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CONTRACTS, TREATIES AND UMBRELLA CLAUSES: SOME JURISDICTIONAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION

Investor State contracts are an important instrument for realising foreign in vestments. The mixture of public and private law present in these contracts raises a number of interesting legal questions. This article focuses on certain jurisdictional issues which are of high importance for both investors and host States in interna tional investment arbitration.

Two main issues are discussed. The first is the relationship between the breaches of investor State contract as opposed to the breaches of the bilateral invest ment treaty, and the impact this has on establishing arbitral jurisdiction. The second issue discussed are the "umbrella" clauses and the proper understanding of their content. Both topics are mainly analyzed in the context of ICSID, but conclusions drawn can be applied to other forms of investment dispute settlement.

The article concludes with proposed guidelines on how to overcome the exist ing divergence in jurisprudence which is detrimental to legal certainty in this area of law.

Key words: *Investor State contracts. Investment arbitration. ICSID. Um brella clauses*

1. INTRODUCTION

Contracts between the host State and the foreign investor, aimed at realising a foreign economic investment, have a long history. They range from early concession contracts dealing with exploitation of mineral resources to contemporary contractual arrangements such as service agree-

ments.[1] Respecting investor-State contracts, especially in times of turmoil, was seen as one of the cornerstones in relations between the host State and foreign investors. What is important to note is that these contracts have actually lost nothing of their importance in the modern business world of foreign investment. Investor-state contracts, in one form or another, are still very often used to enter a foreign market and make an investment. The entrance into certain sectors of the host State economy (such as oil exploitation) is often possible solely through such contracts, as governments deem it necessary to retain certain control over some crucial and sensitive areas.[2] All this has prompted one International Centre for Settlement of Investment Disputes (hereinafter ICSID) tribunal to state that foreign investments are actually *characteristically* made with the contractual involvement of the host State.[3]

It is, thus, understandable that legal issues surrounding investor-State contracts deserve special attention. It has been established that interference with the contractual rights of the foreign investor in these contracts (mostly in cases of expropriation) often engages international responsibility of the host State.[4] However, for the host State to be responsible, it is necessary for a foreign investor to obtain a judgement or an arbitral award.

In that regard, investment arbitration is an especially important method of dispute resolution. There is no doubt that the possibility of resolving disputes with a sovereign State through arbitration is an important development in favour of foreign investors, chiefly in the terms of getting an unbiased and more predictable outcome. Readiness of States to accept being on equal footing with a foreign *private* entity can be seen as a part of a grand bargain to attract foreign investments as much as possible. It can also be seen as an aspect of the gradual restriction of State immunity, which has, as a trend, received general acceptance in the international community.

However, despite these developments, it would be wrong to think that establishing jurisdiction over a State is a problem-free area. Regarding the topic of this article, a number of jurisdictional issues can only

[1] For a historical overview, see M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, Cambridge 2010[3], 19 28.

[2] UNCTAD, *State Contracts*, New York Geneva 2004, 2 3.

[3] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, IC SID Case No. ARB/02/6, Decision on Objections to Jurisdiction (January 29, 2004), 132(d), 8 ICSID Reports 518 (2005).

[4] S. Alexandrov, "Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?", *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (ed. K. Yannaca Small), Oxford University Press, Oxford 2010, 324 325. *See also* R. Leal Arcas, "The Multilateralization of International Investment Law"*, North Carolina Journal of International Law and Commercial Regulation* 35/2009 2010, 53 54.

arise in relation to investor-State contracts, as opposed to a situation where the host State is not a contractual party. Two main issues which are occupying the attention of academics and practitioners in this area are the distinction between contractual and bilateral investment treaty (BIT) claims and the proper interpretation of so-called "umbrella" clauses. These two topics will be examined in parts 2 and 3, respectively, followed by a conclusion in part 4.

It should be noted that the following text is primarily focused on ICSID jurisprudence. This is warranted as ICSID has positioned itself, in terms of case volume dealt with,[5] as a primary forum for resolution of investment disputes in the world. However, most of the deliberations can be relevant for other means of investment arbitration, such as under UNCITRAL Arbitration Rules and conclusions reached can be applied *mutatis mutandis*.

2. CONTRACTUAL AND BIT CLAIMS

Regarding the relationship between the claims of a foreign investor stemming from a contract with the state and the ones from a BIT, the basic idea is clear. A host State guarantees certain standards of protection to a foreign investor in accordance with a BIT (or a domestic law, but for simplicity sake we will refer to BITs)[6] it has concluded with that investor's home State. If it fails to fulfil these standards, this constitutes a breach of the treaty and the foreign investor is entitled to pursue (in most cases) investment arbitration before an international institution as stipulated in the dispute resolution clause of the BIT itself. Previous steps along the way can exist (such as the need to exhaust domestic remedies first)[7], but ultimately in most cases the dispute can be expected to end up before an arbitral tribunal. If the State has a contract with a particular foreign investor, breaches of contract are to be (like in ordinary commercial contracts) examined and sanctioned before the institution (international commercial arbitration/domestic court) designated in the dispute resolution provisions of that particular contract. These two types of disputes, BIT and contractual ones, remain analytically distinct.[8]

[5] J.P. Sasse, *An Economic Analysis of Bilateral Investment Treaties*, Gabler Ver lag, Hamburg 2011, 59.

[6] This is also warranted as arbitration based on domestic legislation is now rela tively rare. See A.K. Bjorklund, "The Emerging Civilization of Investment Arbitration", *Penn State Law Review* 113/2008 2009, 1270.

[7] C. Schreuer, "Calvo's Grandchildren: The Return of Local Remedies in Invest ment Arbitration"*, The Law and Practice of International Courts and Tribunals* 4/2005, 1 3.

[8] G. Van Harten, "The Public Private Distinction in the International Arbitration of Individual Claims Against the State", *International and Comparative Law Quarterly*

This distinction holds true even if the breach of the BIT stems from the breach of a contract. It is quite possible that the host State's breach of a particular contract is such as to trigger the breach of the BIT standards as well and, consequently, engage the BIT dispute resolution mechanism.[9] Despite the fact that in determining whether or not there has been a breach of the BIT the tribunal must usually interpret the particular contract and examine its performance (as stated, for example, in the *Vivendi* case)[10] this does not mean that it has jurisdiction to decide upon the contractual breach itself. It simply means that it so happened that the host State infringed its treaty obligations by breaching a contract, and not, for example, by outright seizing of corporate premises of the foreign investor. The same distinction applies even if breaches of contract and BIT exist concurrently, as is often the case. Each of the breaches is to be resolved in its own forum. It is not always easy to distinguish between these breaches in practice, but theoretically there should be no dilemma about the proper solution.

The legal situation becomes more complicated when, in one way or another, the BIT dispute mechanism becomes entangled with "purely" contractual breaches. The least problematic scenario is where the BIT explicitly states in its jurisdiction clause that it can be used to resolve "any dispute" between the State and the foreign investor.[11] This simply opens up a possible dispute settlement mechanism to be pursued by the foreign investor in additions to the one(s) existing in the contract(s). The key here is for the wording of the BIT to be explicit and all inclusive, such as including "all" disputes in this extension of the BIT jurisdiction.[12] As soon as the wording becomes more qualified predictability of the result seems to diminish rapidly, as is well illustrated by the *SGS* cases discussed later.

A more controversial scenario is the situation which can be described as "disguising" contractual claims into treaty-based ones. A foreign investor faced with the host State's contractual breach might be inclined to qualify this as a BIT breach in order to avoid the contractual dispute resolution mechanism (which can entail, for example, litigating

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56/2007, 372; s*ee also* C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford 2007, 103.

[9] *See* G. Van Harten, 387; *see also* A. Reinisch, "Expropriation", *The Oxford Handbook of International Investment Law* (eds. P. Muchlinski, F. Ortino, C. Schreuer), Oxford University Press, Oxford 2008, 417 420.

[10] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002), 105, 110 111, *International Legal Materials* 41/2002, 1135 *et seq*.

[11] *See* S. Alexandrov, 329 330.

[12] C. Schreuer, "Investment Treaty Arbitration and the Jurisdiction over Contract Claims The Vivendi Case Considered"*, International Investment Law and Arbitration: Leading Cases From the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (ed. T. Weiler), Cameron May, London 2005, 296.

only in the domestic courts). Based on the theoretical model explained above, the conclusion is that the foreign investor's claims are to be rejected in the jurisdictional phase of an investment dispute. The problem, however, arises on the factual level. What needs to be distinguished is whether the State really acted as a contractual party, and thus committed a contractual breach, or its actions fall within a public/BIT sphere. There is no generally accepted method for distinguishing these two spheres, but some guidelines can be suggested.

It is submitted that in order for an act of State to cause breach of the BIT and engage international responsibility, it must be one done by the State in its capacity as a sovereign. Pragmatically speaking, it should be of such nature that the ordinary contractual party would not be in a position to perform such an act.[13] Thus, a tribunal faced with the issue should, in accordance with well established practice,[14] determine jurisdiction by establishing whether or not the alleged breaching act is in any case capable of being characterised as falling within a BIT scope. As was clearly explained by the *Vivendi* ad hoc Committee, "[a] treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard."[15] The *Impregilo v. Pakistan* tribunal, which fully endorsed such approach, also set out the rationale for it: "(...) to ensure that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate."[16]

However, some ICSID tribunals disagreed with such approach. In *Joy Mining v. Egypt* it was concluded that, under certain circumstances, "it might be considered to be a dispute where it is virtually impossible to separate the contract issues from the treaty issues and to draw any jurisdictional conclusions from a distinction between them." [17] Other tribunals suggested that examination whether sovereign powers have been employed requires establishing the nature, or even the motive and intent of the alleged breach, which can only be done in the merits stage of the dispute.[18]

Such arguments can be said to indicate a real issue in some cases. Indeed, sometimes the factual matrix of the case at hand simply cannot

[13] *See* UNCTAD, 9 10; *See also* G. Van Harten, 373 374.

[14] M. Feit, "Responsibility of the State under International Law for the Breach of Contract Committed by a State Owned Entity", *Berkeley Journal of International Law* 28/2010, 145.

[15] *Vivendi v. Argentina*, 113.

[16] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (April 22, 2005), 254, *available at* http://icsid.worldbank.org, accessed 23 September 2011.

[17] *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award (August 6, 2004), 75, *ICSID Review* 19/2004, 486.

[18] *See* S. Alexandrov, 340.

allow for dealing with a distinction between contractual and treaty breaches at the jurisdictional level. In such situations leaving the final decision for the merits phase, of course, remains warranted.

Still, in the author's opinion, it is advisable to fully examine these issues in the jurisdictional phase whenever it is possible. It is for the tribunal to exert careful evaluation in order to distinguish the issues present and, if prompted, end the proceedings. Leaving essentially jurisdictional questions to be answered in the merits phase should in any case be *ultima ratio*. Three reasons, at least, can be put forward.

Firstly, not allowing for a case to go to the merits phase without convincing reasons should be strived for as much as possible because loosening of scrutiny in the jurisdictional phase might encourage proliferation of dubious claims to the (already rather overflowed) ICSID dispute resolution mechanism. The *Impregilo* decision on jurisdiction took note of this danger.[19] If it appears that it is relatively easy to advance the case to the merits phase, foreign investors might be inclined to attempt to do so without sufficient ground and by that also ignore contractual jurisdiction clauses. This is harmful to the balance of the whole dispute settlement system. In the author's opinion, lack of scrutiny in the jurisdictional phase is somewhat reminiscent of the (in)famous quote uttered during the Albigensian crusade "*Caedite eos! Novit enim Dominus qui sunt eius*"[20] in the sense that the sorting out of the issues is left to the latter stage, but with very unwelcome consequences.

Secondly, it should be borne in mind that prolongation of arbitral proceedings means more expenses for the parties involved. Investors (which are practically always in the position of the claimant in ICSID proceedings) might be faced with the unnecessary costs associated with proceeding to the merits phase (while having a rather weak claim) just because the tribunal wanted to give itself additional time and "breathing space" to deal with certain issues. Strictness in the jurisdictional phase also prevents possible delay tactics by host States, aimed at financially wearing out claimant (if the said claimant is not, of course, a strong multinational company). On the other hand, States in dire financial straits (example of Argentina after the 1999–2002 financial collapse comes to mind) would also be interested in ending the proceedings as soon as possible, preferably in the jurisdictional phase.[21]

Thirdly, the undue prolongation of proceedings can have an adverse impact on the host State's reputation as an investment-friendly destination. The launching of proceedings could already be seen as tarnish-

[19] *Impregilo v. Pakistan*, 254.

[20] "Kill them [all]! Surely the Lord discerns which [ones] are his" according to historical reports, this was the answer given by the papal legate Arnaud Amaury when asked how the crusaders were to distinguish Catholics and heretical Cathars in the be sieged city of Béziers.

[21] A.K. Bjorklund, 1275.

ing the reputation of the host State, and the decision that the dispute is to proceed to the merits phase can send an additional negative signal to other potential investors. *Fama est* principle can be quite harmful, especially regarding countries not known for their good investment climate in the first place.

Thus, it can be said that an arbitral tribunal should cautiously approach any situation that is reminiscent of an attempt to "disguise" a contractual claim into a BIT garb. But this must not go against the need to carefully evaluate if the host State itself is attempting to mask its sovereign acts into a contractual shell. The actual careful weighing of arguments has to be done in each and every case, which, unfortunately, must leave any attempt to provide guidelines at a rather general level.

3. UMBRELLA CLAUSES

The proper understanding and application of the so-called "umbrella clauses" has been deemed as of the most contentious questions in investment arbitration.[22] Generally speaking, it is a provision in the BIT by which the host State guarantees that it will respect all obligations assumed in regards to investments. However, the wording of the umbrella clauses is far from uniform. Lack of uniformity is also present regarding their occurrence – they are present in one form or another in around 40% of the 2700 BITs worldwide.[23]

It is not possible within the scope of this article to go into all the interesting factual or theoretical subtleties of particular ICSID cases. The focus is on the two cases which were the progenitors of two main branches of ICSID jurisprudence. Umbrella clauses came under the spotlight after the well known *SGS v. Pakistan*[24] and *SGS v. Philippines*[25] cases. Two arbitral tribunals reached divergent conclusions whether an umbrella clause extended the jurisdiction of the investment tribunal to pure contractual breaches. The tribunal in *SGS v. Pakistan* took a restrictive approach. It interpreted the clause worded "either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party" of the Switzerland-Pakistan BIT as not extending its jurisdiction to purely contractual breaches. In short, the tribunal was of the opinion that

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[22] K. Yannaca Small, "What About This 'Umbrella Clause'?", *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (ed. K. Yannaca Small), Oxford University Press, Oxford 2010, 480; *See also* UNCTAD, 19.

[23] *See* K. Yannaca Small, 483.

[24] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* IC SID Case No. ARB/01/13, Decision on Objections to Jurisdiction (August 6, 2003), *Inter national Legal Materials* 42/2003, 1290 *et seq*.

[25] *SGS v. Philippines*, *supra* note 3.

the consequences of such a broad interpretation would be to allow for establishing jurisdiction against Contracting States in a largely unpredictable (theoretically unlimited) number of cases and that this could not have been the parties' intentions. This opinion was further backed by the systematic interpretation, indicating that the position of the clause within the BIT does not suggest such a broad content and importance of the clause.[26] This reasoning was followed in a number of cases, including *Joy Mining v. Egypt*,[27] *Salini v. Jordan*,[28] *El Paso v. Argentina*,[29] and *Pan American v Argentina/BP Energy Joint Decision*.[30]

However, the tribunal in *SGS v. Philippines* reached a different conclusion. The BIT clause here stated "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 concluded, basically, that the clause "is what it says" and that the tribunal has jurisdiction over contractual disputes. Eventually, however, it did not exercise its jurisdiction and suspended the proceedings indefinitely until the domestic courts in Philippines (which had jurisdiction according to the contract) deal with the dispute.[31] *SGS v. Philippines* reasoning was also followed in a number of cases, such as *Sempra v. Argentina*, [32] *Noble Ventures v. Romania*,[33] *LG v. Argentina*,[34] and *Continental Casualty v. Argentina*.[35]

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[26] *See* K. Yannaca Small, 485.

[27] *Joy Mining v. Egypt, supra* note 17.

[28] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan,* ICSID Case No. ARB/02/13, Decision on Jurisdiction (November 29, 2004), *Internation al Legal Materials* 44/2005, 569 *et seq.*

[29] *El Paso Energy International Company v. Argentine Republic,* ICSID Case No. ARB/03/15, Decision on Jurisdiction (April 27, 2006), *ICSID Review* 21/2006, 488 *et seq.*

[30] *Pan American Energy LLC and BP Argentina Exploration Company v. Argen tine Republic,* ICSID Case No. ARB/03/13 and *BP America Production Company and others v. Argentine Republic,* ICSID Case No. ARB/04/8, Joint Decision on Preliminary Objections (July 27, 2006), *available at* http://italaw.com, accessed 23 September 2011.

[31] For the distinction between jurisdiction and admissibility of disputes see G. Zeiler, "Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Pro ceedings"*, International Investment Law for the 21st Century: Essays in Honour of Chris toph Schreuer* (eds. August Reinisch et al.), Oxford University Press, Oxford 2009.

[32] *Sempra Energy International v. Argentine Republic,* ICSID Case No. ARB/02/16, Decision on Jurisdiction (May 11, 2005), *available at* http://icsid.worldbank.org, accessed 23 September 2011.

[33] *Noble Ventures, Inc. v. Romania,* ICSID Case No. ARB/01/11, Award (October 12, 2005), *available at* http://italaw.com, accessed 23 September 2011.

[34] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006) ICSID Review 21/2006, 203 *et seq*.

[35] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (September 5, 2008), *available at* http://italaw.com, accessed 23 Sep tember 2011.

In consequence, this led to two branches of divergent jurisprudence, which can be characterized as taking a "narrow" and a "wide" approach.[36] Both approaches warrant a closer look. Those in favour of a narrow approach emphasize the need to be very careful in widening the scope of treaty jurisdiction based on another clause and not the jurisdiction clause itself. Umbrella clauses can put a host State in a very precarious position in addition to introducing a grey area into a public-private dispute distinction.[37] In dealing with these clauses, tribunals should, as has been already observed in jurisprudence, exert restraint and careful balancing. In the words of *El Paso* tribunal, "(...)far-reaching consequences of a broad interpretation of the so-called umbrella clauses, quite destructive of the distinction between national legal orders and the international legal order, have been well understood and clearly explained(...)".[38]

In addition, it can be said that the situation could be complicated by the interplay with a Most-Favoured-Nation (MFN) clause, possibly transposing the umbrella clause to all BITs containing the MFN clause despite not having the umbrella clause themselves. This multiplies the number of contracts in which a foreign investor could assert treaty jurisdiction for contractual breaches.[39] It cannot be automatically assumed that this would be the typical intention of a host State. In the author's opinion, the opposite presumption (narrowing of the jurisdiction) is what seems as a more plausible typical intention.

However, the arguments for a wide approach are quite strong too. Most importantly, it is not clear what would be the purpose of umbrella clauses if not exactly to extend the jurisdiction. Granting a wide consent to arbitration by a State is not something unheard of or starkly unusual.[40] If offering wider protection to a foreign investor is seen as a primary goal, then a wider approach can be seen as better in achieving it. As the *Sempra* tribunal observed, "[t]he fact that the Treaty also includes the specific guarantee of a general 'umbrella clause' (...) creates an even closer link between the contract, the context of the investment and the Treaty."[41] Generally, it does seem that the wide approach is currently the preferred one in scholarly writings.[42]

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[36] *See* K. Yannaca Small, 488, 490.

[37] *See* G. Van Harten, 388.

[38] *El Paso Energy v. Argentina*, 82.

[39] More on this subject: S.W. Schill, "International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds", *Trade, Law and Development* 2/2010, 71 73.

[40] For example, domestic legislation can also allow for such jurisdiction. See S. Alexandrov, 331 332.

[41] *Sempra Energy v. Argentina,* 101.

[42] J. Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries

What is the right approach? As is so often the case, there is no straightforward answer or hard and fast rule. It must be understood that "the" umbrella clause does not exist, as the wording of different clauses varies significantly.[43] Accordingly, interpretation of a particular clause on a case by case basis is of the utmost importance. The host State is, of course, free to widen the scope of treaty jurisdiction as much as it wants. What is highly preferable is that such widening is unambiguously clear from the BIT. Thus, tribunals should be careful when interpreting broad and rather ambiguous clauses which require, for example, maintaining of an "adequate legal framework" for the protection of investments.[44] Such general and broad wording might indicate something akin to a standard of treatment, instead of indicating consent to arbitration. Also, despite widespread opposing opinions, there might be persuasive alternative explanations for the meaning of the umbrella clause even if its wording might seem to indicate extension of treaty jurisdiction to contractual breaches.

For instance, it has been suggested that an umbrella clause might have a substantive aspect in the sense that it is a modified version of a stabilization clause.[45] Furthermore, the wording of a clause calling for observance of obligations towards an investment might actually mean that the State is simply extending the treaty dispute resolution to any obligation it has acquired *alongside* the BIT, but not contractually with a particular foreign investor. This could include any provision of national legislation, or even a proclamation of the host State that would seem to imply a certain obligation towards investors.[46] Although the doctrine suggests that this expansion of jurisdiction to obligations assumed outside the BIT is an additional function of the umbrella clause (in addition to expansion of jurisdiction to contractual disputes), in the author's opinion there is no reason why this function could not actually be the sole one.

Of course, the main aim of the tribunal should always be the discovery of what the contracting States really intended. The tribunal should primarily remain committed to the discovery of that intent, including recourse to the history of the particular BIT provision and preceding negotiations.[47] However, if faced with a hard case that can legitimately go either way, the tribunal should, in the author's opinion, decline treaty jurisdiction. It should be borne in mind that the issue of interpretation of um-

in Foreign Investment Disputes", *George Mason Law Review* 14/2006, 164. *See also* C. McLachlan, L. Shore, M. Weiniger, 115.

[43] J. Crawford, "Treaty and Contract in Investment Arbitration", *Arbitration International* 24/2008, 355.

[44] *See Salini v. Jordan*, 66.

[45] *See* C. McLachlan, L. Shore, M. Weiniger, 116 117.

[46] *See* K. Yannaca Small, 497.

[47] Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) art. 32.

brella clauses is actually one more aspect of the long standing conflict between the interests of developed and developing countries.[48] Some authors even deem investment law as a whole to be a relic of imperialistic policies of great powers.[49]

In general, maintaining the balance of interests of investors and host States through sensible interpretation is thus of key importance. Overprotection of investors could seriously impede the whole investment disputes settlement system by causing a backlash against it by the host States. Such potential consequences seem to suggest that when a State opposes the wide approach and there is no persuasive evidence to the contrary, the old Roman law maxim *in dubio pro reo* offers the right solution.

4. CONCLUSION

It is not difficult to notice that in matters of large importance for establishing a jurisdiction of an arbitral tribunal in investment arbitration there is no unified stance either in jurisprudence or in doctrine. This divergence, especially in ICSID jurisprudence, is a reason for serious concern.

Currently, the decision on jurisdiction of an ICSID tribunal is more likely to be predicted by the analysis of the composition of the arbitral tribunal (and by looking to which strand of jurisprudence particular arbitrators adhere to) than by the analysis of legal principles. This, of course, calls for reform aimed at achieving convergence.

One should be aware, however, that the lack of formal stare decisis doctrine in ICSID arbitration might be an obstacle to ever achieving a totally unified approach. However, with the attitude that was exhibited, for example, by the *Bayindir* and *Saba Fakes* tribunals, the homogeneity of case law can be largely achieved. As stated in *Saba Fakes*, "(...)unless there are compelling reasons to the contrary, it [tribunal] ought to follow solutions established in a series of consistent cases that are comparable to the case at hand, subject to the specificity of the treaty under consideration and the circumstances of the case."[50]

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[48] *See* P.M. Blyschak, "State Consent, Investor Interests and the Future of Invest ment Arbitration: Reanalyzing the Jurisdiction of Investor State Tribunals in Hard Cases"*, Asper Review of International Business and Trade Law* 9/2009, 99 101 *et seq*.

[49] For example, K. Miles, "International Investment Law: Origins, Imperialism and Conceptualizing the Environment"*, Colorado Journal of International Environmental Law and Policy* 21/2010, 1.

[50] *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award (July 14, 2009), 96, *available at* http://italaw.com, accessed 23 September 2011.

While achieving uniformity of practice through introducing binding precedents is hardly practically feasible, or even desirable, ICSID tribunals should be aware of their role in remedying the current situation of divergence. Similar thoughts have been expressed elsewhere in doctrinal writings.[51]

In that regard, it is the author's opinion that when dealing with investor-State contracts some solutions can be distilled from the previous discussion and that these general guiding principles can be of assistance for the tribunals, both ICSID and non-ICSID ones.

Firstly, breaches of contract and breaches of a BIT should be kept distinct as much as possible as to prevent uncertainty and/or unwelcome overflow of litigation. The tribunals should be quick to sanction any attempt to confuse these two in order to obtain BIT jurisdiction.

Secondly, States are free to widen their consent to investment arbitration to all situations they want, but should aim to express this in a BIT as unambiguously as possible. Another point of interest for a host State would be how to limit a potential default expansion of consent to arbitrate through MFN clauses.

Thirdly, there can be no uniform interpretation of "umbrella" clauses, as they differ in wording and each clause necessarily deserves its own interpretation. In a seemingly irresolvable case of doubt whether the clause grants jurisdiction to deal with contractual breaches, the tribunal should decline it as this is more justified from a legal viewpoint and is important for keeping the balance of the investment law system.

It is, of course, not easy to achieve the observance of these guidelines in practice. But it is something to be aimed for. It is the author's opinion that application of the above guidelines would promote fair, balanced and reasonably predictable outcomes in deciding various issues that come before investment arbitration tribunals. And such outcomes would increase the protection of both legal and economic interests of investors and host States.

[51] See, for example, T.H. Cheng, "Precedent and Control in Investment Treaty Arbitration", *Fordham International Law Journal* 30/2006 2007, 1016.