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**INTERNATIONAL REMEDIES FOR BREACH OF STATE CONTRACT:
DEBUNKING THE MYTH OF CONCURRENCY**

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I. INTRODUCTION

Contracts are generally seen as a specific kind of promises which the state will recognize and enforce.¹ Not content to be the final arbiter of contractual promises, the state may itself become a party to the contract. The state then wears the dual hat of contracting party, liable to breach the contract, and of sovereign, liable to undo the contract through legislation or simply by refusing assistance in enforcing it. In purely domestic transactions, private parties have learned to live with this insecurity and to rely, ultimately, on the state's commitment to the rule of law.²

In international transactions, foreign parties have proved much less willing to trust such a schizophrenic partner. Acutely aware of the dual role played by the state in these rather peculiar contracts, foreign parties have extended much effort and, to some extent, creativity, to remedy this fundamental imbalance and emancipate the contractual relationship from its dependence on the state party. In addition to the ubiquitous clause providing for international arbitration, attempts at emancipating or "internationalizing" the relationship have taken mainly two forms: contractual restraints on the state's sovereign power, the so-called stabilization clauses, or submission of the contract to a normative environment independent of the state party, generally some forms of transnational law.³

In addition to these – still controversial – developments in contractual practice, the dual role of the state in state contracts has engaged international law through the rules relating to the treatment of aliens, notably the rules relating to expropriation.⁴ In some quarters, the issue of state contracts has come to be discussed in terms of whether, and

¹ Guenter Treitel, *The Law of Contract* (London: Thomson, 2003) at 1.

² These difficulties have led, in some jurisdictions, to the elaboration of a law specific to administrative contracts. For a comparative study of administrative contracts, see Georges Langrod, "Administrative Contracts: A Comparative Study" (1955) 4 A.J.C.L. 325.

³ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2004) at 406 *et seq.* See also Pierre Mayer, "La neutralisation du pouvoir normative de l'Etat en matière de contrats d'Etat" (1986) 113 Clunet 5.

⁴ Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 522-23.

under which circumstances, a breach of contract could constitute a violation of international law.⁵ With hindsight, this formulation appears to have obscured the debate, impeding a clear distinction to be drawn between the state as contracting party liable to breach the contract, on the one hand, and the state as sovereign liable to violate international law, on the other hand. This formulation also suggests that, under certain circumstances to be determined, a breach of contract could concurrently give rise to contractual remedies under the *lex contractus* and to international remedies under international law.

While the view that a breach of contract constitutes *per se* a violation of international law is today only held by a minority,⁶ the idea of concurrency between contract and international claims pervades the modern developments in the law of state contracts largely prompted by the surge in arbitral proceedings brought under investment treaties, whether bilateral (“BITs”) or multilateral (like the North American Free Trade Agreement, the “NAFTA”, and the Energy Charter Treaty, the “ECT”).⁷ As contracts can, under certain circumstances, qualify as investments entitled to substantive protection under these treaties, a whole debate has arisen as to whether and when arbitral tribunals appointed under investment treaties could entertain disputes relating to state contracts.⁸ In practice, as will be shown in Part II, claimants will have to frame their claims in terms of violations of the treaty rather than in terms of breaches of the contract. Engaging

⁵ Stephen Schwebel, “On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law” in *Justice in International Law* (Cambridge: Cambridge University Press, 1994) at 425. See also, Prosper Weil, “Problèmes Relatifs aux Contrats Passés entre un Etat et un Particulier” (1969) 128:3 Rec. des Cours 95.

⁶ Brownlie, *supra* note 4, at 523.

⁷ *North American Free Trade Agreement*, Canada, Mexico and United States, 17 December 1992, (1993) 32 I.L.M. 283 [Entry into Force: 1st January 1994]; *Energy Charter Treaty*, 17 December 1994 36116 U.N.T.S. 2080 [Signed in Lisbon, Entry into Force: 16 April 1998]. In 2005, 23 out of 25 new cases registered by the International Centre for the Settlement of Investment Disputes (ICSID) had been brought under BITs, see ICSID, *Annual Report 2005*, online at: <http://www.worldbank.com>, at 6.

⁸ See e.g. Stanimir Alexandrov, “Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty-based Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*” (2004) 5:4 J. World Investment & Trade 555; Christoph Schreuer, “Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road” (2004) 5:2 J. World Investment & Trade 232; Zachary Douglas, “The Hybrid Foundations of Investment Treaty Arbitration” (2003) 74 B.Y.I.L. 151; and Bernardo Cremades & David Cairns, “Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes” in Norbert Horn, ed., *Arbitrating Foreign Investment Disputes* (The Hague: Kluwer Law International, 2004) at 324.

different bodies of law – international law for the violations of treaty and the *lex contractus* for the breaches of contract – these characterizations are assumed to be largely independent and, potentially, concurrent. These assumptions have given rise to serious jurisdictional difficulties, notably where the contract at issue contains a choice-of-forum clause, and are questioned in Part III. I argue that international remedies are neither independent from, nor concurrent with, contractual remedies. In truth, international law only gives a remedy – whether for unlawful expropriation or violations of another standard of treatment – where effective contractual remedies are made unavailable by the state party through the use of its sovereign prerogatives. International remedies are thus better conceived as subsidiary remedies. The practical insights of this conception are sketched in Part IV.

II. INTERNATIONAL AND CONTRACTUAL REMEDIES AS CONCURRENT REMEDIES

This Part will show that, to elevate a dispute relating to a state contract in the international forum provided for under the applicable investment treaty (to which I shall refer as the “treaty tribunal”), the private party will have to frame the claims as violations of the treaty itself. Treaty tribunals have, under certain circumstances, jurisdiction to decide upon contractual claims, *i.e.*, claims for breach of contract arising under the law applicable to the contract or *lex contractus* and to grant contractual remedies (A). Yet in practice, contractual choice-of-forum clauses and discrepancies in the identity of the parties to the contract and to the treaty limit the jurisdiction of treaty tribunals over contractual claims (B). As a practical matter, treaty tribunals will thus only entertain disputes relating to state contracts where violations of international law are alleged and international remedies sought (C).

A. JURISDICTION OF TREATY TRIBUNALS OVER CONTRACTUAL CLAIMS

Two basic requirements have to be met for a treaty tribunal to have jurisdiction over contractual claims. First, the underlying contract must qualify as an “investment” under the BIT and, where arbitration is sought under the auspices of the International Centre for

the Settlement of Investment Disputes (“ICSID”), under the ICSID Convention.⁹ The investments eligible to protection under BITs are broadly defined and generally include contractual rights.¹⁰ In this connection, reference is routinely made to “claims to money or to any performance under contract having a financial value”.¹¹

In contrast, no definition of “investment” is included in the ICSID Convention, but it is generally agreed that “the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State’s development.”¹² As a result, a contract between a foreign party and the state will not necessarily pass the test. In 1999, the ICSID Secretariat refused to regard a contract for the sale of goods as an investment and, accordingly, declined to register a request to arbitrate a dispute relating to the said contract.¹³ Similarly, the tribunal in *Joy Mining v. Egypt* refused to regard a contract for the supply of complex mining equipment as an investment under both the ICSID Convention and the applicable BIT.¹⁴ The tribunal emphatically noted that such a contract could not compare with the so-called “*contrats de développement économique*” or other public service concessions – which have generally been the subject matter of investment disputes – and appeared mindful to distinguish between the latter and mere sales and procurement contracts “for the sake of a stable legal order.”¹⁵ However commendable the cautious, restrictive approach in *Joy Mining* might be, treaty tribunals

⁹ *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 10 March 1965, 8359 U.N.T.S. 575 [Signed in Washington, Entry into Force 14 October 1966].

¹⁰ Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995) at 26.

¹¹ See e.g. *Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments*, 29 April 1996, 34972 U.N.T.S. 2027, art. I(g)(iii) [Signed in Quito, Entry into Force 6 June 1997].

¹² Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) at 140.

¹³ Ibrahim Shihata, “The Experience of the International Centre for the Settlement of Investment Disputes” (1999) 14 ICSID Rev. – FILJ 299 at 308 and note 27.

¹⁴ *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, (6 August 2004) Award, ARB/03/11, online at: [www.http://ita.law.uvic.ca](http://ita.law.uvic.ca). [ICSID, hereinafter *Joy Mining*]

¹⁵ *Ibid.* at ¶ 57-58.

have so far adopted a liberal approach and state contracts have generally qualified as “investments” under the ICSID Convention and the BITs.¹⁶

Second, for the treaty tribunal to assume jurisdiction over contractual claims, the offer to arbitrate under the BIT must be sufficiently broad to cover contractual disputes. In this respect, clauses in BITs vary from narrow ones that limit the treaty tribunal’s *rationae materiae* jurisdiction to alleged breaches of the treaty itself to wider ones that extend the treaty tribunal’s *rationae materiae* jurisdiction to any disputes “with respect to an investment” or any disputes between an investor and the host state.¹⁷ Under the former type of clauses, the offer to arbitrate does not extend to contractual claims, and the investor will be forced to frame the claims in terms of violation of the treaty.¹⁸ In contrast, clauses of the latter type, the prevailing ones, are generally regarded as sufficiently broad to include contractual claims as these can be said to constitute disputes relating to the investment, this so long as the contract qualifies as an “investment” for the purposes of the BIT.¹⁹ Although refused by the tribunal in *SGS v. Pakistan*, this approach was adopted in *SGS v. Philippines* and commended by commentators.²⁰

Provided these two requirements – contract qualifying as “investment” and sufficiently broad offer to arbitrate – are met, the investor can, at least in theory, have its contractual claims entertain in the treaty tribunal. As a practical matter, however, two difficulties remain in its way. These are explored in the next section.

¹⁶ See e.g. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, (6 August 2003) ARB/01/13, (2003) 42 I.L.M. 1290 online at: <http://ita.law.uvic.ca> [ICSID, hereinafter *SGS Pakistan*]; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, (29 January 2004) ARB/02/6 online at: <http://ita.law.uvic.ca> [ICSID, hereinafter *SGS Philippines*]; *Salini Costruttori S.P.A. v. Kingdom of Morocco*, (23 July 2001), (2003) 42 I.L.M.609 online at: <http://ita.law.uvic.ca> [ICSID, hereinafter *Salini Morocco*]; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction (29 November 2004) ARB/02/13 online at: <http://ita.law.uvic.ca> [ICSID, *Salini Jordan*].

¹⁷ Douglas, *supra* note 8, at 238.

¹⁸ *Ibid.*

¹⁹ *Ibid.* Alexandrov, *supra* note 8, at 573 *et seq.*

²⁰ Alexandrov, *supra* note 8, at 575. Douglas, *supra* note 8, at 256 *et seq.* (for a critique of the ruling in *SGS v. Pakistan* on this issue) and at 285 (for an appraisal of the decision in *SGS v. Philippines*).

B. PRACTICAL LIMITATIONS ON THE JURISDICTION OF TREATY TRIBUNALS OVER CONTRACTUAL CLAIMS

A first difficulty relates to the existence of a choice of forum clause in the investment contract. If the parties have specifically agreed to submit the disputes arising out of the contract to the local courts, to arbitration or to any other dispute resolution mechanism, can the investor nevertheless initiate arbitration under the treaty and have contractual claims heard in this forum? The answer appears to be a clear no. In the *Vivendi* case, the ad hoc committee made clear 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.”²¹ Adopting this approach, the tribunal in *SGS v. Philippines* declined to consider the investor’s contractual claims and referred the parties, as far as these contractual claims were concerned, to the agreed contractual forum, the regional courts in Manila or Makati.²²

A second practical difficulty relates to the identity of the contracting parties. No particular issue arises where the contract has been entered into with the host state directly. As a contracting party, the state can be held liable for breach of contract under the *lex contractus*, and the investor can bring a contractual claim against the state directly.²³ The situation is different where the contract has been entered into, not with the state directly, but with one of its agencies or administrative subdivisions. Where, as is generally the case, the agency or administrative subdivision is a distinct legal person, the doctrine of privity of contract, or its local equivalent, will prevent any contractual claim being brought against the state directly. Admittedly, the investor could argue that the agency or administrative subdivision represented the state and entered into the contract on its behalf. But, as the ad hoc committee in the *Vivendi* case pointed out, the question has to be resolved by reference to the *lex contractus* and has to be distinguished from that

²¹ *Compania de Aguas des Aconquija S.A. and Vivendi Universal v. Argentine Republic*, (3 July 2002) Annulment Decision, 41 I.L.M. 1135, ARB/97/3 [ICSID, hereinafter *Vivendi (Annulment)*] at ¶ 98.

²² *SGS Philippines*, *supra* note 16, ¶ 136-55.

²³ Such was the case, *e.g.*, in *SGS Pakistan*, *supra* note 16; *SGS Philippines*, *supra* note 16; and *Lanco International v. Republic of Argentina*, (8 December 1998) Decision on Jurisdiction, (2001) 40 I.L.M. 457 [*Lanco*]

of attribution, under international law, of the acts of the agency or administrative subdivision to the state for the purposes of establishing an international wrong or a breach of treaty.²⁴

Confronted with this issue, treaty tribunals have generally considered that even the widest offers to arbitrate could not, on their plain meanings, encompass contractual disputes between the investor and a state agency or subdivision enjoying separate legal personality.²⁵ In *Salini v. Morocco*, the tribunal constituted under the Italy – Morocco BIT declined to entertain Salini’s contractual claims on the basis that the contract at issue had been entered into with the *Société Nationale des Autoroutes du Maroc*, an entity controlled by the Moroccan government but having separate legal personality.²⁶ The tribunal held:

“Dans l’hypothèse où l’Etat a organisé un secteur d’activité par l’intermédiaire d’une personne morale distincte, fût-elle une émanation de celui-ci, il n’en découle pas pour autant qu’il a accepté *a priori* que l’offre de compétence de l’article 8 le lie à raison des manquements contractuels de cette entité.”²⁷

This approach was approved in the recent *Impregilo v. Pakistan* decision.²⁸ In this dispute relating to the construction of a hydroelectric dam, the contract had been entered into with the Pakistan Water and Power Development Authority, which the tribunal found to be an “autonomous corporate body, legally and financially distinct from Pakistan.”²⁹ Tribunal refused to read the offer to arbitrate in the Italy – Pakistan BIT as extending to contractual claims against a person distinct from the state itself.³⁰

In sum, both the existence of a choice-of-forum clause and the structuring of an investment through a contract with a state agency or corporation are likely to thwart

²⁴ *Vivendi (Annulment)*, *supra* note 21, at ¶ 96.

²⁵ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, (22 April 2005) Decision on Jurisdiction, ARB/03/3 online at: <http://ita.law.uvic.ca> [ICSID, hereinafter *Impregilo*] at ¶ 198-216; *Salini Morocco*, *supra* note 16, at ¶ 60-63.

²⁶ *Salini Morocco*, *supra* note 16, at ¶ 60-63.

²⁷ *Ibid.* at ¶ 60.

²⁸ *Impregilo*, *supra* note 25, at ¶ 198-216

²⁹ *Ibid.* at ¶ 209.

³⁰ *Ibid.* at ¶ 209.

efforts to elevate contractual claims in an international forum. Given the ubiquity of these two features in investment contracts, the investor will, in practice, never be in a position to have its contractual claims entertained by the treaty tribunal.

C. INTERNATIONAL REMEDIES FOR BREACH OF CONTRACT AND THE ASSUMPTION OF CONCURRENCY

As a practical matter, an investor willing to have a dispute relating to a state contract entertained by a treaty tribunal will have to frame the claims in international law terms, *i.e.*, as violations of the treaty. In substance, the ad hoc committee in the *Vivendi* case adopted this position when deciding that a treaty tribunal with no jurisdiction over claims for breach of contract – for the reasons elaborated earlier – should nonetheless consider whether, under the circumstances, a violation of the treaty had occurred.³¹ This approach is fine insofar as it recognizes that, beyond refusing to perform or breaching a state contract, state interference with an investment can take other forms. However, the *Vivendi* approach is more problematic insofar as it suggests that the breach of contract itself can, under certain circumstances, constitute an interference amounting to a violation of the treaty. In this connection, the tribunal in the recent *Impregilo* case stated:

“Hence, contrary to Pakistan’s approach in this case, the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.”³²

In substance, the suggestion is that the same contractual dispute – the same breach of contract – could be concurrently and independently analyzed as a violation of the contract giving rise to a contractual remedy under the *lex contractus* and as a violation of the treaty giving rise to an international remedy under the treaty. In the next Part, I contend that this idea of concurrency between contractual and international remedies is misplaced and inaccurate. Rather, international remedies are more adequately described as subsidiary remedies only available in the absence of effective contractual remedies. Before turning to this demonstration, it might be useful to illustrate the intractable

³¹ *Vivendi (Annulment)*, *supra* note 21, at ¶ 101 *et seq.*

³² *Impregilo*, *supra* note 25, at ¶ 258.

practical difficulties that have stemmed from this idea of concurrency. These difficulties have mainly arisen in relation to contractual choices of forum. As was seen earlier, where the contract includes a choice-of-forum clause, the two sets of remedies are then available in different forums, one set in the contractual forum and the other in the treaty forum. Splitting up the two sets of remedies has proved difficult to reconcile with the so-called “Fork-in-the-Road” clauses and the (in)famous exhaustion of local remedies rule.

A first difficulty with the assumption of concurrency relates to the provision found in some investment treaties that allows investors to elect the forum in which the investment disputes will be entertained.³³ Under these so-called “Fork-in-the-Road” clauses, the investor is to make a final choice between, generally, one of three forums: (i) the courts of the host State, (ii) a pre-agreed settlement mechanism and (iii) ad hoc or administered international arbitration under the treaty.³⁴ When confronted with a choice-of-forum clause in the contract, treaty tribunals have struggled with the “Fork-in-the-Road” clause as the contractual choice of forum could be regarded as the investor’s choice under the clause, a finding that would have deprived the investor of the opportunity of claiming under the treaty.³⁵ And, indeed, these very difficulties led to the *Vivendi* ad hoc committee’s distinction between contractual and treaty claims, only the former being subject to the choice-of-forum clause.³⁶

The *Vivendi* decision remains problematic in this respect in that it suggests that, had contractual remedies been pursued in the contractual forum, in this case the Argentine courts, the “Fork-in-the-Road” clause would have prevented the investor from initiating

³³ For an overview of the variety of dispute settlement clauses, see Dolzer & Stevens, *supra* note 10, at 147 *et seq.*

³⁴ Douglas, *supra* note 8, at 274 *et seq.*

³⁵ In the first cases dealing with the issue, *Lanco*, *supra* note 23, and *Salini Morocco*, *supra* note 16, the tribunals came to the conclusion that the reference to the administrative courts of the host State was not a true choice of forum as, absent the clause, these courts would have had jurisdiction in any event and, accordingly, did not constitute a “pre-agreed settlement mechanism.” The reasoning appears artificial but these decisions, rendered before that of the ad hoc committee in *Vivendi (Annulment)*, *supra* note 21, did not draw a clear distinction between treaty and contract claims. At stake was thus the very jurisdiction of the treaty tribunal over the dispute in both its contractual and international aspects.

³⁶ *Vivendi (Annulment)*, *supra* note 21, at ¶ 98.

international arbitral proceedings under the treaty.³⁷ This reading of the “Fork-in-the-Road” clause has been rightly criticized as standing in contradiction with the very distinction between contractual and treaty claims and as likely to have a “chilling effect” on an investor willing to bring a contractual dispute in the contractual forum.³⁸ But, more fundamentally, the most questionable part is the very assumption underpinning the ad hoc committee’s reading of the clause, *i.e.*, that, for the same breach of contract, contractual and treaty remedies could be available concurrently. When, as is suggested in the second part of the present work, it is recognized that the treaty remedies are only subsidiary remedies available in the absence of effective contractual remedies, the “Fork-in-the-Road” clause do not present much interpretative difficulty. At the stage of obtaining redress for the breach of contract, the investor is confronted with no choice and has to proceed to the contractual forum.

A second difficulty with the assumption of concurrency relates to the exhaustion of local remedies rule. A customary principle of international law, the rule requires, as a condition of admissibility of international claims by an alien aggrieved by the actions of a state, that redress be first sought in the courts of the host state.³⁹ Assuming a breach of contract could give rise to an international claim, the local remedies rule would apply and the aggrieved contracting party would have first to seek redress in the contractual forum. No question of concurrency between contractual and international remedies would arise in that case; the international remedies would only play a subsidiary role once the contractual remedies have been, unsuccessfully, exhausted.

As a practical matter, however, the local remedies rule can be waived and is routinely waived in investment treaties.⁴⁰ It is only in this setting that the issue of concurrency

³⁷ *Ibid.* at ¶ 55.

³⁸ Douglas, *supra* note 8, at 276-7.

³⁹ The leading authority is the decision of the International Court of Justice in the *Interhandel Case (Switzerland v. U.S.)*, [1959] I.C.J. Rep. 5. See Brownlie, *supra* note 4, at 472 *et seq.* See generally Chittharanjan Amerasinghe, *Local Remedies in International Law*, 2nd ed., (Cambridge: Cambridge University Press, 2004).

⁴⁰ Article 26 of the ICSID Convention, *supra* note 9, provides an example of explicit waiver. The requirement that an investor waives its “right to initiate or continue” local proceedings in article 1121 of the NAFTA has also been interpreted as operating a waiver of the local remedies rule, see William Dodge, “National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata under Chapter

arises. That is, the waiver can potentially be read as allowing the investor to proceed directly to the treaty forum without seeking redress in the contractual forum first. The necessary assumption is of course that the international remedies sought in the treaty forum are available independently of and concurrently with the contractual remedies. Before turning to this point, it should be noted that, although waivers of the local remedies rule are arguably designed to enhance the protection afforded foreign investors, it is at best unclear whether the intent could have been to allow an investor to trump the contractual choice of forum agreed to in the contract.⁴¹ The suggestion is all the more problematic when it is recognized that the main motive – if not the only motive – underlying an investor’s framing claims as violations of the treaty might simply be to avoid the contractual forum, perceived as potentially biased, and to have the dispute gain political prominence and thus enhance the prospects of enforcement by claiming directly against the state under the treaty.⁴² Such a result is shocking as it flies in the face of the very contractual intent the parties expressed in the choice-of-forum clause, but here again it only rests on the questionable assumption of concurrency between contractual and treaty remedies.

Eleven of NAFTA” (2000) 23 *Hastings Int’l & Comp. L. Rev.* 357 at 373 *et seq.* The local remedies rule can also be waived by implication as is the case where the investment treaty contains a “fork in the road” clause requiring the investor to elect between bringing its claims in the local courts or in the treaty tribunal. Amerasinghe, *supra* note 39, at 270-71. Absent explicit or implied waiver, it is however disputed whether it can be said that, as a general rule, the local remedies rule is inapplicable in investment treaty arbitration. *Ibid.* at 274. *Contra* Douglas, *supra* note 8, at 240.

⁴¹ In this respect, states have been more emphatic when intending to override express choice of forum clauses, as was the case in the Algiers Accord establishing the Iran – United States Claims Tribunal. See the *Claims Settlement Declaration of 19 January 1981*, (1981) 75 A.J.I.L. 418, Article II(1) [Signed in Algiers].

⁴² It is indeed doubtful that the investor’s choice of pursuing an international remedy be primarily motivated by different standards of compensation for breach of contract and violation of international law as similar principles (*restitutio in integrum* and recovery of lost profits) generally apply to both breach of contract under the *lex contractus* and to unlawful takings and expropriation under international law. Derek Bowett, “State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach” (1988) 59 B.Y.I.L. 49, at 61 *et seq.* Admittedly, things might differ in practice but the casual, some would say random, way in which lost profits are assessed by tribunals applying both the *lex contractus* and under international law is unlikely to give claimants much guidance. For a review of these difficulties, see Thomas Wälde, “Remedies and Compensation in International Law” (2005) 2:5 *Transnat’l Dispute Management* at 4 *et seq.* online at: www.transnational-dispute-management.com [July 2005, first draft prepared for the ILA Committee on International Law of Foreign Investment]. Professor Waelde rightly points at the CME and Lauder’s arbitrations brought against the Czech Republic where, on the same facts, one investment tribunal awarded US\$ 350 million in damages and the other none. *CME Czech Republic B.V. v. Czech Republic*, (14 March 2003) Final Award, online at: <http://ita.law.uvic.ca> [UNCITRAL]; *Lauder v. Czech Republic*, (3 September 2001) Award, online at: <http://ita.law.uvic.ca> [UNCITRAL].

In sum, in recent years, the multiplication of investment treaties coupling the availability of international arbitration with waivers of the local remedies rule has given rise to serious jurisdictional difficulties as regards state contracts. Underlying these difficulties is the assumption of concurrency between contractual and international remedies, an assumption I propose to confront in the following Part. The task will require exploring a question that has long bedeviled students of international law: When, if ever, will a breach of contract attributable to a state amount to a violation of international law?⁴³ In following this well-trodden path, my purpose is to cast some light on the interplay between contractual and international remedies. It will appear that the assumption of concurrency is misplaced. Rather, the role of international remedies should be approached in terms of subsidiarity.

III. INTERNATIONAL REMEDIES AS SUBSIDIARY REMEDIES

While some failed attempts at arguing that any breaches of contract could *per se* amount to violations of international law, notably on the basis of the principle of *pacta sunt servanda*, are to be found in the annals of international law,⁴⁴ it is relatively uncontroversial today that not any breach will suffice. In this respect, Professor Crawford made clear in his commentaries to the International Law Association's Articles on State Responsibility that "[s]omething further is required before international law becomes relevant [...]."⁴⁵ What the law understands by this "something further" has been presented in various ways. For one school of thought, the question has to be approached in terms of a independent international wrong. That is, the breach of contract would give rise to an international remedy so long as the conditions for an unlawful taking or violation of another international standard of treatment are met.⁴⁶ In contrast,

⁴³ For a recent example, see Schwebel, *supra* note 5.

⁴⁴ The argument was made by the Greek government in the *Ambatielos* arbitration. *Ambatielos Case (Greece v. United Kingdom)*, I.C.J. Pleadings at 71, referred to in Schwebel, *supra* note 5, at 425. Similarly, in the *Losinger & Co.* case, Switzerland contended that the principle of *pacta sunt servanda* applied to State contracts. See *Losinger & Co. case (Switzerland v. Denmark)*, (1936) P.C.I.J., Series C, No. 78 at 32, referred to in Schwebel, *supra* note 5, at 427.

⁴⁵ James Crawford, *The International Law Association's Articles on State Responsibility*, (Cambridge: Cambridge University Press, 2002) at 96.

⁴⁶ R. Jennings & A. Watts, *Oppenheim's International Law*, 9 ed., (Harlow: Longman, 1992) at 927. Brownlie, *supra* note 4, at 522.

another school of thought regards this independent wrong approach as artificial and considers that the breach of contract itself, under certain circumstances to be determined, constitutes the international wrong.⁴⁷

As it fits more readily the analytical framework offered by investment treaties, which distinguish between expropriation and several other standards of treatment, and allows a clear presentation of the case law, the first, somewhat pigeonholing approach is adopted in this work. The issues raised by the breach or repudiation of a state contract will therefore be approached alternatively in terms of expropriation and violation of standards of treatment. To some extent, the approach adopted by the second school of thought reflects more a concern over the tidiness of the conceptual framework than any truly alternative reading of the law as it has evolved from judicial and state practice.⁴⁸ Still, its insight, *i.e.*, that the breach or repudiation is subject to a uniform regime whether approached in terms of expropriation or violation of standards of treatment, will be confirmed. In particular, the criterion upon which the proponents of this second approach have insisted, that in issue be acts of the state as sovereign and not as contracting party, will appear as the touchstone to a finding both of expropriation and violation of the standards of treatment.⁴⁹ Yet by putting the emphasis on the breach of contract, this second approach might lead to overlook the fact that it is not so much the breach of contract, regardless how serious it is, as the absence of effective contractual remedies for this breach that give rise to an international wrong.⁵⁰

⁴⁷ Weil, *supra* note 5, at 145; Schwebel, *supra* note 5, at 434. This is also the approach embodied in the *Restatement (3d) of the Foreign Relations Law of the United States*, § 712 (1986).

⁴⁸ This concern with tidiness is apparent when Weil, referring to the decision of Nielsen in *International Fisheries Company*, states, “on ne peut guère se déclarer convaincu par un raisonnement aussi éloigné de la réalité: comment prétendre, en effet, que le refus de l’Etat débiteur de payer le prix convenu est extérieur au contrat, sous prétexte qu’il s’agirait de la confiscation de ce prix (ou des biens qu’il représente), alors qu’il saute aux yeux que l’on est en présence de l’inexécution pure et simple d’une obligation contractuelle, inexécution qui ne peut d’ailleurs être constatée par le juge qu’à la lumière du contenu même de ces obligations ?” Weil, *supra* note 5, at 145.

⁴⁹ Schwebel would limit the existence of an international wrong to case where the state “employs its legislative or administrative or executive authority as only a State can employ governmental authority to undo the fundamental expectation on the basis of which parties characteristically contract.” Schwebel, *supra* note 5, at 435. [My emphasis] Similarly, for Weil the overriding criterion rests in distinguishing whether the state acted as any other party to a contract or whether it used its sovereign prerogatives. Weil, *supra* note 5, at 205-6.

⁵⁰ O’Connell does not fall in this trap and consider that the repudiation of a contract by a State would give rise to an international wrong where such repudiation is achieved either by modification of the municipal

A. LEGISLATIVE BREACH AS EXPROPRIATION OF CONTRACTUAL RIGHTS

The law relating to confiscatory takings has dramatically evolved over the past decades. International law has historically been concerned with instances of direct seizure of property by the state, whether by legal or physical means.⁵¹ The bulk of the work of modern international tribunals does not, however, relate to these instances of “direct expropriation” but rather to what has come to be known as “indirect expropriation”,⁵² a concept defined as a “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”⁵³ While the terminology varies, terms like regulatory, de facto, or creeping expropriations also have currency, an understanding exists upon the basic idea, *i.e.*, the confiscation of property might result from state interferences short of formal legislative decree.⁵⁴ What constitutes expropriation has thus come to be understood more in consequential than in formal terms, the emphasis being put on the effects of the actions of the host state.⁵⁵

The analytical framework offered by the distinction between direct and indirect takings is also relevant to contractual rights, a type of assets sufficiently valuable to be regarded as susceptible of expropriation under international law.⁵⁶ The *Norwegian*

law or by “sovereign action in violation of municipal law, where no municipal remedy is available.” D. O’Connell, *International Law*, vol. 2 (London: Stevens & Sons, 1970), at 986.

⁵¹ August Reinisch, “Expropriation” (2005) 2:5 *Transnat’l Dispute Management* at 2, online at: www.transnational-dispute-management.com [Document submitted to the ILA Committee on the International Law of Foreign Investment]; Brownlie, *supra* note 4, at 509.

⁵² Reinisch, *ibid.* at 2, points out that, since the middle of the 1990s, in only one case has an investment tribunal concluded that a direct expropriation had occurred, see *Sedelmayer v. Russian Federation*, (7 July 1998) Award, online at: <http://ita.uvic.ca> [UNCITRAL].

⁵³ *Metalclad Corporation v. Mexico*, (30 August 2000) Award, ARB(AF)/97/1, online at: <http://ita.uvic.ca> at § 103 [NAFTA, ICSID Additional Facilities].

⁵⁴ Michael Reisman & Robert Sloane, “Indirect Expropriation and Its Valuation in the BIT Generation” (2003) 74 *B.Y.I.L.* 115 at 121.

⁵⁵ *Ibid.* at 121.

⁵⁶ Reinisch, *supra* note 51, at 3 *et seq.*; Christoph Schreuer, “The Concept of Expropriation under the ETC [*sic*] and other Investment Protection Treaties” (2005) at 19 *et seq.* online at: www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf [hereinafter “Expropriation”] The contrary argument made by the United States in the *Norwegian Shipowners Claims (Norway v. U.S.)*, (1922) 1 *R.I.A.A.* 307 [P.C.A.], a case that involved the legislative cancellation by the United States as a preparation to enter World War I of certain shipbuilding contracts entered into by American shipbuilders and Norwegian

Shipowners Claims offers a clear instance of direct taking of contractual rights by the state.⁵⁷ Certain Norwegian nationals had entered into contracts for the building of ships with some American nationals. In the military build-up preceding its entry into World War I, the American government requisitioned commercial ships and nullified by legislation the contracts the Norwegians had entered into. Rejecting the American argument to the contrary, the tribunal held that contractual rights could be expropriated and that the Norwegian nationals' rights had, in the circumstance, been unlawfully taken.⁵⁸ In contrast, the famous *Chorzow Factory* case is a clear illustration of indirect taking of contractual rights.⁵⁹ In issue was the Polish government's decision to expropriate a nitrate plant owned by a German company. The Court held that the decision had not only prejudiced the owner but also the third party contractually entitled to operate the plant, a clear – actually the seminal – instance of indirect expropriation.⁶⁰ These cases, however, involved contracts between private parties, not state contracts. It is only when the state is the contracting party that the question arises whether breach or repudiation of the contract by the state can amount to an expropriation, whether direct or indirect.

purchasers, was flatly rejected. This approach has been confirmed on a variety of occasions, the most famous being the Permanent Court of International Justice's decision in the *Chorzow Factory* case. *Case concerning certain German interest in Polish Upper Silesia (Germany v. Poland)*, (1926) P.C.I.J. Ser. A, No. 7. [*Chorzow Factory*]. The court found that the rights of a company under a contract for the operation of a factory had been expropriated when the factory was expropriated. *Ibid* at 24. See also *e.g. Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, (1983) 4 Iran-U.S.C.T.R. 122 at 156 [Iran-U.S. C.T.]; *Amoco International Finance Corp v. Iran* (1987) 15 Iran-U.S.C.T.R. 189 at §. 105 [Iran-US C.T.]; *Phillips Petroleum Co. v. Iran*, (1989) 21 Iran-U.S.C.T.R. 79 at §. 76 [Iran-US C.T.]; and *S.P.P. v. Egypt*, (20 May 1992) Award, 3 I.C.S.I.D. Rep. 189, at 228, § 164.

⁵⁷ *Norwegian Shipowners Claims*, *ibid.* at 307

⁵⁸ *Ibid.*

⁵⁹ *Chorzow Factory*, *supra* note 56.

⁶⁰ *Ibid.* But see Reisman & Sloane, *supra* note 54, at 119 (suggesting that the *Norwegian Shipowners Claims* would also be an instance of indirect expropriation).

The Earliest Authorities and the Concept of Legislative Breach

In the *Singer Sewing* case, a case involving the Turkish government's failure to pay for certain sewing machines purchased from an American company, Commissioner Nielsen held that:

“It cannot be said that the law of nations embraces any “Law of Contracts” such as is found in the domestic jurisprudence of nations. International Law does not prescribe rules relative to the forms and legal effect of contracts. [...] But [...] that law may be considered to be concerned with the action authorities of a Government may take with respect to contractual rights. It is believed that in the ultimate determination of responsibility under international law, application can properly be given to principles of law with respect to confiscation, and that confiscation of the property of an alien is violative of international law. If a Government agrees to pay money for commodities and fails to make payment, the view may be taken that the purchase price of the commodities has been confiscated, or that the commodities have been confiscated.”⁶¹

This statement, which could result in regarding any breach as a confiscatory measure, is generally rejected as being far too broad.⁶² Rather, the general view has it that only in certain circumstances will the breach or repudiation of a contract amount to a confiscatory measure, and the touchstone has come to be expressed in terms of whether, in breaching or repudiating the contract, the state acted as a sovereign or as a contracting party.⁶³

This test, however, begs the question: In which circumstances will the breach or repudiation be regarded as a sovereign act and not as that of a contracting party? Further, by suggesting that, under certain circumstances to be determined, the breach can qualify

⁶¹ *Singer Sewing Machine Company Arbitration (United States v. Turkey)* reported in Fred K. Nielsen, ed. *American-Turkish Claims Settlement under the Agreement of December 24, 1923, Opinions and Report*, (Washington: US Gov., 1937) at 491. [My emphasis]

⁶² The tribunal in *Waste Management (II)* pointed out that taken literally it would abrogate the distinction between breach of contract and violation of international law and that, in any event, the statement was *obiter* as the American-Turkish commission had also jurisdiction to decide over contractual claims. See *Waste Management, Inc. v. United Mexican States (II)*, (30 April 2004) Final Award, ARB(AF)/00/3, at §. 170, online at: <http://ita.law.uvic.ca> [NAFTA, ICSID Additional Facilities, hereinafter *Waste Management (II)*].

⁶³ World Bank Development Committee, *Guidelines on the Treatment of Foreign Investment*, Art. IV(11) (1992), online at: <http://ita.law.uvic.ca/documents/WorldBank.pdf>. Schreuer at 23 *et seq*, Reinsich at 12.

as a sovereign breach giving rise to an international wrong, it seemingly lends support to the assumption that contractual and international remedies can be concurrent. In reviewing the authorities cited in support of this test, assistance can be found in the analytical framework offered by the distinction between direct and indirect takings. It will appear that most of the authorities are instances of direct, formal expropriation of contractual rights, tribunals refusing to assimilate a state's refusal to perform under a contract as an indirect taking. In these cases, which can be conveniently referred to as cases of "legislative breach",⁶⁴ there is no breach of contract giving rise to a remedy under the *lex contractus*. Rather, it is the deprivation of the remedies that would otherwise been available under the *lex contractus* that constitute the confiscatory measure for which international law gives a remedy.⁶⁵ Thus, no question of concurrency arises.

The earliest authorities referred to in this context, the *Company General of the Orinoco* case,⁶⁶ *Shufeldt Claim*⁶⁷ and the *Jalapa Railroad* case⁶⁸, are clear instances of legislative breach and lend support to the conclusion that international law gives a remedy when the contractual remedies are suppressed.⁶⁹ The first case involved two concession contracts a French company, the Company General of the Orinoco, held for the exploitation of mines and the development of transportation facilities in Venezuela. Tensions with a neighboring country led the Venezuelan government to abrogate those contracts. The French-Venezuelan Mixed Claims Commission held that, while as a sovereign power the government of Venezuela could abrogate the contracts, compensation "commensurate to the damages caused by the act of the respondent Government in denying efficacy to the contract" should have followed.⁷⁰

⁶⁴ The term is used by Amerasinghe, *supra* note 39, at 138. For a similar approach, see O'Connell, *supra* note 50, at 986-88.

⁶⁵ The proposition is supported by O'Connell, *ibid.* at 986-88.

⁶⁶ *Claim of Company General of the Orinoco (France v. Venezuela)*, (31 July 1905) Opinion of Umpire, reported in Jackson Ralston, ed., *Report of French-Venezuelan Mixed Claims Commission of 1902*, (Washington: U.S. Gov., 1906) 322 at 362.

⁶⁷ *Shufeldt Claim (U.S. v. Guatemala)*, (1930), 2 RIAA 1079 (Award).

⁶⁸ *Jalapa Railroad and Power Co. (U.S. v. Mexico)*, (1948) reported in Marjorie Whiteman, ed., *Digest of International Law*, vol. 8, (Washington: U.S. Gov., 1976) at 908 [American-Mexican Claims Commission]

⁶⁹ These cases are referred to in Alexandrov, *supra* note 8, at 559; see also Schreuer, "Expropriation", *supra* note 56, at 25; Reinisch, *supra* note 51, at 12.

⁷⁰ *Claim of Company General of the Orinoco (France v. Venezuela)*, *supra* note 66, at 362.

Similarly, the *Shufeldt claim* involved the legislative abrogation by Guatemala of a concession contract with an American national. The United States contended that “the property rights of the claimant were arbitrarily confiscated and destroyed by the Guatemalan Government, and that that Government [was] bound to make compensation therefor.”⁷¹ The Arbitrator, Sir Herbert Sisnett, agreed and rejected the Guatemalan Government’s contention that “the decree was the constitutional act of a sovereign State” and “not subject to review by any judicial authority.”

In the *Jalapa Railroad* case, the government of the state of Veracruz had purchased from an American national certain assets in consideration of a share in the proceeds of the federal tax on petroleum. At some point, the government passed a legislative decree that purported to nullify the payment clause. The American-Mexican Claims commission held that:

“In the circumstances, the issue for determination is whether the breach of contract alleged to have resulted from the nullification of clause twelfth of the contract was an ordinary one involving no international responsibility or whether the said breach was effected arbitrarily by means of a governmental power illegal under international law [...] the 1931 decree of the same Legislature, [...] was clearly not an ordinary breach of contract. Here the Government of Veracruz stepped out of the role of contracting party and sought to escape vital obligations under its contract by exercising its superior governmental power. Such action under international law has been held to be a confiscatory breach of contract [...].”⁷²

Similarly, a more recent decision, that of the Iran-US Claims Tribunal in *Phillips Petroleum Co. v. Iran*, is often referred as supporting the sovereign act test.⁷³ The claimant had entered into a Joint Structure Agreement (“**JSA**”) for the exploration of off-shore oil fields with the National Iranian Oil Company (“**NIOC**”). Following the Islamic revolution in 1979, the Iranian government announced its intention to nationalize the country’s oil industry, and the claimant was thereafter confronted with systematic obstruction on the part of the Iranian government and NIOC (notably through the

⁷¹ *Shufeldt Claim*, *supra* note 67.

⁷² *Jalapa Railroad and Power Co.*, *supra* note 68, at 908-909. [Emphasis added]

⁷³ *Phillips Petroleum Co. v. Iran*, (1989) 21 Iran-U.S.C.T.R. 79 [Iran-US C.T.]; Schreuer, “Expropriation”, *supra* note 56 at 25; Reinisch, *supra* note 51, at 13.

unilateral reduction of the production rates, the replacement of management, and then the repudiation of the contract) that culminated with the enactment of the Single Article Act on 8 January 1980 and the “nullification” of the JVA under the said act in August 1980.⁷⁴ The claimant contended that the respondents’ action amounted to an expropriation of its rights under the JVA or, alternatively, constituted a breach and repudiation of the JVA. Having decided that the alleged acts would be more appropriately considered in terms of international law,⁷⁵ the tribunal found that the claimant’s contractual rights had been unlawfully taken.⁷⁶

These cases are clear instances of direct expropriation by the host state of the contractual rights, *i.e.*, via formal decree abrogating the contract binding the state and the alien investor. If they can be conveniently referred to as cases of “legislative breach”, the term should not hide the fact that the very result of the acts of the state is to suppress the remedies that would otherwise been available under the *lex contractus*. The question remains whether short of a direct, formal taking of contractual rights, the breach or repudiation of the contract by the host state can be found to constitute an indirect expropriation of the investor’s contractual rights.

Modern Authorities and Ordinary Breach as Indirect Expropriation

As was pointed out earlier, the bulk of the work of treaty tribunals nowadays relates to state measures alleged to have indirectly expropriated an investor, *i.e.*, measures whose effects are alleged to be tantamount to expropriation. In this connection, some commentators, while not advocating a return to the position adopted in the *Singer Sewing*

⁷⁴ The Single Article Act reads as follows: “All oil agreements considered by a special commission appointed by the Minister of Oil to be contrary to the Nationalization of the Iranian Oil Industry Act shall be annulled and claims arising from conclusion and execution of such agreements shall be settled by the decision of the said commission.” English translation taken from *AMOCO v. Iran*, (1984) 9 Yearbook Com. Arb. at 239 [Iran-U.S. C.T.R.].

⁷⁵ *Phillips Petroleum Co.*, *supra* note 56, at 106.

⁷⁶ *Ibid.* at 116. A hotly debated issue was the determination, for purposes of compensation, of the actual date of the taking as NIOC’s final refusal to perform under the contract occurred nine months before the legislative nullification. The tribunal noting that the deprivation of property had arisen from “a series of concrete actions rather than any particular formal decree, as the formal acts merely ratified and legitimized the existing state of affairs”, decided that the contractual rights had been expropriated at the earlier of the two dates, *ibid.* at 116. This has led some to view the case as an instance of indirect expropriation. Reisman & Sloane, *supra* note 54, at 120.

case, contends that a serious breach of contract, notably a serious underpayment, could be regarded as a measure tantamount to expropriation.⁷⁷ In practice, treaty tribunals have proved extremely cautious in approaching the question.

In *Consortium R.F.C.C v. Morocco*, the claimant had contracted with the Moroccan highway authority for the construction of certain segments of a highway.⁷⁸ A dispute arose as to certain cost over-runs and the employer's application of liquidated damages for delay and subsequent calls under the performance bonds. Initiating proceedings under the Italy-Morocco BIT, the claimant alleged, *inter alia*, that the employer's failure to pay fell within the ambit of the expropriation provisions. The tribunal acknowledged that the reference to "measures tantamount to expropriation" in investment treaties had been interpreted liberally so as to include measures falling short of legislative or regulatory acts.⁷⁹ However, the tribunal, while approving this liberal approach, noted that this interpretation had only been made in the context of unilateral acts of the host state taken pursuant to its sovereign prerogatives.⁸⁰ The mere refusal to pay under a contract did not qualify, and the tribunal rejected the claim.⁸¹

A similar conclusion was reached in the much commented decision in *SGS v. Philippines*.⁸² In this case, the claimant, a Swiss company, had long provided pre-shipment inspection services for the customs authorities of the Philippines, a relationship that was embodied in a contract between the claimant and the government. When the contract was abruptly terminated, the claimant unsuccessfully presented monetary claims for unpaid services to the government. As a result, the claimant initiated arbitral proceedings under the Swiss-Philippines BIT alleging, *inter alia*, that the government's

⁷⁷ Thomas Wälde & Kaj Hobér, "The First Energy Charter Treaty Arbitral Award" (2005) 22 J. of Int'l Arb. 83 at 97.

⁷⁸ *Consortium R.F.C.C. v. Kingdom of Morocco*, (22 December 2003) Final Award, ARB/00/6, online at: <http://ita.law.uvic.ca> [ICSID, hereinafter *RFCC*].

⁷⁹ *Ibid.* at ¶ 63-4. The tribunal notably referred to the decision in *Ethyl Corporation v. Canada*, (24 June 1998) Decision on Jurisdiction, online at: <http://ita.law.uvic.ca> [NAFTA, UNCITRAL], [announcement of intention to enact a legislative ban on fuel additive] and *Metalclad v. Mexico*, *supra* note 53, [unwarranted refusal to issue a building permit].

⁸⁰ *RFCC*, *supra* note 78, at ¶ 65.

⁸¹ *Ibid.* at ¶ 85 *et seq.*

⁸² *SGS Philippines*, *supra* note 16.

failure to pay the sums allegedly due under the contract amounted to expropriation. The tribunal emphatically noted the absence of any law or decree purporting to deny the claimant's contractual rights and rejected the contention that the refusal to pay amounted to expropriation.⁸³

In the *Waste Management (II)* case, the claimant contended that a Mexican municipality's persistent failure to pay certain sums due under a waste disposal concession contract was "tantamount to expropriation" under Article 1110 of NAFTA.⁸⁴ Here again, the contention was dismissed, and the tribunal's reasoning bears reproducing:

"The mere no-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts [...]. It is true that, having regard to the inclusive definition of "measure" ["tantamount to expropriation" in Article 1110(1) of NAFTA], one could envisage conduct tantamount to an expropriation which consisted of acts and omissions not specifically or exclusively governmental. All the same, the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach."⁸⁵

Accordingly, the contention that the breach or repudiation of a contract by a state could fit in the category of "measures tantamount to expropriation" has had little success. In light of the nature of contractual rights, this cautious approach appears commendable. Contractual rights are nothing more than claims to performance, which the *lex contractus* recognizes and will enforce if need be. Admittedly, the very value of these claims resides in the fact that the *lex contractus* gives a remedy in case of breach. As a result, the breach or repudiation does not cause the investor to lose its contractual right. The claim to performance, and therefore the value of the right, remains so long as a remedy remains available under the *lex contractus*, a fact that did not escape the tribunal in *SGS v. Philippines* and *Waste Management*. In the former case, the tribunal considered that

⁸³ *Ibid.* at ¶ 161.

⁸⁴ *Waste Management (II)*, *supra* note 62.

⁸⁵ *Ibid.* at ¶ 174. [Emphasis added]

breach could not give rise to an expropriation “at least where remedies exist in respect of such [breach].”⁸⁶ Similarly, in the latter case, the tribunal noted that “[i]t is only where such access [to appropriate courts to remedy the breach] is legally or practically foreclosed that the breach could amount to an [sic] definitive denial of right (i.e., the effective taking of the chose in action) [...]”⁸⁷

In sum, the touchstone for expropriation of contractual rights emerges as whether or not contractual remedies remain available.⁸⁸ This very conclusion contradicts, insofar as the international law of expropriation is concerned, the idea that contractual and international remedies are concurrently available. It remains to consider the conditions in which international law gives a remedy for a breach or repudiation of a contract when the issue is approached in terms of violation of standards of treatment.

B. ORDINARY BREACH AS VIOLATION OF FAIR AND EQUITABLE TREATMENT

As an almost universal rule, investment treaties include clauses requiring that investments be given “fair and equitable treatment.”⁸⁹ The scope to be ascribed to this ubiquitous clause is nonetheless the subject of considerable controversy and has given rise to two different approaches.⁹⁰

⁸⁶ *SGS Philippines*, *supra* note 16, at ¶ 161.

⁸⁷ *Waste Management (II)*, *supra* note 62, at ¶ 174.

⁸⁸ Interestingly, in the recent *EnCana* case, *EnCana Corporation v. Republic of Ecuador*, (30 December 2005) Award, LCIA Case No. UN3481, online at: <http://ita.law.uvic.ca> [UNCITRAL, LCIA as appointing authority, hereinafter *EnCana Award*], the majority adopted a similar reasoning as regards another type of intangible rights, entitlement to VAT tax refunds, confirming that the value of those rights reside in the claims to enforcement under the domestic law. The majority approved the reasoning in *Waste Management (II)* and stated, “Like private parties, governments do not repudiate obligations merely by contesting their existence. An executive agency does not expropriate the value represented by a statutory obligation to make a payment or refund by mere refusal to pay, provided at least (a) the refusal is not merely willful, (b) the courts are open to the aggrieved private party, (c) the courts’ decisions are not themselves overridden or repudiated by the State.” *Ibid.* at ¶ 194. Dr. Horacio Grigera Naón dissented on the basis that the majority’s reasoning amounted to reinstating the local remedies rule. *EnCana Corporation v. Republic of Ecuador*, (3 February 2006) Partial Dissenting Opinion, LCIA Case No. UN3481, online at: <http://ita.law.uvic.ca> [UNCITRAL, LCIA as appointing authority] at ¶ 8 *et seq.* In response, the majority made clear that the issue was not one of admissibility “but whether the relevant rights have been expropriated as a matter of substance.” *EnCana Award* at ¶ 200, note 138.

⁸⁹ Andreas Lowenfeld, *International Economic Law* (Oxford: Oxford University Press, 2002) at 475.

⁹⁰ UNCTAD, *Fair and Equitable Treatment* (New York & Geneva: United Nations, 1999) at 8 *et seq.*

The proponents of the first approach contend that the reference to “fair and equitable treatment” imports customary rules of treatment.⁹¹ On this view, the reference to “fair and equitable treatment” in investment treaties is coextensive to what is known as the international minimum standard.⁹² The leading authority on this issue is the decision of the Mexico-U.S. General Claims Commission in the *Neer Claim*,⁹³ a case that involved the claim presented by the United States on behalf of the heirs of Mr. Neer, an American national shot by gunmen in Mexico. The heirs alleged that the Mexican authorities had been grossly negligent in prosecuting the culprits. Rejecting the claim, the commission held that in order to give rise to an international wrong, the acts of the state would have to be such as to amount “to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”⁹⁴

In contrast, the proponents of the second approach argue that in accordance with the rules governing the interpretation of treaties, the reference to “fair and equitable treatment” should be given its plain meaning.⁹⁵ On this view, the standard would call for an inquiry into whether “in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable” and would, accordingly, go “beyond the minimum standard.”⁹⁶ Adopting this approach, the NAFTA tribunal in *Pope & Talbot v. Canada* pointed out that the reference to fair and equitable treatment in Article 1105 of NAFTA relieved the investor from establishing, as required under the international minimum standard, that

⁹¹ Lowenfeld, *supra* note 89, at 475.

⁹² This is in substance the position adopted on 31 July 2001 by the NAFTA Free Trade Commission following the award on the merits in *Pope and Talbot v. Government of Canada*. NAFTA Free Trade Commission, Interpretative Note of 31 July 2001, online at: www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp. For a comment on these proceedings, see Patrick Dumberry, “Pope & Talbot inc. v. Government of Canada – Fair and Equitable Treatment for Investor under International Law” (2002) 20:3 A.S.A. Bull. 453. This is also the approach adopted in the 2004 US Model BIT, which in its Article 5 “Minimum Standard of Treatment” specifies that the reference to fair and equitable treatment does not create obligations in addition or beyond that imposed under the international minimum standard. United States, *Model Bilateral Investment Treaty* (2004) online at: <http://ita.law.uvic.ca>.

⁹³ *Neer Claim (U.S. v. Mexico)*, (1926) 4 R.I.A.A. 60 [Mexico-U.S. Genral Claims Commission] referred to in Brownlie, *supra* note 4, at 503.

⁹⁴ *Ibid.*

⁹⁵ UNCTAD, *supra* note 90, at 10.

⁹⁶ Frederick A. Mann, “British Treaties for the Promotion and Protection of Investment” in *Further Studies in International Law* (Oxford: Clarendon, 1990) 234, at 238.

“the conduct complained of be ‘egregious’, ‘outrageous’ or ‘shocking’ or otherwise extraordinary”.⁹⁷

The interpretative note issued by the NAFTA Free Trade Commission and the modifications of the Canadian and US Model BITs in the wake of the decision in *Pope & Talbot* bear witness that the debate is far from settled.⁹⁸ At most, it is relatively uncontroversial that the standard would be applicable to instances of denial of justice as understood in customary international law.⁹⁹ Before turning to the consequences of the plain meaning understanding of the fair-and-equitable-treatment standard, the issue of breach or repudiation of state contracts will, therefore, be first approached from this perspective. As they engage both the fair-and-equitable-treatment and the national and most-favored-nation standards, discriminatory breaches of contract will, for now, be set aside.

Ordinary Breach of Contract and Denial of Justice

Historically, states have been reluctant to espouse contractual claims of their nationals against other states and have traditionally refused to exercise diplomatic protection in respect thereof.¹⁰⁰ International intervention in contractual matters has come to be perceived as creating unnecessary tensions and as being counter-productive.¹⁰¹ As a result, disappointed parties have usually been referred to the local courts or other contractual forums, and diplomatic protection reserved to the exceptional case where no redress could be obtained from the contractual forums.¹⁰² For example, the United States

⁹⁷ *Pope & Talbot v. Canada*, (10 April 2001) Award on the Merits, online at: <http://ita.law.uvic.ca> [NAFTA, ICSID Additional Facilities] at ¶ 118.

⁹⁸ The Interpretative Note adopted on 31 July 2001, NAFTA Free Trade Commission, *supra* note 92, reads in its paragraph B.2 as follows: “The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by customary international law minimum standards of treatment of alien.” Art. 5(2) of the 2004 US Model BIT, *supra* note 92, and Art. 5(2) of the 2004 Canadian Model BIT, Canada, *Model Bilateral Investment Treaty* (2004) online at: <http://ita.law.uvic.ca> are to the same effect.

⁹⁹ Lowenfeld, *supra* note 89, at 475. See also Art. 5(2)(1) of the 2004 US Model BIT, *supra* note 92.

¹⁰⁰ Brownlie, *supra* note 4, at 524. O’Connell, *supra* note 50, at 985-86.

¹⁰¹ O’Connell, *ibid.* at 986.

¹⁰² The United States Department of State rejected a request for intervening against the Haitian government in the following terms: “The Department [...] considers that the matter is one which, in accordance with the applicable principles of international law and custom, should be settled by and between the contracting

Department of State declined to endorse one of its nationals' claims for payment under an employment contract with the government of Israel in the following terms:

“[...] claims arising out of contractual relationships between a national of this Government and a foreign government do not, generally speaking, provide a proper subject for diplomatic intervention on the part of this Government in the absence of a clear showing that the American national has exhausted such local remedies as may be open to him and has sustained a denial of justice as that term is understood in international law. It does not appear that you have exhausted the local remedy which may be available in Israel with respect to your claim [...].”¹⁰³

The breach of contract is thus approached in terms of denial of justice, a multifaceted concept usually understood as contemplating some sort of miscarriage of justice.¹⁰⁴ Here, international law is concerned with both instances of procedural unfairness—the Harvard Research Project refers to “denial, unwarranted delay or obstruction of access to courts”, “gross deficiency in the administration of judicial or remedial process”, and “failure to provide guarantees which are generally considered indispensable to the proper administration of justice”—and instances of substantive unfairness—the Harvard Research Project refers to “a manifestly unjust judgment.”¹⁰⁵ Arguably, a denial of justice would also arise in the event a state, bound by an arbitration agreement, refused to arbitrate¹⁰⁶ or refused to enforce a decision favorable to the alien.¹⁰⁷

parties or by legal proceedings in the appropriate tribunals.” Acting Secretary of State Stettinius to Representative Johnson, letter dated 23 November 1944, reproduced in Whiteman, *supra* note 68, at 906

¹⁰³ Attorney Adviser Matre, Office of the Assistant to the Legal Adviser for International Claims, to Hershel Davis, letter, May 14, 1956, reproduced in Whiteman, *supra* note 68, at 906.

¹⁰⁴ Amerasinghe, *supra* note 39, at 91; Brownlie, *supra* note 4, at 506.

¹⁰⁵ Harvard Research Project, “Responsibility of States for Damage Done on their Territory to the Person or Property of Foreigners” (1929, spec. suppl.) 23 A.J.I.L. 133, art. 9.

¹⁰⁶ O’Connell, *supra* note 50, at 990. In *Salini v. Jordan*, the claimant alleged that the Jordanian government refused to comply with an oral undertaking it had given to arbitrate disputes relating to a contract for the construction of a hydroelectric project. At the jurisdictional stage, arbitral tribunal found that, if supported by evidence, the state’s refusal to arbitrate could give rise to an international claim, see *Salini Jordan*, *supra* note 16, at ¶ 166. In its award on the merits, the tribunal however found that the claimant had not satisfied its burden of proof and not established that any such oral undertaking had been given by the Jordanian government. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, (30 January 2006) Award, ARB/02/13, online at: <http://ita.law.uvic.ca> [ICSID] at ¶ 100.

¹⁰⁷ Alain Pellet, Patrick Dailliet & Nguyen Quoc Dinh, *Droit international public*, 6th ed. (Paris: L.G.D.J., 1999) at 751.

As a result, international law will give a remedy where the breach is followed by a denial of justice in either of these forms.¹⁰⁸ Absent denial of justice, the breach of contract would not amount to a violation of the international law minimum standard of treatment, an approach that is clearly illustrated by the decision of the NAFTA tribunal in *Azinian v. Mexico*.¹⁰⁹ The claimant had entered into a concession contract with a Mexican municipality for the provision of waste disposal services. Difficulties arose, and the municipality rescinded the contract alleging misrepresentation and nonperformance, a decision that was unsuccessfully contested in three levels of courts. The claimant then initiated proceedings under Chapter 11 of NAFTA claiming that the termination of the contract amounted to an unlawful expropriation. The tribunal rejected the contention noting that “a governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level.*”¹¹⁰ The tribunal, nonetheless, went on to consider whether the outcome of the judicial proceedings in Mexico could qualify as a violation of the treaty. The tribunal noted that a denial of justice would arise where “the relevant courts refuse to entertain a suit, if they subject it to undue delay or if they administer justice in a seriously inadequate way” and in case of “clear and malicious misapplication of the law.”¹¹¹ Under the circumstances, the tribunal concluded that no such denial of justice had arisen and rejected the claims.¹¹²

Further to this analysis, the denial of justice, and not the breach of contract, is the wrong for which international law gives a remedy. In other words, the international wrong, the violation of fair and equitable treatment, only arises once the investor has sought redress in the contractual forum and these attempts have been frustrated by the state.¹¹³ Here again, no question of concurrency between contractual and international

¹⁰⁸ Crawford, *supra* note 45, at 96.

¹⁰⁹ *Azinian, Davitian, & Baca v. Mexico*, (1 November 1999) Award, ARB (AF)/97/2, online at: <http://ita.law.uvic.ca> [NAFTA, ICSID Additional Facilities, hereinafter *Azinian*]

¹¹⁰ *Ibid.* at ¶ 97. [Emphasis in the text.]

¹¹¹ *Ibid.* at ¶ 102-03.

¹¹² *Ibid.* at ¶ 124.

¹¹³ Where the courts of the host state are the contractual forum, it remains unclear whether, once a denial of justice has occurred in one level of courts, the waiver becomes applicable or the investor remains bound to pursue its claim in higher courts. If Amerasinghe’s analysis is adopted the international wrong has taken place and recourse to higher courts is an instance of the rule of exhaustion of local remedies. As such, it

remedies arise. International law will only give a remedy where the contractual remedies are made unavailable by the host state.

Ordinary Breach of Contract and the Plain Meaning of Fair and Equitable Treatment

It remains to consider whether on the second approach to the fair-and-equitable-treatment standard – the so-called plain meaning approach – a breach of contract could give rise to an international wrong. Arguably, an approach *à la Pope & Talbot*, if unbound, could easily lead to a finding of violation of the standard where a state’s refusal to perform its contractual obligation is unwarranted under the *lex contractus*, *i.e.*, where the state is in breach. Such appears to be one of the many outcomes of the decision in *SGS v. Philippines* where the tribunal, while refusing to assume jurisdiction over the expropriation claim, held that “[w]hatever the scope of the Article IV standard [fair and equitable treatment] may turn out to be—and that is a matter for the merits—an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV.”¹¹⁴ While it accepted jurisdiction with respect to that claim, the tribunal, however, stayed the proceedings pending determination in the contractual forum of the amount remaining due under the contract.¹¹⁵

Yet international tribunals have been particularly cautious when requested to assess breaches of contract in terms of violation of the standard of treatment. In *Consortium R.F.C.C v. Morocco*, the tribunal also had to decide whether the Moroccan state employer’s failure to pay under the construction contract in issue could amount to a violation of the fair-and-equitable-treatment standard in the Italy – Morocco BIT. The tribunal rejected the claim on the merits. Observing that no agreement existed as to the definition of “fair and equitable treatment” and acknowledging the two different

could be waived effectively. However, the approach adopted in the *Loewen* case belies this contention as the tribunal considered that the waiver in article 1121 of the NAFTA was not applicable in matters of denial of justice. *Loewen Group, Inc. and Raymond L. Loewen v. United States*, (26 June 2003) Award on the Merits, ARB(AF)/98/3, online at: <http://ita.law.uvic.ca> [NAFTA, ICSID Additional Facilities] at ¶ 158-64. In other words, the tribunal considered that exhaustion of local remedies and not merely resort to local remedies was a substantive requirement of the international wrong.

¹¹⁴ *SGS Philippines*, *supra* note 16, at ¶ 162.

¹¹⁵ *Ibid.*

approaches, the tribunal however eschewed taking position on this issue.¹¹⁶ Rather, the tribunal considered that to establish a violation of the standard, the claimant would, in any event, have to show that the state used its sovereign prerogatives, *i.e.*, powers that the state alone enjoys as sovereign.¹¹⁷ In the opinion of the tribunal, only the use of these sovereign powers was subject to scrutiny under the BIT. The tribunal held:

“L’Etat, ou son émanation, peuvent s’être comportés comme des cocontractants ordinaires ayant une divergence d’approche, en fait ou en droit, avec l’investisseur. Pour que la violation alléguée du contrat constitue un traitement injuste ou inéquitable au sens de l’Accord bilatéral, il faut qu’elle résulte d’un comportement exorbitant de celui qu’un contractant ordinaire pourrait adopter. Seul l’Etat, en tant que puissance publique, et non comme contractant, a assumé des obligations au titre de l’Accord bilatéral.”¹¹⁸

Similarly, in *Salini v. Jordan*, a dispute relating to sums allegedly due under a contract for the construction of a hydroelectric dam granted by the Jordan Valley Authority (“JVA”), the claimant contended that JVA’s failure to pay amounted to a violation of fair and equitable treatment under the Italy – Jordan BIT. In this respect, the tribunal was reluctant to accept an argument that “seems to be that all the contractual breaches for which they hold JVA responsible must be regarded as constituting an unjust and unfair treatment by Jordan.”¹¹⁹ Approving the approach adopted in *Consortium R.F.C.C. v. Morocco*, the tribunal held that it had no jurisdiction to consider the claim.¹²⁰

In *Joy Mining v. Egypt*, the claimant had supplied certain longwall mining devices to an agency of the Republic of Egypt (“IMC”). Following delivery and commissioning, a dispute arose between the parties as to the equipment’s performance, and IMC refused to release performance bonds given by the claimant pursuant to the contract. The claimant contended that IMC’s refusal to release the bank guarantees amounted, *inter alia*, to an expropriation, to a discriminatory measure and to a violation of fair and equitable

¹¹⁶ *RFCC*, *supra* note 78, at ¶ 51.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Salini Jordan*, *supra* note 16, at ¶ 159.

¹²⁰ *Ibid.* at ¶ 155.

treatment.¹²¹ In the event, as was noted earlier, the tribunal refused to regard the contract as an “investment” under the treaty.¹²² However, the tribunal went on to consider, *arguendo*, the nature of the claims presented by the claimant. Mindful of the emerging distinction between contract and treaty claims, the tribunal held that “a basic general distinction [could] be made between commercial aspects of a dispute and other aspects involving the existence of some form of state interference with the operation of the contract involved”¹²³ and considered that, under the circumstances, no treaty claim had been made as the bank guarantee was “a commercial element of the contract” and that the dispute was still “commercial and contractual.”¹²⁴

It is noteworthy that the *Joy Mining* decision apparently establishes sovereign action as the threshold to claim under the treaty, irrespective of the specific provision – expropriation, standards of treatment – that is invoked. This approach was confirmed in the *Impreligo v. Pakistan* case.¹²⁵ In that case, the claimant had contracted with a Pakistani state agency for the construction of a hydro-electric dam. Pakistan had allegedly failed to compensate the claimant, as required under the contract, for the delays, disruptions and additional costs resulting from unforeseen geological conditions, failure to facilitate the importation of equipment, failure to provide design drawings and failure to give access to certain construction sites.¹²⁶ The claimant contended that these failures amounted to a violation of the fair-and-equitable-treatment standard and to an unlawful expropriation of the contractual rights. The tribunal, presided by Judge Gilbert Guillaume, emphasized that the threshold for claiming under the treaty was that of “activity beyond that of an ordinary contracting party (“*puissance publique*”).”¹²⁷ In light of this threshold, the tribunal refused to assume jurisdiction over the claims relating to unforeseen geological conditions but reserved its decision regarding the other claims to the merits stage of the proceedings.¹²⁸

¹²¹ *Joy Mining*, *supra* note 14, at ¶ 22.

¹²² *Ibid.* at ¶ 41 *et seq.*

¹²³ *Ibid.* at ¶ 72.

¹²⁴ *Ibid.* at ¶ 78-9.

¹²⁵ *Impreligo*, *supra* note 25.

¹²⁶ *Ibid.* at ¶ 264.

¹²⁷ *Ibid.* at ¶ 266.

¹²⁸ *Ibid.* at ¶ 268 *et seq.* and ¶ 282 *et seq.*

A common thread emerges from these recent decisions dealing with breaches of contract from the fair and equitable treatment perspective, *i.e.*, the efforts made by treaty tribunals to distinguish between acts of the state as a sovereign and as contracting party. This criterion was previously encountered in matters of expropriation of contractual rights, and, as a matter of fact, the *Impreligo* and *Joy Mining* decisions seem to establish this criterion as the threshold for a breach of contract to come within the ambit of investment treaties, irrespective of the basis of the claim. In the present context, the sovereign act test nonetheless suffers from the same defects as in the context of expropriation. That is, it begs the question, shifting the inquiry from whether the breach constitutes a violation of international law to whether the breach constitutes a sovereign act. Further, when suggesting that, under certain circumstances – acts of sovereignty, the breach of contract itself would give rise to an international wrong, this test lends support to the assumption of concurrency between contractual and international remedies and – it is submitted – obscures the analysis.

In the context of expropriation, it was demonstrated earlier that the authorities supporting the sovereign act test were primarily concerned with instances of governmental abrogation of the contractual remedies. Absent such a “legislative breach”, contractual remedies remained available, and the investment tribunals declined to entertain the claims or rejected them on the merits. In light of the *Impreligo* and *Joy Mining* decisions, it would be legitimate to extend these conclusions to the context of violations of standards of treatment, the sovereign act test being used as the threshold to claim under treaties. Whether a breach or repudiation of a contract gives rise to an international wrong would then depend on the availability of contractual remedies. This approach also casts a new light on the *SGS v. Philippines* decision that is apparently inconsistent with the other cases under study. Admittedly, the *SGS* tribunal, while declining to entertain the claim that the alleged breach of contract amounted to expropriation, found jurisdiction over the claim of violation of fair and equitable treatment. Yet the fact that the tribunal stayed the proceedings pending determination of the contractual claims in the contractual forum leads to think that what the tribunal had in

contemplation as a violation of fair and equitable treatment was a potential denial of justice in the Philippines courts or, later, at the stage of enforcement, *i.e.*, a denial of effective contractual remedies.

C. THE ELUSIVE DISCRIMINATORY BREACH

Finally, it is necessary to consider the issues arising where a breach or repudiation by a state is alleged to be discriminatory. Customary international law lays down certain rules relating to the non-discrimination of aliens,¹²⁹ and a prohibition on discriminatory measures is often included within the fair and equitable treatment, national treatment, and expropriation provisions of investment treaties.¹³⁰ Even absent express reference, discriminatory measures would be regarded as violations of the fair-and-equitable-treatment standard, whether considered on its plain meaning or as merely importing the international minimum standard.¹³¹

While controversy subsists as to its scope,¹³² the principle of non-discrimination in international investment law appears to establish two prohibitions: an “absolute” and a “comparative”.¹³³ Under the former, customary prohibition, only state measures intended to harm and actually harming aliens because of their nationality are considered discriminatory.¹³⁴ The second, modern comparative prohibition results from the importation of the international trade law principle of national and most-favored nation treatments in investment treaties.¹³⁵ Comparative discrimination arises where other nationals of the host state or other aliens are afforded more favorable treatment.¹³⁶

¹²⁹ A.F.M Maniruzzaman, “Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview” (1998) 8:1 J. Transnational L. & P. 57. See also, Todd Weiler, “Saving Oscar Chin: Non-Discrimination in International Investment Law” in Horn, *supra* note 16, at 157.

¹³⁰ Dolzer & Stevenson, *supra* note 10, at 62 and at 105.

¹³¹ UNCTAD, *supra* note 90, at 37.

¹³² See, generally, Maniruzzaman, *supra* note 129.

¹³³ Weiler, *supra* note 129, at 162 *et seq.*

¹³⁴ Dolzer & Stevenson, *supra* note 10, at 62.

¹³⁵ Weiler, *supra* note 129, at 162.

¹³⁶ *Ibid.* at 164.

The principle of non-discrimination proves relevant to the analysis of breach or repudiation of state contracts. The Restatement (3d) of the Foreign Relations Law of the United States refers to discrimination alongside noncommercial motivations as a circumstance in which a breach of contract would give rise to an international wrong.¹³⁷ Two recent investment decisions illustrate the workings of absolute and comparative discriminations in matters of breach of state contract.

The decision of the ad hoc tribunal appointed pursuant to the Netherlands – Poland BIT in *Eureko B.V. v. Republic of Poland* provides an instance of absolute discrimination.¹³⁸ The case involved the privatization by the Polish State Treasury of a Polish insurance company, PZU, in which the claimant, a Dutch company, had acquired a 20% stake. The Shares Purchase Agreement (“SPA”) under which the investment was made contemplated that an initial public offering would take place and that the claimant would then acquire a controlling stake in PZU. Following a change in government, Poland reconsidered its privatization strategy and refused to carry out the IPO. Several public statements made it patently clear that the primary concern of the Polish authorities was to keep PZU out of foreign hands. A majority of the tribunal found that Eureko was contractually entitled to have the IPO carried out, that this contractual right constituted an investment under the treaty and that the Polish authorities’ discriminatory refusal to perform was contrary to fair and equitable treatment.¹³⁹ Alternatively, the tribunal found that Poland’s discriminatory refusal to carry out the IPO was a measure tantamount to expropriation in violation of the treaty.¹⁴⁰

The award in *Nykomb Synergetics Technology v. Latvia*, the first award rendered under the Energy Charter Treaty, offers an instance of comparative discrimination.¹⁴¹ The claimant had acquired a majority stake in a company operating several power plants

¹³⁷ *Restatement (Third) of Foreign Relations Law of the United States* (1987), § 712(2)(a).

¹³⁸ *Eureko B.V. v. Republic of Poland*, (19 August 2005) Partial Award, online at: <http://ita.law.uvic.ca/ICSID>, hereinafter *Eureko*].

¹³⁹ *Ibid.* at ¶ 231 *et seq.*

¹⁴⁰ *Ibid.* at ¶ 238 *et seq.*

¹⁴¹ *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, (16 December 2003) Award, online: http://ita.law.uvic.ca/alphabetical_list.htm [SCC, hereinafter *Nykomb*]; commented in Wälde & Hobér, *supra* note 77.

in Latvia. Pursuant to the terms of several off-take agreements with the Latvian electricity monopoly, Latvenergo, the surplus electric power produced was to be purchased at twice the market price for a period of eight years. A dispute arose as Latvenergo refused to comply with the undertaking, and the claimant initiated arbitral proceedings under the Energy Charter Treaty alleging that Latvenergo's refusal to pay constituted, *inter alia*, an expropriation and a violation of fair and equitable treatment for which Latvia was responsible. In particular, the claimant pointed out that other energy producers were paid on their double tariff contracts. While it rejected the expropriation claim, the tribunal found that in light of the facts that other operators were paid under the double tariff contracts, Latvenergo's refusal to pay in this case constituted an unwarranted discrimination in violation of the standards of treatment in the treaty.¹⁴²

In both cases, the contracts in issue included choice-of-forum clauses giving exclusive jurisdiction to the local courts, and the respondents, accordingly, contended that the disputes should have been referred to the contractual forums.¹⁴³ Both tribunals rejected the contention, the *Eureko* tribunal referring at length to the *Vivendi (Annulment)* decision and the *Nykomb* tribunal merely noting that the claimant was not bound by the choice-of-forum clause in the contract between its subsidiary and Latvenergo as it was claiming under the treaty against the Republic of Latvia directly.¹⁴⁴ As a result, in these two cases, contractual and international remedies were in fact available concurrently. Yet these findings are open to criticism.

As far as the finding of expropriation in *Eureko* is concerned, it should be noted that the discriminatory character of a state measure is generally seen as but one circumstance – alongside the absence of compensation or public purpose – that renders a taking unlawful.¹⁴⁵ That is, discrimination does not give rise to the taking; it only makes it unlawful. As demonstrated earlier, the taking of contractual rights arises not from the mere nonperformance, but rather from the state's using its sovereign power to abrogate

¹⁴² *Nykomb, ibid.* at 33-4.

¹⁴³ *Eureko, supra* note 138, at ¶ 81; *Nykomb, ibid.* at 9.

¹⁴⁴ *Eureko, ibid.* at ¶ 92 *et seq*; *Nykomb, ibid.* at 9.

¹⁴⁵ Brownlie, *supra* note 4, at 514 (noting that discriminatory takings are unlawful per se whether or not compensation is paid).

the contractual remedies. It follows that, even when discriminatory, the breach of contract cannot amount to an unlawful taking as no taking has taken place.

More problematic, admittedly, are the findings of unfair and inequitable treatments in both *Eureko* and *Nykomb*. At the very least, these decisions appear out of keeping with the emerging consensus – underlined in the previous section – that makes sovereign action the threshold for claiming under investment treaties in contractual matters. Further, while these findings can be accounted for under the plain meaning approach to the standard, one wonders whether, when balancing the equities of the case as required under this approach, a tribunal should not also take into consideration the fact that the investor is most likely framing an international claim only to bypass the contractually agreed forum, a tactical maneuver that did not escape the dissenting arbitrator in *Eureko*.¹⁴⁶ In this respect, it is significant, I submit, that none of the cases reviewed in this work involved choice-of-forum clauses providing for truly international arbitration, under the auspices of the I.C.C. or other institutions. Rather, the parties had agreed to submit their contractual disputes either to the local courts¹⁴⁷ or to domestic arbitration.¹⁴⁸

IV. CONCLUDING THOUGHTS

The thrust of this work has been to demonstrate that, in matters of state contracts, contractual and international remedies are neither concurrent nor independent. Rather, international remedies are better conceived as subsidiary remedies, available where the state party uses its sovereign prerogatives to deprive the other contracting party of effective contractual remedies. This conclusion, it is submitted, cast some light on the intricate interplay between contractual and treaty forums. In particular, it has been seen earlier that the waivers of the local remedies rules found in many investment treaties do

¹⁴⁶ *Eureko B.V. v. Republic of Poland*, (19 August 2005) Dissenting Opinion, online at: <http://ita.law.uvic.ca> [ICSID, hereinafter *Eureko Dissent*] at ¶ 6.

¹⁴⁷ *Eureko*, *supra* note 138 (Polish administrative courts); *Nykomb*, *supra* note 141 (Latvian courts); *SGS Philippines*, *supra* note 16 (regional courts in Manilla or Makati); *Salini Morocco*, *supra* note 16 (Moroccan administrative courts); *RFCC*, *supra* note 78 (Moroccan administrative courts); *Salini Jordan*, *supra* note 16 (the claim related to the Jordanian government's refusal to submit to I.C.C. arbitration as had been, allegedly, agreed).

¹⁴⁸ *SGS Pakistan*, *supra* note 16 (arbitration in Lahore), *Joy Mining*, *supra* note 14 (arbitration in Cairo).

not cause much interpretative difficulty when it is recognized that international law only kicks in where the contractual remedies are unavailable or ineffective.

Whether the availability of contractual remedies can provide a clear, bright-line rule at the jurisdictional stage is, admittedly, uncertain. Alleged breaches of contract will often come intertwined with other allegations of misbehavior on the part of the host state, and the true nature of the dispute might only emerge much later in the adjudication process. Yet, at the very least, acknowledging that the availability of international remedies depends on that of contractual remedies should invite treaty tribunals to caution when assuming jurisdiction over disputes involving state contracts.

The conclusions drawn in the present work can also provide some insight into the ongoing debate surrounding what has come to be known as the ‘umbrella’ clause. The reader will, no doubt, have noticed the absence of the (in)famous clause from the preceding pages. Found in some investment treaties, the ‘umbrella’ or ‘*pacta sunt servanda*’ clause obliges the host state to “observe”, “guarantee” or otherwise respect the commitments or obligations entered into with respect to investments of foreign nationals. The scope to be ascribed to this clause is the subject of fierce controversy in arbitration and academic circles. Taken at its widest, the ‘umbrella’ clause would elevate breaches of contract as breaches of treaty.¹⁴⁹ Some treaty tribunals and commentators have balked at this conclusion.¹⁵⁰ In particular, it has been pointed out that the said ‘umbrella’ clauses were initially devised as means of protecting investors from sovereign abrogation of long-term contracts and not as a guarantee from any “commercial law breach.”¹⁵¹ Under such an interpretation, the ‘umbrella’ clause is primarily concerned with instances

¹⁴⁹ An interpretation relentlessly advocated by Prof. Gaillard, see Emmanuel Gaillard, *La jurisprudence du CIRDI* (Paris: Pedone, 2004) at 903 *et seq.*

¹⁵⁰ *SGS Pakistan*, *supra* note 16, at ¶ 167 (doubting that that the contracting parties could have contemplated such a dramatic change in the protection granted to foreign investors); *Joy Mining*, *supra* note 14, at ¶ 81 (“an umbrella clause [...] could [not] have the effects of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contracts rights of such a magnitude as to trigger the Treaty protection [...]”).

¹⁵¹ Thomas Wälde, “Investment Arbitration under the Energy Charter: An Overview of Selected Key Issues based in Recent Litigation Experience” in Horn, *supra* note 8, at 193. See also, Thomas Wälde, “The Umbrella Clause in Investment Arbitration – A Comment on Original Intentions and Recent Cases” (2005) 6 *J. World Investment & Trade* 183.

of legislative breach and can easily be reconciled with a view of international remedies as subsidiary remedies.

Yet the origins of the ‘umbrella’ clause remain shrouded in mist,¹⁵² and the widest interpretation might well prevail in the coming years.¹⁵³ If such is the case, in the presence of an ‘umbrella’ clause, international remedies will be available concurrently with contractual remedies. In deciding whether the investor should be able to bypass the contractual forum, treaty tribunals should be mindful to the fact that, far from being a slight broadening¹⁵⁴ or a mere clarification of the customary rules,¹⁵⁵ the ‘umbrella’ clause represents a dramatic departure from the scope of protection traditionally offered by international law in contractual matters. Further, treaty tribunals should keep in mind that, when overriding choice-of-forum clauses in treaties, states have usually been more explicit.¹⁵⁶ Finally, treaty tribunals should be aware of the potential for tactical maneuvers, underlined earlier, that concurrent contractual and international remedies offer.

Against this background, the cautious approach adopted by the *SGS v. Philippines* tribunal, which recognized full effect to the ‘umbrella’ clause but gave priority to the contractual forum to determine the extent of liability under the contract, appears commendable and does not deserve the criticisms it received.¹⁵⁷ As the question comes down to a contest of principle between the binding force of contract and the protection of investment, I would favor the former. *Pacta sunt servanda* should cut both ways.

¹⁵² Anthony Sinclair, “The origins of the Umbrella Clause in the International Law of Investment Protection” (2004) 20:4 *Arb. Int’l* 411 (contending that a radical change in the scope of protection could have been contemplated).

¹⁵³ Such an interpretation was accepted in *SGS Philippines*, *supra* note 16; *Eureko*, *supra* note 138; and *Noble Ventures, Inc. v. Romania*, (12 October 2005) Award, ARB/01/11, online at: <http://ita.law.uvic.ca> [ICSID].

¹⁵⁴ Alexandrov, *supra* note 8, at 565

¹⁵⁵ Dolzer & Stevenson, *supra* note 10, at 82

¹⁵⁶ Douglas, *supra* note 8, at 246 (referring to the Algiers Accord setting up the Iran – U.S. Claims Tribunal).

¹⁵⁷ *SGS Philippines*, *supra* note 16, at ¶¶ 128 and 162. This approach was criticized e.g. in Gaillard, *supra* note 149, at 903 *et seq.* and Judith Gill, Matthew Gearing & Gemma Birt, “Contractual Claims and Bilateral Investment Treaties – A Comparative Review of the SGS Cases” (2004) 21 *J. Int’l Arb.* 397 at 412 (questioning the import of the clause where the offer to arbitrate in the BIT was wide enough to cover contractual disputes).

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