3. THE SUBSTANTIVE COVERAGE OF CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS THROUGH INVESTMENT TREATY STANDARDS

A. THE DISTINCTION BETWEEN TREATY CLAIMS AND CONTRACT CLAIMS

The conclusion of investment treaties by States creates, in addition to state contracts, a second legal instrument for the protection of foreign investment. As a corollary to the co-existence of contracts and treaties, the question of the relationship between both elements of investment protection becomes relevant. Principally, a host State’s unlawful conduct may entitle a foreign investor to lodge claims grounded on both legal sources.

I. Conceptual Distinction

At first sight, the distinction between claims based on an investment agreement between a private investor and a State or a state entity and claims based on an investment treaty, i.e., an international treaty concluded between two or several States seems to be an obvious and clear-cut one. But a second glance at the criteria for distinguishing the two claims reveals the possible complications of the undertaking.

Five legal criteria can be put forward to distinguish the two types of claims. The first criterion refers to the source of the right or the cause of the claim. The basis of a treaty claim is a right established and defined in an investment treaty while a contract claim is based on the contract. This criterion is supposedly the only one that does not allow

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any overlap between the two categories. By definition, a treaty claim cannot be based on a contract and vice-versa. The second criterion posits that a distinction can be made by reason of the right's content. Whilst treaty rights established by BITs are of a generic nature and defined by international law, the contents of contractual rights usually are connected to the specific investment and find their definition in the domestic law of the host State. The possibility of overlap in this category is relatively high. Several rights, for instance the right to compensation subsequent to expropriation, may be granted through treaty as well as through contract. The impact of an “umbrella clause” could even lead to the situation that the whole of the contractual obligations becomes part of the treaty’s coverage.3 The third criterion is made up of the parties to the claim. As mentioned before, investment treaties are concluded between two or more States, and the parties to a treaty claim therefore are the investor, which is a national of the other State party to the treaty, and the host State itself. By contrast, the parties to a contract claim are the parties to the contract. Whereas the investor is the same, the State party may often be a federal or regional unit or some other entity of the host State. Identity of the parties to the claims occurs when the contract is entered into by the foreign investor directly with the host State. A further aspect of distinction between the two instruments is the applicable law. Adjudication of treaty claims generally deals with the provisions of the BIT itself, the domestic law of the host State and the general principles of international law. The contract claim, in contrast, generally is subject to the domestic law of the host State. Finally, the liability of the host State comes into play in order to distinguish the two claims. Whereas under the treaty claim the responsibility of the host State takes place on the international plane, contractual responsibility will result in the State’s responsibility under the rules of its domestic laws. Again, the possible application of an “umbrella clause” may blur such a distinction completely. Moreover, the tenet according to which contractual violations can amount under certain circumstances to treaty claims does not support the effectiveness of this last criterion.

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3 For a detailed examination of the effect of so-called “umbrella clauses” and their impact on the distinction between contract claims and treaty claims, see chapter 4.