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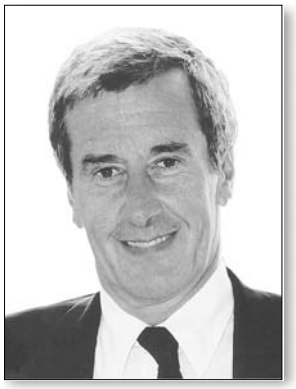
Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses

What is the effect of broadly phrased dispute resolution clauses contained in investment protection treaties that provide that "any" or "all" disputes "with respect to," "relating to" or "concerning" investments between a Contracting Party to the treaty and an investor of the other Contracting Party can be submitted to international arbitration?

In particular, does the jurisdiction of an arbitral tribunal constituted on the basis of an investment protection treaty extend, under such clauses, to breaches of an investment contract or is such jurisdiction limited to violations of the substantive provisions of the treaty only?

This question has divided practitioners and legal commentators and remains unsettled in the international arbitral case law. There are mainly two approaches to this question [for an overview, see E. Gaillard, "Investment Treaty Arbitration and Jurisdiction Over Contract Claims. The SGS Cases Considered," in International Investment Law and Arbitration: Leading Cases From the ICSID, NAFTA, Bilateral Treaties and Customary International Law (T. Weiler ed.) 2005, at 325]. Under a first approach, a treaty-based arbitral tribunal has jurisdiction over mere contractual claims when the dispute resolution clause is drafted in sufficiently broad language to extend to any disputes, including disputes in relation to the performance of a contract. Under a



second, more restrictive, approach, the broad wording of a dispute resolution clause is not sufficient justification for the jurisdiction of a treaty-based tribunal over purely contractual claims.

Investor-State Contracts Covered

One of the first decisions to address this question was the decision on jurisdiction handed down in 2001 in *Salini v. Morocco*. The dispute resolution clause of the applicable bilateral investment treaty (BIT) in that case allowed for international arbitration with respect to "[a]ll disputes or differences…between a Contracting Party and an investor of the other Contracting Party concerning an investment." The tribunal held that the terms of that provision were "very general" and that "[t]he reference to expropriation and nationalization measures, which are matters coming under the unilateral will of a State, cannot be interpreted to exclude a claim based in contract from the scope of application of this Article" [*Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, Decision on jurisdiction, July 16, 2001, 42 ILM 606 (2003), para. 59, introductory note by E. Gaillard and Y. Banifatemi]. However, having decided that the broad dispute resolution clause did extend to contractual claims, the *Salini v. Morocco* tribunal restricted its jurisdiction to only such contractual claims that arose out of a "breach of a contract that binds the State directly. The jurisdiction offer contained in Article 8 does not, however, extend to breaches of a contract to which an entity other than the State is a named party" (id., para. 61).

A similar reasoning was adopted by the arbitral tribunal in the recent decision in *Impregilo v. Pakistan*. The *Impregilo* tribunal decided that the scope of the treaty's dispute resolution provision was limited to disputes between the entities or persons concerned and that the question of its jurisdiction over contractual claims depended upon the precise status of the state-owned utility, Pakistani Water and Power Development Authority (WAPDA), that had entered into the investment contract [*Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on jurisdiction, April 22, 2005, available on the International Center for the Settlement of Investment Disputes (ICSID) Web site, paras. 198 and 211]. On the basis of the factual premise that WAPDA was an autonomous corporate body, legally and financially distinct from Pakistan, the tribunal concluded that "[g]iven that the Contracts at issue were concluded between the Claimant and WAPDA, and not between the Claimant and Pakistan;…and given that Article 9 of the bilateral investment treaty (BIT) does not cover breaches of contracts concluded by such an entity, it must follow that this tribunal has no jurisdiction under the BIT to entertain Impregilo's claims based on alleged breaches of the Contracts" (id., para. 216). It follows—as in the *Salini v.*

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Morocco decision—that the situation would have been different had the contract been entered into by the state itself: "the jurisdiction offer in this BIT does not extend to breaches of a contract to which an entity other than the State is a named Party" (id., para. 214).

All Contractual Claims Covered

Other tribunals have adopted an even wider approach. In the *Vivendi v. Argentina* annulment decision of 2002, the ad hoc committee was called upon to determine—in the context of the exercise by the investor of its jurisdictional option under the treaty's fork in the road clause—the scope of a dispute resolution clause providing for international arbitration as regards disputes "relating to investments made under th[e] Agreement between one Contracting Party and an investor of the other Contracting Party." The committee held that that provision "does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT" [*Compañía de Aguas del Aconquija, S.A. et Compagnie Générale des Eaux (Vivendi Universal) v. Argentine Republic*, Decision of July 3, 2002, 41 ILM 1135 (2002), para. 55].

Another notable decision was rendered in 2004 by the arbitral tribunal constituted in *SGS v. Philippines*. That tribunal similarly gave wide effect to the dispute resolution provision of the Swiss-Philippines BIT, which provided for ICSID arbitration as regards "disputes with respect to investments" between an investor and the host state. The tribunal held that "[t]he 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 CISS Agreement" [*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on jurisdiction, Jan. 29, 2004, 19 MEALEY'S: INT'L ARB. REP. C1 (Feb. 2004), para. 131]. It further held that "the phrase 'disputes with respect to investments' naturally includes contractual disputes" (para. 132). To the extent, however, that the relevant investment agreement contained its own exclusive dispute resolution clause, the tribunal found that:

> there are two different questions here: the interpretation of the general phrase 'disputes with respect to investments' in BITs, and the impact on the jurisdiction of BIT tribunals over contract claims (or, more precisely, the admissibility of those claims) when there is an exclusive jurisdiction clause in the contract. It is not plausible to suggest that general language in BITs dealing with all investment disputes should be limited because in some investment contracts the parties stipulate exclusively for different dispute settlement arrangements. As will be seen, it is possible for BIT tribunals to give effect to the parties' contracts while respecting the general language of BIT dispute settlement provisions. Interpreting the text of Article VIII in its context and in the light of its object and purpose, the Tribunal accordingly concludes that in principle (an apart from the exclusive jurisdiction clause in the CISS Agreement) it was open to SGS to refer the present dispute, as a contractual dispute, to ICSID arbitration under Article VIII(2) of the BIT (paras. 134-135).

Because, however, it viewed the exercise of the parallel contractual dispute resolution mechanism as an admissibility requirement before the claim could be submitted to the treaty-based tribunal under the treaty, the *SGS v. Philippines* tribunal drew no consequences from its previous conclusion that the general wording of the treaty's dispute settlement provision endowed it with jurisdiction over purely contractual claims. It thus decided not to exercise its jurisdiction and to stay the ICSID proceedings by referring the parties to the contractual dispute resolution mechanism: "Under Article VIII(2) of the BIT, the Tribunal has jurisdiction with respect to a claim arising under the CISS Agreement, even though it may not involve any breach of the substantive standards of the BIT…. But such a contractual claim, brought in breach of the exclusive jurisdiction clause embodied in Article 12 of the CISS Agreement, is inadmissible, since Article 12 is not waived or over-ridden by Article VIII(2) of the BIT or by Article 26 of the ICSID Convention" (id., para. 169).

Purely Contractual Claims

It is worthy of note that, although all the tribunals referred to above established that the jurisdiction of a treaty-based tribunal could extend to purely contractual claims on the basis of a broadly drafted dispute resolution clause, none, in fact, recognized its own jurisdiction over such contractual claims in the case at hand.

By contrast, other arbitral tribunals have adopted, and abided by, a more restrictive approach. In 2003, the arbitral tribunal in *SGS v. Pakistan* held that a broad dispute resolution clause in a BIT does not provide sufficient basis for a treaty-based tribunal to have jurisdiction over purely contractual claims:

> We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as 'disputes with respect to investments,' the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the factual subject matter of the disputes, does not relate to the legal basis of the claims, or the cause of action asserted in the claims. In other words, from that description alone, 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.…Thus, 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.…We conclude that the Tribunal has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT. [*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision of Aug. 27, 2003, 18 ICSID REV. 307 (2003), paras. 161-162].

The requirement that contractual claims brought before a treaty-based tribunal must also amount to a violation of the treaty standards was again emphasized by the decision rendered in January 2005 by the arbitral tribunal in *LESI-Dipenta v. Algeria*. In that case, the claimant referred to the broad

language of the dispute resolution clause contained at Article 8(1) of the Algeria-Italy BIT. The tribunal, however, held that the defendant state's consent to arbitration "does not imply necessarily that it has a general scope and may therefore endow jurisdiction for any violation complained of by the Claimant" (*Consorzio Groupement L.E.S.I.-Dipenta v. People's Democratic Republic of Algeria*, Jan. 10, 2005, Award in French, available on the ICSID Web site, para. 25). The tribunal further referred to Article 4(1) of the BIT, which defines the scope of the treaty's protection of the investments as embodying in particular the standards of full protection and security of such investments and the prohibition of unjustified or discriminatory measures, and held that the contracting parties' "consent is not given, extensively, for all rights and claims that could be related to an investment. It is a requirement that the measures complained of amount to a violation of the bilateral Agreement, which means in particular that they be of an unjustified or discriminatory nature, in law or in fact. This is not necessarily the case for any breach of contract" (id.).

Treaty Violation

The key difference between the two approaches described above is whether the investor must allege, in order to establish the jurisdiction of the treaty-based tribunal over its contractual claims, that the substantive standards of the treaty under which it is initiating the arbitration against the host state were violated. In other words, the question is whether the treaty-based tribunal could rule on contractual breaches without being required to pass judgment on the substantive provisions of the treaty, or whether its jurisdiction would be warranted only where a contractual breach would also amount to a violation of the substantive standards of the treaty.

Arguably, under the first, extensive approach, one could maintain that the implicit intention of the contracting parties to a treaty must be taken into account and that the fact that some treaties expressly restrict the jurisdiction of the treaty-based tribunal to breaches of the substantive standards contained in the treaty may suggest that broader language is intended to encompass other types of disputes such as contractual ones. Manifestly, the wording "any dispute with respect to investments" may be contrasted with that of other dispute resolution provisions which limit the scope of the arbitration to disputes "concerning an obligation of the [host state] under this Agreement" such as Article 8(1) of the U.K. Model BIT or Article 26(1) of the Energy Charter Treaty.

Conversely, it could be argued that, in the absence of an express provision, a phrase such as "all disputes with respect to investments" cannot, in and of itself, provide a basis for the jurisdiction of a treaty-based tribunal over purely contractual claims. Some may further find argument in the fact that, should the contracting parties wish to extend their jurisdiction offer to contractual claims, the language of the dispute resolution provision would be so crafted. For example, Article 24 of the U.S. Model BIT expressly endows a treaty-based tribunal with jurisdiction over breaches of an investment agreement.

The latter approach may be preferred in light of the fact that investment protection treaties are international law instruments that create substantive standards of international law for the protection for the covered investors. Presumably, the dispute resolution clause that is contained in those treaties is meant to create a neutral, international forum for the investors in the event of an alleged violation of those standards. Absent specific language to the contrary, it may seem odd to interpret a treaty as creating a jurisdictional basis for a treaty-based tribunal in cases where it is not called upon to rule on alleged violations of that treaty. There is always a danger in divorcing the jurisdictional provisions from the substantive terms of the same treaty in that this may suggest that the treaty-based tribunal has jurisdiction but is invited to rule on a vacuum.

This tension does not arise when the investment treaty under consideration contains an observance of undertakings clause. Under such clauses, the contracting states reiterate in the investment treaty their commitments with regard to the investments of investors, and therefore undertake a binding obligation under international law, as regards contracts in particular, in the realm of those states' treaty obligations. Because it creates a treaty standard, an observance of undertakings clause may—at the same time as embodying a substantive obligation—provide a basis for the jurisdiction of a treaty-based tribunal.

This reasoning was adopted by the *LESI-Dipenta* tribunal, which laid emphasis on the absence of an observance of undertakings provision in the treaty under consideration that would establish its jurisdiction. The tribunal decided that its interpretation according to which the contracting parties' consent to jurisdiction under the treaty did not extend to breaches of contract that would not also amount to breaches of the applicable treaty "is confirmed a contrario by the drafting found in other treaties. Certain treaties indeed contain provisions known as observance of undertakings clauses or 'umbrella clauses.' The effect of such clauses is to transform breaches of the State's contractual commitments into violations of that provision of the treaty and, accordingly, to endow the arbitral tribunal constituted in accordance with the treaty with jurisdiction [over such breaches]" (*LESI-Dipenta v. Algeria*, para. 25).

The same conclusion, as regards observance of undertakings clauses, was reached by the recent decision rendered in *Eureko B.V. v. Republic of Poland* (partial award of Aug. 19, 2005, available on the Investment Treaty Arbitration Resource Web site). That decision constitutes a persuasive precedent in finding that the contractual arrangements with the host state were subject to the jurisdiction of the tribunal in light of the observance of undertakings clause contained in the Dutch-Polish BIT, and in effectively giving effect to a such clause by finding that Poland had breached its treaty commitment to "observe any obligations it may have entered into with regards to investments of investors." It is worthy of note that although the *Eureko* decision paid lip service to the *SGS v. Philippines* decision on the effect of an observance of undertakings clause, it did not, as the latter, suspend the proceedings pending a determination by the courts having jurisdiction as per the investment contract, something that would be hardly compatible with the conclusion that a breach of a binding commitment under an observance of undertakings clause is a breach of the treaty itself.