SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes

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SUMMARY

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I. INTRODUCTION

Few areas of international law have undergone more change in the last half-century than the relationship between investors and the foreign countries in which they invest. Bilateral investment treaties (BITs), which govern the relationship between investors of one state and the government of another, have been increasingly prevalent since the 1960s.[1] In addition to providing a number of substantive protections to international investors, many BITs provide for investor-state arbitration before the International Center for the Settlement of Investment Disputes (ICSID).[2] Established by the World Bank in 1966, ICSID provides an arbitration and conciliation forum to all states who are signatories to the ICSID Convention.[3] Dispute resolution clauses in BITs overwhelmingly provide for ICSID arbitration, either exclusively or as an available alternative.[4] Consequently, the increase of BITs has seen a corresponding surge in ICSID arbitrations.[5] The stakes in this type of arbitration are substantial, with most awards constituting hundreds of millions of dollars.[6]

ICSID is a forum that resolves foreign investment disputes, defined as disputes "between an investor from one country and a government that is not its own that relat[e] to an investment in the host country."[7] It is important to note that today ICSID arbitration generally arises in one of two ways.

In the first situation, an investor who has contracted with another private party in the host country claims that the host country has breached substantive provisions of the BIT. For example, the investor may claim that the host country expropriated an investment without compensation or did not afford the investor fair and equitable treatment. Thus, in addition to any private cause of action against the private party, an investor has a claim

1. RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES xii (1995).

2. *See* U.N. CONF. ON TRADE AND DEV. ("UNCTAD"), BILATERAL INVESTMENT TREATIES, 1959-1999, at 20, U.N. Doc. UNCTAD/ITE/IIA/2 (2000); UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990s, at 94–95, U.N. Doc. UNCTAD/ITE/IIT/7 (1998). *See generally* UNCTAD, New York, Geneva, 2003, *Course on Dispute Settlement in International Trade, Investment and Intellectual Property: International Centre for Settlement of Investment Disputes: 2.1 Overview*, U.N. Doc. UNCTAD/EDM/Misc.232 (prepared by Christoph Schreuer) [hereinafter *Course on Dispute Settlement*].

3. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270 (entered into force Oct. 14, 1996) [hereinafter ICSID Convention]; *Course on Dispute Settlement*, *supra* note 2, at 13, 15. ICSID also serves as a potential arbitration forum for non-signatory states. *See* ICSID Additional Facility Rules, http://www.worldbank.org/icsid/facility/AFR_English-final.pdf (last visited Apr. 19, 2008).

4. *See* LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 4 (2004) ("[M]any, if not most BITs, include the option of ICSID dispute resolution."); Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INVESTMENT & TRADE 231, 231 (2004) ("Most [BITs] refer to ICSID."). *See also* The Treaty Between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investments, art. 7(3) Feb. 26, 1986, S. TREATY DOC. NO. 99-22, [hereinafter U.S.-Cameroon BIT] (consenting to submit investment disputes exclusively to ICSID); The Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. VII (4), Nov. 14, 1991, S. TREATY DOC. No. 103-2 (consenting in advance to any one of the available forms of arbitration provided in the BIT, including but not limited to ICSID arbitration).

5. Judith Gill et al., *Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases*, 21 J. INT'L. ARB., 397, 397 n.4 (2004) ("Of the 63 cases pending before the Centre during the year [2003], 47 were submitted under the dispute-settlement provisions of bilateral investment treaties").

6. *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521 n.1 (2005) (detailing claims seeking millions of dollars against sovereign states for breaches of international investment agreements).

7. R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 9 (2005).

based on international law.[8] In effect, the investor is initiating arbitration proceedings to which the host country has already consented, either in the BIT or in the host country's national law.[9]

In the second situation, a dispute arises after the investor signs a contract with the host country itself or with an agency of the host country. This type of foreign investment dispute is the article's focus. Just as in the case involving a private contract, the investor is able to bring BIT claims against the host government under the BIT's substantive provisions. In addition, the investor may sue in contract against the host country. Therefore, two types of claims against the host country potentially exist: treaty-based claims and contract-based claims. The host country's status as a party to both the BIT and the contract poses a problem for ICSID tribunals determining whether they have jurisdiction.

ICSID tribunals derive their jurisdiction solely from the consent given by countries in the BIT.[10] While the BIT provides for arbitration in a neutral forum such as ICSID, the investor-state contract usually contains a forum-selection clause specifying the courts or tribunals of the host country.[11] It is now widely accepted that ICSID tribunals have jurisdiction over BIT claims notwithstanding a forum-selection clause in the contract.[12] But in recent years ICSID tribunals have reached opposite conclusions regarding whether a tribunal has jurisdiction to decide an investor's contract-based claims.

The tribunals in *SGS v. Pakistan* and *SGS v. Philippines* were presented with the same issue: whether an ICSID tribunal has jurisdiction over an investor's contract claims despite an exclusive forum-selection clause in the contract.[13] In each case, the investor pointed to a provision of the BIT referred to as an "umbrella clause" and argued that the contract claim was transformed by the clause into a BIT claim over which ICSID had jurisdiction. Of the two tribunals, only the tribunal in *SGS v. Philippines* decided that it had jurisdiction and found itself in a position to confront a second issue: after accepting jurisdiction over a

8. *Id.* at 837 ("Customary international law has long provided for the protection of aliens, including the protection of their investments in the territory of other states . . . BITs may play some role in the formation of customary international law. Hence, there may be certain overlaps . . . .").

9. *Id.* at 317 ("ICSID's jurisdiction may now be secured by a unilateral statement on behalf of a contracting state party to the Washington Convention and may, also, be incorporated in BITs as well as NAFTA."); International Centre for Settlement of Investment Disputes (ICSID) Official website, http://www.worldbank.org/icsid/about/about.htm (last visited Oct. 16, 2007) [hereinafter ICSID Official website] ("Advance consents by governments to submit investment disputes to ICSID arbitration [are] found in about twenty investment laws and in over 900 bilateral investment treaties."). *See* Lanco Int'l, Inc. v. Argentine Republic, Preliminary Decision on Jurisdiction, ICSID Case No. ARB/97/6, para. 32 (1998) ("The States that are signatories to the [BIT] make a generic offer . . . to submit to international arbitration as selected by the investor . . . .").

10. ICSID Convention, *supra* note 3, art. 25(1). Again, consent may also be given unilaterally, that is, outside of a treaty as part of national law. *See* ICSID Official website, *supra* note 9. *See also* DOLZER & STEVENS, *supra* note 1, at 131 ("The consent of the two parties, both the governmental party and the investor, has been called the 'cornerstone' of ICSID's jurisdiction.").

11. Of course, the investor would rather avoid the prospect of a partisan forum, but the highly competitive nature of foreign investment strengthens the host country's bargaining position, and the result is almost always a host-friendly forum-selection clause. *See, e.g.*, SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/01/13, para. 157 (2002) (providing for dispute resolution in a forum other than a Pakistani arbitration tribunal would have been a "deal-breaker" for host country Pakistan.).

12. *Lanco*, ICSID Case No. ARB/97/6 para. 32; Vivendi v. Argentina, Decision on Annulment, ICSID Case No. ARB/97/3, para. 14 (2002).

13. SGS v. Pakistan, ICSID Case No. ARB/01/13 para. 157; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, paras. 16–17 (2004).

contract claim, must an ICSID tribunal decide the merits of the dispute?[14] The tribunal held that it had jurisdiction, but it did not decide the merits, choosing instead to give effect to the contract's forum-selection clause and stay the proceedings.

Current commentary criticizes the inconsistency of the *SGS* cases, sometimes using the disparate results as a platform to advocate greater consistency among ICSID tribunals or among international arbitration tribunals in general.[15] Others go a step further, saying that *Philippines* was right to accept jurisdiction but wrong for stopping short of deciding the merits of the underlying claim.[16] Needed at present is a comparison of the *SGS* decisions that examines whether either outcome is consistent with other ICSID decisions and with international legal policies. In addition, *SGS v. Philippines* seems to upset the prevailing assumption that if jurisdiction is accepted, an ICSID tribunal must decide the merits of the case in order to safeguard investors' expectations and provide certainty.

This article argues that of the two *SGS* cases, *Philippines* finds the better approach by accepting jurisdiction over contract claims. Furthermore, the tribunal's decision to give effect to the contract's forum-selection clause is in accord with both previous ICSID decisions and the policies underlying private international investment law. Although there are circumstances in which a tribunal might find it appropriate to decide the contract-based claim, safeguarding investment expectations is an inadequate justification for deciding contract claims in each and every case.

Part One of the paper provides a brief history of private international investment law, focusing on bilateral investment treaties and ICSID arbitration. Part Two lays essential groundwork for the *SGS* cases by discussing two decisions, *Lanco v. Argentina* and *Vivendi v. Argentina*. Both cases define the scope of ICSID's jurisdiction over BIT claims, and *Vivendi* provides a test for distinguishing treaty-based and contract-based claims that is employed by both *SGS* tribunals. Part Three explores the *SGS* cases in two segments: first, the tribunals' different approaches to the question of jurisdiction over contract claims, and second, the *SGS v. Philippines* decision to accept jurisdiction but leave resolution of the merits to the forum designated by the contract. Part Four examines the result in *Philippines* to determine its congruity with international investment policies. Part Five concludes that the *Philippines* result gives ICSID tribunals the latitude to which they are entitled.

II. A BRIEF HISTORY OF PRIVATE INTERNATIONAL INVESTMENT

A. Bilateral Investment Treaties (BITs)

The lure of undeveloped and developing markets in foreign countries has long held attraction for intrepid investors. Along with the potential for reward, however, came significant risk. Expropriation by a host state without adequate compensation could mean a

14. *See* Ignacio Suarez Anzorena, et al., *International Legal Development in Review: 2005 Disputes*, 40 INT'L LAW. 251, 255 (2005) (framing the issues as follows: "[C]an an umbrella clause transform a contract breach into a treaty breach; and if it can, must the breach be of a particular character or magnitude to engage the host state's responsibility?").

15. *See* Franck, *supra* note 6, at 1568-74; David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39, 49 (2006); Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AMER. J. INT'L L. 835 (2005).

16. *See, e.g.*, Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135 (2006).

complete loss for the investor despite carefully laid plans. In the past, the investor would petition his own country to flex its military might, bullying the less developed country into capitulating and refunding the investor's money.[17] Such unwieldy "gunboat diplomacy" made few investors' prospects secure, for they had no assurance that their government would find their particular grievance a worthy cause to support and there was no guarantee of full recovery. For the developing capital-importing country, resentment against foreign investment and the conflicts it engendered became widespread. The Calvo Doctrine, which claims that foreign investors are not entitled to equal or better treatment than the host country's own citizens, requires foreign investors to seek redress in the country's courts and nowhere else.[18] Although such hostility towards foreign investors still finds a voice today,[19] in general, host countries' need for capital and investors' desire for profit have compelled agreement and compromise.

The mutually beneficial effects of foreign investment became increasingly apparent following the Second World War, as market forces encouraged increased flow of capital among investors and developing countries.[20] As a result of the socialization of Eastern Europe, increased nationalization of certain industries worldwide, and newly freed colonial territories, opportunities for investment were matched by an increasing probability of investment disputes.[21] By this time, although gunboat diplomacy had become a relic of the past, investors still had little protection save for "the cumbersome and politically costly procedure of diplomatic protection."[22]

Even investors whose countries had treaties in place to govern economic relations with other sovereigns found the existing structure inadequate for the post-WWII frontier. For example, the United States had come to rely on Friendship, Commerce, and Navigation treaties (FCNs) to govern a wide range of economic issues with foreign countries.[23] During the 1950s, other nations adopted FCNs also.[24] But, since they were generally signed between two developed governments, FCNs were ill-equipped to balance competing interests between developed and developing countries. Specifically, developing countries were unwilling to grant foreign investors the rights to which FCNs entitled them, such as unrestricted entry and unqualified equal treatment.[25] When conflicts arose, FCNs provided no ready mechanism for resolution.[26] It became increasingly apparent that a new type of treaty to govern investor-state relations was needed.

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17. *See, e.g.*, HOLGER H. HERWIG, GERMANY'S VISION OF EMPIRE IN VENEZUELA: 1871–1914 45–62 (1986) (detailing the events leading up to one such confrontation between Germany and Great Britain and the host country of investment, Venezuela).

18. BISHOP ET AL., *supra* note 7, at 4.

19. DOLZER & STEVENS, *supra* note 1, at 8 (citing the Andean Common Market (ANCOM) as evidence that "[m]ost Latin American countries have supported the Calvo doctrine well into the twentieth century.").

20. Jewswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 68 (2005). *See also* Wong, *supra* note 16, at 139 ("As the global economy began to normalize following World War II, foreign capital flowed more freely and the significance of foreign investment grew.").

21. BISHOP ET AL., *supra* note 7, at 4 (The ever-increasing recognition of property rights in human rights declarations and state constitutions during this period made the clash between investors and governments all the more sharply defined).

22. *Id.*

23. DOLZER & STEVENS, *supra* note 1, at 3–4.

24. BISHOP ET AL., *supra* note 7, at 4.

25. DOLZER & STEVENS, *supra* note 1, at 10–11.

26. *See also id*. at 11 n.35 (noting the inadequate dispute resolution procedures provided by FCNs); Franck, *supra* note 6,at 1526 ("[FCNs] did not have a forum for resolving disputes.").

During the same period, multilateral solutions were attempted with little success.[27] The Havana Charter of 1948 had the aim of establishing an international trade organization, but it failed because of the disparate interests among developed and developing nations.[28] The Economic Agreement of Bogotá of 1948 was likewise not enacted.[29] Therefore, even in the 1950s, investors' only support was "an ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and contested general principals of law."[30] Before the BIT became the prevalent instrument it is today, further attempts at multilateral treaties, though ineffective, helped frame the contours of the BITs that would follow.

In particular, two proposals in the 1960s were significant for suggesting approaches to balance the host country's sovereignty and the investor's need for protection. First, in 1962 the United Nations General Assembly adopted a resolution that affirmed an investor's entitlement to compensation in the event of expropriation, and required good faith observance of foreign investment agreements.[31] Another U.N. resolution affirmed a host country's permanent sovereignty over natural resources.[32] That these resolutions were not given formal effect is a reflection of different interpretations regarding what constituted internationally recognized principles.[33]

Second, the Organization for Economic Cooperation and Development (OECD) produced the Draft Convention on the Protection of Foreign Property in 1967.[34] The Draft was recommended to OECD member states as a model for foreign investment treaties. Although it too failed to gain official status, "it nevertheless played an important role in the development and formulation of subsequent treaties negotiated by OECD member states."[35] The first modern bilateral investment treaty had been signed between Germany and Pakistan in 1959.[36] As more European countries began to negotiate treaties with developing countries, the consensus that had been built around the OECD Draft helped ensure that, when member countries wrote treaties of their own, they would be working from a common foundation.[37]

The success of European nations with BITs encouraged other nations to draft their own. Sovereigns quickly found that similar treaties could enhance "the type of asset protection that facilitates wealth-creating cross-border capital flows, bringing net gains for both host state and foreign investors."[38] Like other international treaties, most BITs contain dispute settlement provisions for inter-governmental disputes arising out of the interpretation or application of the BIT.[39] The focus of the following discussion, however, will be those BIT provisions providing for resolution between one signatory state and

27. Salacuse & Sullivan, *supra* note 20, at 72 (discussing various multilateral efforts, including the 1957 International Convention for the Mutual Protection of Private Property Rights in Foreign Countries and the 1959 Abs-Shawcross Draft Convention).

28. BISHOP ET AL., *supra* note 7, at 4. *See also* Wong, *supra* note 16, at 140 ("Wide-ranging interests of multiple countries . . . were ultimately too striated to reconcile.").

29. BISHOP ET AL., *supra* note 7, at 4.

30. Salacuse & Sullivan, *supra* note 20, at 66.

31. BISHOP ET AL., *supra* note 7, at 5; G.A. Res. 1803 (XVII), at 15–16, U.N. Doc. A/5217 (Dec. 14, 1962).

32. G.A. Res. 2158 (XXI), at 29, U.N. Doc. A/6518 (Nov. 25, 1966).

33. DOLZER & STEVENS, *supra* note 1, at 2.

34. *Id*. at 1–2.

35. *Id*. at 2.

36. *Id.* at 1.

37. *Id*. at 2.

38. Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 366 (2003).

39. DOLZER & STEVENS, *supra* note 1, at 119.

citizens of the other. Such provisions are unusual insofar as they provide private parties the right to bring a claim under an international treaty.[40]

By 1970, developing and developed countries had concluded a total of eighty-three BITs.[41] Eighty-six BITs were signed in the 1970s, and 211 were concluded in the 1980s.[42] Beginning in the 1990s, the number of BITs increased exponentially, as emerging economies in Eastern and Central Europe, Asia, and South America opened their markets to attract foreign capital.[43] There were slightly fewer than 400 BITs worldwide by the end of 1990,[44] 1857 at the end of the 1990s,[45] and 2400 in place at the end of 2004.[46] The BIT has become an integral part of the legal framework for developing countries, who view them as a highly necessary means of attracting foreign investment.[47] It has been said that BITs "are now a touchstone of international relations."[48]

B. International Centre for the Settlement of Investment Disputes (ICSID)

1. A Forum for the Resolution of BIT Claims

For the investor-state relationship, ICSID provided a perfectly suited forum for dispute resolution. ICSID was created by the World Bank in 1965 and made effective a year later. ICSID provides arbitration and conciliation services for disputes between states and investors from other states, when both states are parties to the Convention for the International Centre for the Settlement of Investment Disputes (known as either the ICSID Convention or the Washington Convention).[49] Until the mid-1980s, ICSID usually derived its jurisdiction from the consent given by both an investor and a state in a foreign investment contract.[50] Therefore, ICSID is not a product of BITs, at least not in the sense that only BIT arbitration provisions can give rise to ICSID jurisdiction. Nevertheless, as BITs gained prevalence, they have, together with multilateral treaties, become the primary source of ICSID's jurisdiction.[51]

Although ICSID's caseload was slow to develop, comprising just over thirty arbitrations in its first thirty years,[52] the relevance of the institution to investor-state

40. *Id*.

41. UNCTAD, BILATERAL INVESTMENT TREATIES, 1959-1991 at 3, U.N. Sales No. E.92.II.A.16 (1992).

42. *Id*. at 4.

43. *Id.* at 3–4.

44. *Id.* at 3.

45. *Course on Dispute Settlement*, *supra* note 2.

46. UNCTAD, WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND INTERNATIONALIZATION OF R&D at 28, U.N. Doc. UNCTAD/WIR/2005, U.N. Sales No. E.05.II.D.10 (2005).

47. UNCTAD, BILATERAL INVESTMENT TREATIES, 1959-1999, *supra* note 2, at 1 ("[BITs] constitute to date the most important instrument for the international protection of foreign investment."). *See also* DOLZER & STEVENS, *supra* note 1, at xi.

48. Franck, *supra* note 6, at 1527.

49. *Course on Dispute Settlement*, *supra* note 2, at 1.

50. Gill et al., *supra* note 5, at 397 & n.5.

51. Of the twenty-six arbitration proceedings registered with ICSID in 2006, twenty-one were based on bilateral or multilateral treaties. *See* ICSID, *2006 Annual Report*, at 5 (2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2006_Eng (last visited Mar. 28, 2008).

52. *See* ICSID Official Website, List of Concluded Cases, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListConcluded (last visited Mar. 28, 2008).

arbitration is now beyond question. Since 2000, there have been 65 ICSID tribunals.[53] In 2006, ICSID administered a record 118 cases, bringing the total cases registered with ICSID to 210.[54] However, the number of arbitrations does not tell the whole story, since this is a forum reserved for highly controversial disputes involving large sums—disputes that are far from commonplace.[55] Other forums are simply not as well suited to such disputes, leading one practitioner to summarize as follows: "[M]ost specialists would agree that ICSID arbitration is an intrinsically superior mechanism in certain contexts. An ICSID award, rendered in accordance with one of the most universally accepted international treaties, may be expected to have an exceptionally high degree of authority."[56] Therefore, the importance of ICSID is apparent not so much in the sheer volume of arbitrations concluded by the institution as in the high number of BITs pointing to ICSID arbitration.[57] Furthermore, the increasingly ubiquitous nature of BITs has required a coherent dispute resolution framework, which ICSID provides.

Beyond ICSID's unique position in the world of international investment, another reason why investors choose ICSID arbitration is the text of the BITs themselves. Dispute resolution clauses in BITs designating ICSID arbitration in large part explain the prevalence of ICSID arbitration in foreign investment disputes. The first BITs provided for resolution of disputes by non-ICSID ad hoc arbitration, and not until 1968 did a BIT contain a clause for ICSID arbitration.[58] Since then, the use of such clauses has increased, and it was only a matter of time before the number of ICSID arbitrations rose accordingly.[59] As already noted, BITs may provide for resolution of disputes before bodies other than ICSID, such as UNCITRAL or the ICC, but "[t]he overwhelming majority of BITs contain a reference to ICSID."[60] This reference is either exclusive or, more commonly, contained among other choices for arbitration.[61] The fact that ICSID arbitration is so widely used for BIT-based claims is therefore in large part textual—a direct result of the dispute resolution clause in the BIT designating an ICSID arbitral tribunal. The investors' choice of ICSID arbitration, despite the availability of alternative forums, indicates that, with regard to investor-state disputes, ICSID is the premier arbitration forum.

2. The Source of ICSID Jurisdiction

The dispute resolution clause in a BIT does more than designate ICSID as the forum for arbitration; it also serves as evidence of the parties' consent to arbitrate BIT disputes. Article 25(1) of the ICSID Convention establishes that ICSID jurisdiction extends to:

> any legal dispute arising directly out of an investment, between a Contracting State or any constituent subdivision or agency of the Contracting State designated

53. *See id.*

54. ICSID, *2006 Annual Report*, *supra* note 51, at 5.

55. Jan Paulsson, *Dispute Resolution*, *in* ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT, AND THE LAW: ISSUES OF PRIVATE SECTOR INVOLVEMENT, FOREIGN INVESTMENT AND THE RULE OF LAW IN A NEW ERA 209, 219 (Robert Pritchard ed., 1996).

56. *Id*.

57. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 251 (Cambridge Univ. Press ed., 2nd ed. 2004) ("Most dispute settlement provisions in investment treaties refer to ICSID arbitration.").

58. DOLZER & STEVENS, *supra* note 1, at 130.

59. *See* Gill et al., *supra* note 5, at 397 n.5.

60. *Id*. at 129.

61. *Id*.

> to the Centre by that State, and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[62]

Unless two parties "consent in writing" to ICSID arbitration, a tribunal will not have jurisdiction over a dispute between them.[63] Mere reference to ICSID arbitration by a state in a BIT does not necessarily indicate consent. For example, some dispute resolution provisions provide for arbitration only upon subsequent agreement by the parties.[64] Other BIT provisions also stop short of giving consent, providing that a contracting state shall give "sympathetic consideration to a request" for arbitration or, more forcefully, "shall assent to any demand [by a national of the other country]."[65] The purpose of drawing attention to such provisions, in which parties give something less than full consent, is not to overemphasize their importance. Indeed, in most BITs the countries give what appears to be unambiguous consent.[66] Rather, the fact that these "consents to consent" exist should bring unambiguous consent in BITs into sharp relief. For example, the UK-Sri Lanka BITs provision beginning, "[e]ach Contracting Party hereby consents . . ." evidences the parties' explicit consent.[67] The relevant provision in the United States-Cameroon BIT reads as follows: "Each Party hereby consents to the submission of an investment dispute to the International Centre for the Settlement of Investment Disputes ("ICSID") for settlement by conciliation or binding arbitration."[68] With such clear language, parties make clear to the whole world how they intend to settle disputes. No wonder consent has been called the "cornerstone" of ICSID's jurisdiction.[69]

But the parties' consent to the BIT solves only half of the consent equation. After all, BITs have as their purpose the delineation of rights and responsibilities between states and private investors. Therefore, before a tribunal can accept jurisdiction, it must be satisfied that the investor submitting a claim to ICSID has consented to the same forum as provided for in the BIT. The widely held view is that an investor, by submitting a claim to ICSID, has thereby consented to its jurisdiction.[70] Certainly, this result is driven in part by practicality, since every potential investor cannot be a signatory to the BIT under which a claim is later brought. But more than that, it is consistent with the original intention of the ICSID Convention's drafters, who viewed BIT consent provisions as constituting an open offer by a state that could subsequently be accepted by the other state's investors.[71] The contracting state's consent has been referred to as a "generic offer" that is accepted upon

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62. ICSID Convention, *supra* note 3, art. 25(1).

63. *See* SGS v. Philippines, ICSID Case No. ARB/02/6 paras. 26 ("The Tribunal's jurisdiction, if it exists, must arise by virtue of the ICSID Convention associated with the BIT."), 51 ("The Philippines stressed that both parties' consent is the cornerstone of ICSID jurisdiction and that such consent was not given by the Philippines . . . .").

64. DOLZER & STEVENS, *supra* note 1, at 132 ("[F]or example, the 1979 treaty between Sweden and Malaysia provides that: 'In the event of a dispute . . . it *shall upon the agreement by both parties to the dispute be submitted* for arbitration to [ICSID].") (emphasis added).

65. *Id*. at 133 (quoting the Netherlands-Kenya BIT and the Netherlands-Pakistan BIT, respectively).

66. *Id*. at 134.

67. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Sri Lanka for the Promotion and Protection of Investment, UK-Sri Lanka, Feb. 13, 1980, 1227 U.N.T.S. 391, art. 8(1).

68. United States-Cameroon BIT, *supra* note 4, art. 7(3).

69. *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, para. 23, ICSID Doc. 2 (March 18, 1965) [hereinafter Directors' Report].

70. *See* Bernardo M. Cremades, *Investor Protection and Legal Security in International Arbitration*, 60 DISP. RESOL. J. 82, 84 (2005).

71. Directors' Report, *supra* note 69, para. 24.

making a request for arbitration.[72] An underlying theme of this article is that such generic offers by contracting states cede a large degree of authority to the arbitrator, including the question of what types of claims an ICSID tribunal may decide.

3. The Effect of Umbrella Clauses

ICSID's jurisdiction derives solely from the parties' consent, and today this consent is frequently found in BITs. Consequently, an investor, who for reasons of impartiality and convenience wants ICSID to arbitrate all of the investor's claims, would naturally want to describe the claims as those which the contracting state agreed to arbitrate. Suppose, for example, that an investor enters into a concession contract with a foreign government. Problems ensue, and the investor has both a BIT claim for unfair and inequitable treatment and a simple breach of contract claim. Assuming the BIT confers consent, an ICSID tribunal has jurisdiction over the BIT claim, because a country's consent extends to BIT claims.[73] But does ICSID have jurisdiction over the contract claim? The contract probably has a forum-selection clause designating the host country's courts or tribunals as the forum for resolution of contract disputes. Not wanting to be subject to the contentious courts of a foreign country, the investor has every incentive to have these contract claims arbitrated before ICSID.

While Article 25(1) gives ICSID jurisdiction over such freestanding contract claims,[74] there remains the controversial issue of whether the host country has consented to arbitrate these claims before ICSID. The investor often has difficulty arguing that the host country consented to arbitrate purely contractual disputes before ICSID, especially since the contract contains a forum-selection clause to the contrary. In addition, the host country will argue that its consent to ICSID arbitration in the BIT was limited to international claims arising out of the BIT.[75] In other words, it argues that the requisite consent to arbitrate contract claims is missing.

A new argument, based on the so-called umbrella clause found in some BITs, has recently been added to the investor's arsenal. Only within the last decade have these clauses found their way into enough BITs that ICSID tribunals have begun to grapple with their implications.[76] A typical umbrella clause provides that each contracting state agrees to observe all of its commitments and obligations. For example, the umbrella clause in the Switzerland-Philippine 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."[77]

Investors argue that the host country's consent extends to all BIT provisions, including the umbrella clause. The investor-state contract is one of the obligations or commitments the host country is obligated to observe under the umbrella clause. Since ICSID's jurisdiction over BIT claims is not a matter of dispute, the investor argues that ICSID has jurisdiction over the contract claim by reason of the umbrella clause. Therefore, an ICSID tribunal faces the question of whether the investor has, in addition to the first substantive BIT claim, a second claim that is elevated to the level of a BIT claim by the umbrella clause.

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72. *See Lanco*, ICSID Case No. ARB/97/6, para. 32.

73. *See, e.g*,. SGS v. Philippines, ICSID Case No. ARB/02/6, para. 77 ("[T]he Parties' intention was to emphasize their commitment to comply with the substantive treatment obligations assumed under the BIT.").

74. *See* ICSID Convention, *supra* note 3, art. 25(1) and accompanying text.

75. *See, e.g.*, SGS v. Philippines, ICSID Case No. ARB/02/6, paras. 51(b), 77.

76. *See* Wong, *supra* note 16, at 142–50 (discussing the origins and development of the umbrella clause).

77. *Id*. para. 34.

The importance of the umbrella clause is that it potentially tilts the debate in favor of the investor by forcing the host country to argue that an investor-state contract is not one of the "obligations or commitments" the umbrella clause encompasses. This was precisely the issue faced in both *SGS v. Philippines* and *SGS v. Pakistan*. Both tribunals had to decide whether the consent given in the BIT should be extended to include contract-based claims.

Before examining the *SGS* cases, it is necessary to review two earlier ICSID decisions, *Lanco v. Argentina* and *Vivendi v. Argentina*. Neither case dealt with the effect of umbrella clauses on contract claims, but their impact upon the *SGS* tribunals cannot be underemphasized. Both *Lanco* and *Vivendi* examined the issue of whether a contract's forum-selection clause was sufficient to dispel ICSID's jurisdiction over an investor's BIT claim. Harmoniously, each tribunal decided that the host country's consent to ICSID arbitration in the BIT was unaffected by the forum-selection clause. *Vivendi* went on to wrestle with the distinction between contract-based claims and treaty-based claims, emerging with a test that both *SGS* tribunals cited, though for different reasons. As will be seen, those different reasons go a long way towards explaining the different *SGS* results.

III. BIT CLAIMS AND CONTRACT FORUM-SELECTION CLAUSES

A. Lanco v. Argentina

In *Lanco v. Argentina*, the Argentine Ministry of Economy and Public Works entered into a concession agreement with a consortium that included Lanco International. Alleging that Argentina breached its obligations under the Argentina-United States BIT, Lanco submitted a request for arbitration in 1997, seeking compensation.[78] A clause in the Agreement provided for the jurisdiction of the Argentine Republic's courts for settlement of disputes, and Argentina argued that the clause should preclude ICSID jurisdiction.[79] In other words, while Argentina had consented to arbitration in the BIT with the United States, this consent was surpassed by its contractual agreement with Lanco. In the most important part of the decision, the tribunal held Argentina to the treaty.[80] It found that Argentina's settlement clause in the concession agreement did not supplant consent to ICSID jurisdiction in Article VII(4) of the BIT.[81] As signatories to the BIT, the United States and Argentina made "a generic offer in Article VII(4) to submit to international arbitration as selected by the investor pursuant to Article VII(3)."[82] The investor consented by submitting the dispute for ICSID arbitration.[83] Therefore, the consent of both parties required by Article 25(1) of the ICSID Convention was present.[84]

The tribunal assessed Argentina's argument that the concession agreement nullified this consent in light of Article 26 of the ICSID Convention:

78. *Lanco*, ICSID Case No. ARB/97/6, para. 2.

79. *Id*. para. 7.

80. *Id*. para. 40.

81. *Id*. para. 38. *See* United States-Argentina BIT Art. VII(4) ("Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3 . . . .").

82. *Lanco*, ICSID Case No. ARB/97/6, para. 32.

83. *Id*. para. 33.

84. *Id*. para. 40. *See* ICSID Convention, *supra* note 3, art. 25(1).

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.[85]

The second sentence of Article 26 indicates that a stipulation requiring the exhaustion of local remedies as a condition to consent, at the very most, dilutes the exclusivity of ICSID as a source of remedy. But it cannot replace the consent given by the contracting state.[86] All of this assumes that there is such a stipulation in the first place. Significantly, the court found no such stipulation in the BIT and was highly doubtful that one existed in either the Agreement or the national law of Argentina.[87] Not only did the Agreement's forum-selection clause fail to dislodge Argentina's consent to arbitration in the BIT, but the tribunal made clear that this would have been the result even if Argentina had qualified its consent in the BIT by requiring the investor to exhaust local remedies.[88]

B. Vivendi v. Argentina

The award in *Vivendi v. Argentina* involved a similar question about the relationship between a BIT claim and a forum-selection clause in a concession contract. Compagnie Générale des Eaux (CGE) (the predecessor in interest to Vivendi Universal) and an affiliate, Compañia de Aguas del Aconquija, S.A. (CAA), entered into a water and sewage contract with Tucumán, a province of Argentina.[89] Shortly after beginning performance of the concession contract, Argentina took steps that made it "impossible . . . to operate the concession in a commercially reasonable manner."[90] CGE filed for ICSID arbitration, alleging that Tucumán's actions and failures to act were attributable to the federal government of Argentina, resulting in a breach of the 1991 Argentine-French BIT.[91]

Argentina objected to the ICSID tribunal's jurisdiction, arguing that the concession contract's forum-selection clause, which pointed to the contentious administrative Tucumán courts, was exclusive. As such, the clause precluded an ICSID tribunal from deciding the dispute. Relying on *Lanco*, the tribunal held that it had jurisdiction over CGE's BIT claims. The forum selection-clause "did not and could not constitute a waiver" by CGE of its right to bring a BIT claim before an ICSID tribunal.[92] By signing the BIT, Argentina had consented to ICSID arbitration, and a concession contract's forum designation could do nothing to alter this consent. Significantly, the tribunal focused on the treaty-based nature of the claim: "Claimant's claims 'are not subject to the jurisdiction of the contentious

85. ICSID Convention, art. 26, quoted in *Lanco*, ICSID Case No. ARB/97/6, para. 35.

86. *Lanco*, ICSID Case No. ARB/97/6, para. 38.

87. *Id.* para. 32 (The Argentina-United States treaty was the first in which Argentina submitted to international arbitration without reservations).

88. *Id*. para. 38.

89. *Vivendi*, ICSID Case No. ARB/97/3, para. 11.

90. Stanimir A. Alexandrov, *The Vivendi Annulment Decision and the Lessons for Future ICSID Arbitrations*, *in* ANNULMENT OF ICSID AWARDS 97, 98–99 (Emmanuel Gaillard et. al eds., 2004).

91. *Vivendi*, ICSID Case No. ARB/97/3, para. 11. In addition to the attribution argument, CGE alleged that the Republic of Argentina breached the BIT in its own capacity. *Id*. para. 16. The tribunal found that Argentina acted appropriately and dismissed these claims, a result endorsed by the Annulment Committee. *Id*. paras. 90–91.

92. Vivendi v. Argentina, Award, ICSID No. ARB/97/3 (1997) para. 53 [hereinafter Vivendi Award].

administrative tribunals of Tucumán, if only because, *ex hypothesi*, these claims are not based on the Concession Contract but allege a cause of action under the BIT.'"[93]

The tribunal, however, stopped short of deciding the merits of the investor's BIT claim. It found that examining the merits of CGE's BIT claim required a determination of whether Tucumán had breached the contract, and the forum-selection clause prohibited such a "detailed interpretation."[94] An ICSID tribunal could hear the merits of the claim only after the claimant had first submitted the dispute to the courts of Tucumán—and then only if the local courts had "procedurally or substantively" denied CGE's rights.[95] Thus, while the contract's forum-selection clause did not prevent ICSID jurisdiction, the tribunal seized on it as a basis for refusing to decide the merits of the claim.

The claimants sought an annulment of the award by special committee. Their argument was that the tribunal, by refusing to resolve the merits of the dispute, manifestly exceeded its powers—one of three grounds for annulment provided for in Article 52 of the ICSID Convention.[96] The committee proceeded by examining the tribunal's findings on the issues of both jurisdiction and the merits.[97] It reaffirmed the tribunal's holding that a contract could not act as a barrier to ICSID jurisdiction over a BIT claim. Of primary importance was the committee's reaffirmation of the *Lanco* doctrine that a contract between a sovereign and an investor did not nullify the sovereign's consent to arbitrate before ICSID claims arising under the BIT.[98] But with jurisdiction comes responsibility. If the tribunal had jurisdiction over the dispute, it followed that anything less than a decision on the merits was an abrogation of the tribunal's responsibility rising to the level of a manifest excess of powers. "In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court."[99]

By declining to decide the merits, the tribunal had made it impossible for the claimants to later bring a BIT claim before ICSID.[100] The annulment committee emphasized the close relationship between finding jurisdiction and deciding the merits. Just as a forum-selection clause is insufficient to remove a BIT claim from ICSID jurisdiction, a contract claim does

93. *Vivendi*, ICSID Case No. ARB/97/3, para. 14(d).

94. Vivendi Award, para. 79.

95. Vivendi Award, para. 78.

96. *See* ICSID Convention, *supra* note 3, art. 52 (The claimants also argued that if the tribunal had decided the merits of the dispute, as opposed to dismissing the case, it had done so without stating reasons as provided in Article 52. This was rejected by the committee as grounds for annulment.).

97. The Committee reexamined the jurisdictional issue in response to Argentina's request for a conditional annulment of the jurisdictional aspect of the award. *Vivendi*, ICSID Case No. ARB/97/3, para. 67.

98. *Vivendi*, ICSID Case No. ARB/97/3, paras. 76–78.

99. *Id.* para. 102.

100. The committee found particularly relevant Article 8(2) the France-Argentina BIT, which contained a so-called "fork in the road" provision. Article 8(2) says that "[o]nce an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of those procedures is final." The tribunal was aware that requiring CGE to submit the breach of contract issue to the contentious administrative courts of Tucumán potentially closed the door on ICSID's jurisdiction. As such, the tribunal attempted to diminish the importance of such a drastic step by reading the "fork in the road" provision narrowly to apply only to pure BIT claims. Since the claimants would be bringing a contract claim to the local courts (as opposed to a BIT claim), the tribunal was confident that art. 8(2) did not foreclose the possibility of later bringing a BIT claim before ICSID. That is, a fork in the road was never reached, because the claimant's submission to the local courts was contractual in nature. The committee disagreed and imposed a broader reading of art. 8(2), with an important result: because 8(2) is not limited exclusively to claims alleging a breach of the BIT, requiring claimants to bring their non-BIT claims to local courts would have constituted an absolute waiver of their right to ICSID arbitration. Therefore, the tribunal's refusal to decide the merits had harsher consequences for the claimants than the tribunal was willing to admit. *Id*. para. 36.

not eclipse a BIT claim just because there is overlap between a BIT breach and a contract breach. As a result, the tribunal's finding that CGE's BIT claims were so "intertwined" with the contract claims as to require an analysis of the contract itself was no reason to refuse to decide the merits. It was not irrelevant that the contract may have been breached. But the BIT claims "set an independent standard. A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT."[101]

Deciding whether there has been a breach of the BIT is a question of international law, resolved by reference to the obligations each BIT country assumes. By contrast, in order to decide a contract question, reference to the local law of the country is required. The committee allowed that "compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g., by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it."[102] The law of Tucumán was relevant in determining whether Tucumán breached the contract. This in turn indicates whether Argentina breached a provision of the BIT. The overlap between the two issues should not absolve an ICSID tribunal of having to decide the merits of the BIT claim. As the committee made clear, whether ICSID jurisdiction exists depends on the essence of the claim:

> [W]here "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.[103]

A few points regarding this fundamental basis test will be particularly relevant to the discussion that follows. First, there was no objection in *Vivendi* to the investors' description of the claim as treaty-based. In fact, the committee's conclusion affirmed its status as a BIT claim by emphasizing its separateness from a factually related contract claim.[104] This leaves open the question of what a tribunal must do if it accepts jurisdiction over a claim that is not fundamentally treaty-based. If a tribunal accepts jurisdiction and decides the merits of a contract claim, this could be seen as violating the forum-selection clause of the contract with no apparent justification found in *Vivendi*.

The justification lacking in *Vivendi*, but present in the *SGS* cases and others, is an umbrella clause. An ICSID tribunal cannot accept jurisdiction over a contract claim based on *Vivendi*'s fundamental basis test, but an umbrella clause changes the analysis. Similarly, a tribunal that follows *Vivendi* and takes the opposite stance—giving effect to the forum-selection clause based solely on the contractual nature of the claim—may be ignoring an important variable. The presence of an umbrella clause raises difficult questions about its application, and while tribunals have reached divergent answers, one of its clear effects is to alter the stand-alone status of *Vivendi*. In short, the clause is a fulcrum with the potential to alter *Vivendi*'s "fundamental basis" categories.

Finally, the *Vivendi* annulment committee fashioned the fundamental basis test only after affirming the tribunal's holding regarding jurisdiction. Looking to *Lanco*, the tribunal had found that it had jurisdiction over the BIT claims because the parties so consented. The

101. *Id.* para. 95.
102. *Id.* para. 70.
103. *Id*. para. 101.
104. *Vivendi*, ICSID Case No. ARB/97/3, para. 96.

annulment committee agreed.[105] Therefore the jurisdictional question was separate from the merits of the case. The committee's basis for annulment was the tribunal's refusal to decide the merits of the BIT claim on the grounds of its close connection to the contract claim, and it was in this connection that the committee articulated its oft-cited fundamental basis test. Therefore any use of the fundamental basis test by a tribunal prior to accepting jurisdiction would be premature, or at the very least a misapplication of *Vivendi*. Yet as the *SGS v. Pakistan* tribunal's decision demonstrates, test is susceptible to use for purposes other than those intended by the *Vivendi* committee.

IV. THE *SGS* CASES: OF CONTRACT CLAIMS AND FORUM-SELECTION CLAUSES

A. Declining Jurisdiction over Contract Claims: The Approach in SGS v. Pakistan

1. Background

The dispute between SGS Société Générale de Surveillance S.A. and the Islamic Republic of Pakistan arose from a Pre-Shipment Inspection (PSI) Agreement the two parties signed in 1994.[106] Approximately two years later, Pakistan notified SGS that the contract would be terminated. The procedural history that followed was more involved and prolonged than the average pre-ICSID arbitration maneuvering. After communications between the parties failed to reach a resolution, SGS filed suit against Pakistan in Switzerland. Pakistan successfully argued that in the PSI Agreement the parties had chosen to arbitrate any disputes arising out of the contract before an arbitral tribunal in Pakistan.[107] On this ground, the Swiss Court of First Instance rejected SGS' claim, and SGS' subsequent appeals were unavailing.[108] Meanwhile, Pakistan had instituted arbitral proceedings in Pakistan, invoking the arbitration provided for in the PSI Agreement.[109] SGS objected to the PSI Agreement arbitration but filed counter-claims against Pakistan for alleged breaches of the Agreement.[110] Six months later, SGS notified Pakistan that it was seeking resolution of the dispute according to Article 9(2) of the Swiss-Pakistan BIT, which provided for ICSID arbitration.[111]

In its request for ICSID arbitration, SGS alleged several claims under the BIT, including failure to ensure "fair and equitable treatment" of SGS' investment and taking measures of expropriation without providing effective and adequate compensation. Furthermore, in what would become the decision's flashpoint issue, SGS asserted that Pakistan violated Article 11 of the BIT by failing to guarantee observance of its contractual commitments. Article 11 reads: "Either Contracting Party shall constantly guarantee the

105. *Id*. para. 77.

106. SGS v. Pakistan, ICSID Case No. ARB/01/13, para. 11.

107. *Id.* paras. 22–25.

108. *Id.* paras. 23–25. The higher Swiss courts upheld the result on the ground that Pakistan, because it enjoyed sovereign immunity, could not be sued in Swiss courts.

109. *Id.* para. 26.

110. *Id*. para. 27.

111. *Id*. para. 32.

observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."[112]

By this umbrella clause, SGS sought to bring its contractual claims within the ambit of the BIT, so that the ICSID tribunal would decide not just BIT claims like expropriation and inequitable treatment, but purely contractual claims as well. Pakistan objected that the ICSID tribunal could not investigate these Article 11 claims until the Pakistani arbitral tribunal made a determination as to whether there had been a contract breach in the first place.[113] Moreover, the parties had chosen as their method of dispute resolution arbitration in Pakistan, and accepting SGS' view would "eviscerate the parties' specific arbitration agreement in this case."[114] For its part, SGS insisted that Article 11 "elevated" otherwise purely contractual claims into the favored realm of BIT claims over which ICSID had jurisdiction.[115]

The tribunal ultimately sided with Pakistan and decided it had no jurisdiction over contractual claims.[116] But en route to this result, it decided conclusively that it had jurisdiction over SGS' BIT claims, purporting to follow *Lanco* and *Vivendi*. An examination of the tribunal's reasoning regarding its jurisdiction over BIT claims helps in understanding why the tribunal found it lacked jurisdiction over contract claims.

2. Analysis

As a preliminary matter, the *Pakistan* tribunal had to decide whether to allow a claimant to characterize claims as it sees fit, without the tribunal inquiring too closely into the "real" nature of the claim. Pakistan argued forcefully that SGS was characterizing as BIT claims what in substance were mere contract claims. For four years preceding the request for ICSID arbitration, SGS had never raised a BIT issue, content to frame its claims as contract-based. Mere re-labeling as a BIT claim before ICSID was insufficient to mask the claim's true contractual nature, Pakistan argued.[117] Pakistan drew upon *Vivendi*'s fundamental basis test, arguing that "[i]n 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."[118] SGS responded accordingly, citing *Vivendi* for the proposition that a BIT-labeled claim is per se a treaty-based claim.[119]

Unfortunately, the tribunal did not acknowledge this misuse of the *Vivendi* standard, which, as noted above, had as its purpose the determination of whether a tribunal must decide a claim's merits.[120] Passing for the time being on the question of the claims' fundamental basis, the tribunal simply endorsed SGS' pragmatic argument that the benefit of the doubt should go to the claimant asserting a BIT violation; not until the merits phase should the tribunal probe the veracity of the claim's BIT characterization.[121] But if the tribunal is untroubled by the prospect of separating BIT claims from contract claims after

112. Switzerland-Pakistan BIT, art. 11.

113. *See* SGS v. Pakistan, ICSID Case No. ARB/01/13, para. 48.

114. *Id.* para. 55.

115. *Id*. para. 54.

116. *Id*. para. 173.

117. *Id.* para. 62.

118. *Id.* para. 44.

119. SGS v. Pakistan, ICSID Case No. ARB/01/13, para. 83.

120. *See supra*, pp. 14–15.

121. SGS v. Pakistan, ICSID Case No. ARB/01/13, para. 145 ("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 . . . . ").

accepting jurisdiction, it makes little sense to deny itself jurisdiction based on the contractual nature of a claim under any circumstances. But as the rest of its decision demonstrates, the tribunal saw no incongruity between this generous standard and a narrow umbrella clause interpretation.

Next, the tribunal confronted the same question that faced the *Lanco* and *Vivendi* tribunals: did it have jurisdiction over the BIT claims? Again, Pakistan relied on *Vivendi*'s fundamental basis test to challenge the tribunal's jurisdiction.[122] As before, the tribunal did not attempt to clarify as non-jurisdictional the portions of the *Vivendi* opinion cited by Pakistan. This was the time to look to *Lanco* and *Vivendi* to see how those tribunals assessed the jurisdiction question. Instead, the tribunal tackled the issue as it was posed, asking whether overlap between contract and treaty claims was sufficient to nullify ICSID jurisdiction. BIT and contract claims each present distinct questions to be resolved by different laws, the tribunal decided, citing the *Vivendi* annulment committee's discussion of the separateness of a treaty breach and a contract breach.[123] The tribunal concluded that it had jurisdiction over those claims whose fundamental basis was in the BIT.[124]

On its way to this holding, the Tribunal examined Article 9 of the BIT, in which the parties consented to ICSID arbitration. This clause gave little direction as to the types of claims the parties consented to arbitrate, leaving the tribunal to declare that "if Article 9 relates to any dispute at all . . . it must comprehend disputes constituted by claimed violations of BIT provisions establishing substantive standards of treatment . . . ."[125] The tribunal acknowledged that the contract's forum-selection clause was insufficient to divest the tribunal of jurisdiction,[126] but this seems more like an afterthought than an endorsement of *Lanco* and *Vivendi*'s analysis.[127] The tribunal accepted jurisdiction over the BIT claims because they were fundamentally treaty claims and because there was no good reason to decline jurisdiction.

By accepting jurisdiction over BIT claims, the *Pakistan* tribunal reached the right result, but for the wrong reasons. The tribunal would have done better to examine *Vivendi*'s discussion of the jurisdictional issue, which relied heavily on *Lanco*. Instead, it lost sight of *Lanco*'s focus on consent between sovereigns as the basis of BIT arbitration agreements.

The tribunal went on to hold that it lacked jurisdiction over contract claims, which is understandable, if only because such a holding resides so comfortably alongside the application of the *Vivendi* test to the issue of BIT claims. If the entire universe of BIT claims is limited to those claims whose "fundamental basis" is in the BIT, then it is little surprise that a contract claim does not meet the *Pakistan* tribunal's standard because its fundamental basis will always be contractual. Of course, the *Pakistan* tribunal confronts the question of whether the umbrella clause transforms what is fundamentally a contract claim

122. *Id*. paras. 62–63.

123. *Id*. paras. 147–48.

124. *Id*. para. 155.

125. *Id*. para. 150.

126. SGS v. Pakistan, ICSID Case No. ARB/01/13, para. 154.

127. *Id*. para. 152 (noting that the parties did not give ICSID exclusive jurisdiction over BIT claims). *Cf*. *Lanco*, ICSID Case No. ARB/97/6, para. 36 ("[W]hen the parties give their consent to ICSID arbitration, they lose their right to seek to settle the dispute in any other forum . . . ."); *id*. para. 38 ([A dispute resolution clause in contract] does not replace any consent but instead dilutes the presumption as to the exclusivity of ICSID jurisdiction."). The tribunal's analysis casts doubt as to whether its BIT jurisdiction would be exclusive if the facts were slightly different. SGS v. Pakistan, ICSID Case No. ARB/01/13, para. 153 (reasoning that parties contracting prior to BIT's entry into force do not intend dispute resolution clause to relate to BIT claims); *id*. para. 154 (noting that no claims based on the BIT have been brought pursuant to contract's dispute resolution provision).

into the BIT claim. But against the backdrop of its BIT claim reasoning, one might speculate that the tribunal was approaching the problem in reverse, that is, beginning with the general principal that a contract claim can never become a BIT claim. The reasons given in support of its holding on the issue of contract claims do little to dispel such a conclusion.

The first reason given by the tribunal for reading Article 11 narrowly is that a broad interpretation would render the umbrella clause "susceptible to almost indefinite expansion."[128] The result would be to make an international obligation out of all "the municipal legislative or administrative or other unilateral measures of a Contracting Party." There are two problems with this argument. The first is based on the tribunal's role, which is limited to deciding a dispute between the parties based on the text of the BIT presented. If susceptibility to indefinite expansion is the primary reason for the tribunal's holding, it is inadequate. Such reasoning has its basis not in the application of Article 11 to the contract claims at issue, but in possible reprecussions for tribunals interpreting similarly worded BITs. Second, as the *SGS v. Philippines* tribunal later pointed out, the umbrella clause would not apply to any and all legal obligations, but only to those "assumed vis-à-vis the specific investment . . . ."[129] For example, a unilateral obligation promulgated by a contracting state as part of its national law would not be encompassed by an umbrella clause. Thus, to say that an umbrella clause would have limitless application is an untenable basis for denying a readily identifiable contract claim its coverage.

The tribunal advanced a second argument, focusing on the principle in international law that "a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law."[130] Cited approvingly in *Vivendi*, this principle loses force when an umbrella clause is involved. A clause like Article 11 of the Swiss BIT is exactly the kind of mechanism that would elevate a contract violation to the level of an international violation. At the very least, "[t]he question is essentially one of interpretation, and does not seem to be determined by any presumption."[131] It is incomplete to assert that a contract violation is not "by itself, a violation of international law" when at issue is a clause whose operation would render the contract violation a violation of international law.

Finally, the *Pakistan* tribunal voiced its concern that a broad interpretation of an umbrella clause would override forum-selection clauses in investor-state conflicts.[132] Of all the reasons given for declining jurisdiction, this deserves the most attention, because it points to a very real problem that arises once jurisdiction is accepted. But as the *Philippines* tribunal demonstrated, acceptance of a contract claim based on the umbrella clause does not require resolution of the contractual dispute. *Pakistan*, however, assumed that it did.

The tribunal cannot be faulted for its concern that a contract's forum-selection clause would bow to the sweeping language of the umbrella clause. After all, this is the tension at the heart of the *SGS* cases. But in part because of its analysis of the BIT issue, in which it erroneously applied the *Vivendi* test, the tribunal was ill-equipped to confront the issue of contract claims. Had it instead consulted the *Lanco* standard with regard to the BIT issue, the tribunal might have been more likely to grant the appropriate breadth to the Switzerland-Pakistan BIT's umbrella clause when deciding whether to afford contract claims BIT protection.

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128. *Id*. para. 166.
129. SGS v. Philippines, ICSID Case No. ARB/02/6, para. 121.
130. SGS v. Pakistan, ICSID Case No. ARB/01/13, para. 167.
131. SGS v. Philippines, ICSID Case No. ARB/02/6, para. 122.
132. SGS v. Pakistan, ICSID Case No. ARB/01/13, para. 168.

The position taken by *SGS v. Pakistan* has support among ICSID tribunals. *Joy Mining v. Egypt* found that an umbrella clause not prominently inserted into a BIT cannot operate to transform a contract claim into a treaty claim, unless there exists "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 . . . ."[133] Since all of the claimant's causes of action in that case were contractual in nature and did not relate to an investment, there were no treaty claims, and the tribunal found that it lacked jurisdiction.[134] Apparently this rendered the forum-selection clause in the contract decisive with respect to contract claims.[135] The tribunal cited *Vivendi*, emphasizing that the "essential basis" of the claim was contractual.[136] This result was further compelled, according to the tribunal, by the "missing link" between the contract and the treaty able to support ICSID jurisdiction over the contract claims.[137] It seems that the umbrella clause—absent in *Vivendi* but present in *Joy Mining*—was an insufficient link to support jurisdiction in the eyes of the tribunal. [138]

The tribunal in *CMS v. Argentina*, analyzing the Argentina-United States BIT, allowed that "not all contract breaches result in breaches of the Treaty," even when there is an umbrella clause present.[139] While "purely commercial aspects of a contract" do not receive treaty protection, the umbrella clause operates to elevate a contract dispute to a treaty claim when there is "significant interference by governments or public agencies with the rights of the investor."[140] The tribunal concluded that the state measures complained of by CMS were not commercial but instead "resulted in the violation of the standards of protection under the Treaty."[141] This result is consistent with *Pakistan* and *Joy Mining* in that the umbrella clause itself is insufficient to elevate a contract claim. Yet the *CMS* tribunal was willing to give meaning to the umbrella clause in the presence of "significant interference" by the host government. Here is a circumstance in which, contrary to *Pakistan*, an ICSID tribunal has employed the umbrella clause despite a contract's forum-selection clause.[142]

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133. Joy Mining Mach. Ltd. v. Egypt, Award on Jurisdiction, ICSID No. ARB/03/11, para. 81 (2004).

134. *Id.* para 63. The tribunal's lack of subject matter jurisdiction was based on its finding that there was no investment within the meaning of Article 25(1) of the ICSID Convention. This appears to make the umbrella clause discussion dicta. Alternatively, *Joy Mining* can be distinguished from the *SGS* cases on the basis that the contractual claim at issue was not related to an investment—a factor that, because it destroyed subject matter jurisdiction, persuaded the court to give effect to the forum-selection clause. *Id*. para. 89. *See* Sempra Energy International v. Argentine Republic, Decision on Objections to Jurisdiction, ICSID No. ARB/01/16, para. 95 (2005) ("A claim can have a purely contractual origin and refer to a right that does not qualify as an investment, in which case there will be no jurisdiction, as was the case in Joy; . . . or, as is more frequently the case, [a claim can] originate in violation of a contractual obligation that at the same time amounts to a violation of the guarantees of the treaty.").

135. *Id.* para. 89.

136. *Id.* para. 90.

137. *Id.* para 81.

138. *See* Wong, *supra* note 16, at 160 n.162 (criticizing the reasoning in *Joy Mining* as "incomprehensible and quite far from amounting to a clarification") (citing CHRISTOPH SCHREUER, INVESTMENT TREATY ARBITRATION AND JURISDICTION OVER CONTRACT CLAIMS—THE VIVENDI CASE CONSIDERED, IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 280, 301 [Todd Weiler ed., 2005]).

139. CMS Gas Transmission Co. v. Argentine Republic, Award, ICSID No. ARB/01/8, para. 299 (2005).

140. *Id.* para. 299.

141. *Id.* paras. 301–03.

142. It seems that the *Pakistan*, *Joy*, and *CMS* tribunals are employing the same general rule—that the umbrella clause does not elevate a contract claim—while differing in their articulation and application of a common exception. *Pakistan* (1) insists on a narrow reading, (2) allows that in extreme circumstances the contract claim could be elevated to a treaty claim, and (3) finds that no such circumstances apply to its facts. *Joy* (1) adopts a narrow reading, (2) looks for a clear violation of treaty rights to link the contract claim and the treaty, and (3) finds no such violation on its facts. *CMS* (1) adopts a relatively narrow reading, (2) requires the presence of substantial state interference before giving effect to the umbrella clause, and (3) finds sufficient interference to

In *El Paso v. Argentina*, the tribunal followed *Pakistan*'s narrow reading of the umbrella clause in interpreting the United States-Argentina BIT at issue. While stating that "[t]he arguments put forward by the [*Pakistan*] Tribunal are . . . more than conclusive,"[143] the tribunal underscored various points of agreement with *Pakistan* and even buttressed the *Pakistan* reasoning with arguments of its own. A narrow reading of the umbrella clause was necessary in the tribunal's view to prevent a state's minor commitments from being transposed to international treaty obligations.[144] The tribunal expressed doubt that investors would exercise restraint in invoking the umbrella clause: "[t]he responsibility for showing appropriate restraint rests rather in the hands of the ICSID tribunals."[145] The tribunal understandably wanted to retain discretion as to whether it would decide contract claims. In this connection, it opted for *Pakistan*'s bright-line exclusion of contract claims over the broad reading of the umbrella clause advanced in *SGS v. Philippines*.[146]

B. Accepting Jurisdiction Over Contract Claims: The Approach of SGS v. Philippines

1. Background

The contractual relationship giving rise to the dispute between SGS and the Philippines was similar to that in *SGS v. Pakistan*.[147] In 1991, the Philippines entered a contract with SGS in which the latter would provide pre-shipment inspection services of the Philippines' imports in the country of supply, including verification of the imports' quality, quantity, and price.[148] As part of the Philippines' comprehensive import supervision service (CISS), the contract was referred to as a CISS Agreement. From 1986 to 1998, new agreements were entered into, and after 1998, the CISS Agreement was extended twice.[149] In 2000, SGS' services under the Agreement were discontinued.[150] SGS submitted claims to the Philippines for money unpaid on the contract, totaling approximately US $140 million plus interest.[151]

When attempts for amicable settlement failed, SGS submitted a request for arbitration to ICSID, contending that the Philippines was in breach of Articles IV(1), IV(2), VI(1), and X(2) of the Switzerland-Philippines BIT.[152] The Article IV claim alleged failure to accord SGS fair and equitable treatment, the Article VI claim concerned expropriation, and the Article X claim was the umbrella clause requiring the host country to observe its

support implementation of the umbrella clause on its facts. Assuming this is indeed the approach intended by the tribunals, it is not clear why a provision as sweeping as the umbrella clause should be caged inside a narrow interpretation and released only upon the happening of an exception deemed sufficient by the tribunal. It would seem less cumbersome to give the umbrella clause its plain broad effect and only then determine whether state action warrants review of the contract claim by an ICSID tribunal—the approach adopted in *SGS v. Philippines*. *See also* Shany, *supra* note 15 (highlighting *SGS v. Pakistan* and *SGS v. Philippines* as examples of two competing analytical methodologies, disintegrationism and integrationism, respectively).

143. El Paso Energy International Company v. Argentine Republic, Decision on Jurisdiction, ICSID No. ARB/3/15, para. 71 (2006).

144. *Id.* para. 76.

145. *Id.* para. 82.

146. *Id.* para. 76.

147. *See* SGS v. Philippines, ICSID No. ARB/02/6, paras. 12–13.

148. *See id.*

149. *Id.* paras. 13–14.

150. *Id.* para. 14.

151. *Id.* para. 15.

152. *Id.* para. 16.

commitments.[153] The Philippines objected to the ICSID tribunal's jurisdiction. The dispute, the Philippines argued, was "purely contractual in character" and therefore subject to the forum selection clause in the CISS agreement, which required contract disputes to be settled in the courts of the Philippines.[154] The Article IV and VI claims were contractual and not BIT claims at all. As for the Article X claim, the Philippines relied on *SGS v. Pakistan*, which had found umbrella clauses insufficient to transform a claim from contract to the realm of BIT.

SGS countered that ICSID's jurisdiction was found in Article 25(1) of the ICSID Convention, which provided for jurisdiction over a legal dispute arising directly out of an investment when there was consent by the parties in writing.[155] The required consent in writing was present in the Switzerland-Philippines BIT,[156] and SGS argued that the tribunal had jurisdiction over contract claims based inter alia on the umbrella clause.[157] Article X(2) reads: "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."[158]

The tribunal's first task was to evaluate the strength of SGS' argument for a broad umbrella clause interpretation, which SGS summarized as follows: "[I]t [is] abundantly clear that a provision such as Art. X(2) of the BIT is designed to extent [sic] the BIT's protection to cover breaches of contracts between the host State and the investor."[159] The tribunal acknowledged the *SGS v. Pakistan* tribunal's conclusion with regard to the umbrella clause. *Pakistan* said that such a clause should never automatically elevate a contract claim to the level of an international breach of law, and only under "exceptional circumstances" would it provide an appropriate basis for accepting jurisdiction over a contract claim.[160] The *SGS v. Philippines* tribunal proceeded to examine *Pakistan*'s conclusions,[161] but only after reaching its own "provisional conclusion—that Article X(2) means what it says . . . ."[162]

The tribunal advanced a number of arguments in support of bringing contract claims within the scope of the umbrella clause. First, the text of the provision favors a broad interpretation. It is phrased in mandatory language, using the word "shall" just as in other substantive BIT provisions imposing obligations on the parties.[163] Also, the tribunal decided that the phrase "any obligation" is wide enough to include obligations arising under national law with regard to an investor-state contract.[164] "Interpreting the actual text of Article X(2)," the tribunal reasoned,

> [i]t would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation it has assumed, or will in the future assume with regard to specific investments covered by the BIT. Article X(2) was adopted

153. *See* SGS v. Philippines, ICSID No. ARB/02/6 paras. 113, 160.

154. *Id.* para. 17; para. 22 ("Article 12 of the CISS Agreement provided that: '. . . All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila.'").

155. SGS v. Philippines, ICSID No. ARB/02/6 para. 16. *See* ICSID Convention, *supra* note 3, art. 25(1).

156. SGS v. Philippines, ICSID No. ARB/02/6, para. 46.

157. *Id.* paras. 63–68.

158. *Id.* para. 34.

159. *Id.* para. 86. *See also* para. 65 (reviewing SGS' argument that "[t]he effect of an 'umbrella clause' . . . is to elevate a breach of contract claim to a treaty claim under international law.").

160. *Id.* para. 96(b).

161. *Id.* paras. 120–126.

162. SGS v. Philippines, ICSID No. ARB/02/6, para. 119.

163. *Id.* para. 115.

164. *Id.* para. 115.

> within the framework of the BIT, and has to be construed as intended to be effective within that framework.[165]

Second, any uncertainty regarding the scope of Article X(2) should be resolved in favor of protecting investment, since this is the overriding purpose of the BIT.[166] Moreover, "it seems entirely consistent with the object and purpose of the BIT to hold that [binding obligations or commitments such as investor-state contracts] are incorporated and brought within the framework of the BIT by Article(2)."[167] Finally, had the parties intended to limit the umbrella clause to obligations arising under "other international law instruments," Switzerland and the Philippines were free to stipulate such a restriction in the BIT, but they did not do so.[168]

The tribunal then examined the *SGS v. Pakistan* tribunal's conclusions, some of which are reviewed in the previous section of this article.[169] Two of the *Pakistan* tribunal's arguments were singled out by *SGS v. Philippines* and will be considered here. First, *SGS v. Pakistan* had found significant the location of the clause at the end of the BIT.[170] Whereas other BITs containing such clauses placed them with the treaty's other substantive provisions at the beginning of the treaty, the Switzerland-Philippines BIT placed the umbrella clause at the end.[171] This was a factor worthy of consideration, the *Philippines* tribunal agreed. But unlike *Pakistan*, the tribunal did not find the location of the clause decisive. It reasoned that other Philippine BITs, for example, contained an umbrella clause earlier in the treaty. The tribunal found it "difficult to accept that the same language in other Philippines BITs is legally operative, but that it is legally inoperative in the Swiss-Philippines BIT merely because of its location."[172]

A second *Pakistan* argument was particularly relevant to the rest of the *Philippines* decision. According to *Pakistan*, a broad interpretation would have the detrimental effect of overriding the dispute settlement clauses in investor-state contracts. If an ICSID tribunal finds that a BIT party consented to ICSID jurisdiction over a contract claim by operation of the umbrella clause, the host country will argue that the contract's forum-selection clause should be unaffected. After all, as the Philippines argued, all indications are that an investor-state contract is the result of bidding by various companies, followed by an arms-length agreement.[173] Why should the giving of consent to arbitrate disputes with an investor override a valid contractual clause providing for dispute settlement in the host country? The tribunal found this to be a valid concern, but proceeded to explain why a broad

165. *Id.*

166. *Id.* para. 116. This investor-friendly approach was criticized in *El Paso v. Argentina*, in which the tribunal favored a more "balanced" view that accounts for "both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow." El Paso Energy International Company v. Argentine Republic, Decision on Jurisdiction, No. ARB/-3/15, paras. 69–70. *See also* UNCTAD, INTERNATIONAL INVESTMENT RULEMAKING, para. 34, U.N. Doc. TD/B/COM/2/EM.21/2 (2007) ("Mostly as a result of the enormous increase in investment disputes in recent years, discussion of what should be the counterweight to investors' rights has gained momentum.").

167. SGS v. Philippines, ICSID No. ARB/02/6, para. 117.

168. *Id.* para. 118.

169. *See supra* Part IV.A.2.

170. SGS v. Philippines, ICSID No. ARB/02/6, para. 124.

171. *Id.*

172. *Id.* para. 141.

173. *Id.* para. 52.

interpretation does not necessarily lead to an evisceration of the dispute settlement clauses.[174]

The remainder of the decision dealt with the effect of umbrella-clause-based ICSID jurisdiction upon the forum-selection clause. The tribunal began from the principal "that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision."[175] The relevant provision of the CISS Agreement between SGS and the Philippines provides: "All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila."[176]

First, the tribunal determined whether the forum-selection clause was overridden by the BIT provision that provided for ICSID arbitration. Concluding that the BIT did not override the contract clause, the tribunal cited two reasons. First, the BIT clause in which the parties consent to ICSID jurisdiction is drafted in general language, negating any presumption that it "has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties."[177] Further, BITs were negotiated between countries in order to enhance and protect investment contracts, so the BIT's effect cannot be to replace in substance those same contracts.

Second, the question was raised whether Article 26 of the ICSID Convention could override the CISS Agreement's forum-selection clause. SGS argued that when it began ICSID arbitration proceedings against the Philippines in 2002, both parties thereby consented "to such arbitration to the exclusion of any other remedy," as provided in ICSID Article 25(1).[178] The tribunal characterized SGS' request for arbitration as an agreement to ICSID arbitration between two parties, SGS and the Philippines.[179] Although the tribunal acknowledged that such an agreement could in theory override the previous CISS Agreement between the same two parties, the forum-selection clause was nevertheless preserved.[180]

The tribunal supported this conclusion for three reasons. First, Article 26 "was intended as a rule of interpretation, not a mandatory rule."[181] As a result it could not have the legal effect ascribed to it by SGS. Second, Article 25 provides that consent to ICSID arbitration "shall, unless otherwise stated, be . . . to the exclusion of any other remedy."[182] This indicates that the exclusivity of the remedy in Article 25(1) is subject to modification, and in fact, SGS and the Philippines effected such a change when they agreed to a contrary provision in the CISS Agreement, which provided for dispute resolution in the Philippine courts.[183] Third, the tribunal found SGS' Article 25(1) argument unattractive because it would make the parties' legal rights dependent on the forum selected by the investor under the BIT.[184] If the investor were to choose an arbitration like ICSID, Article 25(1) would override the contract. If instead another arbitral institution were selected, the parties contractual obligations would be unaffected if that institution's rules had no 25(1)

174. *Id.* para. 123.
175. *Id.* para. 138.
176. SGS v. Philippines, ICSID No. ARB/02/6, para. 137.
177. *Id.* para. 141.
178. *Id.* para. 144.
179. *Id.* para. 16.
180. *Id.* para. 145.
181. *Id.* para. 146.
182. SGS v. Philippines, ICSID No. ARB/02/6, para. 147.
183. *Id.*
184. *Id.* para. 148.

equivalent.[185] For all of these reasons, the forum-selection clause remained intact and was given its full effect.

2. Analysis

The significance of *SGS v. Philippines* rests on its twin outcomes: accepting jurisdiction over contract-based claims and deciding to give effect to the contract's forum-selection clause despite that jurisdiction.

A number of ICSID tribunals have adopted the *Pakistan* approach,[186] but others side with the *Philippines* tribunal by accepting jurisdiction. For example, in *L.E.S.I.-DIPENTA v. Algeria*, the tribunal accepted jurisdiction over a contractual claim on account of a BIT umbrella clause.[187] *Eureko B.V. v. Poland* found the imperative wording and broad scope of the BIT determinative in finding that a BIT encompassed all of a state's obligations, including investor-state contracts.[188] The tribunal in *Sempra Energy Int'l v. Argentina* found that the claims were simultaneously contract claims and treaty claims. The umbrella clause served to strengthen this connection, the tribunal decided, based on "the contract, the context of the investment and the Treaty."[189] The *Noble Ventures v. Romania* tribunal decided that an umbrella clause clearly references contracts entered into between the host state and the investor.[190] The *CMS v. Argentina* tribunal, discussed above, gave effect to the BIT's umbrella clause despite a relatively narrow reading.[191] Other ICSID tribunals have also accepted jurisdiction over contract claims based on a BIT's umbrella clause.[192]

While the issue of jurisdiction over contract claims is still being debated, a new problem has arisen, as predicted by the *Pakistan* tribunal. Indeed, the debate may be shifting from the desirability of accepting jurisdiction over contract claims to whether BIT provisions allowing for ICSID jurisdiction override the forum-selection clauses in investor-state contracts.

By staying the proceedings pending resolution of the contract claims in a Philippine court, the *Philippines* tribunal attempted to allay Pakistan's concerns of an umbrella clause overriding contract forum-selection clauses.[193] Despite accepting jurisdiction over the contract claims, the tribunal did not decide the merits. The dissenting arbitrator in *Philippines* disagreed with this part of the result, advocating a decision on the merits based on the broad reach of the umbrella clause and consent to ICSID arbitration in the BIT.[194]

Many advocate a position similar to the *Philippines* dissent that would always give a BIT's dispute resolution provision precedence over the investor-state contract. If this

185. *Id.*

186. *See supra* Part IV.A.2.

187. Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria, Award, ICSID Case No. ARB/03/8 (2005).

188. Eureko B.V. v Republic of Poland, Partial Award on Liability paras. 255, 257 (ad hoc arbitration of Aug. 19, 2005), *available at* http://ita.law.uvic.ca/documents/Eureko-PartialAwardand DissentingOpinion.pdf.

189. Sempra Energy Int'l v. Argentine Republic, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/16, para. 101 (2005).

190. Noble Ventures, Inc. v. Romania, Award, ICSID Case No. ARB/01/11, paras. 59–61 (2005), *available at* http://ita.law.uvic.ca/documents/Noble.pdf.

191. *See supra* note 139 and accompanying text.

192. *See* LG&E Energy Corp. v. Argentine Republic, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/16, para. 46 (2004); ADC Affiliate Ltd. v. Republic of Hungary, Award, ICSID Case No. ARB/03/16, para. 294 (2006).

193. SGS v. Philippines, ICSID No. ARB/02/6 para. 177(c).

194. SGS v. Philippines, ICSID No. ARB/02/6 (dissent).

position were adopted, a country's consent to ICSID arbitration as an arbitration forum would render the contract's forum-selection clause ineffective. This would put the entire spectrum of investor-state disputes in ICSID's domain.

But as *SGS v. Philippines* indicates, just because jurisdiction is accepted does not mean the dispute settlement clauses in individual contracts are going to be nullified.[195] To the extent the *Pakistan* tribunal, or any tribunal, is worried about eviscerating a contract forum-selection clause, it need not exercise jurisdiction once accepted.

Is there a sound basis for the *Philippines* approach, when it is customary practice in arbitration tribunals to decide the merits after accepting jurisdiction? The tribunal's decision to accept jurisdiction but pass on the merits of the contract claim deserves special scrutiny, because it defies expectations of how the arbitral process usually works. It is worthwhile to determine the validity of the tribunal's reasons for such a holding and inquire as to whether alternative reasons may exist for accepting the *SGS v. Philippines* result.

The tribunal advances two primary arguments to support its position. First, even though the contract claim is elevated to the level of a BIT claim, it cannot hide its origins. In most cases, the fact that the claim is contractual compels resolution of the claim in the forum chosen by the contract. At the very least, the tribunal "cannot accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims."[196] The tribunal takes a significant step: it employs the *Vivendi* fundamental basis to support the conclusion that contract claims should be adjudicated in accordance with the contract's forum-selection clause. It will be remembered that while the *Vivendi* annulment committee required the tribunal in that case to decide a claim whose fundamental basis is in the BIT, it was left open to tribunals to decide what to do with a fundamentally contractual claim. "[W]here the essential basis of a claim brought before an international tribunal is a breach of contract," the committee stated, "the tribunal will give effect to any valid choice of forum clause in the contract."[197] When it comes to deciding the merits of SGS' contract claim, the tribunal cannot ignore the contract because it provides the claim's fundamental basis.

The valid use of *Vivendi* by the tribunal in *Philippines* contrasts sharply with the fundamental basis test as employed in *Pakistan*. In that decision, the tribunal, before even reaching the jurisdictional issue created by the umbrella clause, decided whether it had jurisdiction over SGS' BIT claims for expropriation and unfair treatment. The tribunal cited *Vivendi* and the fundamental basis test to support accepting jurisdiction over the BIT claim. As previously noted, this is problematic for two important reasons. First, the *Vivendi* test was never meant to be employed before a tribunal decides to accept jurisdiction. Instead, as in both *Vivendi* and *Philippines*, the proper role of the fundamental basis test is to guide the tribunal in its decision on the merits of a BIT-based claim. If not BIT-based, the tribunal can give effect to the contract's choice of forum. Second, as a result of its misapplication of *Vivendi*, the *Pakistan* tribunal seemed to have already made up its mind about contract-based claims by the time it examined the BIT's umbrella clause. By limiting BIT claims to those with a fundamental basis was in the BIT, the tribunal closed the door on any argument that would elevate the contract claim to the same level as a BIT claim. This is made all the more puzzling by the tribunal's decision to not inquire too closely at the jurisdictional stage of the proceedings as to whether a claim was based in contract or treaty.

195. *Id.* para. 123.

196. *Id.* para. 153.

197. *Id.*; Vivendi v. Argentina, ICSID No. ARB/97/3, para. 98 (2002).

If the *SGS* cases were to be judged merely on the basis of which tribunal interpreted *Vivendi* correctly, there would be less discussion about the irreconcilable conflict between the *SGS* cases, and a wider consensus as to the correctness of the *Philippines* holding. One of this article's purposes has been to dismantle the perceived conflict between the *SGS* cases on the issue of jurisdiction over contract-based claims. The desired result is a renewed focus on the controversy surrounding ICSID tribunals once jurisdiction is accepted.

The *Vivendi* test provides a healthy dose of support for the *Philippines* result. The *Philippines* tribunal knew, however, that implementing the *Vivendi* standard, without something more, would not satisfy critics. A previous ICSID decision, while useful for reference and to support a tribunal's argument, is not binding precedent.[198] Therefore, the tribunal searches for an argument to supplement the *Vivendi* approach. No doubt it realized the novelty of accepting jurisdiction over a claim but then letting another forum decide it. The solution settled on by the tribunal distinguishes between "jurisdiction" and "admissibility."

In its second main argument, the tribunal says that it did not accept jurisdiction over SGS' contract claims; rather, the claims were admitted, at which time the fundamental basis of the claims required resolution elsewhere. Finding a claim to be admissible, but then leaving resolution to another forum, is the same approach embodied, for example, in the *forum non conveniens* doctrine.[199] Whether or not such a maneuver is justified, using it as a basis for the *Philippines* decision lends little clarity to the debate over whether or not contract claims should be decided by an ICSID tribunal. The tribunal relies on the principle that "a party to a contract cannot claim on that contract without itself complying with it" and decides that such a restriction "is more naturally considered as a matter of admissibility than jurisdiction."[200] If an investor wants to make a contract-based claim against the host country, it must do so consistent with its obligations under the contract.[201]

One response to the *SGS v. Philippines* decision would demand that the tribunal, if it will not review the contract claim once admitted, refuse the contract claim at the outset. Another view is that favored by the *Philippines* dissent: once a contract claim is admitted, the merits should be decided as a matter of course. These opposite approaches are neither necessary nor in accordance with principles underlying international investment law. The *Philippines* outcome is desirable, because it relieves ICSID tribunals from deciding each and every contract claim, while ensuring that ICSID tribunals have the discretion to decide a case if necessary. The challenge is to defend the *Philippines* result without relying on the admissibility classification that is the basis for the decision. The next section of the article offers suggestions that would lead to the *Philippines* result based on principles of international investment law.

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198. SGS v. Philippines, ICSID No. ARB/02/6 para. 97 (acknowledging that while consistency with other ICSID tribunals is preferable, decisions may be inconsistent due to different applicable law and the lack of precedent in international law).

199. *See* Piper Aircraft v. Reyno, 454 U.S. 235 (1981).

200. SGS v. Philippines, ICSID No. ARB/02/6, para. 154.

201. Another route to the same result would find the investor-state contract to be a waiver by the investor of its right under the BIT to bring a contract claim before ICSID. Assuming that the contract claim is elevated to a BIT claim by the umbrella clause, the investor may have waived his right to an ICSID forum upon becoming a party to the contract with the host state. ICSID arbitration is not absolute even for substantive BIT claims. *See supra* note 100 (discussing the common BIT "fork in the road" provision, precluding an investor from choosing ICSID arbitration after submitting a BIT claim to the courts of another contracting party). If triggered, the "fork in the road" would close the door to ICSID arbitration for substantive BIT claims and contract claims alike. The arguably more attenuated contractual BIT claim would be considered waived as soon as the investor enters a contract containing an alternate forum-selection clause. By becoming a party to the contract, the investor would be limited to the dispute resolution provision of the contract, to the exclusion of ICSID arbitration.

V. EVALUATING THE ROLE OF ICSID TRIBUNALS: THE SHORTCOMINGS OF A "DECIDE EVERYTHING" APPROACH

A. Consent Controls: The BIT as an Agreement to Arbitrate

The Switzerland-Philippines BIT is just one of the thousands of BITs in which contracting parties consent to ICSID jurisdiction. What is more, the choice of whether to arbitrate before ICSID or some other forum is ultimately in the hands of the investor who submits the request for arbitration. Although ICSID is the forum favored by investors, the possibility remains that an alternate forum, such as an UNCITRAL or ICC tribunal, will decide the dispute. Upon signing a BIT, a host country has not only consented to arbitrate; it has also consented to be bound by the investor's choice of forum. Therefore, when the investor submits a request for arbitration, the host country is getting just what it bargained for in the BIT. There is no element of surprise when an investor brings a claim, since the country agreed to arbitrate with investors and no one else. Furthermore, the host country cannot claim altered expectations when a given arbitral forum is chosen, because it relinquished that choice to the investor in the BIT.[202] In short, the consent given by the host country is the widest kind of consent possible. Packaged within this consent are three important consequences, each following from the other.

First, the host country has consented to have arbitrators determine questions of jurisdiction. In other words, there is an acknowledgment in the BIT that only the arbitrators are in a position to decide the claims over which they have jurisdiction. Thus, the threshold question of who decides the jurisdiction of the arbitrators is for the arbitrators themselves. This is in part a result of the nature of international arbitration, in which arbitrators are the only actors in a position to make such a decision.

This conclusion is only enhanced by the dispute resolution provisions in BIT. By consenting in the BIT to resolve claims before ICSID, a host country has necessarily vested in the tribunal the power to decide its own jurisdiction. As a result, the opposing sides in the *SGS v. Philippines* decision could be described as doing nothing more than trying to persuade the tribunal that it did or did not have jurisdiction. Accordingly, it is difficult to conclude that the tribunal did not reach the correct result, at least in the sense that it was the tribunal's decision to decide whether it had jurisdiction over SGS' contract claims. In ICSID decisions, the issue of who decides questions of jurisdiction is rarely contested. What has not been emphasized enough in the current commentary on the *SGS* cases is the enormous effect the BIT parties' consent has on questions of jurisdiction. In the BIT, both countries have have consented to have the question of "who decides" resolved by whatever arbitrator is chosen by the investor.

Second, once it is acknowledged that ICSID arbitrators determine their own jurisdiction, it becomes even easier to accept the holding in *SGS v. Philippines* that the umbrella clause elevates a contract claim to the level of a BIT claim. The reasons for a broad reading of the umbrella clause have already been explored in some detail. A further basis can be found in *Lanco v. Argentina*. In that decision, the tribunal found that it had jurisdiction over an investor's BIT claims notwithstanding the forum-selection clause in the

202. *See* SGS v. Philippines, ICSID No. ARB/02/6, para. 50 (citing SGS' argument that "[t]he Philippines have consented to ICSID arbitration as one of the available means of dispute resolution and the final decision as to whether . . . ICSID arbitration supersedes [the contract's forum-selection clause] rests solely in the hands of the investor.").

investor-state contract. More important than the holding itself is the rationale given by the tribunal. It was the consent given by Argentina in the BIT that persuaded the tribunal to hold fast to the jurisdictional provision in the BIT, despite the contract's forum-selection clause.

The *SGS v. Philippines* decision would have been bolstered by a discussion emphasizing the consent the Philippines gave in the BIT to arbitrate disputes before ICSID. The tribunal's argument in *Lanco* was that consent to arbitrate BIT claims overrode all else. This reasoning could have been transposed to the *SGS v. Philippines* facts. The Philippines, having consented to arbitrate a wide array of disputes before ICSID, would have to overcome a presumption that they consented to arbitrate contract claims as well, especially given the presence of an umbrella clause. For just as Argentina's consent in *Lanco* was undiminished by the contract, the Philippines' consent should be accorded a great deal of weight in determining whether it agreed to arbitrate contract claims. In *Lanco*, the tribunal reasoned that "when the parties give their consent to ICSID arbitration, they lose their right to seek to settle the dispute in any other forum, domestic or international . . . ."[203] The fact that the Philippines at least agreed to arbitrate something with a Swiss investor before ICSID should be given due consideration in determining whether an umbrella clause is broad enough to include contract claims within that consent. To be sure, this would not have conclusively demonstrated ICSID's jurisdiction over the contract claims, but explaining the result in terms of the host country's consent given in the BIT would have added another level of legitimacy to the *Philippines* holding.

Finally, if a tribunal is able to decide whether it has jurisdiction over a claim, and if it decides that jurisdiction exists, the next question is the extent to which an arbitrator is empowered to adjudicate a claim. This is in some ways the most straightforward power vested in an arbitration tribunal. The parties' consent in the BIT must be read like any other agreement to arbitrate. As a result, both the investor and the host country have by mutual consent agreed in advance to privatize the resolution of their dispute. Although it is unclear whether BIT parties could subject an ICSID award to review by a national court, this is not an issue at present, since no BITs provide for such judicial review. What is clear enough, however, is that consent given in the BITs extends to the final decision of the tribunal.

The decision in *SGS v. Philippines* to stay the proceedings pending the outcome of a contract claim in Philippine courts has been attacked as an abdication of arbitral responsibility.[204] But from the standpoint of consent, it is difficult to see why this is so. The arbitrators, entrusted to resolve the dispute before them, are vested with the power to render any judgment they deem appropriate, within the limits of the ICSID Convention.[205] The decision to allow resolution of contract claims by the courts of the host country, while perhaps not the outcome expected by the parties, is nevertheless an outcome to which they consented. Viewing the BIT's forum-selection clause as an agreement to arbitrate suggests that basic principles of arbitration should control. Chief among those principles is party autonomy. It has been said that arbitration, as a creature of party autonomy, is "at bottom little more than 'the parties' dream.'"[206] Like any arbitration, therefore, an ICSID arbitration is subject to change by the parties when they agree to arbitrate. Subject as it is to alteration, the agreement could stipulate that a tribunal shall decide, contrary to *Philippines*,

203. Lanco v. Argentina, ICSID Case No. ARB/97/6, para. 36.

204. Wong, *supra* note 16, at 137–38.

205. *See* ICSID Convention, *supra* note 3, art. 52 (providing very limited grounds for annulment).

206. Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L. J. 449, 449 (2005) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 336 (tent. ed. 1958)).

every claim over which it accepts jurisdiction. Absent such alteration, however, the tribunal should not be held to such a restriction.

B. Certainty in an Uncertain World? Choices Facing ICSID Tribunals

The effect of the *SGS v. Philippines* decision was to leave resolution of the claimant's contract claims to the forum designated by the contract. This result has given rise to various grounds for criticism, the most important of which—that uncertain decisions fail to safeguard investors' expectations—will be discussed last.

The first criticism questions the *Philippines* tribunal's insistence on separating the contract claims from treaty claims. The argument is that both the BIT and the investor-state contract have broadly worded dispute resolution clauses. For example, the BIT provides for resolution of all disputes before an international tribunal, and the contract provides for all disputes to be resolved in the courts of the host country. Neither instrument allows for the possibility of settling contract disputes in one forum and treaty disputes in another. Therefore, the *Philippines* tribunal had no basis for treating the claims separately: "Nothing in these provisions contemplates, much less authorizes, the determination of different components of the dispute (whatever they may be) in different fora."[207]

Such an argument at least helps frame the debate by highlighting the tension between the BIT and the contract. Both are valid agreements, negotiated at arms' length. In the BIT, the host country agrees to arbitrate a wide range of disputes in a forum chosen by the investor. In the contract, the investor agrees to resolve all contractual disputes in the designated forum. Therefore, two valid agreements demand recognition by an ICSID tribunal. What should be clear enough is that an ICSID decision on the merits of a contract claim runs afoul of the parties' agreement in the contract. There are defensible positions for interpreting ICSID's jurisdiction broadly enough to permit this.

But an argument that disallows an ICSID tribunal from distinguishing between contract and treaty claims, simply because neither instrument contemplates such a distinction, does little to suggest on what basis a tribunal may decide any claims. For by the same reasoning, a tribunal should refuse to decide both BIT and contract claims because "determination of different components of the dispute" is unauthorized. A better approach focuses on the validity of both agreements, underscoring the dilemma facing the *Philippines* tribunal: that a recognition of either agreement invariably violates the other. The tribunal found persuasive the Philippines' argument that SGS "may not seek to enforce the 'specific' payment obligations of the CISS Agreement whilst at the same time disregarding the agreement to resolve these payments (and all other contractual) obligations in [the Philippine courts]."[208] Determining the circumstances in which one of the agreements may be violated requires an analysis of the policies underlying international investment law. An inevitable result of such an inquiry is what critics of *SGS v. Philippines* have termed "inconsistent" results.

Inconsistency is a second perceived weakness in the *Philippines* holding, which according to one commentator "results in the BIT tribunal having jurisdiction over an empty shell and deprive[es] the BIT dispute resolution provision of any meaning."[209] By accepting

207. Wong, *supra* note 16, at 168.

208. SGS v. Philippines, ICSID No. ARB/02/6 para. 59.

209. Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims: The SGS Cases Considered*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION 334, 344–45 (Todd Weiler ed., 2005).

jurisdiction but staying the proceedings, the tribunal renders the umbrella clause "superfluous."[210] It guarantees a decision regarding the contract claims only in "extra-contractual" circumstances, such as fraud, a "mis-carriage of justice," or circumstances rendering contract performance impossible. For these reasons, the *Philippines* stance is described as internally "inconsistent." The proposed solution? If an umbrella clause is to have any effect, its scope must be absolute, resulting in complete ICSID jurisdiction over contract claims. Anything less causes uncertainty for the investor, who will not know what to expect from such "inconsistent" results. According to those favoring ICSID arbitration of contract claims, uncertainty in international arbitration must be avoided at all costs.

To say that accepting jurisdiction over contract claims without deciding them is "inconsistent" is self-evident, but only if one accepts at the outset that consistency requires deciding all claims over which jurisdiction is accepted. Determining, in turn, what amounts to consistency requires an examination of the applicable arbitration rules and, next, any accepted arbitration norms and practices.[211] Since the ICSID arbitration rules are silent on whether a tribunal must decide the merits of a claim once accepted, other sources must be consulted.

It is tempting to find a solution to the problem in the *Vivendi* annulment decision. In that case, the committee determined that the tribunal had manifestly exceeded its powers by refusing to decide BIT claims whose jurisdiction had already been determined. Using similar reasoning, one might argue that a refusal to decide contract claims whose jurisdiction has already been determined is likewise unacceptable. But this would ignore the nature of the claim in *Vivendi*, which was based on the BIT's substantive provisions. The tribunal had no reason to refuse to decide the merits of the BIT claims, because the BIT itself provided for ICSID jurisdiction. In contrast, by refusing to decide contract claims, the *Philippines* tribunal was merely giving effect to the contract's dispute resolution clause. Therefore, there is no easily identifiable basis for labeling the *Philippines* decision inconsistent, because such a label raises the common-sense question: "Inconsistent with regard to what?"

The real basis of the inconsistency argument seems to be the discomfort many have with the novel result reached in *SGS v. Philippines*. Based on voluminous systems of national law and years of precedent, we have come to expect that once a court accepts jurisdiction over a claim, it will decide the merits. Only in certain circumstances will a court accept jurisdiction but have the merits decided elsewhere (for example, by employing the doctrine of *forum non conveniens*). By extension, this widespread expectation has been applied to arbitration tribunals without engendering much controversy. ICSID tribunals bear a likeness to arbitration tribunals generally. For example, they are creatures of agreement governed by principles of party autonomy, and they represent the fruits of the parties' decision to privatize the resolution of disputes.

But for all of the similarities, ICSID arbitration is unique. More than the result of a bargain struck between private parties, it is a product of the multilateral ICSID Convention and a bilateral treaty whose purpose is to protect investors.[212] Furthermore, ICSID obtains its jurisdiction from the consent of the same countries who sign BITs for the sole purpose of attracting the capital of private investors. As investments in developing countries continue

210. Wong, *supra* note 16, at 167.

211. *See* Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 470 (2004) ("Arbitral tribunals and international courts have usually been custodians of international investment norms when called upon by investors and states to adjudicate investment disputes.").

212. *See* Franck, *supra* note 6, at 1538 ("[Shifts made by investment treaties] created a mechanism to bolster investors' confidence that they will receive a 'fair shake' when resolving disputes with Sovereigns, thus reducing the risks associated with investment and, arguably, increasing the incentive to invest abroad.").

to increase, and as countries naturally become more involved with these investments, investor-state contracts will become increasingly prevalent and will have to coexist alongside BITs.

Only ICSID is in the position of balancing these kinds of mixed public-private agreements involving contradictory dispute resolution provisions. It should be noted that, in addition to the competing provisions found in BITs and contracts, ICSID tribunals are faced with different laws governing the agreements. This is because the BIT is a product of international law and the contract is governed by the law agreed upon by the investor and the host country. Therefore, as a basis for dismissing the *Philippines* result, an argument based on inconsistency fails to appreciate the divergent interests implicated when an investor brings a contract claim against the country of investment and the difficult balancing act such a claim requires of ICSID tribunals.

Finally, there is a policy argument that seeks uniformity of result in order to protect investors' expectations. This seems to be the most commonly accepted argument for giving ICSID broad jurisdiction that would include contract claims. The primary impetus behind the ICSID Convention was the protection of investors, who are powerless to compel a sovereign to settle a dispute absent provisions in a treaty or convention.

The *SGS* tribunal got it halfway right by reading the umbrella clause broadly, but the international investment policy demands that a tribunal decide the merits of all investment claims. Otherwise, the uncertain prospects facing the investor will discourage investment. In short, this line of thinking says that, if there is any kind of protection for an investor, it must be absolute.

The protection of investor expectations is a worthwhile goal, and to the extent ICSID tribunals weigh policy concerns, investor protection should be accorded its due weight. Uncertainty has the potential to slow investment, and it is ICSID's purpose to safeguard investors expectations. However, it is not clear that the resolution of contract-based claims by ICSID will significantly alter investors' expectations.

There is little evidence that by increasing its role to include contract claims, ICSID would provide more certainty to the investor. Current commentary often takes for granted the fact that deciding contract claims will affect expectations.[213] One practitioner concludes that "more aggressive protections, such as elevating all investment undertakings into treaty obligations, are often not critical to promoting investments because an investor's basic investment is secure even without such aggressive protections."[214] In other words, an investor's behavior may be little-affected by whether or not ICSID decides contract claims. In large part, this is due to the relatively limited importance of contract claims to an investor's overall decision-making process. Of primary concern to the investor is whether the host country is party to a BIT under which the investor has a claim. Increased protections "should be viewed with some suspicion because any positive effect these protections may have on global investments is insufficiently supported by evidence."[215] At present, the international investment environment affords no basis to conclude that ICSID must decide contract claims to spur investment.

Even if it could be shown that certainty is enhanced by such measures, other mechanisms are in place to safeguard investor expectations. The most important safety net for investors is still the BIT, which provides basic yet indispensable protections against

213. *See, e.g.*, Franck, *supra* note 6.

214. Tai-Heng Cheng, *supra* note 211, at 502–03.

215. *Id.* at 504.

expropriation and unfair treatment.[216] When an investor enters into a contract with the host country, the BIT claim remains at the investors' disposal. By itself, such a treaty transforms investors into "private attorneys general" able to enforce a BIT's international law standards against a sovereign.[217] Nor is international arbitration the only mechanism for reducing an investors' risk. Subrogation of an investor's claim by its home country is another widely used method.[218] In addition, protection against detrimental action by the host country may be provided in the contract itself, in the form of a stabilization clause, an exchange control clause, or so-called denationalization of development agreements.[219] If the resolution of contract claims by ICSID has an effect on an investor's calculations, this effect is diminished by other mechanisms in place to safeguard investor expectations.

Perhaps most significantly for the present discussion, the *SGS v. Philippines* result leaves open the possibility of protecting an investor's contract-based claims under certain circumstances.[220] Even the decisions rejecting the *Philippines* result allow that examination of an investor's contract claims will be warranted in the event that a contract breach is so egregious as to rise to a breach of an international law standard.[221] The fact that an investor's contract claim will at least pass through the hands of the tribunal should be of some comfort to an investor calculating risks.

The trend in decisions after *Philippines* points to a likelihood that an ICSID tribunal will give itself the option to decide the merits of a contract claim.[222] This reflects a positive consequence of the *Philippines* decision: tribunals that disagree with the reasoning can nevertheless decide the merits of a contract claim, while maintaining fidelity to the result in the *Philippines* decision simply by accepting jurisdiction. A tribunal need only declare that it has found a reason to override the contract that was lacking in *Philippines*. Leaving it to individual tribunals to decide when an investor-state contract's forum-selection clause should be violated at the expense of the BIT is preferable to mandating the resolution of contract claims in every circumstance. Such an ad hoc approach is not only in line with the tribunal's purpose, it reflects an understanding that deciding contract claims may or may not be necessary to safeguard investor expectations, given the particulars of each case. In view of the multitude of risk-minimizing measures at the investor's disposal, it is safe to conclude that in many cases, resolution of contract claims has minimal effect on investor expectations.

Finally, supposing it could be demonstrated that certainty for investors would be markedly enhanced, I submit that investor certainty is an insufficient reason for ICSID to arbitrate contract claims. While desirable, certainty should not be allowed to obscure the difficult issue facing ICSID tribunals in the form of two valid agreements, the BIT and the investor-state contract, each with its own forum-selection clause. This type of conflict is the inevitable result of increasing international investment, and it will only become more common. The constantly evolving nature of international investment has already proved too complex to be resolved by treaty, the instrument of choice of sovereigns. The result is a relinquishment of power from public to private actors. Discussing this phenomenon, Tai-Heng Cheng concludes: "The power and authority that international investment law drains from states does not vaporize, and is often transferred to a wide range of decision-makers . . . . Among these transferees, the greatest beneficiaries are foreign and international

216. *Id.* at 502.

217. Franck, *supra* note 6, at 1538.

218. *See* DOLZER & STEVENS, *supra* note 1, at 156–64.

219. *See* Piero Bernardini, *Development Agreements with Host Governments*, *in* ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW 161, 170–72 (Robert Pritchard ed., 1996).

220. SGS v. Philippines, ICSID No. ARB/02/6 para. 154.

221. *See* Joy Mining v. Egypt, Award on Jurisdiction, ICSID Case No. ARB/03/11 para. 75 (2004).

222. *See supra* notes 186–166 and accompanying text.

tribunals and investors."[223] The more complex the issue before an international institution such as ICSID, the less useful it is to question the outcomes it reaches, due to the lack of alternative solution mechanisms. ICSID is a vanguard institution in the new global economy in which states increasingly cede decision-making power. "Many of the new issues," writes one scholar, "are not only 'global' but they are also somehow irresistible, in the sense that they are outside the control of national authorities."[224]

Advocating that an ICSID tribunal should always decide contract claims to ensure certainty misses the mark, and not just because certainty cannot be guaranteed. Global integration has further convinced investors that the rewards of economic development outweigh the comfort of certainty. Though investors will gladly accept any new protections granted by ICSID or by individual BITs, they understand that international investment will always pose risks. Among these risks at present is the possibility that contract claims will be resolved in the host country, even when the claim is elevated to the same level as a BIT's substantive protections. It is unclear the extent to which this realization affects the behavior of investors, if at all. But an approach requiring the resolution of contract claims by ICSID tribunals in all cases does little to untangle the competing forum-selection provisions found in BITs and investor-state contracts. Different forum-selection clauses governing the same party relationship is an inevitable result of international investment if there ever was one.

VI. CONCLUSION

The *SGS v. Philippines* decision, while viewed favorably by many compared to the narrow umbrella clause reading in *SGS v. Pakistan*, has been criticized for not deciding the merits in the underlying dispute between the parties. This article has defended the result in *SGS v. Philippines* on two grounds. First, the consent of the parties, evidenced in the BIT, transfers a substantial amount of decision-making power to the ICSID tribunal. Requiring that a tribunal decide the merits of every claim over which it has jurisdiction ignores this consent. Second, the *Philippines* middle ground is the only way to respect both the integrity of the bilateral investment treaty and the contract between investor and host state. While such a result is not perfect, ICSID tribunals should not alter their approach in order to safeguard investors' expectations. ICSID jurisdiction over an investor's BIT claims and contract claims is all the certainty an investor can and should be able to expect in an inherently risky enterprise.

As international investment evolves and dispute resolution matures, private decision makers like ICSID tribunals will be given more autonomy. The inability of local courts to resolve certain international disputes, recognized by BITs and subsequently by ICSID arbitration, means that a leaner solution to problems arising in international investment relations is more necessary than ever. In answering "whether human law should be changed in any way," St. Thomas Aquinas gave an answer that resonates today:

> It seems natural to human reason to advance gradually from the imperfect to the perfect. . . . So also in practical matters: for those who first endeavored to discover something useful for the human community, not being able by themselves to take everything into consideration, set up certain institutions which

223. Tai-Heng Cheng, *supra* note 211, at 492.

224. Ambassador Emilio J. Cárdenas, *The Notion of Sovereignty Confronts a New Era*, *in* ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW 13, 15 (Robert Pritchard ed., 1996).

> were deficient in many ways; and these were changed by subsequent lawgivers who made institutions that might prove less frequently deficient . . . .[225]

Arbitration is by nature an improvement over legal systems unsuited to the demands of a global economy. Therefore, calls for ICSID tribunals to fashion decisions to ensure a given result run counter not only to the consent of the parties, but to the very purpose of arbitration. The open-ended and at times conflicting decisions by tribunals do not afford the consistency that many investors seek, yet the primary purpose of international arbitration—to impartially resolve disputes arising from transnational transactions—is superbly served by agreements such as BITs and the arbitration clauses contained in them. As an examination of the *SGS* cases illustrates, requiring a guarantee from ICSID tribunals that they will decide the merits of contract claims exacts too high a cost: by imposing our notions of what we think an arbitral decision should look like, we risk losing sight of the advantages the arbitration process provides. ICSID arbitrators, because of their unique position in the ever-changing international investment landscape, should have the freedom to decide the methods employed in the resolution of disputes over which they have jurisdiction. Bilateral investment treaties vest in them nothing less.

225. THOMAS AQUINAS, SUMMA THEOLOGICA: FIRST COMPLETE AMERICAN EDITION 1022 (Fathers of the English Dominican Province trans., Benziger Bros. 1947).