The Allocation of Jurisdiction Between International Arbitral Tribunals and Local Courts in Investor—State Disputes

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I. Introduction

When handling an international investment dispute, counsel early on will face challenging jurisdictional questions. Often, a contract will govern the investment, and that contract will contain a choice of forum clause by which the parties have agreed to submit all disputes arising out of or in connection with the contract to a local forum. The investment also may be protected by a bilateral or multilateral treaty between the home State of the investor and the host State of the investment providing for international arbitration of investment disputes. In such a case, the dispute may give rise to claims based both on the contract and on the investment protection treaty, and counsel will have to determine not only whether or not each of the local forum and an international arbitral forum have jurisdiction, but also the scope of jurisdiction of each forum. In other words, the question arises whether and to what extent a breach of contract claim can be brought before a treaty-based international arbitral tribunal or must be brought exclusively before the local forum.

Several recent decisions in investor—State arbitrations have addressed this issue, discussing the difference between contract and treaty claims, the significance of so-called "umbrella clauses" contained in investment treaties (i.e., clauses in which States undertake to respect obligations entered into with respect to investments), and the issue of attribution of action to States. Most of the decisions have come to similar conclusions: limited or no jurisdiction of the treaty-based arbitral tribunal over purely contractual claims, especially where the contract at issue contains a local forum selection; a reluctance to interpret "umbrella clauses" too broadly and a functionalist standard for attribution. Sometimes the reasoning offered appears to differ from one decision to the next or even to be contradictory. The results, however, reflect a trend toward greater predictability on these issues. The following gives a general overview of those recent decisions and their reasoning.

II. *SGS v. Pakistan*

In 1994, Société Générale de Surveillance S.A. ("SGS") entered into a contract with the government of Pakistan to provide inspection services to aid in Pakistan's customs revenue collection. The contract provided that, following the first financial year, either of the parties

could terminate the agreement on three months notice.[1] The contract also contained a dispute settlement clause providing for "any dispute, controversy or claim arising out of or relating to" the agreement to be arbitrated in Islamabad, Pakistan, under the Arbitration Act of Pakistan.[2]

Two years into the contract, Pakistan notified SGS that it was terminating the agreement, effective in three months' time.[3] SGS initially filed claim in the Swiss courts, which refused to hear the claims. Pakistan then invoked the contractual dispute resolution clause, asking a court in Pakistan to refer the dispute to an arbitrator.[4] SGS filed an objection to the arbitration and "without prejudice to such objections," also filed a counter-claim.[5]

SGS later notified Pakistan that a dispute had arisen under the terms of the bilateral investment treaty ("BIT") between Switzerland and Pakistan, and shortly thereafter submitted a Request for Arbitration to ICSID.[6] In the request, SGS claimed that Pakistan had wrongly terminated the contract, had failed to pay outstanding invoices, and had damaged the reputation of SGS. According to SGS, these acts or omissions constituted violations of the BIT; in particular, a failure to promote SGS's investment, a failure to protect the investment, a failure to ensure fair and equitable treatment, and expropriation or measures having the same effect. SGS also noted that "most or all of Pakistan's acts and omissions" also qualified as breaches of the contract, giving rise to liability for breach of contract as well as breach of treaty.[7]

Pakistan objected to the jurisdiction of the ICSID Tribunal, arguing that the "essential basis" of the claims was breach of contract, and that the contract with SGS required those claims to be arbitrated under the contractual dispute resolution clause, "regardless of whether such claims sound in contract, tort, or treaty."[8]

A. Provisional Measures

Before the ICSID Tribunal had fully heard the parties and decided on the question of its jurisdiction, SGS requested that the Tribunal issue provisional measures ordering, among other things, that "all proceedings in the courts of Pakistan relating in any way to this arbitration" be discontinued and Pakistan refrain from participating in such proceedings in the future, and that the local arbitration be stayed until the ICSID Tribunal had decided on its jurisdiction.[9]

As concerns the local court proceedings, the ICSID Tribunal found that they had in the meantime been completed, with the Supreme Court of Pakistan issuing a final decision on appeal granting Pakistan's request to compel the contract arbitration and restraining SGS from pursuing or participating in the ICSID arbitration.[10] The ICSID Tribunal accepted that Pakistan, therefore, could not remove or set aside that final decision.[11] The ICSID Tribunal noted, however, that, notwithstanding its finality as a matter of Pakistan law, the Pakistan Supreme Court decision, "as a matter of international law [did] not in any way bind this Tribunal" and that, under Article 41 of the ICSID Convention, it was for the ICSID Tribunal to determine its own jurisdiction.[12] The ICSID Tribunal also held that it was its duty to protect the right of access to international adjudication in a case where both breach of contract and breach of substantive treaty obligations are alleged, and that such right of access could not "be constrained by an order of a national court."[13] On the other hand, the ICSID Tribunal held that it could not "enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory." For this reason, the ICSID Tribunal held that Claimant's request that Pakistan refrain from participating in all future court proceedings relating to the ICSID arbitration was too broad.[14]

In addressing the proceedings in the contract-based arbitration, four issues concerned the ICSID Tribunal. The first was the right of the Respondent to file a counter-claim with the ICSID Tribunal. [15] In support of its request to stay the contract-based arbitration, the Claimant had argued that the Respondent had a right to make counter-claims in the ICSID proceedings. The Respondent countered, however, that "there are no rights" for Pakistan under the BIT, only under the contract.[16] The Tribunal noted that "it would be inequitable if…the Claimant

could…elevate its side of the dispute to international adjudication and…preclude the Respondent from pursuing its own claim for damages" through a stay of proceedings pursuant to the contract.[17]

Secondly, the Tribunal was concerned about "the subject matter of the [contract-based] arbitration," and whether there was overlap between the proceedings.[18] Overlap was a potential concern as SGS argued that it was entitled to submit contract disputes to ICSID arbitration in accordance with the BIT.

The third concern was whether the Claimant's consent to ICSID arbitration constituted a waiver of its rights to pursue its own counterclaims in the local arbitration. Article 26 of the ICSID Convention states that consent to ICSID arbitration "shall be deemed to be consent 'to the exclusion of any other remedy.'"[19] If this provision meant that Claimant could not assert counter-claims, the local arbitrator might have been "deprived of a full joining of the legal issues."[20]

Finally, the Tribunal deferred to the jurisdictional phase its decision on its further concern, that is, whether both parties had agreed within the meaning of Article 26 of the ICSID Convention that they would submit all disputes regarding the contract to arbitration pursuant to the contract rather under the ICSID Convention.[21]

The Tribunal issued the following two recommendations of provisional measures:

1. That Pakistan refrain from initiating, or not act upon, a complaint for contempt against Claimant for pursuing the ICSID arbitration

2. That the contract-based arbitration be stayed until such time as the ICSID Tribunal had resolved the issue of its own jurisdiction over the present dispute.[22] Following its decision on jurisdiction (which was issued almost one year later), the ICSID Tribunal lifted the stay.[23]

B. Jurisdiction Over Contract Claims?

In its decision on Pakistan's objections to its jurisdictions, the ICSID Tribunal first undertook a general examination of BIT claims and contract claims, starting from the general principle that "the same set of facts can give rise to different claims grounded on differing legal orders."[24] Citing the *Vivendi Annulment* decision, the Tribunal noted that a BIT generally sets out "*an independent standard*" from the terms of a contract; "*a state may breach a treaty without breaching a contract, and vice versa.*"[25] Therefore,

> whether 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…Contract, but the proper law of the contract…[26]

Quoting from the *Vivendi* annulment decision, the Tribunal further explained that "where the *essential basis of a claim…*is a *breach of contract*, *the tribunal will give effect to any valid choice of forum clause in the contract.*"[27] However, "where the *fundamental basis* of the claim is *a treaty laying down an independent standard…*, *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.*"[28]

The Tribunal concluded that it had jurisdiction over the BIT claims pursuant to Article 9 of the BIT, which stated that "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party…shall be submitted to [ICSID] arbitration."[29] However, even though "claims based wholly on supposed violations of the contract" could also be described as "disputes with respect to investments," that phrase used in Article 9 of the BIT only described the factual subject matter of the dispute, not the legal basis of the claims or the cause of action.[30]

In other words, the Tribunal found nothing in Article 9 that "would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements."[31] The Tribunal concluded that those claims, which were merely for breach of contract and did not arise to violations of the BIT, were outside the Tribunal's jurisdiction.[32]

C. Jurisdiction Under the "Umbrella Clause"?

The Tribunal still had to address the claim of whether the "umbrella clause" in Article 11 of the BIT transformed all contractual claims into BIT claims. Article 11 provided: "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."[33] The Claimants had previously described this Article as an "elevator" or "mirror effect" clause that "takes breaches of contract under municipal law and elevates them immediately to the level of a breach of an international treaty."[34]

The Tribunal first noted that it would "seek to give effect to the object and purpose projected by that Article and by the BIT as a whole," and that such object and purpose "must be ascertained, in the first instance, from the text itself of Article 11 and the rest of the BIT."[35] Using that standard, the Tribunal did not find a convincing basis for the argument that the clause "elevated" purely contractual claims to BIT claims.

According to the Tribunal, the phrase "'constantly [to] guarantee'…does not…necessarily signal the creation and acceptance of a new international law obligation on the part of the Contracting Party, where clearly there was none before."[36] As it is a widely accepted principle of international law that a State's violation of a contract with an investor of another State is not in and of itself a violation of international law, and as the consequences of turning Article 11 into an elevator clause "are so far-reaching…so automatic and unqualified and sweeping…so burdensome in their potential impact," the Tribunal felt that clear and convincing evidence was needed that the contracting parties intended such an interpretation.[37] In the absence of such evidence, the Tribunal declined to interpret Article 11 as an "elevator clause."

The Tribunal noted in some detail what the potential consequences of such an interpretation would be. First, it would incorporate into the BIT "an unlimited number of State contracts."[38] Second, it would render the substantive portions of the BIT "substantially superfluous," because there would be no need to show a violation of the substantive Treaty standards if the BIT was violated by any breach of contract on the part of the State.[39] Third, it would allow the investor to nullify any dispute settlement agreed to in a State contract; the investor would be free to choose between arbitration under either the contract or the BIT, and could defeat the State's choice of the forum in the contract by invoking the BIT.[40]

Finally, in support of its interpretation, the Tribunal noted that Article 11 was separate from the substantive provisions of the BIT, which were found in Articles 3 through 7, which indicated that Article 11 "was *not* meant to project a substantive obligation like those set out in Articles 3 to 7, let alone" an obligation that would render redundant the substantive articles.[41]

The Tribunal did note that States may choose to agree that henceforth, any breach of contract is also a Treaty violation, but declined to read such an intent into the Treaty at issue.[42] Perhaps a weak point in the decision is the failure of the Tribunal to explain clearly what the true purpose or effect of the clause was, although it did make some attempt. According to the Tribunal, the clause could be read as "an implied affirmative agreement to enact implementing rules and regulations…to give effect" to contractual or statutory obligations "that would otherwise be a dead letter."[43] In addition, "under exceptional circumstances, a violation of certain provisions of a State contract" might be a treaty violation.[44]

III. *SGS v. Philippines*

In 1991, Société Générale de Surveillance ("SGS") entered into a contract with the Philippines under which SGS provided certain inspection and customs services to the Philippines. The agreement was discontinued in March 2000, apparently due to changes brought about by the implementation of a GATT/WTO agreement.[45] SGS submitted to the Philippines various claims for unpaid invoices, which the Philippines initially disputed. The Secretary of Finance of the Philippines directed SGS and the Philippines Board of Customs to establish a joint review team, which concluded in October 2001 that a major portion of the amount claimed by SGS should be paid.[46] SGS later agreed to forego the balance to receive payment of the agreed upon amount. The Philippine made "a token good faith payment" in January 2002, but nothing further was ever paid, and in April 2002, SGS filed a claim with ICSID under the Swiss-Philippines BIT.[47]

A. Jurisdiction Under the "Umbrella Clause"?

After concluding that SGS had made an investment in the Philippines that was covered by the BIT, the Tribunal turned to the question of the umbrella clause. That clause, found in Article X(2) of the BIT, provided that "each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."[48]

The Tribunal interpreted the clause "to say clearly, that each Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT,"[49] and further noted that, to effectuate the purpose of the BIT, "it is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."[50]

The Tribunal was aware that this interpretation would conflict with the "highly restrictive interpretation of the 'umbrella clause'" in the earlier decision in *SGS v. Pakistan*;[51] the Tribunal therefore spent some time explaining the differences in reasoning. First, the Tribunal argued that the "umbrella clause" in the Swiss-Pakistan BIT was "formulated in different and rather vaguer terms than" the clause in the Swiss-Philippines BIT, specifically highlighting what it considered the vagueness of the phrase "shall constantly guarantee the observance" in the Swiss-Pakistan BIT.[52] The Tribunal also felt that the phrase "'the commitments it has entered into with respect to the investments'" in the Swiss-Pakistan BIT[53] was "less clear and categorical" than the phrase "'any obligation it has assumed with regard to specific investments in its territory'" in the Swiss-Philippines BIT.[54]

The Tribunal then went on to refute the reasoning given in *SGS v. Pakistan*, arguing that it was "unconvincing" and "failed to give a clear meaning to the 'umbrella clause.'"[55]

- First, the Tribunal noted that the *SGS v. Pakistan* Tribunal was concerned that the "umbrella clause" would be "susceptible of almost indefinite expansion," but argued that this was incorrect, since, at least in this instance, the clause was limited to obligations "assumed with regard to specific investments." Therefore, the "umbrella clause" would only operate when the State had assumed a specific legal obligation, "not as a matter of the application of some legal obligation of a general character."[56]

- Second, the Tribunal rejected the general presumption, applied by the *SGS v. Pakistan* Tribunal, that a breach of contract on the part of a State is not necessarily a violation of international law and that it automatically operated when there was a clause in a treaty requiring State observance of specific commitments. According to the Tribunal, that question "is essentially one of interpretation, and does not seem to be determined by any presumption."[57]

- Third, although the Tribunal acknowledged the concern expressed by the *SGS v. Pakistan* Tribunal that a broad interpretation of the "umbrella clause" could override the dispute settlement clauses in particular contracts, it felt that such

consequences would not necessarily follow from a broad interpretation.[58] The Tribunal's reasoning on this point is the central component of the decision, and will be discussed below.

- Fourth, the Tribunal concluded that mere placement of the clause in the Treaty was not decisive, noting that it would be difficult to justify different interpretations of such clauses based on their locations in different treaties.[59]

Perhaps most importantly, the Tribunal declared that "if [the "umbrella clause"] has any effect at all, [it] confers jurisdiction on an international tribunal, and needs to do so with adequate certainty."[60] The Tribunal seemed to be reacting to the fact that the earlier *SGS v. Pakistan* decision never provided an adequate explanation for the purpose or effect of the "umbrella clause." The Tribunal concluded that, under the BIT, the State had an "obligation to pay what is due under the contract," and that the Tribunal had jurisdiction over a dispute regarding this obligation.[61] Nonetheless, "the extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract."[62] In other words, the BIT "addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained."[63] According to the *SGS v. Philippines* Tribunal, the "umbrella clause" therefore becomes a guarantee of performance of specific contract obligations, and allows jurisdiction under the BIT for disputes regarding that performance. The scope of the performance could be decided by the Tribunal "in the absence of other factors," but the Tribunal would have to apply the law of the contract (in this case, the law of the Philippines).[64]

B. The Effect of a Dispute Resolution Clause in the Underlying Contract

Having concluded that there was an investment and a claim for a breach of the BIT, the Tribunal noted that the dispute could be characterized as a dispute with respect to an investment. The Tribunal, therefore, could assert jurisdiction over the dispute under the BIT. However, the Tribunal noted that "there are two different questions here:" the general question of jurisdiction under the BIT, and "the impact on the jurisdiction of BIT tribunals over contract claims…where there is an exclusive jurisdiction clause in the contract."[65] In the Tribunal's view, although such a clause does not remove or limit the jurisdiction of a BIT Tribunal, "a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision."[66]

The Tribunal thus essentially distinguished between jurisdiction and admissibility, holding that BIT Tribunals do have jurisdiction over "contract claims" when there is an umbrella clause in the BIT, but that such claims are not admissible if there is an exclusive dispute resolution clause in the contract.

The Tribunal reasoned that "the BIT did not purport to override the exclusive jurisdiction clause in the" contract.[67] Citing the maxim *generalia specialibus non derogant*, the Tribunal concluded that a dispute settlement clause in a contract in relation to a specific investment should take precedence over the general consent to arbitration in the BIT.[68] The Tribunal also considered the general principle of *lex posterior derogat legi priori*; the claimants had argued that the BIT was later in time, therefore overriding the dispute resolution clause in the earlier contracts. The Tribunal, however, rejected that argument. The Tribunal noted that there was no textual basis in the BIT for such a conclusion.[69] In addition, "the distinction would tend to operate in an arbitrary way," in cases where both the BIT and the contract were renewable and had been renewed, which agreement, the Tribunal noted the difficulty in determining which agreement was prior and which subsequent.[70] Finally, the Tribunal concluded that the principle only applied to instruments of a similar legal character; a bilateral treaty under international law and a specific contract under national law were not similar enough in character.[71]

SGS also had argued that the consent to ICSID arbitration in the BIT meant that Article 26 of the ICSID Convention had effect, namely, that there was "consent to [ICSID] arbitration to the exclusion of any other remedy."[72] The Tribunal observed,

however, that Article 26 was not a mandatory rule, and that the phrase "unless otherwise stated" in Article 26 meant that the parties could agree to an alternative forum through a contractual dispute resolution clause.[73] Finally, the Tribunal concluded that such an interpretation would render meaningless common BIT provisions allowing for a choice between ICSID and UNCITRAL arbitration.[74]

In summary, the Tribunal stated:

> Thus, the question is not whether the Tribunal has jurisdiction; unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract. 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. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction…SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim.[75]

The Tribunal ultimately concluded that, as the only matter under dispute was the claim for money owed under the contract, there were no independent BIT claims. SGS was bound by the dispute resolution clause of the contract to determine the amount of the obligation; the ICSID proceedings were stayed "pending a determination of the amount payable, either by agreement between the parties or…in accordance with" the dispute resolution clause of the contract.[76]

The Tribunals in the two *SGS* cases reached the same practical result: both Tribunals declined jurisdiction over contract-based claims. The reasons for that conclusion, however, differ. The *SGS v. Pakistan* Tribunal determined that there was no jurisdiction over contract claims given its interpretation of the umbrella clause, whereas the *SGS v. Philippines* Tribunal found jurisdiction, but held that the contractual forum selection agreement took precedence.

IV. *Joy Mining v. Egypt*

In April 1998, Joy Mining Machinery Limited entered into a contract with the General Organization for Industrial and Mining Projects of the Arab Republic of Egypt ("IMC") to provide replacement equipment and a new system for phosphate mining.[77] Joy Mining also supplied letters of guarantee for Contract Performance, Advance Payment and Remaining Payment or Balance; the contract and the amendment provided timetables for the release of these guarantees based on the performance of the equipment and the production of the mines.[78]

Soon after the project commenced, disputes arose. Despite the disputes, Joy Mining was paid the full purchase price for the equipment supplied; however, the guarantees were not released, and the company instead had to renew them several times.[79] The parties' dispute then revolved around whether the guarantees should have been released. Joy Mining commenced ICSID arbitration under the UK-Egypt BIT.

Joy Mining claimed that Egypt's actions amounted to nationalization or measures equivalent to expropriation, prevented the free transfer of funds, were discriminatory, and that Egypt did not accord Joy Mining fair and equitable treatment and full protection and security. Joy Mining also claimed that the dispute concerned a breach of the contract between itself and Egypt.[80]

Egypt raised several objections to jurisdiction, arguing that there was no investment under the BIT, there was no violation of the BIT attributable to Egypt, and all contract claims should be decided according to the dispute resolution clause in the contract.[81]

A. Jurisdiction over Contract Claims?

Although the Tribunal concluded that it lacked jurisdiction because the contract did not constitute an investment, it also addressed other jurisdictional issues "in order to make certain clarifications concerning the nature of the Contract and the role of the forum selection clause contained therein."

The Tribunal explained that "a basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some form of State interference with the operation of the contract involved,"[82] although there will be instances "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."[83] The Tribunal also noted that "a purely contractual claim, however, will normally find difficulty in passing the jurisdictional test of treaty-based tribunals."[84] The Tribunal cited *SGS v. Pakistan* in support of the proposition that there is no jurisdiction over claims "which do not also constitute or amount to breaches of the substantive standards of the BIT,"[85] and, in somewhat of an oversimplification, noted that the *SGS v. Philippines* Tribunal had "referred certain aspects of contractual claims to local jurisdiction while retaining jurisdiction over treaty-based claims."[86]

The Tribunal stated that "a bank guarantee is clearly a commercial element of the Contract." It concluded that a refusal to release such a guarantee could not constitute a substantive violation of the BIT; there was no taking of property, as "it is hardly possible to expropriate a contingent liability."[87]

B. Jurisdiction Under the "Umbrella Clause"?

Joy Mining had argued that "all the contractual and statutory violations…also amount to Treaty violations" because of the "umbrella clause" in the BIT.[88] The Tribunal summarily concluded the opposite, holding that "it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty."[89] According to the Tribunal, there was no connection between the contract and the Treaty, and that the "missing link…prevent[ed] any such effect."[90]

C. Was There an Act of the State?

As treaty claims relate to state action, the Tribunal considered whether Joy Mining's dispute, insofar as it related to IMC's contract performance, was conduct attributable to Egypt. In that regard, the Tribunal accepted Egypt's argument that "IMC is only an operating agency for the Government in respect of mining activities," and that it was therefore no different from any other commercial entity performing the same functions.[91] The Tribunal concluded simply that it was not "credibly alleged that there was Egyptian State interference with the Company's contract rights."[92]

D. The Effect of a Dispute Resolution Clause in the Underlying Contract

Joy Mining had argued alternatively that "the consent clause of the Treaty allows any contract claim to be taken to arbitration even if it does not amount to a Treaty breach."[93] The Tribunal rejected this argument and held that the existence of a valid forum selection clause in the contract precluded the Tribunal from deciding disputes arising under the contract.[94] The consent clause of the applicable BIT, however, should be considered in this regard as it refers to "Disputes between the Contracting Parties concerning the interpretation or application of" the treaty, as opposed to, for instance, the more general phrase "disputes with respect to investments" that is found in other treaties.

V. *Salini v. Jordan*

In November 1993, Salini Construttori S.p.A. and Italstrade S.p.A., operating as a Joint Venture, concluded a contract with the Jordanian Ministry of Water and Irrigation—Jordan Valley Authority.[95]

The Joint Venture was to be the Contractor for the construction of a dam, and the Jordan Valley Authority was the Employer.[96] The project was completed in October 1997, and in April 1999 the joint venture submitted a final statement, claiming that they were due approximately $28 million. The Engineer appointed by the Employer responded that, according to its calculations, the amount due was only $49,210.[97] Attempts were made to resolve the dispute, and, according to the claimants, Jordan agreed that if no result could be found, the dispute would be referred to arbitration under the dispute settlement clause contained in the contract.[98] After continued failure to resolve the dispute, and an apparent refusal by Jordan to submit to the dispute settlement clause, the joint venture submitted a request for ICSID arbitration.[99]

The claimants alleged several violations of the BIT, including unjustified or discriminatory measures, failure to ensure just and fair treatment, failure to ensure continuity of legal treatment, measures which limit the right of ownership, possession, control or enjoyment of their property, and measures equivalent to expropriation. Jordan responded that the claims really were for breach of contract and therefore should be resolved under the dispute resolution provision of the contract, that there was no government conduct which constituted a treaty violation, and that the dispute did not arise out of an investment.[100]

A. Was There an Act of the State?

The Tribunal first considered whether the Jordan Valley Authority was an "entity" of the Jordanian Government because the dispute settlement provisions in the BIT contained an article stipulating that where an investor and an "entity of the Contracting Parties" have a contract with a dispute settlement agreement "the procedure foreseen in such investment Agreement shall apply."[101] The claimants argued that this provision did not apply, as the contract was not with an "entity" of the government, but with the government itself; the respondent argued that the contract was with the Jordan Valley Authority, an entity of the government.

The Jordan Valley Authority was established under Jordanian law, which called for it to undertake "the development of the water resources of the valley and utilizing them" and "all the works related to the development, utilization, protection and conservation of these resources."[102] Jordanian law provided that it was to "be considered an autonomous corporate body."[103] The Authority could conclude contracts, its funds were to be deposited in a special account at the Central Bank, and it had its own employees, some of whom were subject to Civil Service Law and some of whom were "under a specific status."[104] The Jordan Valley Authority consisted of the Minister of Water and Irrigation, a Board of Directors chaired by the Minister and comprised of representatives of various Ministries and an expert appointed by the Cabinet, a Secretary General, and staff.[105]

In view of those factors, the Tribunal concluded, "although the Government exercises a strict control over the JVA, this Authority is an autonomous corporate body, distinct legally and financially from the State of Jordan."[106]

The Tribunal considered whether the contract was concluded with Jordan or with the Jordan Valley Authority. Citing the definitions and special provisions in the contract, which listed the Jordan Valley Authority as the Employer, the signatures on the contract (the Minister of Water and Irrigation and the Secretary General, presumably on behalf of the Jordan Valley Authority), and the written correspondence between the claimants and the Jordan Valley Authority, the Tribunal found that, despite the fact that the tenders for the contract were issued by a different Ministry, the Jordan Valley Authority, and not Jordan, was the party to the contract. The Tribunal, therefore, held that the dispute resolution procedures contained in the contract were applicable.[107]

Although the claimants contended that their dispute also could be settled under the BIT, the Tribunal held that the word "shall" in Article 9(2) of the BIT made it obligatory to use the procedures in the contract.[108] The Tribunal emphasized that the contract procedures "could

only cover claims based on breaches of the Contract," and could not apply to "claims based on breaches of the BIT (including breaches of those provisions of the BIT guaranteeing fulfillment of contracts…)."[109]

The Tribunal noted that "the rules of attribution governing responsibility for the performance of contract obligations may differ from those governing responsibility for the performance of BIT obligations."[110] According to the Tribunal, it was possible that Jordan would not be responsible for the breach of contract, because the Jordan Valley Authority had a legal personality distinct from the Jordanian State, but it was also possible that the State could be responsible for the actions of the Jordan Valley Authority under public international law, if the Jordan Valley Authority acted under the State's authority.[111] The Tribunal, therefore, could not rule out, in the jurisdictional phase of the case, that the State could be responsible for acts of the Jordan Valley Authority that could constitute violations of the BIT.[112]

B. Jurisdiction Under the "Umbrella Clause"?

Claimants argued that, as a consequence of the "umbrella clause" in the BIT, the Tribunal could address the parties' contract disputes under the terms of the BIT. That clause provided that: "each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor."[113]

The Tribunal noted that Article 2(4) of the BIT "is couched in terms that are appreciably different from the provisions applied" in other arbitral awards, including the two *SGS* awards.[114] The Parties to the Treaty did not commit themselves to observing any previous obligations or guaranteeing the observance of any commitments, only to creating and maintaining a legal framework suitable for preserving such obligations. The BIT thus did not restate the State's contractual obligations—those obligations remained "purely contractual in nature and any disputes regarding the said obligations must be resolved in accordance with the dispute settlement procedures foreseen in the contract."[115] The Tribunal, therefore, concluded that it did not have jurisdiction over purely contractual claims.

C. Jurisdiction over Contract Claims?

The Tribunal noted, citing *Vivendi*, that "a State may breach a treaty without breaching a contract, and vice-versa,"[116] and that "not any breach of an investment contract could be regarded as a reach of a BIT."[117] The Tribunal reasoned that for a breach of contract to "constitute unfair or inequitable treatment within the meaning of the bilateral agreement, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt."[118] In other words, the State must have assumed some obligation under the BIT "in the exercise of its sovereign authority (*puissance publique*)," and not merely some contractual obligation as a commercial actor.[119]

The Tribunal found that the claimants' main argument seemed "to be that all the contractual breaches for which they hold JVA responsible must be regarded as constituting an unjust and unfair treatment by Jordan," and that this was not sufficient to give the Tribunal jurisdiction.[120] The claimants presented one claim that was not merely a breach of contract claim. Claimants alleged that Jordan had agreed to submit to arbitration and later reneged (although Jordan denied that it had given such consent). Although the Tribunal found the Claimants' submissions "lacking, in terms of both the facts and the law," it considered that it could not rule "from the outset that the alleged facts, if established" did not constitute a breach of the substantive provisions of the BIT.[121] It deferred that issue to be considered on the merits.[122]

VI. *Impregilo v. Pakistan*

Impregilo was part of a joint venture involving companies from Italy, Germany, France and Pakistan.[123] In December 1995, Impregilo, on behalf of the joint venture, entered into two

contracts with the Pakistan Water and Power Development Authority (WAPDA). The joint venture was to construct various dams and structures to control the Indus River and deliver water to a powerhouse.[124] An engineer, Pakistan Hydro Consultants, was to act as an agent for the employer and control the performance of the contracts.[125]

Work on the Project was delayed. Impregilo alleged that the delays were due to unforeseen conditions and obstacles created by Pakistan, including delay in the issuance of detailed instructions by the Engineer and changes to the specifications made by the Engineer as well as a failure by WAPDA to turn over the necessary land.[126] According to Impregilo, the Engineer denied the contractor's requests for extensions of time and refused to compensate the contractor for additional costs.[127] Neither negotiations nor arbitration under the contract resulted in satisfaction for the joint venture.[128]

Impregilo commenced an ICSID arbitration asserting claims under the Italy-Pakistan BIT. Pakistan filed jurisdictional objections. In its decision on jurisdiction, the Tribunal ruled that its jurisdiction was limited to claims that the treaty was violated and that such claims were distinct from purely contractual claims.[129]

A. Was There an Act of the State?

Impregilo claimed that as the BIT contained the State Parties' consent to submit to arbitration "any dispute arising between a Contracting Party and the investors of the other," it conferred jurisdiction even over claims for breach of contract.[130] The Tribunal stated that the question of jurisdiction "turns upon the precise status of [WAPDA], and the legal consequences to be drawn from this status."[131] The Tribunal concluded that because the scope of consent contained in the BIT encompassed a contract dispute with the State as a dispute between a "Contracting Party" and "an investor," a dispute with a legal entity distinct from the State would not be covered.[132]

The Tribunal considered WAPDA's status under Pakistani law. It found that WAPDA was an authority "entitled to acquire, hold property…have perpetual succession and a common seal and…by the said name sue and be sued."[133] It consisted of a Chairman and no more than three government-appointed members, who were subject to "such conditions of service as may be prescribed by the Government" and may be removed for various reasons.[134] Those working for the Authority were considered civil servants, at least for some purposes.[135]

WAPDA was responsible for a plan to develop and utilize the water and power resources of Pakistan, and could enter into contracts, undertake works, incur expenses, procure equipment, and acquire and dispose of land.[136] The Government's liability to creditors of WAPDA was limited to the grants made by the Government and loans approved by the Government.[137] WAPDA was to submit annual financial reports for auditing and frame regulations under the Pakistan Water and Power Development Authority Act (which, in part, established WAPDA).[138]

After listing these factors, the Tribunal concluded that "although the Government of Pakistan exercises a strict control on WAPDA…WAPDA is properly characterised as an autonomous corporate body, legally and financially distinct from Pakistan."[139]

The Tribunal noted that "a clear distinction exists between the responsibility of a State for the conduct of an entity that violates international law…and the responsibility of a State for the conduct of an entity that breaches a municipal law contract."[140] The Tribunal concluded that jurisdiction over purely contractual claims under the BIT did not extend to contracts to which one of the States is not a party. As WAPDA was a distinct legal entity, the Tribunal had no jurisdiction over Impregilo's breach of contract claims.[141]

B. Jurisdiction over Contract Claims?

Impregilo further argued that some of its claims were distinct from its claims for breach of contract, "based on conduct by Governmental authorities not directly involved in the Contracts." The Tribunal

reiterated the standards noted in earlier awards, concluding that the fact that "some Treaty Claims here may coincide with Contract Claims" did not deprive the Tribunal of jurisdiction.[142] "Even if the two [types of claims] perfectly coincide, they remain analytically distinct, and necessarily requires different enquiries."[143] The Tribunal then considered whether any of Impregilo's claims could be Treaty violations.

Although lacking sufficient facts at the jurisdictional stage of the proceedings, the Tribunal concluded that "it is possible, at least in theory, that Impregilo might establish breaches of the BIT" with regard to the attitude and conduct of Pakistan;[144] more specifically, the allegations that Pakistani customs failed to facilitate the importation of the necessary equipment, that Pakistan failed to transfer the necessary land, that military authorities failed to ensure necessary access to military bases, and so forth, if proven, might constitute unfair or discriminatory treatment.[145] The Tribunal concluded that the success of these claims would depend on the attribution of these acts to Pakistan itself and whether such activities were beyond those of an ordinary contracting party (in other words, an exercise of *puissance publique*);[146] the Tribunal also noted the decision in *Joy Mining v. Egypt* in support of the conclusion that Treaty violations depended on some form of State interference different from the commercial aspects of the dispute.[147] Such determinations could only be made after careful consideration; therefore, the Tribunal would reserve judgment until the merits of the case.[148]

Impregilo also had claimed that there was nationalization or expropriation, or measures having an equivalent effect. The Tribunal recognized the possibility that "the taking of contractual rights could, potentially, constitute an expropriation."[149] Although there was no nationalization or expropriation "in the traditional sense of those terms," there was behavior that could, in theory, constitute indirect expropriation or its equivalent.[150] Again, however, whether such was the case here depended on whether the State was acting as a contracting party or exercising specific functions of a sovereign authority. The Tribunal stated that a State "acting as a contracting party does not 'interfere' with a contract; it 'performs' it."[151] Performing the contract badly will not, in and of itself, result in nationalization or expropriation, "unless it be proved that the State or its emanation has gone beyond its role as a mere party to the contract" and acted as a sovereign.[152] The Tribunal concluded that it had jurisdiction over "measures taken by Pakistan in the exercise of its sovereign power, and not decisions taken in the implementation or performance of the Contracts."[153]

The Tribunal concluded, in short, that some of Impregilo's claims could constitute violations of the BIT, and that it would rule on those claims during the merits phase.

VII. Conclusion

Generally, this overview of recent cases reveals a sense of great caution by Tribunals to assert jurisdiction over purely contractual claims. Much will depend on the specific language contained in the dispute resolution and any "umbrella" clause contained in the applicable investment treaty.

More specifically, the cases highlight the difficulty of drawing the line between purely contractual claims and those based on treaties. Tribunals will consider whether there is conduct attributable to the State and hence, where a contract is concerned, whether the State is a party to it. Tribunals also will give consideration to whether any State action that is at issue is action taken in a sovereign as opposed to a commercial capacity. In other words, if the action alleged to be in violation of the contract was taken in exercise of sovereign authority, it may give rise to a treaty violation; if it was taken as a commercial act, it might not constitute a treaty violation. A different result may be reached when an umbrella clause is at issue, if the Tribunal were persuaded to follow the approach of *SGS v. Philippines*. In many cases, these distinctions will be difficult to make as a matter of fact.

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1 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (Aug. 6, 2003), 18 ICSID Review—Foreign Inv. L.J. 307 (2003), at paras. 10 – 14.
2 *Id.* at para. 15.
3 *Id.* at para. 16.
4 *Id.* at paras. 19 – 26.
5 *Id.* at para. 27.
6 *Id.* at paras. 30 – 33.
7 *Id.* at para. 36.
8 *Id.* at para. 45.
9 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Procedural Order No. 2 (Oct. 16, 2002), 18 ICSID Review—Foreign Inv. L.J. 293, at 293-294 (2003).
10 *Id.* at 296.
11 *Id.* at 299.
12 *Id.*
13 *Id.* at 299 – 300.
14 *Id.* at 301.
15 *Id.* at 302.
16 *Id.*
17 Nor did the Tribunal decide this in the jurisdictional phase, since the Respondent never submitted any counter-claims. *See SGS v. Pakistan*, Decision on Jurisdiction at *para.* 156.
18 *SGS v. Pakistan*, Procedural Order No. 2 at 303.
19 *Id.* (quoting Article 26 of the ICSID Convention).
20 *Id.*
21 *SGS v. Pakistan*, Procedural Order No. 2 at 303 – 04.
22 *Id.* at 305 (stating that "the expeditious resolution of the jurisdictional issue should be possible," and a stay would not delay the process too much).
23 *SGS v. Pakistan*, Decision on Jurisdiction, at para. 190.
24 *Id.* at para. 147.
25 *Id.* at para. 147 (quoting *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002) [hereinafter *Vivendi Annulment*] at para. 95.).
26 *SGS v. Pakistan*, Decision on Jurisdiction at para. 147.
27 *Id.* at para. 148 (quoting *Vivendi Annulment* at para. 98) (emphasis in original).
28 *Id.* (quoting *Vivendi Annulment* at para. 101) (emphasis in original).
29 *Id.* at paras. 149, 155.
30 *Id.* at para. 161.
31 *Id.*
32 *Id.* at para. 162.
33 *Id.* at para. 163 (quoting the Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, July 11, 1995 [hereinafter Swiss—Pakistan BIT], Art. 11).
34 *SGS v. Pakistan*, Decision on Jurisdiction at para. 163.
35 *Id.* at para. 165.
36 *Id.* at para. 166.
37 *Id.* at para. 167.
38 *Id.* at para. 168.
39 *Id.*
40 *Id.*
41 *Id.* at para. 170 (emphasis in orginal).
42 *Id.* at para. 172.
43 *Id.*
44 *Id.* Exceptional circumstances cited by the Tribunal would include a denial of justice or reneging on a previous promise to submit to arbitration. *Id.*
45 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (Jan. 29, 2004), available at http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf, at paras. 13 – 14.
46 *Id.* at para. 36.
47 *Id.*
48 *Id.* at para. 115 (quoting the Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments, March 31, 1997 [hereinafter Swiss-Philippines BIT], Art. X(2).).
49 *SGS v. Philippines* at para. 115.
50 *Id.* at para. 116.
51 *Id.* at para. 120.
52 *Id.* at para. 119 (quoting Swiss—Pakistan BIT, Art. 11).
53 *SGS v. Philippines* at para. 119 (quoting the Swiss—Pakistan BIT, Art. 11.).
54 *SGS v. Philippines* at para. 119 (quoting the Swiss—Philippines BIT, Art. X(2).).
55 *SGS v. Philippines* at para. 125.
56 *Id.* at para. 121.
57 *Id.* at para. 122.
58 *Id.* at para. 123.
59 *SGS v. Philippines* at para. 124.
60 *Id.* at para. 125.
61 *Id.* at para. 127.
62 *Id.*
63 *Id.* at para. 126.
64 *Id.* at para. 128.
65 *Id.* at para. 134.
66 *Id.* at para. 138.
67 *Id.* at para. 143.
68 *Id.* at para. 141.
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.* at para. 144.
73 *Id.* at paras. 146 – 47.
74 *Id.* at para. 148.
75 *Id.* at para. 154.
76 *Id.* at para. 175.
77 *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004), available at http://www.worldbank.org/icsid/cases/joy-mining-award.pdf, at para. 15.
78 *Id.* at para. 17.
79 *Id.* at para. 18.
80 *Id.* at paras. 22 – 23.
81 *Id.* at para. 26.
82 *Id.* at para. 72.
83 *Id.* at para. 75.
84 *Id.*
85 *Id.* at para. 77 (quoting *SGS v. Pakistan*, Decision on Jurisdiction, at para. 162.).
86 *Joy Mining v. Egypt* at para. 77 (citing *SGS v. Philippines* at para. 163.).
87 *Joy Mining v. Egypt* at para. 78.

88 That umbrella clause reads "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party." Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, June 11, 1975 [hereinafter U.K.—Egypt BIT], Art. 2(2).
89 *Joy Mining v, Egypt* at para. 81.
90 *Id.*
91 *Id.* at para. 67.
92 *Id.*
93 *Id.* at para. 86.
94 *Id.* at para. 90.
95 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 15, 2004), available at http://www.worldbank.org/icsid/cases/salini-decision.pdf, at para. 14.
96 *Id.*
97 *Id.* at paras. 14 – 15.
98 *Id.* at para. 16.
99 *Id.* at para. 1.
100 *Id.* at para. 22.
101 *Id.* at para. 66 (quoting the Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Protection and Promotion of Investments, July 21, 1996 [hereinafter Jordan—Italy BIT], Art. 9(2).
102 *Salini v. Jordan* at para. 81.
103 *Id.* at para. 82.
104 *Id.*
105 *Id.* at para. 83.
106 *Id.* at para. 84.
107 *Id.* at paras. 85 – 92.
108 *Id.* at para. 94.
109 *Id.* at para. 96.
110 *Id.* at para. 157.
111 *Id.*
112 *Id.*
113 *Id.* at para. 66 (quoting the Jordan—Italy BIT, Article 2(4).).
114 *Id.* at para. 126. The claimants cited *SGS v. Philippines* in support of their case, while Jordan cited *SGS v. Pakistan*.
115 *Id.* at paras. 126 – 27.
116 *Id.* at para. 152 (quoting the *Vivendi Annulment* at para. 95). The standard the Tribunal applied, similar to the one invoked in *SGS v. Pakistan*, was that, at the jurisdictional phase, the Tribunal would "seek to determine whether the facts alleged by the Claimants in this case, if established, are capable of coming within" the BIT. *Salini v. Jordan* at para. 151.
117 *Salini v. Jordan* at para. 154.
118 *Id.* at para. 155.
119 *Id.*
120 *Id.* at para. 159.
121 *Id.* at para. 166.
122 *Id.*
123 *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005), available at http://www.worldbank.org/icsid/cases/impregilo-decision.pdf, at para. 10.
124 *Id.* at para. 13.
125 *Id.* at para. 14.
126 *Id.* at paras. 15 – 17.
127 *Id.* at para. 18.
128 *Id.* at para. 19.
129 *Id.* at paras. 170 – 72.
130 *Id.* at paras. 188 – 89 (quoting the Agreement between the government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments, July 19, 1997 [hereinafter Pakistan—Italy BIT], Art. 9(2).).
131 *Id.* at para. 198.
132 *Id.* at para. 216.
133 *Id.* at para. 200 (quoting the Pakistan Water and Power Development Authority Act of 1958, Sec. 3(2).).
134 *Id.* at para. 201 (quoting the Pakistan Water and Power Development Authority Act of 1958, Sec. 4.).
135 *Id.* at para. 203.
136 *Id.* at para. 205.
137 *Id.* at para. 206.
138 *Id.* at paras. 206 – 07.
139 *Id.* at para. 209.
140 *Id.* at para. 210.
141 *Id.* at para. 216.
142 *Id.* at para. 263.
143 *Id.* at para. 258.
144 *Id.* at para. 266.
145 *See Id.* at para. 264.
146 *Id.* at para. 266.
147 *Id.* at para. 261.
148 *Id.* at para. 285.
149 *Id.* at para. 274.
150 *Id.*
151 *Id.* at para. 278.
152 *Id.*
153 *Id.* at para. 281.