BRITISH INSTITUTE FOR INTERNATIONAL AND COMPARATIVE LAW

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When is a Contract Claim not a Treaty Claim?[1]

Can a Contract Claim be a Treaty Claim?

Must every Contract Claim be a Treaty Claim?

- How is the dispute to be characterised?
    - Can the dispute be pleaded as a breach of substantive obligations in the Treaty or is it a "pure" contract claim?
    - If it is pleaded as a Treaty claim, does it require the Tribunal to interpret the contract?
    - If so, how should the Tribunal do this?
- How is the dispute resolution clause of the Treaty worded?
    - Is the language of the Treaty wide enough to cover all types of dispute arising from the relevant investment?
    - If so, are there policy grounds for reading it restrictively?
    - Does the wording of the State to State dispute resolution clause help the Tribunal to interpret the Treaty?
- Is there an "umbrella clause"?
    - Does it elevate contract claims to breaches of Treaty?
    - Does it provide a further substantive right to investors?

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    - If so, how does it relate to the other substantive rights in the Treaty?

- Is there a dispute resolution clause in the contract?
    - If so, should the Tribunal defer to it?

What breaches of Contract can, and cannot, also be breaches of Treaty?

- Is a refusal to pay expropriation?
- Is a refusal to abide by a dispute resolution clause a denial of justice?
- In what capacity, sovereign or contractual counterparty, did the State terminate the contract?

Some thoughts on customary international law

- When can a breach of contract by a State be a breach of international law?
- The special case of stabilisation clauses
- Is a breach of contract that amounts to a breach of international law always a breach of Treaty as well?
- If not, when can it be?