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The Treatment Of Contract-Related Claims In Treaty-Based Arbitration

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Commentary

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Introduction

Contracts between private parties and States and their instrumentalities — for the granting of concessions, privatizations, the engineering, procurement and construction of infrastructure, and the operation of public services, among many others purposes — typically contain dispute resolution clauses of some sort. Despite the presence of these clauses, recent years have seen an increase in claims relating to investor-state contracts in international arbitrations pursuant to bilateral investment treaties, or "BITs." These claims were initially alleged as breaches of traditional treaty-based protections — *e.g.*, the obligations not to expropriate without compensation and to provide fair and equitable treatment. Investors have more recently asserted, successfully, that some BITs were expansive enough to provide investor protection against breach of contract as such. This development has led to the internationalization of contract claims and the blurring of what might previously have been thought to be a line between the two principal sources of legal protection for foreign investors, namely public law (treaties) and private law (contracts). Many questions remain to be answered as to how tribunals in treaty-based arbitrations will handle contract-related claims.

The Development Of Treaty Arbitration

The development of bilateral investment treaty-based arbitration is a new phenomenon. The authors know of no case prior to 1987 that had been brought before the World Bank's International Centre for Settlement of Investment Disputes claiming a violation of a BIT.[1] The traditional legal remedies for an investor whose investment was expropriated or otherwise injured by actions of the host State depended in large part on the involvement of the investor's home government.[2] The involvement of the investor's home government would sometimes be pursuant to a Friendship, Commerce and Navigation treaty, or at other times through various forms of "gunboat diplomacy."[3] Bilateral investment treaties were created, in part, to depoliticize investment disputes and to create a stable investment environment.[4]

For more than a decade after the first claim brought in the ICSID pursuant to a BIT, the fact patterns representing what many would consider "typical" investor claims. Claims were brought, for example, for physical expropriation of farmland by the government without prompt, adequate and effective compensation;[5] violation of fair and equitable treatment for a lack of transparency in regulations governing an investor's loan;[6] and "discriminatory treatment" based on the government's failure to stop looting of the claimant's property by the military.[7]

It was not until 1998 that the ICSID published an award examining whether contract-related claims could be brought pursuant to a BIT.[8] Since that time,

over a dozen ICSID tribunals have grappled with the question of whether investors' claims relating to a contract could be brought pursuant to a BIT. Given the increase in treaty-based arbitration generally,[9] and the many forms of contracts between investors and states, the number of contract-related claims brought pursuant to BITs is likely to keep increasing.

Claims Alleging Violation Of Traditional BIT Protections

Investors have used several arguments to advance contract-related claims in treaty-based arbitration. The early cases involving contract-related claims were brought as violations of traditional public international law bases of claim — *e.g.*, for breach of the obligation to provide fair and equitable treatment. Claimants have subsequently argued that the inclusion in some treaties of a clause obligating States to "observe obligations" entered into with investors — so-called "umbrella clauses" — provide a basis for jurisdiction over claims for breach of contract as such. Some enterprising claimants have even contended that the jurisdictional grant to treaty-based arbitral tribunals over "any disputes" should be read broadly enough to encompass treaty arbitrations as a forum for the determination of municipal law claims including, but in the arguments of some commentators not limited to, claims for breach of contract.[10]

Investors have successfully argued that actions taken by a State impairing contracts may violate the provisions of the BIT embodying traditional international law protections whether or not the state has also committed breach of contract. The first such case was *Lanco International v. the Argentine Republic*. In *Lanco*, Argentina argued that the tribunal did not have jurisdiction to hear Lanco's claims because the contract in question required that disputes be submitted to local courts. The *Lanco* tribunal rejected that argument and held that the plain language of the BIT allowed the investor the option to submit an investment dispute to international arbitration.[11] Argentina did not raise, and the *Lanco* tribunal did not consider, whether contract-related claims could also be violations of Argentina's obligations under the BIT.

It was not long before a State challenged the jurisdiction of contract-related claims brought pursuant to the BITs substantive provisions. In *Vivendi v. Argentina*, Argentina unsuccessfully argued once again that the forum selection clause prevented the claimant from bringing a contract-related action. Argentina also argued, however, that Vivendi's claims were essentially breach of contract claims and not BIT claims. The *Vivendi* tribunal accepted this argument and declined to rule on the merits, concluding that it could not separate out the "contract claims" from the BIT claims and the contract claims had to be decided by the local courts applying municipal law.[12] The tribunal made this ruling despite the fact that the claimant alleged violations of the BIT based on actions of government officials independent of the contract. Vivendi challenged this ruling in an annulment proceeding.

In the annulment proceeding it commenced,[13] Vivendi again argued that actions taken by Argentina, although related to its contractual duties, violated substantive provisions of the BIT — *i.e.*, fair and equitable treatment and expropriation — and that these claims were distinct from the contract claims.[14] The *Vivendi* Annulment Committee agreed with the claimant "that the fact that the investment concerns a Concession Contract made with Tucuman . . . does not mean that the dispute falls outside the scope of the BIT."[15] The Committee reasoned that a "state may breach a treaty without breaching a contract and *vice versa.*"[16] The Committee stated that:

> "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 a claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard."[17]

Tribunals have generally accepted the Vivendi Committee's reasoning that actions relating to a contract do not fall outside the protection of the BIT just because of the action's relation to the contract. For example, in *Eureko v. Poland*, an *ad hoc* tribunal determined that it had jurisdiction to consider whether actions taken by the government related to a contract can amount to violations of treaty provisions. The tribunal, relying on the *Vivendi* annulment decision, held that the tribunal was required to "consider whether the acts of which Eureko complains, whether or not

also breaches of [contract], constitute breaches of the Treaty."[18] The tribunal further stated that "[t]here is an amplitude authority for the proposition that when a State deprives the investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation" of a bilateral investment treaty.[19] The tribunal went on to find that acts taken by Poland relating to Eureko's contract violated Poland's obligations under the BIT.

In the recent jurisdictional award in *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29 (Nov. 14, 2005), the tribunal similarly held that contract-related claims may also be BITclaims. The tribunal found that an investor has a "self-standing right" to pursue BITclaims independent from contract claims. *Id.*, ¶ 167. The tribunal was not troubled by the common set of facts forming the bases for both contract and treaty claims, noting merely that the claims "arose out of the same set of facts." *Id.*, ¶ 160.

The 'Umbrella Clause' And The Internationalization Of Contract Claims

In addition to the substantive treaty protections afforded to investors, such as fair and equitable treatment and protection from discrimination, many investment treaties include clauses by which a State agrees that it will observe obligations or commitments it has entered into with investors, sometimes referred to as "umbrella clauses." These provisions often are framed essentially as follows:

> "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."[20]

Investors have argued in ICSID cases that an observance of obligations clause is a State's consent to have claims for breach of contract obligations heard by treaty-based arbitration tribunals.[21] In *Fedax v. Venezuela*, the investor had brought a claim pursuant to the Venezuela-Netherlands BIT for payments due under promissory notes.[22] Article 3 of the Venezuela-Netherlands BIT contained an umbrella clause requiring the parties to "observe any obligation it may have entered into with regard to the treatment of investments or nationals of the other Contracting Party." The *Fedax* tribunal found that Venezuela's failure to pay the amounts due under the promissory notes violated Venezuela's obligations under the BIT.[23]

In two cases brought by SGS, both alleging breaches by host States of contracts under which SGS was to provide "pre-shipment inspections" of customs exports, distinguished tribunals reached opposite conclusions on this question. The first of these cases decided was *SGS v. Pakistan*.[24] SGS contended that the "observance of commitments" clause[25] meant that the State agreed to have allegations that it did not observe its contracts with an investor heard by an ICSID tribunal. The tribunal rejected SGS's argument and concluded that this clause did not "elevate" claims grounded solely on breach of a contract to claims grounded on the investment treaty, and thus held that it lacked jurisdiction over the breach of contract claims.[26] The tribunal referenced the traditional requirement that treaty-based arbitration must be based on acts of a State in its sovereign capacity, not its commercial capacity.

Shortly after the *SGS v. Pakistan* decision was issued, a separate ICSID tribunal issued its decision on jurisdiction in *SGS v. Philippines*.[27] The *SGS v. Philippines* tribunal rejected the *SGS v. Pakistan* holding and held instead that the term "any obligation" "is capable of applying to obligations arising under national law, e.g. those arising from a contract."[28] The tribunal also concluded that the *SGS v. Pakistan* decision had failed to ascribe any meaning to the observance of obligations clause. Ultimately, the tribunal held that it had jurisdiction to hear SGS's breach of contract claims because of the observance of obligations clause.[29]

The *SGS* decisions present the two divergent conclusions as to whether observance of obligation clauses should be read as consent to treaty-based arbitral jurisdiction over breach of contract claims. Recent decisions, however, suggest that the *SGS v. Philippines* reasoning will be more persuasive for future tribunals. For example, in *Eureko v. Poland*, the tribunal adopted the view that the umbrella clause provided jurisdiction over contract claims between the state and an investor. The tribunal stated that the "plain meaning — the ordinary meaning — of a provision prescribing that a State 'shall observe any obligations it may have entered into' with regard to certain foreign investments is not obscure."[30] The tribunal went on to hold that contractual obligations fall within the plain meaning

of the requirement to observe any obligations that the State has entered into.[31]

Although the developing trend is to follow the *SGS v. Philippines* reasoning and allow claims for contractual obligations pursuant to an umbrella clause, not all tribunals have followed this trend. In *El Paso Energy v. Argentina*, ICSID Case No. ARB/03/15 (April 27, 2006), the tribunal adopted the reasoning of the *SGS v. Pakistan* tribunal. The *El Paso* tribunal was concerned that "investors will not use appropriate restraint" in decidingwhether to bring claims for "trivial disputes" pursuant to an umbrella clause. *El Paso*, ¶82.

The tribunal in *Noble Ventures v. Romania* reached a similar result. In that case, the Tribunal stated that an "umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law."[32] The tribunal further stated that "an umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of States obligations under municipal and under international law."[33] The tribunal, noting that the BIT in question included an umbrella clause even more straightforward than the clause in *SGS v. Philippines*, held that the BIT transferred contract questions under municipal law into international obligations under the BIT.[34]

Some tribunals have read the observance of obligations clause to, in fact, obligate the State to honor its contractual obligations but has restricted the obligation to exclude commercial actions of the State. The tribunal in *Joy Mining Machinery v. Egypt*, for example, held that it purely commercial obligations could not be protected under the BIT.[35] The tribunal stated that "the fact that a State agency might be a party to the Contract involving a commercial transaction of this kind does not change its nature" and that violations of commercial actions were not the subject of investment disputes.[36] The tribunal concluded that:

> "it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, 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."[37]

One commentator has explained the reason for this result as follows:

> "the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law."[38]

The decisions by several tribunals that have allowed breaches of contracts to be brought pursuant to an observance of obligations clause can be understood to conclude that the umbrella clause has the effect of internationalizing contractual obligations. Although the extent of those obligations will likely still be resolved with reference to the municipal law governing the contract, whether the obligation itself has been observed will be examined under principles of international law.

Jurisdiction Over Breach Of Contract Claims Based On The Introduction To The Dispute Resolution Clause

The final mechanism discussed in some awards for the internationalizing of contract claims is by use of the dispute resolution clause. Most investment treaties include a dispute resolution clause that states the mechanisms available to investors to seek redress against the State. The dispute resolution clause in investment treaties typically is presented in a section of the treaty distinct from the substantive treaty provisions. Dispute resolution clauses make available to investors various dispute resolution forums, often including ICSID or UNCITRAL arbitration. These clauses often begin with a phrase such as "disputes related to an investment shall be resolved in accordance with the terms of this clause . . . ." Two tribunals have stated in dicta that such language should be read as embodying the consent of the State to have any claim between an investor and a State resolved under the dispute resolution mechanisms of the treaty.[39]

In the ICSID annulment proceeding in *Vivendi v. Argentina*, the annulment tribunal considered a dispute resolution clause that began as follows:

> "Any disputes relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party."[40]

The annulment tribunal concluded that this clause should be read as consent by Argentina to ICSID jurisdiction for any dispute related to an investment, including contract claims. The tribunal rejected an argument by Argentina that the clause should be read only as a preamble to the dispute resolution clause and was not intended to expand the substantive reach of treaty-based arbitration. The *Vivendi* annulment tribunal concluded that it was not the relationship between a claim and substantive treaty obligations that created treaty-based jurisdiction.[41] The annulment tribunal decided that all that was needed was a relationship between the claim and the investment.

The tribunal in *SGS v. Philippines*, relying upon the *Vivendi* annulment decision, reached a similar conclusion as to the effect of the dispute resolution clause of the relevant investment treaty.[42] The tribunal stated that the dispute resolution clause was "an entirely general provision, allowing for submission of all investment disputes by the investor against the host State."[43] The tribunal therefore concluded that the dispute resolution clause was consent by the State for contract claims to be submitted to ICSID arbitration.[44]

The *SGS v. Pakistan* tribunal reached the opposite conclusion after reviewing the similar introduction to the dispute resolution clause in the investment treaty between Switzerland and Pakistan.[45] The tribunal held that the dispute resolution clause should be read to "comprehend disputes constituted by claimed violations of [investment treaty] provisions establishing substantive standards of treatment by one Contracting Party of investors of the other Contracting Party." The *SGS v. Pakistan* tribunal thus concluded that the dispute resolution clause "does not relate to the legal basis of the claims, or the cause of action asserted in the claims."[46]

The expansive reading of dispute resolution clauses by the tribunals in *SGS v. Philippines* and *Vivendi* has not to date been adopted by other tribunals. It may be expected, however, that investors may urge the adoption of such a reading of similar clauses to attempt to achieve treaty-based arbitration, especially when applicable investment treaties do not have so-called "umbrella clauses." States, on the other hand, may be expected to argue that such language should be regarded as introductory rather than substantive and thus should not be understood to embody a broad consent to treaty-based arbitration of contract (and other) claims with municipal law bases. The interpretation of these clauses is another open question in treaty-based arbitration that presents potential options, and potential risks, for parties to State contracts.

Questions Still To Be Resolved

Given the relatively few cases that have dealt with contract-related claims brought pursuant to BITs, there are a number of questions implicated by this development that have not been definitively answered. The first is the application of municipal law by tribunals. If a tribunal finds jurisdiction over a State's contractual obligations pursuant to an umbrella clause, that tribunal will likely have to determine what the State's obligations are by examining municipal law that is typically selected by the parties in the contracts themselves. Although international arbitral tribunals of all kinds often must deal with municipal law, the inclusion of contract claims in treaty-based arbitration has the potential significantly to change what has up to now been the international law-driven complexion of such proceedings.[47]

Another issue regarding the internationalization of contract-related claims is the possibility of multiplication of proceedings, because of contemporaneous contract-based adjudication and treaty-based adjudication. These multiple proceedings may involve the same parties but could also involve the State and an entity, such as a locally incorporated project company, not a party to the contract itself. There is also the question of the assertion by the State, whether permissively or compulsorily, of counterclaims pursuant to contract — and even non-contract municipal law — in treaty-based arbitration.

There is also a potential convergence of international law bases of claims with municipal law contract claims. Recent BIT decisions have con-

strued broadly the fair and equitable standard. Unlike NAFTA arbitration in which the fair and equitable standard has been specifically tied to the customary international law minimum standard of treatment,[48] most tribunals interpreting the fair and equitable standard of BITs have not confined themselves to violations of accepted minimum standards.[49] Rather, tribunals have more commonly looked for an autonomous standard under which to interpret the fair and equitable obligation by examining the BIT itself,[50] with some commentators asking whether the BITs themselves are in this way altering customary international law.[51] As tribunals in notable recent cases have examined fair and equitable treatment claims in light of "reasonable investment-backed expectations",[52] a convergence of this basis of claim with contract law standards may further blur the line between an international and private law claims.[53]

Party autonomy is another issue implicated by the development of contract-related treaty claims. Although the issue of party autonomy raises many potential questions, one in particular is that States may be inclined to seek ways to limit BIT protections to contract via clauses in the contract itself. The first obvious question is whether a State's requirement that an investor opt-out of the protections of the BIT in order to enter into a contract would be given effect. Although this question remains to be resolved, tribunals may consider such provisions in certain factual contexts to be non-effective as against the investor.[54]

Even if, however, a State conditions the execution of a contract on the contract party's opting-out of BIT protections and a tribunal finds that opting-out to be effective as against that party, this may not insulate the State from treaty arbitration for contract-related claims due to a lack of privity. Contracts that become the subject of an international arbitration, for example, may be between the State and a special purpose entity created for the particular contract. Moreover, significant investors may be able to bring contract-related claims for obligations due to a project company. Simply put, there are many scenarios in which the investor asserting contract-related claim in treaty-based arbitration may not be the party to the contract. In those circumstances, the construction that an treaty tribunal might give an opt-out provision becomes even more uncertain.

Endnotes

1. The first ICSID case decided pursuant to a bilateral investment treaty was reportedly *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, which was registered on July 20, 1987. The ICSID arbitrations prior to this were brought pursuant to contractual agreements between the investor and the host state.

2. Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: the Second Wave*, 14 Mich. J. Int'l L. 621, 626 (1993).

3. Susan D. Franck, *The Legitimate Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1525-28, (2005).

4. *See* Vandevelde, *supra* note 1.

5. *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2.

6. *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7.

7. *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo*, ICSID Case No. ARB/93/1.

8. The first major ICSID case to address the issue of contractual claims brought pursuant to a BIT was *Lanco International, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6.

9. ICSID has seen a dramatic increase in use within the past decade. In the first 30 years of the existence of ICSID up through 1996, it registered only 35 arbitrations. Since 1996, ICSID has seen the number of cases increase to almost 200, including 25 cases registered in 2005 alone. *See* ICSID Annual Report 2005, available at http://www.worldbank.org/icsid.

10. *See*, *e.g.*, Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties (1995).

11. *Lanco v. Argentina*, Preliminary Decision on Jurisdiction, December 8, 1998, 40 *ILM* 457 (2001), ¶¶ 23-25.

12. *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Nov. 21, 2000) ("*Vivendi I*"), ¶ 81.

13. *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002) ("*Vivendi II*").

14. *Vivendi II*, ¶ 60.

15. *Vivendi II*, ¶ 75.

16. *Vivendi II*, ¶ 95.

17. *Vivendi II*, ¶ 101.

18. *Eureko B.V. v. Poland*, *Ad Hoc* Proceeding, Partial Award on Liability (Aug. 19, 2005), ¶ 112.

19. *Eureko*, ¶ 241.

20. Agreement Between the Government of Hong Kong and the Government of Japan for the Promotion and Protection of Investment, May 15, 1997, Art. 2(3).

21. The idea that an observance of obligations clause protects contractual expectations is not necessarily a new argument. In an article written in 1990 by the U.S. State Department's Office of Legal Advisor, this obligation was specifically discussed. In discussing a recently signed BIT between Poland and the U.S., the Advisor wrote that the parties were "obliged to observe their contractual obligations with regard to investments and commercial activities . . . ." Marian Nash Leigh, *U.S. Practice*, 84 A.J.I.L. 885, 898 (1990).

22. *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction (July 11, 1997), ¶ 26.

23. *Fedax*, ¶ 29.

24. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (August 6, 2003) ("*SGS v. Pakistan*").

25. *SGS v. Pakistan,* ¶ 53 (the observance of obligations clause stated that "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").

26. *SGS v. Pakistan,* ¶ 165.

27. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction (January 29, 2004) ("*SGS v. Philippines*") (The observance of obligations clause stated that "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party".)

28. *SGS v. Philippines*, ¶ 115.

29. Notwithstanding the tribunal's conclusion that that it had jurisdiction over the claims, it decided that the breach of contract claim was not admissible at that time because of an exclusive dispute resolution clause in the contract.

30. *Eureko*, ¶ 246.

31. *Eureko*, ¶ 260.

32. *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005), ¶ 53.

33. *Noble Ventures*, ¶ 55.

34. *Noble Ventures*, ¶ 55.

35. *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award (Aug. 6, 2004), ¶¶ 78-79.

36 *Joy Mining*, ¶ 79.

37. *Joy Mining*, ¶ 81.

38. *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (April 22, 2005), fn. 118 (citing Stephen M. Schwebel, "Justice in International Law" (Gro-

tius/CUP), Chapter 26). The BIT in question in the *Impregilo* case did not include an umbrella clause.

39. The two tribunals were the *SGS v. Philippines* tribunal and the *Vivendi* Annulment Committee. It is not surprising that the two tribunals shared reasoning as both of the distinguished tribunals included Professor James Crawford.

40. *Vivendi II*, ¶ 53.

41. *Vivendi II*, ¶ 55.

42. *SGS v. Philippines*, ¶ 34.

43. *SGS v. Philippines*, ¶ 131.

44. *SGS v. Philippines*, ¶ 135.

45. *SGS v. Pakistan,* ¶ 150.

46. *SGS v. Pakistan*, ¶ 161.

47. To date, the role of international law in treaty-based arbitration has been so great that one influential commentator has argued that this typical approach of tribunals fails to give effect to Article 42(1) of the ICSID Convention, which directs tribunals to "apply the law of the Contracting State party to the dispute . . . as may be applicable." *See* Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision*, 15 ICSID Rev. 362, 369 (2000).

48. *NAFTA Free Trade Commission*, Binding Interpretation, July 21, 2001.

49. Fair and Equitable Treatment Standard in International Investment Law, OECD (Sept. 2004), p. 10, available at http://www.oecd.org/dataoecd/22/53/33776498.pdf.

50. Dolzer and Stevens have stated that "the fact that parties to BITS have considered it necessary to stipulate this standard as an express obligation rather than rely on a reference to international law and thereby invoke a relatively vague concept such as the minimum standard is probably evidence of a self-contained standard." Dolzer & Stevens, *supra* note 10. *See also Lauder v. Czech Republic*, Final Award (September 3, 2001) (stating that in "the context of bilateral investment treaties, the "fair and equitable" standard is subjective and depends heavily on a factual context").

51. Judge Schwebel has discussed the effect BITs have had on customary international law. *See* Stephen Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, Transnational-Dispute Management, Vol. 2, issue #05 (November 2005).

52. *See*, *e.g.*, *Saluka Investments BV v. the Czech Republic*, Partial Award (March 17, 2006), ¶¶ 301-02.

53. This is a point recently made by Daniel M. Price in oral remarks at the 2006 annual meeting of the American Society of International Law, held in Washington D.C. from March 29 to April 1, 2006.

54. *See, e.g.***,** *Aguas del Tunari, S.A. v. Republic of Bolivia***,** ICSID Case No. ARB/02/3, Decision on Jurisdiction (Oct. 21, 2005), ¶¶ 115-123. Although the tribunal did not determine whether a waiver of BIT protection could be effective against an investor, the tribunal found that the language was not specific enough to effect a waiver in any event. ■

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