

Treaty Claims vs. Contract Claims: Uncertainty is Certain

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Treaty Claims vs. Contract Claims

- ┌ Bases for Claims in the Context of International Investment
- ┌ Treaty vs. Contract Combinations
- ┌ ICSID Jurisprudence: More Questions than Answers?
- ┌ Ukrainian Experience

Three basic levels:

International Law (treaties: BITs, ECT, NAFTA)

- Public international law nature; usually* international dispute resolution

- Ukraine in world's Top 7, Europe's No. 1 at ICSID

Domestic Law [*Law of Ukraine on Regime of Foreign Investment*]: rarely used

- Public law nature; usually domestic dispute resolution

Contract: probably not *any* contract

- Private law nature; national or foreign applicable law; domestic or international dispute resolution mechanism

I Treaty Claims

- I Specific set of “protection standards” – obligations assumed by the state towards *all* foreign investors (often with vague meaning)
- I National Treatment, Most-Favored Nation regime, Fair and Equitable Treatment, Full Protection and Security, Expropriation and Compensation principles etc.
- I “One-way street” – investor has rights, state has obligations

I Contract Claims

- I Flexible set of mutual rights and obligations

Example 1: Production Sharing Agreement

- Article 31: Disputes shall be heard in the courts of Ukraine unless agreed otherwise by the parties (arbitration)
- The State of Ukraine is a party to the PSA (represented by the Cabinet of Ministers) and is bound by the arbitration clause
- If the investor is from the “BIT State”, investor has recourse to the other dispute resolution mechanism

Example 2: International Energy Transit

- Transit contract with a state owned company – usually with an arbitration clause
- Energy Charter Treaty – special dispute resolution mechanism for transit disputes with the states

Treaty vs. Contract: Effect

┌ Theory: Multiple Layers of Protection

- ┌ True for contracts with state companies, entities, not the state itself
- ┌ Even if the contract claim fails, investor can still seek recourse against the host state
- ┌ Investor may pick the avenue that is more appropriate

┌ Practice: Generous Field for “Legal Play” or “Forum Shopping”

- ┌ Desire to bring contractual claims in the “treaty” forum (ICSID)
- ┌ Reasons:
 - ┌ Unfavorable jurisdiction clause in the contract
 - ┌ Future enforceability

Treaty vs. Contract: Mechanism

Connection between Contract and Treaty Claims

- l Usually arise out of the same factual matrix
- l Can be factually independent from one another:
 - l Specific facts can be seen as contractual breaches
 - l Totality of facts and circumstances can rise to the level of BIT breach
- l Can be based on the same facts if they rise to the level of BIT breach
- l “Umbrella Clause” helps bring a contractual dispute to the level of BIT claims
 - l BIT Provision that imposes requirement on a Contracting State to observe all obligations entered into by it in respect of an investor or investment
 - l “Each [State] shall observe any obligation it may have entered into with regard to investments” (*U.S./Ukraine BIT Article II(3)(c)*)

- l “SGS vs. PPP” [Pakistan, Philippines, Paraguay] – example
 - l (1) *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13
 - l SGS (Swiss corporation) entered into contract for preshipment inspection of goods with Pakistan
 - l Dispute resolution clause: arbitration in Pakistan
 - l Contract unilaterally terminated by Pakistan
 - l SGS brought claim in Swiss courts (ultimately dismissed)
 - l In response, Pakistan commenced arbitration under the contract
 - l SGS then brought ICSID arbitration under Swiss-Pakistan BIT
 - l Parties then sought and obtained mutual anti-arbitration injunctions; ICSID case went ahead

┌ Objections by Pakistan:

- ┌ Contract vested exclusive jurisdiction over the matter with Pakistani arbitration
 - ┌ The essential basis of the ICSID proceedings was the contract claim
 - ┌ ICSID should defer to Pakistani arbitration by way of *lis pendens* rule
- SGS insisted:
 - Legal foundation of treaty and contractual claims is different, though factual matrix is the same
 - ICSID jurisdiction, being of international nature, should be given preference over domestic means

┌ Tribunal's Ruling (August 6, 2003):

- ┌ Accepted jurisdiction over *treaty* claims;
- ┌ Refused to consider *contractual* claims and upheld jurisdiction of Pakistani arbitration over them
 - ┌ BIT intended to cover only claims concerning adherence to its standards
 - ┌ Even the “Umbrella Clause” of the BIT did not cover the contractual claims despite the broad wording
- ┌ No need to coordinate between the proceedings

SGS v. Philippines

1 (2) *SGS Société Générale de Surveillance v. Republic of the Philippines*. ICSID Case No. ARB/02/6

- 1 SGS entered into contract for preshipment inspection of goods with Philippines
- 1 Dispute resolution clause: Philippines courts
- 1 SGS had claims over payments due to it by the government under the contract
- 1 SGS brought claim in ICSID
- 1 Tribunal faced same issues as in *SGS v. Pakistan*

SGS v. Philippines

Philippines objected:

- essential basis for the claims is the contract

SGS maintained:

- despite contractual origin, treaty claims had independent existence; “umbrella clause” elevated contract claims to international level

Tribunal’s Ruling: Jurisdiction Accepted but Case Stayed

- Accepted investor’s broad interpretation of the “umbrella clause”: it encompasses an obligation to fulfill contractual duties
- Accepted that jurisdictional provisions of the BIT were broad enough to apply to contract claims
- Considered contractual claim as inadmissible: contractual jurisdiction clause is *lex specialis* and prevails over treaty

SGS v. Paraguay

- l (3) *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29
 - l Facts very similar to the *Philippines* case
 - l Dispute resolution clause: Paraguay courts
 - l SGS had claims over payments due to it by the government under the contract
 - l SGS brought claim in ICSID
- l Paraguay objected:
 - l essential basis for the claims is the contract that contains exclusive jurisdiction provision; It does not matter if the claim is “labeled” as a treaty claim
 - l It rises to the level of BIT if *sovereign interference* can be shown
- l SGS maintained:
 - l despite contractual origin, treaty claims had independent existence; “umbrella clause” elevated contract claims to international level

SGS v. Paraguay

┌ Tribunal's Ruling:

- ┌ Rejected Paraguay's argument of "sovereign interference": every act by a sovereign State is a sovereign act
- ┌ "Umbrella clause" encompassed contractual claims against the state (plain wording of the clause in the relevant BIT)
- ┌ In contrast to the Philippines case, Tribunal refused to dismiss the claims as inadmissible: it would effectively divest the "umbrella clause" of its core purpose and effect
- ┌ While a later-in-time contractual jurisdiction clause may, in theory, be read as waiver of BIT jurisdictional avenue, such waiver would have to be express, not implied

┌ Three *SGS* cases: three different holdings

Ukraine and “Umbrella Clause”: Bosh and B&P v. Ukraine

- l Bosh International, Inc. and B&P Ltd. Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11 – Award communicated on October 25, 2012
- l Factual setup:
 - l Ukrainian entity (B&P) owned by American investor (Bosh) entered into joint activity agreement with Ukrainian state-owned University: reconstruction of University’s Dormitory and further joint use for academic and educational activities (“Scientific-Hotel Complex”)
 - l Joint Activity contract (2003): dispute resolution “in accordance with Ukrainian law”, i.e. by Ukrainian courts
 - l University sought termination of contract in Ukrainian court for substantive breach by B&P and prevailed
 - l B&P asserted throughout the case that it was the University that breached contract, and the claims fell under the scope of the BIT and ICSID jurisdiction because it was a dispute between an investor and the state (state-owned entity)

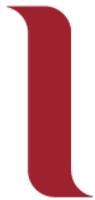
Ukraine and “Umbrella Clause”: Bosh & B&P v. Ukraine

I Determination by the Tribunal:

- I The “umbrella clause” from the U.S./Ukraine BIT only applies to “Parties” to BIT
- I Entities other than the state itself may only be considered as the “Party” if their conduct can be attributable to the State
- I Conduct of the University is not attributable to the State of Ukraine (no exercise of governmental functions), therefore the umbrella clause does not cover the University and its contract with the investor
- I *Even if* conduct of the University was attributable, Claimants’ umbrella clause claim fails:
 - I *“where a contractual claim is asserted under an umbrella clause, the claimant in question must comply with any dispute settlement provision included in the contract”*

Conclusions

- l There is vast (by ICSID standards) amount of case law on contract claims brought within the framework of treaty arbitration
- l The *Bosh* Tribunal cited 20 such cases trying to draw parallels with the case it was considering: it could not because of a fairly unique factual setup
- l This means that more questions than answers remain
- l A lot of different considerations are relevant for the party to choose which avenue to pursue, including those of practical nature
- l These cases are almost always big, complicated and expensive



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