9. Investment Treaty Arbitration and Jurisdiction over Contract Claims – the *Vivendi I* Case Considered

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A. The Award in *Vivendi I*

Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. *Argentine Republic* (the *Vivendi I* case)[1] is the most important case on the relationship between claims based on a treaty and claims based on a contract.[2] This distinction is relevant in a number of contexts and has been explored by several tribunals.

The *Vivendi I* case arose from a Concession Contract of 1995 concluded by a French company (CGE), and its Argentine affiliate, with Tucumán, a province of Argentina, concerning the operation of a water and sewage system. CGE alleged a number of actions by the Provincial Government, which were designed to undermine the operation of the concession, were accordingly in violation of the guarantees offered by the BIT between Argentina and France.[3] CGE argued that the Republic of Argentina was responsible for these provincial actions because the federal government had not intervened to prevent Tucumán from taking the actions that had caused the damage ("federal claims"). In addition it was argued that the actions of the Province were attributable to the Argentine Republic ("Tucumán claims").[4]

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[1] *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux* v. *Argentine Republic*, [Award], 21 November 2000, 16 ICSID Review – FILJ 643 (2001); 5 ICSID Reports 296; 40 ILM 426 (2001); *Compañía de Aguas del Aconquija, S. A. & Vivendi Universal (formerly Compagnie Générale des Eaux)* v. *Argentine Republic*, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340, 41 ILM 1135 (2002). After the partial annulment, the case was resubmitted on 14 April 2004 to a new tribunal in accordance with Article 52(6) of the ICSID Convention. Therefore, the original proceedings will be referred to as *Vivendi I*.

[2] See also *B.M. Cremades*, Litigating Annulment Proceedings The *Vivendi* Matter: Contract and Treaty Claims, in *E. Gaillard/Y. Banifatemi* (eds.) Annulment of ICSID Awards (2004) 87-95; *S.A. Alexandrov*, The *Vivendi* Annulment Decision and the Lessons for Future ICSID Arbitrations – The Applicant's Perspective -, in *E. Gaillard/Y. Banifatemi* (eds.) Annulment of ICSID Awards (2004) 97-121.

[3] Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments, July 3, 1991: http://www.unctad.org/sections/dite/iia/docs/bits/france_argentina_fr.pdf

[4] Award , ¶ 43.

CGE relied on Article 8(2) of the BIT to establish the ICSID's jurisdiction. Article 8(2) offered investors access to international arbitration.[5] Argentina challenged the ICSID Tribunal's jurisdiction by relying on a forum selection clause in the Concession Contract. Article 16.4 of the Concession Contract provided as follows:

> For purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán.[6]

Argentina maintained that the dispute related exclusively to the Concession Contract to which it was not a party. Therefore the dispute should have been heard by the Contentious Administrative Tribunals of Tucumán. Argentina argued that by virtue of Article 16.4 of the Concession Contract CGE had waived its right to resort to ICSID arbitration.[7]

The Tribunal first dealt with jurisdiction. It found that under international law it was well established that in a federal state the actions of political subdivisions were attributable to the central government.[8]

The Tribunal distinguished between claims based on the BIT and claims based on the Concession Contract. The forum selection clause in the Concession Contract did not affect the Claimant's right to go to

[5] Article 8 of the BIT provides as far as is relevant here:

1. Any dispute relating to investments, within the meaning of this agreement, between one of the Contracting Parties and an investor of the other Contracting Party shall, as far as possible, be resolved through amicable consultations between both parties to the dispute.
2. If such dispute could not be resolved within six months from the time it was stated by any of the parties concerned, it shall be submitted, at the request of the investor:
   - either to the national jurisdictions of the Contracting Party involved in the dispute;
   - or to international arbitration in accordance with the terms of paragraph 3 below.
   Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.
3. In the event of recourse to international arbitration, the dispute shall be submitted to any of the following arbitration bodies at the choice of the investor:
   - The International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington on March 18, 1965, when each State Party to this agreement has adhered to it. . . .

[6] Award, ¶ 27.

[7] *Id.* ¶ 47.

[8] *Id.* ¶ 49. The Tribunal's treatment of the status of subdivisions and agencies under Article 25(1) and (3) of the ICSID Convention is not discussed here.

international arbitration to pursue violations of the BIT. The decisive passage in that part of the Tribunal's Award read as follows:

> Finally, the Tribunal holds that Article 16.4 of the Concession Contract does not divest this Tribunal of jurisdiction to hear this case because that provision did not and could not constitute a waiver by CGE of its rights under Article 8 of the BIT to file the pending claims against the Argentine Republic...In this case the claims filed by CGE against Respondent are based on violation by the Argentine Republic of the BIT through acts or omissions of that government and acts of the Tucumán authorities that Claimants assert should be attributed to the central government. As formulated, these claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT.
>
> Thus, Article 16.4 of the Concession Contract cannot be deemed to prevent the investor from proceeding under the ICSID Convention against the Argentine Republic on a claim charging the Argentine Republic with a violation of the Argentine-French BIT.[9]

The Tribunal summarised its own finding on jurisdiction in the following terms:

> For the reasons set forth in this Award, the Tribunal holds that it has jurisdiction to hear the claims of CGE against the Argentine Republic for violation of the obligations of the Argentine Republic under the BIT. Neither the forum-selection provision of the Concession Contract nor the provisions of the *ICSID Convention* and the BIT on which the Argentine Republic relies preclude CGE's recourse to this Tribunal on the facts presented.[10]

Therefore, the Tribunal affirmed its jurisdiction to hear claims based on alleged violations of the BIT. The Concession Contract's forum selection clause was restricted to claims arising from the contract.

[9] Award, ¶¶ 53, 54. Footnotes omitted.
[10] 40 ILM 428 (2001).

On the merits of the claim, the Tribunal applied the distinction between treaty claims and contract claims but encountered considerable difficulties. The Tribunal examined the actions alleged by the Claimant and found that these had never been challenged in the Tucumán courts.[11] Overall, the Tribunal found that all of the claims were closely linked to the performance of the Concession Contract.[12] This, in the Tribunal's view, made it impossible to form an independent view of the alleged violations of the BIT. The Tribunal said:

> [T]he Tribunal holds that, because of the crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract requires, asserted their rights in proceedings before the contentious administrative courts of Tucumán and have been denied their rights, either procedurally or substantively.[13]

It was impossible for the Tribunal to determine which actions of the Province were taken in the exercise of its sovereign authority and which in the exercise of its rights as a party to the Concession Contract without going into a detailed interpretation and application of that contract. That task was left to the Contentious Administrative Tribunals of Tucumán.[14] Therefore, resort to ICSID arbitration would be open to Claimants only after they had failed in the pursuit of their claims.[15] This led the Tribunal to the following overall conclusion:

> ... the nature of the facts supporting most of the claims presented in this case make it impossible for the Tribunal to distinguish or separate violations of the BIT from breaches of the Concession Contract without first interpreting and applying the detailed provisions of that agreement. By Article 16.4, the parties to the Concession Contract assigned that task expressly and exclusively to the contentious administrative courts of Tucumán. Accordingly, and because the claims in this case arise almost exclusively from alleged acts of the Province of

[11] Award, ¶¶ 65, 67, 68, 69.
[12] *Id.* ¶ 77.
[13] *Id.* ¶ 78.
[14] *Id.* ¶ 79.
[15] *Id.* ¶ 80.

> Tucumán that relate directly to its performance under the Concession Contract, the Tribunal holds that the Claimants had a duty to pursue their rights with respect to such claims against Tucumán in the contentious administrative courts of Tucumán as required by Article 16.4 of their Concession Contract.[16]

The Tribunal emphasised that the need to resort to domestic courts was not based on a requirement to exhaust local remedies but was based on the Concession Contract's forum selection clause:

> In this case, however, the obligation to resort to the local courts is compelled by the express terms of Article 16.4 of the [Concession Contract] and the impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts.[17]

In addition, the Tribunal found with respect to the "federal claims" that there was no evidence that the Argentine Republic had failed to respond to the situation in Tucumán to prevent the actions which had caused damage to the investor.[18]

For these reason the Tribunal dismissed the claims.

B. The Decision on Annulment in *Vivendi I*

The Award was partially annulled[19]. The *ad hoc* Committee, which had to decide on the request for annulment of the Award,[20] found that the

[16] Award at Introduction and Summary, 5 ICSID Reports 301.
[17] Award, ¶ 81.
[18] *Id.* ¶¶ 83-90, 92.
[19] *Compañía de Aguas del Aconquija, S. A. & Vivendi Universal (formerly Compagnie Générale des Eaux)* v. *Argentine Republic*, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340, 41 ILM 1135 (2002).
[20] Article 52 of the *ICSID Convention* provides in relevant part: (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

Tribunal had manifestly exceeded its powers.[21] The *ad hoc* Committee found that the Tribunal's affirmative decision as to its jurisdiction had been correct[22] but found that the Tribunal had manifestly exceeded its powers by not examining the merits of some of the claims before it. A tribunal can commit an excess of powers not only by exercising a jurisdiction which it does not have but also by failing to exercise a jurisdiction which it possesses.[23]

The *ad hoc* Committee found that the Tribunal had considered the "federal claims" and had rejected them. Therefore, it had not committed a manifest excess of powers in this respect.[24]

As to the claims based on the actions by the Province of Tucumán, the *ad hoc* Committee concluded that the Tribunal had declined to decide key aspects of the Claimant's BIT claims.[25] Therefore, it annulled the merits part of the Award with regard to those claims. The *ad hoc* Committee summarized the issue as follows:

> 41. The Tribunal's stated rationale for rejecting Claimants' position is "the impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts". The Tribunal appears to have considered that, because Claimants' contract and treaty claims could not be separated, a distinct claim "based on the BIT" was impossible in the circumstances of the case, at least prior to submission of the dispute to the provincial courts.[26]

The *ad hoc* Committee found it "evident that a particular investment dispute may at the same time involve issues of the interpretation and

[21] The *ad hoc* Committee declined to annul the Award on the ground of serious departure from a fundamental rule of procedure and failure to state reasons. The *ad hoc* Committee's treatment of these grounds for annulment is not discussed here. For a summary of the grounds for annulment asserted by Vivendi see *S.A. Alexandrov*, The *Vivendi* Annulment Decision and the Lessons for Future ICSID Arbitrations – The Applicant's Perspective -, in *E. Gaillard/Y. Banifatemi* eds. Annulment of ICSID Awards (2004) 97, 103-106.
[22] Decision on Annulment, ¶ 72.
[23] *Id.* ¶ 86.
[24] *Id.* ¶¶ 89-92.
[25] *Id.* ¶ 108.
[26] *Id.* ¶ 41.

application of the BIT's standards and questions of contract."[27] This did not impair the jurisdiction of the ICSID Tribunal:

> This being so, the fact that the Concession Contract referred contractual disputes to the contentious administrative courts of Tucumán did not affect the jurisdiction of the Tribunal with respect to a claim based on the provisions of the BIT. Article 16 (4) of the Concession Contract did not in terms purport to exclude the jurisdiction of an international tribunal arising under Article 8 (2) of the BIT; at the very least, a clear indication of an intention to exclude that jurisdiction would be required.[28]

On the relation between breach of contract and breach of treaty, the *ad hoc* Committee pointed out that these related to independent standards. "A state may breach a treaty without breaching a contract, and *vice versa*". Therefore, "whether there has been a breach of the BIT and whether there has been a breach of contract are different questions."[29] This led the *ad hoc* Committee to the following conclusions:

> ...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 or one of its subdivisions cannot operate as a bar to the application of the treaty standard.[30]...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.[31] ...it is one thing to exercise contractual jurisdiction (arguably exclusively vested in the administrative tribunals of Tucumán by virtue of the Concession Contract) 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, such as that reflected in Article 3 of the BIT.[32]

[27] *Id.* ¶ 60.
[28] *Id.* ¶ 76.
[29] *Id.* ¶¶ 95, 96.
[30] *Id.* ¶ 101. Footnote omitted.
[31] *Id.* ¶ 103.
[32] *Id.* ¶ 105.

It followed that the Tribunal had manifestly exceeded its powers in that it had failed to decide the Tucumán claims under the BIT:

> ...the Committee can only conclude that the Tribunal, in dismissing the Tucumán claims as it did, actually failed to decide whether or not the conduct in question amounted to a breach of the BIT. In particular, the Tribunal repeatedly referred to allegations and issues which, it held, it could not decide given the terms of Article 16 (4) of the Concession Contract, even though these were adduced by Claimants specifically in support of their BIT claim.[33] ... It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT. In the Committee's view, the Tribunal, faced with such a claim and having validly held that it had jurisdiction, was obliged to consider and to decide it.[34]

Therefore, the *ad hoc* Committee annulled the part of the Award that dealt with the Tucumán claims.[35]

C. Issues Arising from *Vivendi I*

The central point in *Vivendi I* was the decision that the forum selection clause in the Concession Contract did not oust the ICSID's jurisdiction based on the BIT. The decisive reason for this finding was that contract claims and BIT claims have to be distinguished because they have different legal bases. Even if the two types of claims are intimately linked and appear indistinguishable, an ICSID tribunal may not decline jurisdiction over BIT claims on the ground that there is a selection of another forum with respect to contract disputes. A failure by an ICSID tribunal to exercise jurisdiction under these circumstances amounts to an excess of powers and is a ground for annulment of the award.

The distinction between treaty claims and contract claims has repercussions that go beyond the effect of forum selection clauses in contracts. One is the extent of an international tribunal's jurisdiction. It is clear that the tribunal has jurisdiction with respect to claims based on a BIT or other sources of international law. It is less clear whether it has

[33] *Id.* ¶ 111. Footnote omitted.
[34] *Id.* ¶ 112.
[35] *Id.* ¶ 115.

jurisdiction also for claims based on contract or other sources of domestic law. The answer to this question will depend on the precise terms of the tribunal's competence.

Yet another issue that arises from the distinction between claims arising under domestic law and BIT claims is the meaning of so-called fork in the road provisions. Under these provisions contained in BITs and other treaties for the protection of investments the investor has a choice of taking the dispute either to the domestic courts of the host State or to international arbitration. Once the investor has made this choice the investor is deemed to waive the other remedy. This leads to the question which legal proceedings before local courts constitute the choice under the fork in the road. In other words, is a dispute before a domestic court relating to a contract or another aspect of domestic law tantamount to a choice under the fork in the road provision and hence a waiver of international arbitration?

Once it is accepted that the distinction between claims based on international law (treaty claims) and claims based on domestic law (contract claims) is important to determine a tribunal's jurisdiction, the question arises as to who determines the characterisation of a particular claim. Is it sufficient for a claimant to present its claim in terms of a treaty violation or is it for the tribunal to make this determination on the basis of objective criteria? These questions will now be explored against the background of the decisions in *Vivendi I* and in the light of other international tribunal decisions.

D. Domestic Forum Selection and the Jurisdiction of an International Tribunal

Vivendi I was not the first case to deal with the issue of whether an investor, by agreeing to the choice of a domestic forum in a contract, waives her right, granted by a BIT, to go to international arbitration. Another ICSID tribunal addressed this question previously in *LANCO*. Both the *Vivendi I* Tribunal[36] and the *ad hoc* Committee[37] relied on the *LANCO* case.

In *LANCO* v. *Argentina*,[38] jurisdiction was based on an offer of ICSID arbitration, accepted by the investor, in the BIT between Argentina and

[36] Award, ¶ 53.
[37] Decision onAnnulment, ¶¶ 77-79.
[38] *LANCO* v. *Argentina*, Decision on Jurisdiction, 8 December 1998, 40 ILM 457 (1998).

the United States. A contractual choice of forum clause in a concession contract, that the investor and the government of Argentina previously signed, referred disputes to the Federal Contentious-Administrative Tribunals of Buenos Aires. The ICSID Tribunal rejected the Respondent's objection to ICSID's jurisdiction first on the ground that the clause did not constitute a "previously agreed dispute settlement procedure" under the terms of the BIT. The contentious administrative tribunals had jurisdiction under domestic law and this jurisdiction was not subject to agreement or waiver.[39] But the *LANCO* Tribunal also upheld ICSID's jurisdiction on the additional ground that an exclusive jurisdiction clause in a contract did not defeat ICSID's jurisdiction. The Tribunal said:

> §40 In our case, the Parties have given their consent to ICSID arbitration, consent that is valid, there thus being a presumption in favor of ICSID arbitration, without having first to exhaust domestic remedies. In effect, once valid consent to ICSID arbitration is established, any other forum called on to decide the issue should decline jurisdiction. The investor's consent, which comes from its written consent by letter of September 17, 1997, and its request for arbitration of October 1, 1997, and the consent of the State which comes directly from the ARGENTINA-U.S. Treaty, which gives the investor the choice of forum for settling its disputes, indicate that there is no stipulation contrary to the consent of the parties... In effect, the offer made by the Argentine Republic to covered investors under the ARGENTINA-U.S. Treaty cannot be diminished by the submission to Argentina's domestic courts, to which the Concession Agreement remits.[40]

Therefore, in *LANCO* the BIT procedure referring the dispute to ICSID prevailed over the purported contractual forum selection clause not so much on the basis of a distinction between contract claims and BIT claims but more on a general concept of priority of ICSID arbitration over domestic courts.

In *Salini* v. *Morocco*,[41] ICSID jurisdiction was based on an offer of consent, accepted by the investor, in the BIT between Italy and Morocco. A contract

[39] *Id.* ¶ 26.

[40] *Id.* ¶ 40.

[41] *Salini Costruttori SpA et Italstrade SpA* c/ *Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002), 6 ICSID Reports 400, 42 ILM 609. This decision was made between the Award and the Decision on Annulment in *Vivendi I*. The Decision on Annulment in *Vivendi I* contains a reference to this case in footnote 64.

between the investors and ADM, a State entity, contained a clause referring disputes to the administrative courts of Rabat. The Respondent objected to ICSID's jurisdiction on the basis of that clause. The Claimants argued that the consent to ICSID's jurisdiction, contained in the BIT, should prevail over the contractual acceptance of another forum.[42]

The Tribunal found that the competence of the administrative courts was not subject to the parties' agreement. Therefore, there was no true choice of forum.[43] It followed that the contractual forum selection clause did not oust ICSID's jurisdiction. The Tribunal found that it was competent to hear all claims based on a violation of the BIT. The Tribunal could hear contract violations that simultaneously amounted to BIT violations as well as pure contract claims not amounting to a breach of the BIT if the contract was between the investor and the State itself. Therefore, the ICSID tribunal's jurisdiction extended to all claims with the sole exception of claims that were based on a contract with an entity other than the State and that were not based on a violation of the BIT.[44]

Accordingly, *Salini*, while also relying on the main rationale in *LANCO*, the *Salini* Tribunal clearly adopted the distinction between BIT claims and contract claims. That distinction has since found unequivocal acceptance in subsequent cases.[45]

In *SGS* v. *Pakistan*,[46] jurisdiction was based on the BIT between Pakistan and Switzerland. The Claimant had entered into a PSI Agreement with the Government of Pakistan. The PSI Agreement contained a dispute settlement clause providing for domestic arbitration in Pakistan. That procedure had actually been initiated by Pakistan some time before the ICSID proceedings under the BIT. The ICSID proceedings concerned non-payment by Pakistan of invoices submitted by SGS and Pakistan's attempt to terminate the PSI Agreement. Before the ICSID Tribunal, Pakistan contested its jurisdiction arguing that the essential basis of the claims put forward by SGS was a breach of contract and that the parties had agreed to submit their contractual dispute to the domestic arbitration.[47]

[42] *Id.* ¶¶ 25, 26.
[43] *Id.* ¶ 27.
[44] *Id.* ¶¶ 61, 62.
[45] See also *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, 42 ILM 788 (2003), ¶¶ 70-76.
[46] *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, 42 ILM 1289 (2003).
[47] *Id.* ¶¶ 43, 44, 48-74.

The ICSID Tribunal relied on the Decision on Annulment in *Vivendi I* and pointed out that the same set of facts could give rise to contract claims and to BIT claims.[48] The Tribunal found that the contractual forum selection clause in the PSI Agreement did not oust its jurisdiction based on the BIT. The Tribunal said:

> We conclude that the Tribunal has jurisdiction to pass upon and determine the claims of violation of provisions of the Swiss-Pakistan BIT raised by the Claimant. We do not consider that that jurisdiction would to any degree be shared by the PSI Agreement arbitrator.[49]

At the same time the Tribunal found that it did not have jurisdiction over pure contract claims which did not also constitute breaches of the BIT.[50]

In *Azurix* v. *Argentina*,[51] jurisdiction was based on an offer of consent, accepted by the investor, in the BIT between Argentina and the United States. Argentina objected to the ICSID's jurisdiction based on forum selection clauses contained in a series of contractual arrangements between Argentina and the claimant which provided for the exclusive jurisdiction of the courts for contentious-administrative matters of the city of La Plata. The Respondent pointed out that the forum selection clause not only provided for the exclusive jurisdiction of the domestic courts but explicitly waived any other forum or jurisdiction.[52]

The Tribunal after referring to the decisions in *LANCO* and *Vivendi* said:

> 79. The tribunals in the cases cited concluded that such forum selection clauses did not exclude their jurisdiction because the subject-matter of any proceedings before the domestic courts under the contractual arrangements in question and the dispute before the ICSID tribunal was different and therefore the forum selection clauses did not apply. This reasoning applies equally to the waiver of jurisdiction clause in this case. The claims or causes of action before this Tribunal are different in nature from

[48] *Id.* ¶ 147-148.
[49] *Id.* ¶ 155.
[50] *Id.* ¶¶ 156-173.
[51] *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003.
[52] *Id.* ¶ 26.

> any claims which ABA could bring before the courts of the city of La Plata under the Contract Documents.[53]

A number of additional cases have adopted the same reasoning.[54]

This consistent line of authorities demonstrates that a forum selection clause contained in a contract between the investor and the host State does not affect the competence of a tribunal, based on a BIT. The two proceedings are based on different causes of action even though they may arise from the same set of facts. Dispute settlement clauses in contracts are designed to deal with contract claims. ICSID tribunals based on BITs are competent to hear claims arising from the terms of the BIT.

Unfortunately, the matter does not stop here. The Decision on Jurisdiction in *SGS* v. *Philippines*[55] has injected considerable uncertainty into this issue that seemed to be well settled. The jurisdiction of the ICSID Tribunal was based on the BIT between Switzerland and the Philippines. The source of the dispute was unpaid bills under a contract. That contract provided for dispute settlement in the Regional Trial Courts of Makati or Manila. The Respondent objected to the ICSID Tribunal's jurisdiction on the basis of this domestic forum selection clause.

The *SGS* v. *Philippines* Tribunal found that it had jurisdiction for contract claims[56] as well as BIT claims. The Tribunal specifically found that some of the BIT claims put forward by SGS were tenable for purposes of establishing jurisdiction.[57] Nevertheless, the Tribunal stayed the arbitral proceedings and referred the parties to the domestic courts for the determination of the amount due. The main reason for this decision was that the provision on international arbitration in the BIT was the more general one which should yield to the more specific contractual clause.[58]

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[53] *Id.* ¶ 79.

[54] See *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, 42 ILM 788 (2003), ¶¶ 70-76; *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, ¶¶ 89-94 *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, ¶¶ 174-180.

[55] *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004.

[56] Jurisdiction for the contract claims was based on a clause in the BIT providing in general terms for arbitration of "disputes with respect to investments" as well as on an umbrella clause. These aspects are dealt with in separate chapters below.

[57] *Id.* ¶¶ 160-163.

[58] *Id.* ¶ 141.

The Tribunal's reasoning ignores the fact that the dispute settlement clause in the BIT is merely a standing offer to investors. By accepting that offer an investor perfects a specific arbitration agreement.[59] While the contract clause refers to any dispute arising from the contract, the ICSID arbitration agreement, as perfected through the institution of proceedings, applies only to the specific dispute. It follows that the ICSID arbitration agreement is the more specific one. Therefore, the principle *generalia specialibus non derogant* that the Tribunal invoked[60] should work against the contractual forum selection clause and in favour of ICSID. The Tribunal in *SGS* v. *Philippines* largely ignored the authority of the previous cases, set out above, and instead relied on older cases rendered between 1898 and 1931.[61]

The most important part of the decision in *SGS* v. *Philippines* was the Tribunal's introduction of the concept of admissibility. The Tribunal distinguished this concept from jurisdiction. The tribunal admitted that it is at least doubtful that a private party can by contract dispense with the performance of obligations imposed on States by treaty. Treaty jurisdiction was not abrogated by contract. But a party should not be allowed to rely on a contract where the contract itself refers the claim exclusively to another forum. The principle that a party to a contract cannot claim on that contract without itself complying with it was a matter of admissibility rather than jurisdiction.[62] This meant that SGS was bound by the terms of the exclusive jurisdiction clause in the contract to establish the quantum or content of the obligation that the Philippines was required to observe. This was a matter of admissibility rather than jurisdiction and there was a degree of flexibility in the way it was applied.[63]

Therefore, the *SGS* v. *Philippines* Tribunal first found that it had jurisdiction over the BIT claims and the contract claims. The Tribunal then declined to proceed to the merits but referred the parties to the domestic courts for the determination of the amount due. Of course, this is strongly reminiscent of what the *Vivendi I* Tribunal did. But the *SGS* v. *Philippines* Tribunal, unlike the *Vivendi I* Tribunal, did not base its decision to stay the proceedings on the impossibility of separating BIT claims from contract claims. That would not have made sense since the Tribunal held itself competent for both. Rather, the Tribunal rested its decision on the

[59] The Tribunal itself describes this process ¶ 31 of its Decision.
[60] *Id.* ¶ 142.
[61] *Id.* ¶¶ 150-152.
[62] *Id.* ¶ 154.
[63] *Id.* ¶ 170.

concept of admissibility which it found could be applied with some flexibility. Another distinguishing feature is the fact that, unlike the Award in *Vivendi I*, the decision in *SGS* v. *Philippines* was not made in the form of an award but in the form of a decision on jurisdiction. Since only awards are subject to annulment under the ICSID Convention,[64] the Claimants have no recourse against the decision at this stage of the proceedings.

It is possible that the outcome in *SGS* v. *Philippines* was a consequence of the peculiar circumstances of the particular case. It is too early to tell whether tribunals will be induced by that decision to depart from the authority established mainly by the Decision on Annulment in *Vivendi I* and embraced in a series of subsequent decisions.

E. Competence of International Tribunals to deal with Contract Claims

The distinction between claims under domestic law (contract claims) and claims under international law (treaty claims) does not mean that an international tribunal never has jurisdiction to deal with claims arising under a contract. There are several situations in which the tribunal may deal also with claims arising from an alleged breach of contract.

1. Breach of Contract Amounting to Breach of International Law

One such situation involves a breach of contract that, at the same time, amounts to a breach of international law, specifically an applicable BIT. This is implicit in the Decision on Annulment in *Vivendi I* and the *ad hoc* Committee refers to that possibility.[65] Not every breach of contract by a State automatically amounts to a violation of international law,[66] but it does not follow that because a breach of contract is involved there cannot be a breach of international law. The standards are simply different.[67]

Where a BIT is applicable, it is necessary to examine whether a breach of contract violates the standards guaranteed by that particular BIT. Typically, these would include the principle of fair and equitable treatment, the

[64] See *C. Schreuer*, The *ICSID Convention*: A Commentary pp. 911-913 (2001).
[65] *Id.* ¶¶ 60 and 110.
[66] See American Law Institute, Restatement of the Law, Foreign Relations Law of the United States, 1986, §712, Comment h, vol.2, p. 201: "... not every repudiation or breach by a state of a contract with a foreign national constitutes a violation of international law."
[67] *Schwebel, S. M.*, On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law, in: International Law at the Time of its Codification, Essays in Honour of Roberto Ago, III, 1987, p.401.

prohibition of unreasonable or discriminatory measures or the prohibition of measures having effect equivalent to nationalisation. For example, it is generally accepted that an indirect expropriation may occur in the form of a material breach or cancellation of a contract.[68] International courts and tribunals have held repeatedly that measures by a State, affecting rights under a contract, may amount to an expropriation.[69]

2. Competence of Tribunal Extending to All Investment Disputes

Another situation in which an international tribunal is competent for contract claims arises where the jurisdiction conferred upon the tribunal is defined broadly and relates to all disputes concerning investments. In such a situation the tribunal is competent also for contract claims not necessarily amounting to a claim for violation of a treaty or other provision of international law. For instance, 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. There is no reason why contract claims cannot be submitted to an international tribunal under the terms of a consent clause.

The point is made in Oppenheim's International Law:

> It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes *per se* a breach of an international obligation, unless there is some such additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state's international responsibility. However, either by virtue

[68] For a theoretical discussion of the concept of property in the context of expropriation see *Higgins, R.*, The Taking of Property by the State: Recent Developments in International Law, 176 Recueil des Cours 267-278 (1982 –III). For ICSID cases accepting contract rights as possible objects of expropriations see *Amco* v. *Indonesia*, Award, 20 November 1984, 1 ICSID Reports 454 *et seq.*; *LETCO* v. *Liberia*, Award, 31 March 1986, 2 ICSID Reports 366.

[69] See *Norwegian Shipowners' Claims*, Award, 13 October 1922, Reports of International Arbitral Awards. Vol. I, pp. 307, 318, 325; *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No. 7, 1926, at p. 44; *SPP* v. *Egypt*, Award, 20 May 1992, 2 ICSID Reports 189, at pp. 228/229; *Amoco Int'l Finance Corp* v. *Iran* 15 Iran-US CTR, p. 189; *Philips Petroleum Co Iran* v *Iran*, 21 Iran-US CTR, p. 79; *Azinian* v. *Mexico*, Award, 1 November 1999, 39 ILM 537 (2000) ¶¶ 87-92; *Mondev* v. *USA*, Award, 11 October 2002, 42 ILM 85 (2003) para. 98; *Waste Management* v. *Mexico*, Award, 30 April 2004, ¶¶ 163-176.

> of a term in the contract itself or of an agreement between the state and the alien, or by virtue of an agreement between the state allegedly in breach of its contractual obligations and the state of which the alien is a national, disputes as to compliance with the terms of contracts may be referred to an internationally composed tribunal, applying, at least in part, international law.[70]

The point is well illustrated by the decision in *Salini* v. *Morocco*[71], where Article 8 of the applicable BIT defined ICSID jurisdiction in terms of "[t]ous les différends ou divergences...concernant un investissement."[72] The Tribunal noted that the terms of this provision were very general and included not only a claim for violation of the BIT but also a claim based on contract:

> ... l'article 8 oblige l'Etat à respecter l'offre de compétence à raison des violations de l'Accord bilatéral et de tout manquement à un contrat qui le lierait directement.[73] [...article 8 obliges the State to respect the offer of jurisdiction in relation to violations of the BIT and any breach of a contract that binds the State directly.]

The *ad hoc* Committee in *Vivendi I* reached the same conclusion. Article 8 of the BIT between France and Argentina, applicable in that case, referred to "[a]ny dispute relating to investments". In its discussion of the BIT's fork in the road clause, the *ad hoc* Committee said:

> ...Article 8 deals generally with disputes "relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party". It is those disputes which may be submitted, at the investor's option, either to national or international adjudication. Article 8 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

[70] *Sir Robert Jennings/Sir Arthur Watts*, Oppenheim's International Law, Ninth Ed., Vol. 1 p. 927 (1996). Footnotes omitted.
[71] *Salini Costruttori SpA et Italstrade SpA* c/ *Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002); 42 ILM 609 (2003).
[72] Italy/Morocco BIT Art. 8.
[73] *Id.* ¶ 61.

> that the dispute relate to an investment made under the BIT. This may be contrasted, for example, with Article 11 of the BIT [dealing with State/State dispute settlement], which refers to disputes "concerning the interpretation or application of this Agreement", or with Article 1116 of the NAFTA, which provides that an investor may submit to arbitration under Chapter 11 "a claim that another Party has breached an obligation under" specified provisions of that Chapter.[74]

The Tribunal in *SGS* v. *Pakistan*[75] adopted a different position. In that case, the investor/State dispute settlement clause in Article 9 of the applicable BIT between Switzerland and Pakistan referred to "disputes with respect to investments." The Tribunal found that the phrase was descriptive of the factual subject matter of the disputes but did not relate to the legal basis of the claims or cause of action asserted in the claims. The Tribunal said:

> ... 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.[76]

Therefore, the Tribunal concluded that it had no jurisdiction with respect to contract claims which did not also constitute breaches of the substantive standards of the BIT.[77] That decision has not remained uncontradicted.[78] In *SGS* v. *Philippines*[79] Article VIII(2) of the BIT applicable in that case provided for settlement of "disputes with respect to investments." The Tribunal decided that the clause in question was entirely general allowing for submission of all investment disputes. The term was not limited by reference to the legal classification of the claim. Therefore, the Tribunal found that the term included a dispute arising from an investment contract.[80]

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[74] *Id.* ¶ 55.
[75] *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, 42 ILM 1289 (2003).
[76] *Id.* ¶ 161.
[77] *Loc. cit.* In *Joy Mining* v. *Egypt*, Award, 6 August 2004, the Claimant sought to rely on a BIT clause referring "any legal dispute...concerning an investment" to international arbitration. The Tribunal never addressed the argument but seemed to reject it by declaring that it lacked jurisdiction in the absence of a treaty-based claim, ¶¶ 68-82.
[78] See also *Tokios Tokelës* v. *Ukraine*, Decision on Jurisdiction, 29 April 2004, *supra* note 42, ¶ 52.
[79] *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004.
[80] *Id.* ¶¶ 131-135.

The view that a jurisdictional clause referring all investment disputes to international arbitration vests the tribunal also with competence over pure contract claims is clearly the better one. There is no reason in law or policy why this should not be possible or desirable. The distinction between contract claims and BIT claims does not mean that these claims must be presented in different forums. In fact, an arrangement that leads to the adjudication of all claims arising from an investment dispute in one forum is clearly the preferable solution.

3. Umbrella Clauses

A third situation in which a tribunal may deal with contract claims is where there is an umbrella clause. This issue can be dealt with briefly since it is covered by other contributions in this volume.[81]

An umbrella clause is a provision in a treaty for the protection of investments[82] under which the State parties undertake to observe any obligations they may have entered into with respect to investments. [83] In other words, contractual obligations are put under the treaty's protective umbrella. It is widely accepted that under the regime of an umbrella clause violations of the contract become treaty violations.[84]

Despite the apparent clarity of these clauses, they have led to considerable confusion and to conflicting decisions by tribunals.

In *SGS* v. *Pakistan*[85] the Tribunal was called upon to apply the following umbrella clause in Article 11 of the Pakistan-Switzerland BIT:

[81] See *E. Gaillard* in this volume.

[82] Umbrella clauses are common in BITs. The Energy Charter Treaty in Article 10(1), last sentence also contains an umbrella clause: "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

[83] For more detailed treatment see *C. Schreuer*, Travelling the BIT Route, Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 Journal of World Investment & Trade 231, 249 (2004).

[84] *F. Rigaux*, Les situations juridiques individuelles dans un système de relativité générale, 213 Recueil des Cours 229-230 (1989-I); *I.F.I. Shihata*, Applicable Law in International Arbitration: Specific Aspects in the Case of the Involvement of State Parties, in: The Works Bank in a Changing World, vol. II, p. 601 (1995); *P. Weil*, Problèmes relatifs aux contrats passés entre un Etat et un particulier, 128 Recueil des Cours 130 (1969-III); *F. A. Mann*, British Treaties for the Promotion and Protection of Investments, 52 British Year Book of International Law (1981), 241, at p. 246; *R. Dolzer/M. Stevens*, Bilateral Investment Treaties pp. 81/82 (1995); *K. J. Vandevelde*, United States Investment Treaties: Policy and Practice (1992), at p. 78; *J. Karl*, The Promotion and Protection of German Foreign Investment Abroad, 11 ICSID Review–FILJ 1, 23 (1996).

> 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.

The Tribunal rejected the Claimant's contention that this clause elevated breaches of contract to a breach of the treaty.[86] It said:

> The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically "elevated" to the level of breaches of international treaty law.[87]

The Tribunal in *SGS* v. *Philippines*,[88] came to a radically different result when interpreting the umbrella clause in the Philippines-Switzerland BIT. Article X(2) of that BIT provides:

> 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.

The Tribunal took issue with the reasoning of the Tribunal in *SGS* v. *Pakistan* which it described as unconvincing.[89] It reached the following conclusion:

> Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments.[90]

The Tribunal in *Joy Mining* v. *Egypt*[91] was called upon to interpret the following umbrella clause in Article 2(2), last sentence, of the Egypt/ United Kingdom BIT:

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[85] *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, 42 ILM 1289 (2003), ¶¶ 163-173.
[86] *Id.* ¶ 165.
[87] *Id.* ¶ 166.
[88] *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004.
[89] *Id.* ¶ 125.
[90] *Id.* ¶ 128. The Tribunal in *Waste Management* v. *Mexico*, Award, 30 April 2004, seemed to confirm this reading in an *obiter dictum*, ¶ 73
[91] *Joy Mining* v. *Egypt*, Award, 6 August 2004.

> 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.

After stating that it was no called upon to sit in judgment on the views of the tribunals in *SGS* v. *Pakistan* and *SGS* v. *Philippines*, the Tribunal said:

> In this context, 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, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. This might be perfectly different in other cases where that link is found to exist, but certainly it is not the case here.[92]

The approach taken by the Tribunal in *SGS* v. *Philippines* is clearly preferable. The position taken by the other two tribunals deprives the clause of any practical meaning. To require that there must be a treaty violation is simply to negate the effect of the umbrella clause. The reference to a missing link in the *Joy Mining* Award is difficult to understand in this context.

The object and purpose of the umbrella clause is to add extra protection to the investor. It dispenses with the often difficult proof that there has been an indirect expropriation or a violation of the fair and equitable standard under the treaty. There is no good reason why a specific undertaking to honour obligations arising from a contract should not be enforceable by an international tribunal. .[93]

F. The Fork in the Road

Many investment treaties provide that the investor must choose between the litigation of its claims in the host State's domestic courts or international arbitration and that, once made, the choice is final. This

[92] *Id.* ¶ 81.

[93] See *E. Gaillard* in this volume.

type of provision is an expression of the venerable principle of *ne bis in idem.*

An example for such a provision is contained in Article 8 of the BIT between Argentina and France. Article 8 offers the investor a choice between dispute settlement before national courts or international arbitration. The treaty adds:

> Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.

The crucial question that arises in the application of clauses of this kind is whether any proceedings that may have been initiated are in respect of the same dispute. An international tribunal confronted with the argument that the dispute is pending or has been decided by a domestic court must determine whether the dispute before it is indeed the same as the one before the domestic court.

Investors frequently get involved into legal disputes in the course of investment activities. These disputes may involve private law activities with their business partners. They may also involve public law matters with government authorities such as the revocation of a license. In the course of disputes of this kind, it will often be necessary for the investor to appear before a court or to take administrative appeals. Not every appearance before a court or tribunal of the host State will constitute a choice under a fork in the road provision. The domestic proceedings may relate in some way to the investment, but the disputes underlying them are not necessarily identical to "the dispute" referred to the international tribunal. Therefore, the investor's appearance in the domestic proceedings does not necessarily reflect a choice that would preclude international arbitration.

In *Vivendi I,* the Claimants maintained that challenging the acts taken by the provincial authorities in the Contentious Administrative Tribunals of Tucumán, as provided in the concession contract would have meant making the choice under the BIT's fork in the road provision in the *Argentina-France BIT* (quoted above) and would have constituted a waiver of the right to choose international arbitration.[94] The Tribunal rejected this argument by

[94] Award, ¶¶ 42, 81. See also footnote 11.

distinguishing between the different types of claims that would have been pursued in the domestic and the international proceedings:

> The Tribunal does not accept CGE's position that claims by CGE in the contentious administrative courts of Tucumán for breach of the terms of the Concession Contract, as Article 16.4 requires, would have constituted a waiver of Claimants' rights under the BIT and the *ICSID Convention*.[95]

After making the distinction between BIT claims and contract claims, the Tribunal said:

> By this same analysis, a suit by Claimants against Tucumán in the administrative courts of Tucumán for violation of the terms of the Concession Contract would not have foreclosed Claimant from subsequently seeking a remedy against the Argentine Republic as provided in the BIT and ICSID Convention. That is, submission of claims against Tucumán to the contentious administrative tribunals of Tucumán for breaches of the contract, as Article 16.4 required, would not, contrary to Claimant's position, 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*.[96]

The *ad hoc* Committee carefully examined the Tribunal's finding on the "fork in the road" provision.[97] The Committee disagreed with the Tribunal's finding that turning to the domestic courts would not have affected the Claimants' ability to go to arbitration. The Committee pointed out that under the BIT between Argentina and France the definition of "the dispute", to which the fork in the road clause applied, was extremely wide since it covered "[a]ny dispute relating to investments". That definition did not require an allegation of a violation of the BIT itself but extended to contract claims. Therefore:

> In the Committee's view, a claim by CAA against the Province of Tucumán for breach of the Concession

[95] 40 ILM 428 (2001).

[96] *Id.* ¶ 55. See also ¶ 81.

> Contract, brought before the contentious administrative courts of Tucumán, would *prima facie* fall within Article 8(2) and constitute a "final" choice of forum and jurisdiction, if that claim was coextensive with a dispute relating to investments made under the BIT.[98]

The Tribunal and the *ad hoc* Committee in *Vivendi I* were agreed that in order to trigger the fork in the road, the domestic and the international proceedings had to concern the same type of claims. If the domestic proceedings concerned only claims under the contract and the international tribunal's jurisdiction was restricted to BIT claims there would be no overlap. In other words, the domestic and the international proceedings would not concern the same dispute. Where the Tribunal and the *ad hoc* Committee disagreed was the extent of the Tribunal's jurisdiction. In the *ad hoc* Committee's view the Tribunal's competence covered not only BIT claims but extended to contract claims. Therefore, any pursuit of the contract claims in the domestic courts would have triggered the fork in the road provisions.

A number of other tribunals have followed the same basic concept of distinguishing between different causes of action presented in domestic courts and in the international proceedings for purposes of fork in the road provisions.[99] Other Tribunal decisions consistently hold that domestic court proceedings involving a variety of issues of domestic law do not foreclose resort to international arbitration for the pursuit of claims based on BITs. These cases have been examined elsewhere.[100] Therefore it will suffice to summarize them briefly.[101]

The BITs of the United States contain fork in the road provisions that are framed in terms that are somewhat different from the example quoted above. Typical of these provisions is the one contained in Article VII of the Argentina-US BIT:

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[97] Decision on Annulment, ¶¶ 15, 36-42.

[98] *Id.* ¶ 55. See also ¶¶ 113, 114.

[99] ICSID tribunals have dealt with a similar issue in the context of an invocation of a *lis pendens* before domestic courts in the absence of a fork in the road provision. See *Benvenuti & Bonfant* v. *Congo*, Award, 15 August 1980, 1 ICSID Reports 330, 340; *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389, 409. See also the Award of 20 November 1984 at p. 453.

[100] *C. Schreuer*, Travelling the BIT Route, Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 Journal of World Investment & Trade 231, 244-247 (2004).

[101] See also *Eudoro A. Olguín* v. *Republic of Paraguay*, Decision on Jurisdiction, 8 August 2000, 18 ICSID Review- FILJ 133 (2003), 6 ICSID Reports 164; *Middle East Cement Shipping and Handling Co. S. A.* v. *Arab Republic of Egypt*, Award, 12 April 2002, 18 ICSID Rev.-FILJ 600 (2003).

> 2. ... If the dispute cannot be settled amicably the national or Company concerned may choose to submit the dispute for resolution:
>
> (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
> (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
> (c) in accordance with the terms of paragraph 3.
>
> 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) ... the national or Company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: ...

Under this type of provisions too, access to international arbitration is waived only if the same dispute is submitted to the domestic courts or administrative tribunals of the host State. A number of tribunals applying clauses of this kind have dealt with the question of the identity of the disputes before the national courts and the international tribunal.

In the cases concerned, the respondents argued that domestic judicial proceedings that were somehow related to the investment had foreclosed access to international arbitration under the respective fork in the road provisions. In all the cases the tribunals rejected this argument.

In *Alex Genin* v. *Estonia*[102] the domestic proceedings concerned disputes with a domestic business partner arising from a sales contract and the revocation of a license by the Estonian authorities. The Tribunal found that the lawsuits in Estonia did not constitute the choice under the fork in the road provision in the Estonia-US BIT, since they did not concern the "investment dispute" in which BIT violations were asserted before the ICSID tribunal.[103]

In *Lauder* v. *The Czech Republic*,[104] the domestic proceedings concerned disputes with the investor's former business partners. The Tribunal rejected the argument based on the fork in the road provision in the

[102] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil* v. *The Republic of Estonia*, Award, 25 June 2001, 17 ICSID Review-FILJ 395 (2002).
[103] *Id.* ¶¶ 321-334.
[104] *Ronald S. Lauder* v. *The Czech Republic*, Award, 3 September 2001.

Czech–US BIT pointing out that the domestic proceedings not only involved different parties but were also based on different causes of action since they did not involve claims based on the BIT.[105]

In *CMS* v. *Argentina*,[106] the investor's local subsidiary appealed a judicial decision to the Supreme Court and sought other administrative remedies.[107] The Tribunal rejected the argument based on the fork in the road provision in the Argentina–US BIT. The parties to the domestic and international proceedings were different. In addition, the domestic procedural steps were purely defensive. Furthermore, since the domestic proceedings did not concern treaty claims, the subject-matter in these proceedings was not the same as in the ICSID arbitration.[108]

In *Azurix* v. *Argentina*,[109] the investor's local subsidiary had lodged administrative appeals, and a dispute over the termination of a concession agreement had been submitted to a court.[110] The Tribunal rejected the argument based on the fork in the road provision in the Argentina–US BIT. The Tribunal confirmed that the operation of the fork in the road provision would require the identity of the parties, and of the object and cause of action in the respective proceedings which was not the case.[111]

In *Enron* v. *Argentina*,[112] the local company in which Enron had invested had applied to various courts in Argentina seeking remedies against the tax measures that were the object of the dispute. The Tribunal rejected the objection based on the fork in the road provision in the Argentina–US BIT. The tribunal found that both the causes of action and the parties in the respective proceedings were different. In particular, the domestic proceedings did not involve BIT claims.[113]

The case-law on fork in the road provisions in BITs as outlined above is consistent. The loss of access to international arbitration applies only if

[105] *Id.* ¶¶ 162-163.
[106] *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, 42 ILM 788 (2003).
[107] *Id.* ¶ 77. The Decision is unspecific on the nature of the domestic proceedings.
[108] *Id.* ¶¶ 77-82.
[109] *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003, 43 ILM 262 (2004).
[110] *Id.* ¶¶ 37-41, 86.
[111] *Id.* ¶¶ 86-92.
[112] *Enron Corporation and Ponderosa Assets, L.P.* v. *The Argentine Republic*, Decision on Jurisdiction, 14 January 2004.
[113] *Id.* ¶¶ 95-98.

the same dispute based on the same cause of action has previously been submitted to the domestic judiciaries of the host State. If the dispute before the domestic court concerns a contract claim or an appeal against the decision of a regulatory authority and the dispute before the international tribunal concerns a BIT claim, the fork in the road clause will not apply.

In the cases examined above, there was no identity of claims. The domestic proceedings concerned causes of action under domestic law and the international tribunals had to deal with treaty claims. Complications may still arise in cases where both types of claims are brought before one and the same forum. If the investor tries to pursue its domestic law claims as well as its treaty claims before the domestic courts, the answer seems clear. Such a course of action would trigger the consequences of an applicable fork in the road provision and subsequent access to international arbitration would be precluded.

The answer is less clear in the opposite situation. As discussed above, in *Vivendi I* the *ad hoc* Committee pointed out that the Tribunal had been competent to deal not only with treaty claims but also with contract claims. Therefore, in the *ad hoc* Committee's view, resort to domestic courts for the contract claims would have triggered the consequences of the fork in the road provision foreclosing the possibility to go to international arbitration. In that case, the debate on the fork in the road was somewhat theoretical since the claimants had not, in fact, resorted to the domestic courts. The question remains whether the mere fact that the *Vivendi I* Tribunal was competent not only for BIT claims but also for contract claims, would have stripped it of its jurisdiction entirely in case the claimant had taken just the contract claims to domestic courts. In other words, if the claimant takes its claims arising under domestic law to domestic courts, does the operation of a fork in the road provision deprive the international tribunal of its jurisdiction for BIT claims merely because its competence extends to claims under domestic law? Such a consequence would appear unduly harsh for investors who operate under a BIT that combines a fork in the road provision with a wide jurisdictional mandate for the international tribunal. As described above, that wide jurisdictional mandate may be the consequence of a provision that makes the tribunal competent for all disputes arising from an investment (and not just BIT claims) or of an umbrella clause. The solution suggested by the *Vivendi I ad hoc* Committee would lead to the consequence that under a regime that combines BIT provisions of this kind, the investor would have no means of asserting its domestic law claims before domestic courts on pain of losing access to the

international tribunal even for BIT claims. Such an interpretation would not even be in the interest of the host State since it would force the investor into international arbitration without the possibility of having ordinary domestic law disputes settled in their proper forum, that is domestic courts.

G. Explicit Waiver of Domestic Proceedings: Article 1121 NAFTA

The NAFTA contains another approach to the *ne bis in idem* principle in the relationship between international tribunals and domestic courts. The NAFTA requires, as a condition for jurisdiction, that the Claimant submits a waiver of the right to initiate or continue before domestic judiciaries any proceedings with respect to the measures taken by the Respondent that are alleged to be in breach of the NAFTA. Article 1121, the relevant provision, reads as follows:

> 1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
>
> ...
>
> (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
>
> ...

There are several features that distinguish this provision from the typical fork in the road provision discussed above:

- The NAFTA requires a specific declaration of waiver. The mere abstention from domestic proceedings may not be enough;
- The reference to "initiate or continue" indicates that the fact that domestic proceedings have been initiated in the past does not affect

the investor's right to proceed with arbitration. A waiver of further proceedings is enough; and

- The waiver does not relate to the dispute before the international tribunal but to "proceedings with respect to the measure" that is alleged to be in violation of the NAFTA. Therefore, it is disputable whether the distinction between treaty claims and claims based on domestic law apply.

In addition, the issue of a wide jurisdictional mandate potentially including the competence to deal with contract claims does not arise for a NAFTA tribunal. A claim before a NAFTA tribunal may be based only on an alleged violation of a substantive violation of the NAFTA.

The meaning of Article 1121 of the NAFTA was discussed extensively in *Waste Management* v. *Mexico*,[114] a case that was brought under the ICSID Additional Facility. The Claimant had given the required Article 1121 waiver although subject to limiting interpretations. The Tribunal found that it had to look not only at the formal side of the waiver but also at the Claimant's actual conduct. The Tribunal noted that Acaverde, a local company controlled by the Claimant, had brought and maintained a number of lawsuits against Banobras, a State owned Bank, and against the City of Acapulco in respect of the same measures both before and after the institution of the arbitration. The Tribunal said:

> ... when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid.
>
> In the present hypothesis, this Tribunal understands that the domestic proceedings initiated by ACAVERDE fall within the prohibition of NAFTA Article 1121 in that they refer to measures that are also invoked in the present arbitral proceedings as breaches of NAFTA provisions, ... [115]

The Tribunal found that the waiver tendered by the Claimant was invalid in view of the limiting conditions attached to it, which had failed to

[114] *Waste Management, Inc.* v. *United Mexican States*, Award, June 2, 2000, 40 ILM 56 (2001), 5 ICSID Reports 443.
[115] *Id.* ¶ 26.

translate into the effective abdication of the rights mandated by the waiver. Therefore, a Majority of the Tribunal found that it lacked jurisdiction.[116]

The majority Award was accompanied by a forceful dissenting opinion by Arbitrator Keith Highet. Arbitrator Highet pointed out that a distinction must be made between the legal obligations of Mexico under Mexican law and the legal obligations of Mexico under its international treaty obligations imposed by NAFTA. Arbitrator Highet said:

> The "Article 1121 'measure'" is a particular and limited kind of action or concept. Although actions such as denial of payment under a letter of credit, or cancellation of a Concession Contract, can each be viewed as a "measure," they would not be the type of "measure" that Article 1121 refers to. The reference in Article 1121 is to a State act that is itself a breach of international obligations under NAFTA. Article 1121 cannot be read as applying to local components of such an act which are not themselves breaches of international obligations at the international treaty level and which would not be actionable under NAFTA. The failure to pay on a financial guarantee or letter of credit may be a component of a measure that constitutes nationalization, but it is not itself such a measure unless it is joined with other elements that are also components of the ultimate measure of expropriation. It is therefore not the kind of "measure" contemplated by Article 1121.[117]

Arbitrator Highet added that the breaches referred to in Article 1121 of the NAFTA mean breaches of the NAFTA standards and not to breaches of domestic law. The claims advanced in the two proceedings are on distinct and separate planes. The measures complained of in the domestic proceedings may well be elements of the creeping expropriation on which

[116] It does not appear that the issue of whether Mexico's motion actually went to the tribunal's jurisdiction, rather than to the potential admissibility of the claim, was fully argued before the Tribunal. One could contemplate how the same arguments could be treated on the merits, with Mexico proving the existence of other proceedings as violating the requirements of Article 1121(1), rather than the waiver, which it could have always maintained was insufficient.

[117] Dissenting Opinion Mr. Highet, ¶ 13.

the NAFTA claim is based. But creeping expropriation is comprised of several components which must be more than the mere sum of its parts. The causes of action are different: local commercial claims in the Mexican courts, and international treaty claims before the international tribunal. Arbitrator Highet concluded:

> Indeed, it would be an extreme price to pay in order to engage in NAFTA arbitration for a NAFTA claimant to be forced to abandon all local remedies relating to commercial law recoveries that could have some bearing on its NAFTA claim - but which nonetheless were not themselves NAFTA claims. This could not have been the reasonable intent of the NAFTA Parties. ...[118]

> It would only be where a lawsuit had been commenced in domestic courts *that essentially alleged the equivalent of a violation of Chapter Eleven* [of NAFTA] that there would be a clear preemption (...). Such a case or cases would have to allege nationalization, expropriation, taking – direct or indirect – and other action inconsistent with international obligations of the Respondent.[119]

Therefore, Arbitrator Highet adopted a distinction between treaty claims and domestic law claims that is strongly reminiscent of the practice under the fork in the road provisions described above. The majority rejected that distinction and found that the waiver of domestic proceedings had to cover any claim in relation to the measures alleged to violate the NAFTA.

After the dismissal of the claim, Waste Management resubmitted the same case, this time accompanied by an unequivocal waiver in accordance with Article 1121. By that time all domestic proceedings had been dismissed or discontinued. The new Tribunal found the claim admissible.[120] It rejected the Respondent's argument that the investor should only have one attempt at international arbitration under Chapter 11 of the NAFTA.[121] The Tribunal said:

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[118] *Id.* ¶ 44.
[119] *Id.* ¶ 47. Italics original.
[120] *Waste Management, Inc.* v. *United Mexican States*, ICSID Additional Facility, Decision on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, 41 ILM 1315 (2002).
[121] *Id.* ¶ 26.

> .... neither the express terms of NAFTA nor the applicable rules of international law preclude a claimant who has failed to comply with the prerequisites for submission to arbitration under Article 1121(1) from commencing arbitration a second time in compliance with those prerequisites.[122]

The new Tribunal distinguished the waiver provision in Article 1121 of the NAFTA from a fork in the road provision in a BIT:

> Chapter 11 of NAFTA does not contain any express provision requiring a claimant to elect between a domestic claim and a NAFTA claim in respect of the same dispute. Such "fork in the road" provisions are not unusual in bilateral investment treaties, although their language varies. ... [123]

After giving an example of a BIT that contains a fork in the road provisions and of a BIT that does not, the Tribunal continued:

> Chapter 11 of NAFTA adopts a middle course. A disputing investor is evidently entitled to initiate or continue proceedings with respect to the measure in question before any administrative tribunal or court of the respondent State in accordance with its law, without prejudice to eventual recourse to international arbitration. It is only when submitting a claim under Article 1120 that the requirement of waiver arises. ... [124]

In its award on the merits[125] the Tribunal did not discuss the waiver requirement of Article 1121 of the NAFTA, but the Tribunal did touch upon the domestic proceedings in several contexts. It stated that while there was no requirement to exhaust local remedies, the availability of local remedies to an investor faced with contractual breaches was nevertheless relevant to the question of whether the minimum standard of treatment contained in Article 1105(1) had been complied with by the State.[126] With respect to the case before it, the Tribunal found that the

[122] *Id.* ¶ 37.
[123] *Id.* ¶ 29.
[124] *Id.* ¶ 30.
[125] *Waste Management, Inc.* v. *United Mexican States*, Award, 30 April 2004.
[126] *Id.* ¶ 116.

domestic proceedings had not involved a denial of justice and hence no violation of the standard of Article 1105(1) of the NAFTA had occurred.[127] At the same time the Tribunal emphasised that it lacked jurisdiction to examine alleged breaches of contract.[128]

It should be noted, however, that not all NAFTA tribunals have regarded the waiver requirement as a mandatory precondition for the filing of a claim, at least not in the sense that failure to provide a waiver letter would deprive the tribunal of jurisdiction to proceed. For example, in *Pope & Talbot v. Canada*, the Tribunal was asked to dismiss the portion of a claim involving one of the relevant investment enterprises because the waiver letter was not served until approximately two years after the statement of claim had been served[129]. The Tribunal relied upon the jurisdcitional award of an earlier NAFTA tribunal (in: *Ethyl Corp.* v. *Canada*) to conclude that the submission of a claim to arbitration results in a constructive waiver which would – *per force* – be broader in scope than the waiver required under Article 1121. Because a failure to provide such a waiver could therefore only prejudice the interests of the investor, it concluded that "... there would be no good reason to make the execution of the investor's waiver a precondition of a valid claim for arbitration."[130]

Nevertheless, the *Waste Management* case highlights the fundamental differences between the typical fork in the road provision in a BIT and the waiver requirement under Article 1121 of the NAFTA. In some respects Article 1121 takes a more benign attitude of domestic proceedings. Whereas the fork in the road requirement precludes any future access to international arbitration once the choice in favour of the domestic courts or tribunals has been made, Article 1121 of the NAFTA permits concurrent recourse to domestic courts and tribunals, so long as such proceedings do not involve claims to damages. Moreover, under the NAFTA provision it appears that any choice made in favour of seeking damages before a domestic court could conceivably be reversed in order to gain access to international arbitration.

From another perspective the NAFTA is more uncompromising towards domestic proceedings than a fork in the road provision. Article 1121,

[127] *Id.* ¶¶ 128-132.

[128] *Id.* ¶ 73.

[129] *Pope & Talbot* v. *Canada*, NAFTA/UNCITRAL Tribunal, Order re: "Harmac Motion" (4 February 2000).

[130] *Pope & Talbot* v. *Canada*, NAFTA/UNCITRAL Tribunal, Order re: "Harmac Motion" (4 February 2000). at paragraphs 6-17. Available at: www.naftaclaims.com.

unlike the fork in the road provisions in BITs, does not speak of "the dispute" which must not be before domestic courts. Rather, Article 1121 refers to "proceedings with respect to the measure" that is alleged to be a breach of the NAFTA. Therefore, Article 1121 excludes the distinction between treaty claims and claims under domestic law. *Waste Management* demonstrates that NAFTA Article 1121 requires the investor to waive the right to seek damages before any tribunal (domestic or otherwise) in respect of the incriminated measures, rather than just treaty claims.

Put differently, fork in the road clauses contained in BITs permit domestic courts and arbitral tribunals to deal concurrently with different types of damages claims arising from the same factual situation. Article 1121 of the NAFTA, on the other hand, only permits domestic courts and tribunals to handle claims for extraordinary relief, while the international tribunal hears the damages claim, regardless of any difference between the types of claims involved.

H. The Characterization of a Claim as Treaty Based or Contractual

The practice, outlined above, demonstrates that the distinction between claims based on investment treaties and claims based on contracts has important consequences for the jurisdiction of arbitral tribunals. Whether the claims are meritorious falls to be decided only at the merits stage of the case. But at the stage of making a decision on its jurisdiction a tribunal may have to determine whether it is confronted with a treaty claim or a contract claim. It is clear that the claims will initially be formulated by the claimant in a particular dispute. But is the tribunal bound by the characterization made by the claimant for purposes of its jurisdiction?

Practice on this point is not uniform. One school of thought maintains that for purposes of jurisdiction the characterisation of the claims must be undertaken by reference to the claimant's pleadings. In determining its jurisdiction, a tribunal would have to examine merely whether the claims, as presented by the claimant, are covered by the treaty. Whether there has indeed been a violation of treaty guarantees would be left to the merits stage of the proceedings. Therefore, the characterization of the dispute, as arising from a contract or from the treaty, for purposes of jurisdiction, would depend on how the claims are put forward by the claimant.

Another theory requires the tribunal to look behind the claim, as presented by the claimant, already at the stage of jurisdiction. The claimant would have to put forward a treaty claim that is plausible or at least arguable. In particular, if the essential basis of the claim is of a contractual nature, the tribunal would be entitled to reject any treaty claims already at the stage of deciding on its jurisdiction.

In *Vivendi I* the Tribunal in its decision on jurisdiction, which remains unannulled, found that it had to base its jurisdictional finding on the claims as formulated by the Claimants. It said:

> ... In this case the claims filed by CGE against Respondent are based on violations by the Argentine Republic of the BIT through acts or omissions of that government and acts of the Tucumán authorities that Claimants assert should be attributed to the central government. As formulated, these claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT.[131]

The *ad hoc* Committee agreed with the Tribunal's approach on this point:

> ... the Committee agrees with the Tribunal in characterising the present dispute as one "relating to investments made under this Agreement" within the meaning of Article 8 of the BIT. Even if it were necessary in order to attract the Tribunal's jurisdiction that the dispute be characterised not merely as one relating to an investment but as one concerning the treatment of an investment in accordance with the standards laid down under the BIT, it is the case (as the Tribunal noted) that Claimants invoke substantive provisions of the BIT.[132]

These holdings indicate that both the Tribunal and the *ad hoc* Committee were content to look at the claims as formulated by the Claimants. Yet,

[131] Award, ¶¶ 53, 40 ILM 426, 438/439 (2001). Footnote omitted.
[132] Decision on Annulment, 3 July 2002, ¶¶ 74, 41 ILM 1135, 1150/51 (2002).

in a different part of its decision the *ad hoc* Committee appeared to lean towards a more objective standard:

> In 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.[133]

Of course that statement by the *Vivendi I ad hoc* Committee was a mere *obiter dictum*. The Committee found that, despite Argentina's assertions to the contrary, the claims were based on the BIT and that therefore, the fundamental basis of the claim was the treaty. In a number of decisions the tribunals indicated that the characterization of the claim as being based on treaty or contract was left to the claimants. The only requirement was that the characterization should not be *prima facie* implausible. Otherwise these tribunals held that for purposes of jurisdiction they would look at the claim as presented by the claimants.[134]

In *Amco* v. *Indonesia*,[135] the issue did not arise in terms of a BIT violation but in terms of whether there had been an unlawful expropriation under general international law. One of the Government's objections was that the dispute related to the termination of a lease agreement with P.T.Wisma, a private party, and that it was therefore outside ICSID's jurisdiction. The Tribunal ruled that in order to make a decision as to its jurisdiction it had to look at the way the claim was presented. The Claimants had presented their claims not in terms of lease violations but as arising from a nationalization or expropriation by Indonesia:

> The Tribunal is of the view that in order for it to make a judgment at this time as to the substantial nature of the dispute before it, it must look firstly and only at the claim itself as presented to ICSID and the Tribunal in the Claimant's Request for Arbitration. If on its face (that is, if there is no manifest or obvious misdescription

[133] *Id.* ¶ 98. Footnote omitted. The *ad hoc* Committee proceeded to discuss the decision in *Woodruff*, decided by an American-Venezuelan Mixed Commission in 1903, Reports of International Arbitral Awards (RIAA), Vol. IX, p. 213.

[134] This principle was adopted also in *Salini* v. *Morocco* where the Tribunal "se déclare compétent pour connaître des demandes des sociétés italiennes, telles qu'elles sont formulées [declares itself competent to decide on the Italian companies' claims, as formulated]": *Salini Costruttori SpA et Italstrade SpA* c/*Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, para. 64, Journal de Droit International 196 at 209 (2002); 42 ILM 609 at 624.

> or error in the characterization of the dispute by the Claimants) the claim is one "arising directly out of an investment", then this Tribunal would have jurisdiction to hear such claims. In other words, the Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that prima facie the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal.[136]

The Tribunal proceeded to examine the claim, as stated by the Claimants in their Request for Arbitration, and concluded that the Request did not call upon it to arbitrate a lease dispute but one that arises from an alleged nationalization or expropriation.[137]

In *Wena Hotels* v. *Egypt*,[138] jurisdiction was based on the BIT between Egypt and the United Kingdom. One of Egypt's objections to jurisdiction was that the dispute was in reality about lease agreements with EHC, an Egyptian public sector company. That dispute had been the subject of at least four domestic arbitrations in Egypt. The Claimant contended that it had a separate dispute with Egypt for expropriating Wena's investment without prompt, adequate and effective compensation and by failing to accord fair and equitable treatment and full protection and security. The Tribunal said:

> Egypt argues that Wena's assertions are insufficient and that the Tribunal must find evidence that Wena's claims against Egypt are valid. The Tribunal declines to convert a preliminary, jurisdictional dispute into a determination of the merits. Egypt's contention that it is not responsible for the conduct Wena accuses it of performing "may be an effective defense on the merits," as Wena acknowledged during oral argument. Nevertheless, Respondent's objection is a defense that should be addressed on the merits, with the benefit of a full briefing by both parties of the facts of this case.[139]

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[135] *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 390.
[136] *Id.* at 405.
[137] *Loc. cit.*
[138] *Wena Hotels* v. *Egypt*, Decision on Jurisdiction, 25 May 1999, 41 ILM 881 (2002).
[139] *Id.* at 890. Footnotes omitted.

In *SGS* v. *Pakistan*,[140] jurisdiction was based on the BIT between Pakistan and Switzerland. The Respondent argued that the claims in question were, in reality, mere contract claims and were outside the Tribunal's competence. Therefore, Pakistan asked that the Tribunal subject the claims to scrutiny to determine whether they were properly characterized as alleged violations of the BIT.[141] The Tribunal rejected this suggestion but added some qualifying language that reserved its right to examine the plausibility of the claims:

> 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. We do not exclude the possibility that there may arise a situation where a tribunal may find it necessary at the very beginning to look behind the claimant's factual claims, but this is not such a case.[142]

In *Azurix* v. *Argentina*,[143] jurisdiction was based on the BIT between Argentina and the United States. The Respondent argued that the dispute did not relate to a violation of the BIT but was of a contractual nature and concerned the interpretation of and performance under the Concession Agreement. The Tribunal said:

> ... 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.[144]

[140] *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, 42 ILM 1289 (2003).
[141] *Id.* ¶ 144.
[142] *Id.* ¶ 145. Footnote omitted.
[143] *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003.
[144] *Id.* ¶ 76.

In *Enron* v. *Argentina*,[145] the Respondent objected to the Tribunal's jurisdiction on the ground that the dispute involved matters of taxation and did not involve an expropriation and the standards of treatment protected by the Argentina-US BIT. The Tribunal rejected this objection. It said:

> The Claimants have satisfied the requirement of having a present interest to bring action under the Treaty, particularly in view of the fact that is [sic] has been alleged that the tax assessments resulted in the violation of specific provisions and standards of treatment established in the Treaty. These allegations can only be considered at the merits phase of the case, but *prima facie* they are sufficient to justify the exercise of the right of action by the Claimants. Accordingly, the Tribunal upholds jurisdiction to consider the matter on the merits as far as this objection is concerned.[146]

Similarly, in *Siemens* v. *Argentina*,[147] the Respondent objected that the dispute did not concern rights guaranteed by the BIT between Argentina and Germany but that the Claimant was, in reality, pursuing rights under a contract. The Tribunal rejected this argument. It said:

> The dispute as formulated by the Claimant is a dispute under the Treaty. At this stage of the proceedings, the Tribunal is not required to consider whether the claims under the Treaty made by Siemens are correct. This is a matter for the merits. The Tribunal simply has to be satisfied that, if the Claimant's allegations would be proven correct, then the Tribunal has jurisdiction to consider them.[148]

In another group of cases the tribunals were not content with looking at the claims as presented by the claimants, but examined whether the treaty claims put forward by them were plausible.[149] In *SGS* v. *Philippines*,[150] jurisdiction was based on the BIT between The Philippines and Switzerland. The Tribunal was not satisfied with the Claimant's assertion

[145] *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004.
[146] *Id.* ¶ 67.
[147] *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004.
[148] *Id.* ¶ 180.
[149] See also the more general discussion in *United Parcel Service of America Inc* v. *Canada*, Award on Jurisdiction, 22 November 2002 ¶¶ 33-37.
[150] Decision on Jurisdiction, 29 January 2004.

of a claim based on one of the BIT's substantive standards such as fair treatment or expropriation. Rather, it found that it had to examine independently whether a plausible treaty claim had been made. The Tribunal said:

> ... it is not enough for the Claimant to assert the existence of a dispute as to fair treatment or expropriation. The test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on. On the other hand, as the Tribunal in *SGS v. Pakistan* stressed, it is for the Claimant to formulate its case. Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim.[151]

On this basis, the Tribunal proceeded to examine whether the BIT violations invoked by SGS were plausible.[152] Specifically, the Tribunal examined the claims under the BIT's provisions on fair and equitable treatment and on expropriation. The Tribunal found that no tenable case of expropriation had been raised since a mere refusal to pay a debt was not an expropriation of property.[153] On the other hand, the Tribunal found that a refusal to pay sums admittedly payable raised arguable issues under the BIT's provision dealing with fair and equitable treatment.[154] Therefore, as a matter of jurisdiction, one of the treaty claims was rejected, another was upheld.

In *Occidental* v. *Ecuador*,[155] the distinction between contract claims and BIT claims arose in more than one context. The Tribunal's finding on the applicability of a fork in the road provision seemed to lean towards the view that it was up to the Claimant to characterize its claim as being based on the treaty or on contract. The Tribunal said:

> The characterization of the dispute by the Claimant probably would suffice alone for the Tribunal to reach a determination on jurisdiction. As held by the Tribunal

[151] *Id.* ¶ 157. Footnote omitted. See also ¶¶ 26, 72, 83, 96(e), 169(5).
[152] *Id.* ¶¶ 160-164.
[153] *Id.* ¶ 161.
[154] *Id.* ¶ 162.
[155] *Occidental Exploration and Production Company* v. *The Republic of Ecuador*, Final Award, 1 July 2004.

> in *Azurix* in respect of its determination on jurisdiction, it is necessary to decide "whether the dispute as presented by the Claimant, is *prima facie* a dispute arising under the BIT." The Tribunal in SGS v. Pakistan also concluded that "at this jurisdiction phase it is for the Claimant to characterize the claims as it sees fit".[156]

Yet in the context of a claim that an expropriation had taken place through the refusal of the Respondent to refund value added tax, the Tribunal adopted a different position. It said:

> A claim of expropriation should normally be considered in the context of the merits of a case. However, it is so evident that there is no expropriation in this case that the Tribunal will deal with this claim as a question of admissibility.[157]

The Tribunal proceeded to look at the concept of expropriation and held:

> The Tribunal holds that the Respondent in this case did not adopt measures that could be considered as amounting to direct or indirect expropriation. ...
>
> The Tribunal accordingly holds that the claim concerning expropriation is inadmissible.[158]

The Tribunal did, however, examine other treaty claims put forward by the investor some of which it upheld.

The most categorical rejection of the position that it is up to the claimant to characterize its claim in terms of a treaty violation came from the Tribunal in *Joy Mining* v. *Egypt*.[159] The Tribunal based its jurisdiction on the BIT between Egypt and the United Kingdom. The case concerned the return of bank guarantees that had been supplied by the Claimant. After a discussion of contract and treaty based claims, the Tribunal said:

> The Claimant's arguments to the effect that the non-release of the guarantee constitutes a violation of the

[156] *Id.* ¶ Footnotes omitted.
[157] *Id.* ¶ 80.
[158] *Id.* ¶¶ 89, 92.
[159] *Joy Mining Machinery Limited* v. *The Arab Republic of Egypt*, Award on Jurisdiction, 6 August 2004.

> Treaty are difficult to accept. In fact, the argument is not sustainable that a nationalization has taken place or that measures equivalent to an expropriation have been adopted by the Egyptian Government. Not only is there no taking of property involved in this matter, either directly or indirectly, but the guarantee is to be released as soon as the disputed performance under the Contract is settled. It is hardly possible to expropriate a contingent liability. Although normally a specific finding to this effect would pertain to the merits, in this case not even the prima facie test would be met. The same holds true in respect of the argument concerning the free transfer of funds and fair and equitable treatment and full protection and security.[160]

The Tribunal held that it did not have jurisdiction to hear the case. However, the Tribunals' main reason for doing so rested on the grounds that the case did not present an investment dispute.[161] Its finding that there was no treaty-based claim was merely added "to make certain clarifications".

The proper approach to the characterisation of claims as being based on treaty or contract would seem to lie somewhere between the two extremes. It is primarily for a claimant to formulate her own claim. A tribunal must examine the claims as put forward by the parties. If a claimant alleges a breach of treaty obligations it is for the tribunal in its decision on the merits to examine whether such a breach has, in fact, occurred. As the annulment proceedings in *Vivendi I* demonstrate, failure to do so may constitute an excess of powers and is liable to lead to annulment.

On the other hand, claims of treaty breaches must not be obviously unsound. A tribunal need not go into the merits of a claim that, on its face, is untenable. In such a situation a *prima facie* examination of a claim may suffice for its rejection already at the stage of determining the tribunal's jurisdiction. But even such a preliminary examination must meet certain minimum standards. The examination must not deprive the claimant of its right to present a fully reasoned argument to support its claim, a task that will normally be possible only at the merits stage of the proceedings. Also, the tribunal is under an obligation to give

[160] *Id.* ¶ 78.
[161] *Id.* ¶ 63.

convincing reasons for its rejection of a claim already at the jurisdictional stage. A mere statement that *prima facie* there is no violation of the fair and equitable standard and that, hence, the claim will not be examined, is not sufficient.