State.”

Provisions Granting Jurisdiction over Disputes Relating to “Investment Agreements”

A third type of provision in investment treaties that has been invoked as a basis for jurisdiction over claims asserted only as contract claims is a provision specifically defining covered investment disputes as, *inter alia*, disputes relating to an “investment agreement.” When dealing with such provisions, tribunals face the task of determining whether a contract, the breach of which is asserted, qualifies as an investment agreement. At least one tribunal, in *Generation Ukraine*, held that an investment agreement is only a contract with the State itself and that a contract with a municipal authority does not qualify, even though the actions of the municipal authorities are attributable to the State for the purposes of international responsibility. The tribunal stated:

In relation to category (a), an “investment agreement” must be an agreement between the investor and one of the two State Parties to the BIT. The Claimant has never contracted directly with Ukraine as a “Party” to the BIT. In the present case, the parties to the Lease Agreements and the Foundation Agreement are the Claimant and a municipal authority of Ukraine, the Kyiv City State Administration. True enough, the acts of the Kyiv City State Administration may be imputable to Ukraine as a sovereign state for the purposes of the international law of state responsibility.

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48 This provision is typical of bilateral investment treaties of the United States. See, e.g., The Treaty Between the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Alb., Jan. 11, 1995, at Article IX (Settlement of Disputes Between One Party and a National or Company of the Other Party) (“Article IX procedures apply to an ‘investment dispute,’ which covers any dispute arising out of or relating to an investment authorization, an investment agreement, or an alleged breach of rights granted or recognized by the Treaty with respect to a covered investment.”); Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, at Article VII(1) (“For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company . . . “); Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ukr., Mar. 4, 1994, at Article VI (State-Investor Dispute Resolution) (“Article VI procedures apply to an ‘investment dispute,’ a term which covers any dispute arising out of or relating to an investment authorization, an agreement between the investor and host government, or to rights granted by the Treaty with respect to an investment.”).
For this reason, the Claimant is entitled to bring a cause of action based on alleged expropriation of its investment by acts performed by Ukrainian municipal authorities. It is an international claim and international rules of attribution apply. But such rules do not operate to join the central government of Ukraine to contractual relationships entered into by municipal authorities.\footnote{Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award of September 16, 2003, at para. 8.12.} Thus, the Generation Ukraine tribunal made the same distinction that tribunals have made in the context of the “any disputes” provision: if the claims are only contractual, the contractual relationship must be between the investor and the State itself. On the other hand, if the claims are for violations of the treaty, then the actions of political subdivisions, local authorities, organs, officials, etc., are attributable to the State for the purposes of liability under the treaty.

The significance of this precedent may be limited, however. The 2004 United States Model BIT (and, consequently, subsequent U.S. BITs and chapters on investment in U.S. free trade agreements) includes a definition of the term “investment agreement.” Under this definition, an investment agreement is an agreement in writing with a “national authority,” which, for the United States, includes “an authority at the central level of government.”\footnote{2004 Model BIT at Article I. This use of the defined term “national authority” in the definition of “investment agreement” can be found in such agreements as the U.S.-Singapore Free Trade Agreement (defining “national authority” as “(1) for Singapore, a ministry or other government body that is constituted by an Act of Parliament; and (2) for the United States, an authority at the central level of government”), the U.S.-Chile Free Trade Agreement (defining “national authority” as “(a) for the United States, an authority at the central level of government; and (b) for Chile, an authority at the ministerial level of government” and noting that “[n]ational authority does not include state enterprises”), the U.S.-CAFTA-DR Free Trade Agreement (defining “national authority” for both States as “an authority at the central level of government”), and the U.S.-Uruguay BIT (defining “national authority” for both States as “an authority at the central level of government”).} In other words, while the definition excludes the states of the United States and local governments, it does include agreements entered into by federal government agencies and entities (rather than only agreements with the State itself). At the same time, the definition in the Model BIT narrows the scope of an “investment agreement” with respect to subject matter: it covers only certain sectors (natural resources, supply of services to the public, such as power, water, or telecommunications, and infrastructure projects). It remains to be seen how tribunals will interpret this definition.

**DISTINGUISHING BETWEEN BREACH OF TREATY CLAIMS AND BREACH OF CONTRACT CLAIMS**

Given the different treatment of treaty claims and contract claims by treaty-based tribunals, the distinction between these two categories of claims acquires critical importance. As discussed earlier, there is no doubt that treaty-based tribunals have...
jurisdiction to decide claims for breach of the treaty, whether or not those claims arise out of or relate to an underlying contractual relationship. The question of the nature of the distinction between treaty claims and contract claims, however, does arise when the investor asserts treaty claims relating to an underlying contract. In many such cases, the State will argue that the investor’s claims are in fact contractual claims rather than treaty claims and should therefore be treated as such. If a tribunal were to accept this argument, it would then face the task of distinguishing between “genuine treaty claims” arising out of an underlying contract, and claims that, even though presented as such, are in fact contractual claims “disguised” as claims for breach of the treaty. But does a tribunal have to deal with this question and, if it has to, should it do so at the jurisdictional phase?

The difficulty arises from the fact that a breach of contract by a State may well be, and often is, also a breach of an investment treaty obligation. States incur international responsibility when they violate a contract in a manner that constitutes a “clear and discriminatory departure” from the governing law of the contract or an “unreasonable departure from the principles recognized by the principal legal systems of the world.” States are internationally responsible when they terminate a contract in an untimely manner and when a termination is effected “by the exercise of sovereign power instead of claimed contractual right.” States are also responsible under international law for contractual breaches when they have frustrated the contractual dispute settlement mechanism, leaving the foreign investor with no recourse to contractual remedies to redress a contractual wrong. For example, both SGS tribunals agreed that there would be a viable treaty claim if the investor were prevented from submitting disputes to the contractual dispute settlement mechanism. Likewise, the Waste Management tribunal stated that the availability and the viability of a contractual dispute settlement mechanism were critical to determining whether certain acts violated substantive provisions of the treaty. Thus, some (perhaps many) types of contractual breaches by

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55 Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3), Award of April 30, 2004. The Waste Management tribunal found that a contractual claim was not a violation of Article 1105 of the NAFTA, “provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor.
the State could trigger the State’s responsibility under customary international law and amount to a breach of an investment treaty.

Obviously, in many cases where the claims for treaty breach arise out of an underlying contract, the same acts or omissions that result in breach of contract may also result in a breach of the relevant treaty. How should tribunals deal with such acts or omissions—as breaches of contract or as breaches of the treaty? Should they seek to draw a line between contractual breaches that do not rise to the level of treaty violations and those that do?

The best answer to this question was given by the Vivendi I annulment committee, which stated

[W]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract. . . .

The Vivendi I annulment committee explained that “[a] state may breach a treaty without breaching a contract, and vice versa,” and that “whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights.”

In other words, the fact that certain acts or omissions may have given rise to breach of contract claims does not mean that the same acts or omissions could not also give rise to treaty claims. The SGS v. Pakistan tribunal, for example, following the logic of the Vivendi I annulment committee and quoting extensively from its decision, did not see why it should decline jurisdiction over the treaty claims simply because they arose out of the same set of facts as the breach of contract claims. The SGS v. Pakistan tribunal observed that “[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders.” The tribunal in Impregilo v. Pakistan articulated the same approach even more categorically, when it stated: “[C]ontrary to Pakistan’s approach in this case, the fact that a breach may give rise to a contract claim does not mean that it cannot also—and separately—give rise to a treaty claim. Even if the two perfectly

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57 Id. at para. 95.
58 Id. at para. 110.
coincide, they remain analytically distinct, and necessarily require different enquiries.\textsuperscript{60}

It follows, then, that when tribunals have to deal with claims for treaty breaches arising out of an underlying contract, they must engage in an inquiry into whether the alleged conduct constitutes a violation of a treaty obligation—and they must conduct this inquiry regardless of whether the conduct might also constitute a breach of contract. The treatment of contract claims and treaty claims as legally and analytically distinct is the only logical and correct approach. This approach gives rise, however, to several important questions.

\textbf{The Power of Treaty-based Tribunals to Interpret Contracts}

The first question is whether treaty-based tribunals have the power to interpret the contract, if necessary to determine whether the State’s conduct breached the treaty. It may well be that a treaty-based tribunal called upon to decide on claims for treaty breaches arising out of a contractual relationship will first have to determine whether or not the conduct—either of the investor or of the State or both—was consistent with the underlying contract. This may require the tribunal to engage in a detailed and elaborate review of the contract and the rights and obligations arising from it. Can a treaty-based tribunal engage in such a review?

The \textit{Vivendi I} annulment committee once again provided an unambiguous answer: if necessary, the tribunal not only can but must do so. As the committee noted, if the tribunal is called upon to decide on treaty claims arising out of contractual breaches, the tribunal cannot abdicate its responsibility and refuse to rule simply because detailed contractual analysis may be required. In the words of the committee, “under . . . the BIT the tribunal had jurisdiction to base its decision upon the Concession Contract, at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT.”\textsuperscript{61} The committee noted that a detailed contractual analysis and interpretation is different from exercising contractual jurisdiction: “[I]t is one thing to exercise contractual jurisdiction . . . and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law.”\textsuperscript{62} The annulment committee annulled the relevant portion of the \textit{Vivendi I} award because “the tribunal declined to decide key aspects of the Claimants’ BIT claims on the ground that they involved issues of contractual performance or non-performance.”\textsuperscript{63} The annulment committee’s conclusion is consistent with the long-established practice of international tribunals of interpreting contracts

\textsuperscript{60} Impregilo SpA v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005, at para. 258. \textit{See also} Bayındır Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), Decision on Jurisdiction of November 14, 2005, at para. 160, where the tribunal found “not surprising” that the treaty claims and the contract claims arose out of the same set of facts.

\textsuperscript{61} \textit{Vivendi I} Decision on Annulment, supra note 56, at para. 110.

\textsuperscript{62} \textit{Id.} at para. 105.

\textsuperscript{63} \textit{Id.} at para. 108.
and national law when necessary to determine whether there has been a breach of international law.\textsuperscript{64}

This did not deter Argentina from advancing similar arguments at the merits phase of the second, resubmitted Vivendi case. Argentina asserted that because of the forum selection clause in the concession contract, the Vivendi II tribunal could not decide on the meaning of the contract, interpret, or apply the contract when considering the merits of the treaty claims.\textsuperscript{65} The Vivendi II tribunal, invoking the conclusions of the Vivendi I annulment committee, held that it was open to the tribunal, if necessary for its analysis of treaty breaches, to interpret the contract and “come to a view as to whether either of the parties failed to live up to its terms.”\textsuperscript{66} By doing so, the tribunal held, it would not be deciding a contractual issue or granting relief under the contract; it would be “taking the contractual background into account in determining whether or not a breach of the treaty has occurred.”\textsuperscript{67} The tribunal concluded: “[I]t is permissible for the tribunal to consider such alleged contractual breaches, not for the purpose of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyze and determine whether there has been a breach of the Treaty.”\textsuperscript{68}

The Difficulty (and Irrelevance) of Attempting to Identify Contract Claims “Dressed” as Treaty Claims

The second question arises in situations where a respondent State argues that claimants have “dressed” their contractual claims as treaty claims only to gain jurisdiction. Should tribunals seek to distinguish between “genuine” treaty claims and contract claims “dressed” as treaty claims for the purposes of finding jurisdiction? At the

\textsuperscript{64} For example, even though Article 38(1) of the Statute of the International Court of Justice explicitly states that the Court’s function is to decide in accordance with international law, the Court has concluded that it must address questions of domestic law and contract interpretation when necessary to resolve a question of international law. See, e.g., German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 6 (Sept. 10); The Mavrommatis Jerusalem Concessions (Greece v. U.K.), 1925 P.C.I.J. (ser. A) No. 5, at 6 (Mar. 26); German Interests in Polish Upper Silesia and the Factory at Chorzów (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 4 (May 25); Serbian Loans Case (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) Nos. 21–22, at 5 (July 12); Payment in Gold of Brazilian Federal Loans Issued in France (Fr. v. Braz.), 1929 P.C.I.J. (ser. A) Nos. 21–22, at 93 (July 12); Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 65, at 41 (Dec. 4); The Panevezys-Saldutiskis Railway Case (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, at 4 (Feb. 28). See also C. Wilfred Jenks, The Prospects of International Adjudication 572–73 (1964) (discussing international claims where contracts under domestic law were at issue).

\textsuperscript{65} See Compañía de Aguas del Aconcagua S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3) (Vivendi II), Award of August 20, 2007, at paras. 7.3.1.–7.3.4.

\textsuperscript{66} See id. at para. 7.3.9.

\textsuperscript{67} Id. at para. 7.3.9.

\textsuperscript{68} Id. at para. 7.3.10.
jurisdictional stage, this may be an impossible task. The difficulty was emphasized by
the Joy Mining tribunal in the following terms:

To the extent that a dispute might involve the same parties, object and cause of
action it might be considered to be a dispute where it is virtually impossible to
separate the contract issues from the treaty issues and to draw any jurisdictional
conclusions from a distinction between them.69

Tribunals have attempted to make that distinction using various criteria. One test,
often used by tribunals, has been to determine whether, in allegedly acting in breach of
contract, the State actor has used sovereign powers (puissance publique) or instead has
engaged in conduct as a purely commercial actor. This test has been applied in various
contexts: to determine jurisdiction over contractual claims when an umbrella clause or
an “any dispute” clause has been invoked, to determine whether the asserted treaty
claims are in fact contractual claims “dressed” as treaty claims, or to determine the
merits of such claims.70 The problem of applying this test for jurisdictional purposes,
however, is twofold. First, it requires that the tribunal inquire into the nature, or even
into the motive or intent, of the alleged breach—an inquiry that requires a review of the
merits. Second, when the claim is presented as a treaty claim, the inquiry is
irrelevant because every violation of an international obligation by a State is itself a
sovereign act. As the tribunal in Bayındır stated:

In the Tribunal’s view, the test of ‘puissance publique’ would be relevant only if
Bayındır was relying upon a contractual breach . . . in order to assert a breach of the
BIT. In the present case, Bayındır has abandoned the Contract Claims and pursues

69 Joy Mining Machinery Limited v. Arab Republic of Egypt (ICSID Case No. ARB/03/11),
Award of August 6, 2004, at para. 75 (internal citation omitted).
70 See id. at para. 72 (“[A] basic general distinction can be made between commercial aspects of
a dispute and other aspects involving the existence of some forms of State interference with the
operation of the contract involved.”); Azurix Corp. v. Argentine Republic (ICSID Case
No. ARB/01/12), Award of July 14, 2006, at para. 315 (“Whether one or series of such [con-
tractual] breaches can be considered to be measures tantamount to expropriation will depend
on whether the State or its instrumentality has breached the contract in the exercise of its
sovereign authority, or as a party to a contract.”); Impregilo SpA v. Islamic Republic of
Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005, at para. 278
(“[A] Host State acting as a contracting party does not “interfere” with a contract; it “performs”
it. If it performs the contract badly, this will not result in a breach of the provisions of the
Treaty relating to expropriation or nationalisation, unless it be proved that the State or its ema-
nation has gone beyond its role as a mere party to the contract, and has exercised the specific
functions of a sovereign authority.”); Consortium RFFC v. Kingdom of Morocco (ICSID Case
No. ARB/00/6), Award of December 22, 2003, at para. 51 (“[Q]uand l’investissement a pour
origine la conclusion d’un contrat, il est possible pour l’État d’accueille de faire usage, dans sa
relation contractuelle avec l’investisseur, de pouvoirs que lui seul détient en vertu de sa qualité
de puissance publique. Seul l’usage de tels pouvoirs sera examiné par le Tribunal qui y trou-
vera ou non une violation de l’obligation de traitement juste et équitable . . .”) and at para. 87
(“Un manquement à l’exécution d’un contrat, de nature à lésé les intérêts du cocontractant, ne
peut s’analyser en une mesure d’expropriation. Une chose est de priver un investisseur de ses
droits contractuels reconnus par la seule force de l’autorité étatique, autre chose est de contester
la réalité ou l’étendue de ces droits par application du contrat.”).
exclusively Treaty Claims. When an investor invokes a breach of a BIT by the host State (not itself a party to the investment contract), the alleged treaty violation is by definition an act of ‘puissance publique’. The question whether the actions alleged in this case actually amount to sovereign acts of this kind by the State is however a question to be resolved on the merits.\(^7\)

The real question that tribunals need to resolve in the context of a jurisdictional inquiry is whether the facts alleged, if proven, may amount to an act or omission that is in violation of a treaty obligation. As the annulment committee in *Vivendi I* pointed out, the critical issue was that “the conduct alleged by Claimants, if established, could have breached the BIT.”\(^8\) This test was applied by the tribunal in *Impregilo*, which “considered whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked,”\(^9\) as well as by a number of other tribunals.\(^1\) The tribunal in *Azurix* elaborated on this test in the following terms:

According to the Respondent, the dispute is of a contractual nature and related to the interpretation of and performance under the Concession Agreement. However, for purposes of determining its jurisdiction, the Tribunal should consider whether the dispute, as it has been presented by the Claimant, is *prima facie* a dispute arising under the BIT. The investment dispute which the Claimant has put before this Tribunal invokes obligations owed by the Respondent to Claimant under the BIT and it is based on a different cause of action from a claim under the Contract Documents. Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession

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71 Bayındır Insaat Torzım Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), Decision on Jurisdiction of November 14, 2005, at para. 183.


73 Impregilo SpA v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005, at para. 254.

74 See, e.g., Salini Costruttori SpA and Italtrade SpA v. Kingdom of Morocco (ICSID Case No. ARB/00/4), Decision on Jurisdiction of July 23, 2001, 42 ILM 609 (2003), at paras. 59–64; United Parcel Service of America, Inc. v. Government of Canada, Award on Jurisdiction of November 22, 2002, at para. 37 (“Accordingly, the Tribunal’s task is to discover the meaning and particularly the scope of the provisions which UPS invokes as conferring jurisdiction. Do the facts alleged by UPS fall within those provisions; are the facts capable, once proved, of constituting breaches of the obligations they state?”); Wena Hotels Ltd v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Decision on Jurisdiction of June 29, 1999, 49 ILM 881, at 891 (“Wena has raised allegations against Egypt . . . which, if proven, clearly satisfy the requirement of a ‘legal dispute’ under Article 25(1) of the ICSID Convention.”); Consortium RFCC v. Kingdom of Morocco (ICSID Case No. ARB/00/6), Decision on Jurisdiction, at paras. 70–71 (“Le Consortium a expressément précisé dans ses écritures que « plusieurs violations se sont concrétisées comme violations d’ autres provisions générales et spécifiques du Traité ». Il a ultérieurement indiqué que « toutes les demandes qui ont été soumises au Tribunal arbitral par RFCC se situent dans le domaine des violations du Traité bilatéral . . . ». . .Les demandes, ainsi formulées, entrent dans la compétence du Tribunal arbitral. Il appartiendra à la partie demanderesse d’en démontrer le bien fondé dans la suite de la procédure arbitrale.”).
Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot per se transform the dispute under the BIT into a contractual dispute.\textsuperscript{75}

Therefore, the investor is free to state its claims as claims for breach of treaty. Thus stated, such claims need only pass a prima facie test: whether the claims as stated are capable of coming within the purview of the substantive protections of a treaty. Such claims will pass the test if they are capable of giving rise to treaty breaches. The investor cannot “dress up” any claim as a treaty claim if the facts, as stated, cannot—even if established—constitute conduct in breach of the treaty. Other than this inquiry, however, the tribunal’s scrutiny of the claims for jurisdictional purposes should be fairly limited. The tribunal in SGS v. Pakistan articulated that conclusion as follows:

At this stage of the proceedings, the Tribunal has, as a practical matter, a limited ability to scrutinize the claims as formulated by the Claimant. Some cases suggest that the Tribunal need not uncritically accept those claims at face value, but we consider that if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT, consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits. We conclude that, at this jurisdiction phase, it is for the Claimant to characterize the claims as it sees fit.\textsuperscript{76}

As the Bayadur tribunal noted, “when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty.”\textsuperscript{77}

The Impact of Contractual Forum Selection Clauses on the Jurisdiction of Treaty-based Tribunals

Tribunals have often been confronted with a situation where the treaty dispute arises out of an underlying contractual relationship, and the contract contains a forum selection clause in favor of local courts or another domestic forum. The distinction between contract claims and treaty claims has served as the foundation on which tribunals have built their analysis in such cases.

\textit{Jurisdiction over Treaty Claims.} When investors have asserted treaty claims, tribunals have found that a contractual forum selection clause does not preclude jurisdiction under the treaty to resolve such claims. The first case in which a tribunal specifically addressed this situation was Lanco v. Argentina. In that case, the treaty claims arose, \textit{inter alia}, out of conduct that was allegedly in breach of a concession contract, which

\textsuperscript{75} Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, para. 76.

\textsuperscript{76} 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 of August 6, 2003, 18 ICSID Rev.—FILJ 307 (2003), at para. 145 (internal citations omitted).

\textsuperscript{77} Bayadur Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), Decision on Jurisdiction of November 14, 2005, at para. 167.
directed that all disputes under the contract must be submitted to Argentina’s courts. Argentina argued that the treaty-based tribunal lacked jurisdiction because the parties had agreed to resolve their disputes in a different forum. The tribunal demonstrated no hesitation in finding jurisdiction. It concluded that the parties had consented to submit to a treaty-based tribunal (in particular, to an ICSID tribunal) claims for breach of treaty, and that a contractual forum selection clause could not negate or override such consent. The tribunal reasoned that in order for an ICSID tribunal not to have jurisdiction, the forum selection clause must operate as a stipulation requiring exhaustion of local remedies under Article 26 of the ICSID Convention but concluded that was certainly not the case.  

The analysis and conclusions of the Lanco tribunal were endorsed and further developed by the Vivendi I tribunal. One of Argentina’s principal defenses in the Vivendi I case was that the underlying concession contract contained an exclusive forum selection clause in favor of the local courts and that this clause precluded ICSID jurisdiction over the dispute. The Vivendi I tribunal rejected that argument and determined that it had jurisdiction over the dispute, notwithstanding the exclusive forum selection clause in the concession contract. It held that the forum selection clause “does not divest this tribunal of jurisdiction to hear this case because that provision did not and could not constitute a waiver by [Vivendi] of its rights under Article 8 of the BIT to file the pending claims against the Argentine Republic.” The tribunal reasoned that Vivendi was claiming treaty violations rather than claims of breach of the contract containing the forum selection clause. It found that, while disputes relating to breaches of contract might belong in the local courts, claims for breaches of the treaty were properly before the ICSID tribunal. In reaching that conclusion, the Vivendi I tribunal relied directly on the Lanco decision.  

The Vivendi I annulment committee ratified the tribunal’s jurisdictional analysis, agreeing with the Lanco ruling that treaty-based arbitration is unaffected by a contractual forum selection clause, thus rejecting Argentina’s challenge to the tribunal’s jurisdictional holding. The committee endorsed the Vivendi I tribunal’s holding that the tribunal had jurisdiction over Vivendi’s treaty claims and that the forum selection clause in the contract referring contractual disputes to local courts “did not affect the jurisdiction of the tribunal with respect to a claim based on the provisions of the BIT.”  

Notwithstanding the Vivendi I tribunal’s finding of jurisdiction, however, it stopped short of deciding the merits of Vivendi’s core treaty claims precisely because of the presence of the forum selection clause in the contract. According to the Vivendi I tribunal, Argentina could not be held liable under the treaty unless it had first been

79 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Award of November 21, 2000 (Vivendi I Award), at para. 53.  
80 See id. at para. 53.  
established that the concession contract had been breached. To make such a determination, however, the tribunal “would have to undertake a detailed interpretation” of the concession contract.\textsuperscript{82} This, the tribunal decided, it could not do, because the forum selection clause divested it of authority to rule on breaches of contract: this task was, according to the tribunal, within the exclusive jurisdiction of the local courts.\textsuperscript{83} As a result, the \textit{Vivendi I} tribunal declined to decide the treaty claims.

As noted earlier, the \textit{Vivendi I} annulment committee annulled this portion of the tribunal’s award. The committee concluded that the tribunal’s obligation to decide Vivendi’s treaty claims was in no way negated by the contractual forum selection clause. According to the committee, the treaty sets out an independent international law standard by which Argentina’s actions must be judged and “where ‘the fundamental basis of the claim’ is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state . . . cannot operate as a bar to the application of the treaty standard.”\textsuperscript{84} The key paragraph of the committee’s holding reads as follows:

\begin{quote}
In the Committee’s view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.\textsuperscript{85}
\end{quote}

“At most,” the committee noted, the contractual forum selection clause “might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty.”\textsuperscript{86}

The \textit{Vivendi I} annulment committee concluded that if there were a breach of the treaty in the case, the existence of a forum selection clause in the contract could not prevent its characterization as a treaty breach because “[a] state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.”\textsuperscript{87} Subsequent tribunals have followed this reasoning of the \textit{Lanco} tribunal and the \textit{Vivendi I} tribunal and annulment committee and have uniformly declined to entertain objections to jurisdiction over treaty claims based on forum selection clauses contained in underlying contracts.\textsuperscript{88} As the tribunal in \textit{Jan de Nul N.V. v. Egypt} observed, “the fact that the dispute involves contract rights

\textsuperscript{82} \textit{Vivendi I Award, supra} note 79, at para. 79.
\textsuperscript{83} \textit{See id.} at paras. 79 and 81.
\textsuperscript{84} \textit{Vivendi I Decision on Annulment, supra} note 81, at para. 101.
\textsuperscript{85} \textit{Id.} at para. 102.
\textsuperscript{86} \textit{Id.} at para. 101.
\textsuperscript{87} \textit{Id.} at para. 103.
and contract remedies does not in and of itself mean that it cannot also involve Treaty breaches and Treaty claims.\textsuperscript{89}

The only possible exception to this consistent refusal to abrogate treaty jurisdiction in the face of a contractual forum selection clause is where such a clause constitutes an explicit waiver by the investor of its rights to an international treaty-based arbitration. In \textit{Aguas del Tunari}, the tribunal reasoned that whether a contractual forum selection clause constitutes a waiver of the treaty-based right to arbitration depends on the intent of the parties.\textsuperscript{90} The tribunal observed that if “the parties to an ICSID arbitration could jointly agree to a different mechanism for the resolution of their disputes other than that of ICSID, it would appear that an investor could also waive its rights to invoke the jurisdiction of ICSID.”\textsuperscript{91} However, the tribunal required an explicit waiver or other “specific indications” of the common intention of the parties.\textsuperscript{92} It held that the mere fact that the forum selection clause confers upon the domestic forum exclusive jurisdiction to resolve contractual claims is not sufficient to affect a treaty-based tribunal’s jurisdiction.\textsuperscript{93}

The \textit{Aguas del Tunari} approach was endorsed by the tribunal in \textit{Occidental Petroleum v. Ecuador}. That tribunal concluded: “Based on elementary principles of contract interpretation, any exception to the availability of ICSID arbitration for the resolution of disputes arising under [the relevant contract] requires clear language to this effect.”\textsuperscript{94} In reaching this conclusion, the \textit{Occidental} tribunal quoted extensively from the \textit{Aguas del Tunari} decision and stated its agreement with it. The \textit{Occidental} tribunal noted further that the parties could have excluded certain disputes from ICSID jurisdiction but did not do so, and, therefore, the tribunal could not imply such an exclusion.\textsuperscript{95}

Jurisprudence on this point is scarce and the significance of the \textit{Aguas del Tunari} approach may be limited: it is unlikely that many investors will agree to include in an investment contract a provision by virtue of which they explicitly waive their rights to submit any disputes arising out of or relating to the contract, including claims for breaches of an investment treaty, to international treaty-based arbitration.

\textit{Jurisdiction over Contract Claims}. While a contractual forum selection clause will not deprive a treaty-based tribunal of jurisdiction over a treaty claim, the effect of a contractual forum selection clause may be different when the question is whether a treaty-based tribunal has jurisdiction over contract claims. The question then is whether a treaty-based tribunal, which may otherwise have jurisdiction over “purely” contractual

\begin{itemize}
\item \textsuperscript{89} Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (ICSID Case No. ARB/04/13), Decision on Jurisdiction of June 16, 2006, at para. 80.
\item \textsuperscript{90} \textit{Aguas del Tunari} v. Bolivia (ICSID Case No. ARB/02/3), Decision on Jurisdiction of October 21, 2005, at para. 115.
\item \textsuperscript{91} \textit{Id.} at para. 118.
\item \textsuperscript{92} \textit{Id.} at para. 119.
\item \textsuperscript{93} \textit{Id.} at para. 122.
\item \textsuperscript{94} \textit{Occidental Petroleum Corp. and Occidental Exploration and Production Company v. Republic of Ecuador} (ICSID Case No. ARB/06/11), Decision on Jurisdiction of September 9, 2008, at para. 71.
\item \textsuperscript{95} \textit{See} \textit{id.} at para. 73.
\end{itemize}
claims (whether by virtue of an umbrella clause, or an “any dispute” clause, or a grant of jurisdiction in a treaty over investment agreements), should take jurisdiction in the presence of an exclusive contractual forum selection clause. Most tribunals have answered that question in the negative and have held that an exclusive contractual forum selection clause deprives a treaty-based tribunal of jurisdiction over contract claims.96

Further, some tribunals have treated contractual forum selection clauses as precluding a treaty-based tribunal’s consideration not only of “purely” contractual claims but also of claims where “the basis of the claim” is a contract, or the “essential basis” for the claim is a breach of contract. For example, the SGS v. Philippines tribunal stated:

The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal’s view the answer is that it should not be allowed to do so, unless there are good reasons, such as force majeure, preventing the claimant from complying with its contract.97

This approach was also articulated by the Vivendi I annulment committee, which held that “[i]n a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.”98 The Vivendi I annulment committee relied, inter alia, on the Woodruff case, where it was stated:

[T]he judge, having to deal with a claim fundamentally based on a contract, has to consider the rights and duties arising from that contract, and may not construe a contract that the parties themselves did not make, and he would be doing so if he gave a decision in this case and thus absolved from the pledged duty of first recurring for rights to the Venezuelan courts, thus giving a right, which by this same contract was renounced, and absolve claimant from a duty that he took upon himself by his own voluntary action... [A]s the claimant by his own voluntary waiver has disabled himself from invoking the jurisdiction of this Commission, the claim has to be dismissed without prejudice on its merits, when presented to the proper judges.99

It is, however, not entirely clear what the difference is between a “pure” contract claim and “a claim fundamentally based on a contract.” Another pre-treaty arbitration case, North American Dredging Company of Texas, suggests that “pure” contract claims and “claims fundamentally based on a contract” may be coextensive and, therefore, the

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96 See, e.g., Joy Mining Machinery Limited v. Arab Republic of Egypt (ICSID Case No. ARB/03/11), Award of August 6, 2004, at para. 89 et seq.
Woodruff case rule applies to “pure” contract claims rather than treaty claims, whether fundamentally based on a contract or not:

Each case involving the application of a valid clause partaking of the nature of the Calvo Clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfillment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities, and then wilfully ignores them by applying in such matters to his government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim.100

The Woodruff/Vivendi I approach, however, could be interpreted to apply, beyond “pure” contract claims, to claims presented as treaty claims but where the basis of the claim is a contract. This approach would then allow a treaty-based tribunal to decline jurisdiction not only over a “pure” contract claim but also over a treaty claim if the “essential basis” of the treaty claim is a breach of contract. In such a case, there is a risk that tribunals may seek to establish, at the jurisdictional stage, what is the real (essential or fundamental) basis of the claim and thus substitute an inquiry into the merits for a jurisdictional test.

The Role and Significance of “Fork-in-the-Road” Provisions

The distinction between treaty claims and contract claims is not only relevant to the jurisdiction of treaty-based tribunals in the presence of contractual forum selection clauses but also raises the question of the relationship between domestic court proceedings and international arbitration.

Older investment treaties often require the exhaustion of local remedies before international arbitration may be invoked. Some modern investment treaties require that efforts be made first to resolve the dispute in domestic court for a certain period of time. If no satisfactory resolution is found, the dispute can then be submitted to international arbitration.

Most modern investment treaties, however, require that the investor must choose between litigation in the host State’s domestic courts and international arbitration. This provision has generally been referred to as the “fork in the road,” because the choice of the investor is final and binding—on the State and on the investor itself. In other words, it is the point of no return: once the investor submits a dispute to local courts, it cannot submit that dispute to international arbitration.

Still other investment treaties (of which Chapter Eleven of the NAFTA is a prominent example) require that the investor waive its right to initiate or continue proceedings in

local courts in order to submit the same dispute to international arbitration. This means that the investor does not forfeit its access to international arbitration by initiating local court proceedings, but if the investor resorts to local courts and then turns to international arbitration, it must discontinue the local court proceedings.

When considered in the context of fork-in-the-road provisions, the distinction between contract claims and treaty claims raises the specter of significant implications. Will the investor lose access to international arbitration if it submits contractual claims to local courts? The answer is, of course, "it depends."

The first logical step in the analysis is clear: a tribunal cannot decline jurisdiction under a fork-in-the-road provision if the investor has not submitted the dispute to local courts. In *Lanco*, Argentina argued that Lanco was precluded from submitting the dispute to arbitration under the U.S.-Argentina BIT because of a forum selection clause in the underlying concession agreement. The tribunal's logic in this case (dealing with treaty claims alone) was compelling. The tribunal held that the fork-in-the-road provision could not be a bar to its jurisdiction in this case. It noted that the investor had not chosen, simply by agreeing to a forum selection clause, to submit the dispute to the procedure agreed to in the concession agreement; instead the investor chose to submit the dispute to arbitration under the treaty.101 In other words, in the view of the *Lanco* tribunal, the mere existence of a contractual forum selection clause did not constitute the choice by the investor, required by the fork-in-the-road provision, to submit the dispute to the contractual forum. Only the actual submission of the dispute to local courts would have constituted such a choice and triggered the fork-in-the-road provision, thus barring the tribunal's jurisdiction.

The *Vivendi I* tribunal took a further analytical step by making a distinction between treaty claims and contract claims. The tribunal held that it had before it treaty claims, which were not subject to the jurisdiction of local courts under the contractual forum selection clause "if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT."102 On that basis, the tribunal concluded that "a suit by Claimants [in local courts] for violation of the terms of the Concession Contract would not have foreclosed Claimants from subsequently seeking a remedy against the Argentine Republic as provided in the BIT and ICSID Convention" because such a suit would not have been "the kind of choice by Claimants of legal action in national jurisdictions (i.e., courts) against the Argentine Republic that constitutes the 'fork in the road' under Article 8 of the BIT, thereby foreclosing future claims under the ICSID Convention."103 In the subsequent annulment proceeding, the *Vivendi I* annulment committee agreed with the tribunal's analysis and declined to annul the jurisdictional part of the award.104

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102 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Award of November 21, 2000 (*Vivendi I Award*), at para. 53.
103 *Id.* at para. 55.
Numerous tribunals have performed the same analytical exercise when approaching fork-in-the-road provisions. As the CMS Gas tribunal noted, "[d]ecisions of several ICSID tribunals have held that as contractual claims are different from treaty claims[,] even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration." The Enron tribunal echoed that conclusion: "It has . . . been held that even if there was recourse to local courts for breach of contract this would not prevent resorting to ICSID arbitration for violation of treaty rights." A fork-in-the-road provision, therefore, would be triggered (and the investor would lose access to international arbitration) only if the same dispute between the same parties has been submitted to local courts prior to its submission to international arbitration. The investor’s submission of contractual claims to local courts does not preclude its access to treaty-based arbitration for the resolution of treaty claims. For the fork-in-the-road provision to be triggered, then, the parties to the local court proceedings and the international arbitration must be identical and the causes of action in the two proceedings must be identical.

As a result, the fork-in-the-road provision would act as a bar to jurisdiction in only two situations. First, it would apply where an investor has submitted breach of treaty claims against the State to local courts and then seeks to submit the same claims to international arbitration. This situation is highly unlikely for obvious reasons. Second, the fork-in-the-road provision would apply if the investor has submitted claims for breach of contract to local courts and then seeks to submit the same contract claims (most likely together with treaty claims) to treaty-based arbitration. In this second case, a tribunal—even assuming it otherwise had jurisdiction over breach of contract claims—would decline to exercise its jurisdiction over the contract claims because, by submitting the contract claims to local courts, the investor has taken the fork in the road with respect to those claims. This, however, would not affect the tribunal’s jurisdiction over any treaty claims submitted by the investor.

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CONCLUSION

The approach of treaty-based tribunals to analyzing jurisdiction over breach of treaty and breach of contract claims has been undergoing significant clarification and refinement. Tribunals continue to build upon prior decisions on the subject. The result is a clearly emerging jurisprudence that establishes a framework for future tribunals to approach the jurisdictional analysis of treaty and contract claims in a consistent and analytically sound manner.