The Disputed Scope of the Umbrella Clauses under International Investment Law and Investment Arbitration

A dissertation to be submitted in partial fulfilment of the requirement for the award of the degree of the Master of the laws

In

School of the Legal Studies

(2020-2021)

By

Muskan Singh

Roll no. 1200990036

Under The Guidance

Of the

Ms. Sonali Yadav

Session: 2020-2021

Acknowledgement

*I would like to express my special thanks of the gratitude to my teacher **MS. SONALI YADAV MAM** who gave me the golden opportunity to do this wonderful project on the topic **THE DISPUTED SCOPE OF THE UMBRELLA CLAUSES UNDER INTERNATIONAL INVESTMENT LAW AND INVESTMENT ARBITRATION,** which also helped me in doing a lot of the Research and I came to know about so many new things I am thankful to them.*

Secondly, I would also like to thank my parents and friends who helped me a lot in finalizing this project within the limited time frame.

Sincerely

Muskan Singh

LL.M CCL 2 Sem

DECLARATION

I declare that the dissertation entitled "The Disputed Scope of the Umbrella Clauses under International Investment Law and Investment Arbitration" is the outcome of the my own work conducted under the supervision of the Assistant Prof the. **Ms. Sonali Yadav mam** at School of the Law**, BBDU, Lucknow**. I declare that the dissertation comprises only of the my original work and due acknowledgement has been made in the text to all other material used.

Signature & Name of the Student:

Muskan Singh

Research methodology

Secondary sources of the research have been used and various research papers and articles have been referred for this project.

TABLE OF THE CASES

S.No.	Case Name
1.	Bosh International Award (25 October 2012).
2.	Azurix Corp
3.	BIVAC B.V. v. The Republic of the Paraguay, ICSID Case No. ARB/07/9, Decision of theTribunal on Objections to Jurisdiction (29 May 2009).
4.	Burlington Resources Inc. v. Republic of the Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012).
5.	CMS Gas Transmission Company v. The Republic of the Argentina, ICSID Case No. ARB/01/8, Decision of thead hoc Committee on the Application for Annulment of the Republic Argentine (25 September 2007).
6.	CMS Gas Transmission Company v. The Republic of the Argentina, ICSID Case No. ARB/01/8, Decision of theTribunal on Objections to Jurisdiction (17 July 2003).
7.	Vivendi Universal S.A. v. Republic Argentine , ICSID Case No. ARB/97/3 Decision on Annulment (3 July 2002). Compañiá de Aguas del Aconquija S.A.
8.	Continental Casualty Company v. The Republic Argentine , ICSID Case No. ARB/03/9, Award (5 September 2008).
9.	El Paso Energy International Company v. The Republic Argentine , ICSID Case No. ARB/03/15, Award (31 October 2011).
10.	El Paso Energy International Company v. The Republic Argentine , ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 April 2006).
11.	Enron Corporation and Ponderosa Assets, L.P. v. Republic Argentine , ICSID Case No. ARB/01/3, Award (22 May 2007).

12.	Eureko B.V. v. Republic of the Poland, UNCITRAL, Partial Award (19 August 2005).
13.	Gustav F W Hamester GmbH
14.	LG&E Energy Corp., LG&E Capital Corp., and LG&E International,
15.	Impregilo S.p.A. v. Republic Argentine , ICSID Case No. ARB/07/17, Award (21 June 2011).
16.	Impregilo S.p.A. v. Islamic Republic of the Pakistan,
17.	Noble Ventures, Inc. v. Romania
18.	Pan American Energy LLC and BP Argentina Exploration Company v.
19.	Salini Costruttori S.p.A. and Italstrade S.p.A. v.
20.	Sempra Energy International v. The Republic Argentine , ICSID Case No. ARB/02/16, Award (28 September 2007).
21.	SGS S.A. v. Islamic Republic of the Pakistan, ICSID

22.	SGS Société énérale de Surveillance S.A.
23.	SGS Société Générale de Surveillance S.A. v.
24.	Siemens A.G. v. The Republic Argentine ,
25.	Fedax N..V. v. Venezuela,
26.	Anglo-Iranian Oil Co. Ltd. (U.K. v. Iran), 1952 I.C.J. 93 (July 22)
27.	Yaung Chi Oo Trading Pte Ltd v. Myanmar
28.	Al-Bahloul v. Tajikistan, SCC Case No.
29.	Toto Costruzioni Generali S.p.A. v. 9.
30.	Link-Trading v. Department for Customs Control of the Moldova, Award, 18 April 2002
31.	IBM v. Ecuador, Decision on Jurisdiction, 22 December 2003
32.	Cayuga Indians Claims, American and British Claims Arbitration Tribunal, Award, 22 January 1926
33.	First National City Bank v. Banco
34.	La Generale des Carriereset

Introduction

Not long after World War II as the worldwide economy guidelinesized, outside While things were searching up for foreign investment, the same could not really be said for foreign investors. Specifically, there was no lucid lawful system set up to the interests of the foreign investors.

Foreign investors hoping to depend on international investment law found only "a fleeting structure comprising to a great extent of the scattered treaty provisions, a few questionable customs, and challenged general principles of the law." This chaotic gathering of the laws was dolefully deficient. For example, the legal system failed to account for contemporary investment practices, or even lacking to of thefer investors an effective enforcement decivce to put forth their claims against host countries that seized their interests or rescinded their contractual responsibilities. There was basically no reasonable enunciation of therights and commitments of the investors and host states separately. Most of thetime ambiguous worldwide legitimate rules that existed concerning such rights and commitments were liable to differing translation, inciting sharp difference between developed nations and the recently decolonized developing nations. While developed nations announced that all-inclusive law constrained.

Nonetheless, with the proceeding with quick extension of the foreign investment, the two sides had developing motivation to make a more ideal legitimate condition for global international investments. Early endeavours to build such a regime took of the Commerce International Code of the Fair Treatment of the Foreign Investing[1] .

However, too striated to accommodate[2.]

Faced with disappointment at the multilateral level, singular European nations started a spearheading push to arrange remote foreign investment bargains with developing countries on a balanced premise[3.] Their success ushered in the first modern bilateral investment treaties or BITs, and therefore prodded industrialized countries outside Europe to go into their own particular BITs with singular creating nations. By 1970,

Developing and developed nations had closed an aggregate of the eighty-three BITs. In the period following the late 1980s, the BIT advancement again impacted a quantum to bounce forward as rising

[1] .Jarrod Wong, Umbrella Clauses in Bilateral Investment Divide between Developing and Developed Counties in Foreign Investment Disputes.

economies in Eastern and Central Europe, Asia, Africa, and South America opened their business sectors in quest for remote capital. While countries had marked a little more than 300 BITs before the finish of the 1988, there were near 2,400 BITs set up toward the finish of the 2004[4] .

As its name recommends, a BIT is a comprehension between two countries that administers the treatment of the investments made in the domain of the each state by people or organizations from the other state. Albeit numerous nations depend alone on model understandings while arranging singular BITs, BITs are strikingly comparable in their association and substance. When all is said in done, BITs address four substantive issues:

(1) conditions for the admission of the foreign investors to the host State.

(2) benchmarks of the treatment of the foreign investors.

(3) protection against expropriation; and

(4) methods for resolving investment disputes.

---

2. Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions,

3. Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITs Really Work? An Evaluation of the Bilateral Investment Treaties and their Grand Bargain, 46 HARV. INT'L L. J. 73 (2005).

4. U.N Conference on Trade and Development, World Investment Report, 2005 on Transnational Corporations and the Internationalization of the R&D, U.N. Doc. UNCTAD/WIR/2005, (2005), U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992). http://www.unctad.org/en/docs/wir2005_en.pdf (last visited Mar. 8, 2018).

BITs are likewise fundamentally the same as because of theway that they ordinarily contain meanings of the investments, which are of theten broad[2], including the investment's time element and therefore, many BITs cover both existing and future investments. In this manner, BITs not just give impetus to future investment, as well as have the impact of the encouraging foreign investors to keep up existing ventures.

Fundamentally, just states and not the investors enter BITs. In any case, the investor can uphold specifically its rights under the BIT through the BIT's dispute settlement arrangements. These provisions typically authorize the investor to submit an investment dispute between it and a Contracting

---

[2] . Fedax N.V. v. Venezuela, Decision of the Tribunal on, ICSID Case No. ARB/96/3 (1997), Objections to the the Jurisdiction (Jul. 11, 1997), 37 I.L.M. 1378, 1385 (1998).

State to the investor's choice of the forums, of theten including international arbitration through ICSID. Along these lines, when a state goes into a BIT, it viably stretches out an of thefer to qualified investors to arbitrate any relevant investment dispute through international arbitration. Should the investor choose to accept the of thefer, it may do so of theten by simply initiating arbitration proceedings, thereby perfecting the parties' agreement to arbitrate the investment dispute[3].

From the perspective of theinvestor, this ability to submit an investment dispute to international arbitration is one of theBIT's primary benefits. As that component is at the core of the umbrella clause, its interpretation has significant ramifications for the investor.

[3] . J. Paulsson, Arbitration To the theout Privity, 10 ICSID REVIEW 232–257 (1995).

Overview

Historical Background of the Umbrella Clauses

Referred to differently as the mirror or parallel effect clause or pacta sunt servanda which means holiness of the agreement clause, the umbrella clause is a treaty arrangement found in numerous BITs that requires each Contracting State to watch all investment commitments it has expected as for investors from the other Contracting State. The thought behind the metaphor is that an umbrella clause brings generally autonomous investment arrangements between a Contracting State and private investors from the other Contracting State under the treaty's "umbrella of the protection." Its motivation is to make a between state commitment to observe investment agreements that investors may enforce when the BIT presents an immediate right of the response to arbitration. More particularly, the history of the umbrella clause clarifies that it was intended to take into account any breach of the a significant investment contract to be settled under the treaty in a worldwide forum[4]

Under general global law, it is not clear whether a state breaching a contract with an investor qualifies in essence as an infringement of the a universal obligation. Such a breach may basically be dealt with as a domestic commercial issue. In that capacity, investors were frequently compelled to determine any arguments about their contracts with the host state in that state's metropolitan courts and under its domestic laws, which were helpless against one-sided variety by the state. It was in this setting the umbrella proviso initially emerged. Researchers have followed its sources to a 1954 draft settlement understanding including the Anglo-Iranian Oil Company's ("AIOC") claims with respect to Iran's oil nationalization program[5] .

In 1951, AIOC's interests under a long-standing oil concessionary contract with Iran were.

adequately expropriated when the changing government prompted the sanctioning of theIranian

Oil Nationalization Law, which put all oil activities in Iran in the administrations.

Hands[6] .

[4] . Anthony C. Sinclair, The Origins of the Umbrella Clause in the International Law of Investment Protection, 20 ARBS. INT'L 411, 413- 18 (2004).

[5] . Anthony C. Sinclair, The Origins of the Umbrella Clause in the International Law of Investment Protection, 20 ARBS. INT'L 415, 416 (2004).

[6] . Id. at 414.

Thereafter, AIOC sought after a scope of the at last unsuccessful lawful alternatives for review, including a fizzled endeavour to arbitrate the cases as per what ended up being a blemished arrangement in the concession agreement and failed procedures before the ICJ[7]. It was not until a U.S.- supported coup in Iran came back to control authorities. cordial to remote interests that the debate was settled.

As per exhortation gave by Elihu Lauterpacht to AIOC, the proposed settlement was to be involved two instruments: (an) a "Consortium Understanding" amongst Iran and a consortium of the oil organizations including AIOC that would keep on operating certain Iranian oil of thefices; and (b) an "umbrella treaty" amongst Iran and the United Kingdom joining the Consortium Agreement and containing a certification by Iran to satisfy the terms thereof the. To counter the obvious disappointment of theprior concession consent to ensure AIOC's interests, the proposed settlement was intentionally organized to such an extent that any agreement amongst Iran and AIOC would be "fused or alluded to in a treaty amongst Iran and the United Kingdom such that a breach of theagreement or settlement should be ipso facto esteemed to be a breach of thetreaty."

The umbrella treaty both guaranteed that the settlement would not be only administered by Iranian law (and generally powerless against its one-sided fluctuation), and gave an interstate cure permitting to any break of thesettlement to be settled by the ICJ rather than the Iranian courts. As it turned out, the settlement took an alternate bearing and the umbrella treaty never appeared.

Only a couple of the years after the fact, notwithstanding, the umbrella statement reemerged in a more solid shape in the 1959 Abs-Shawcross Draft Convention of the Investments Abroad also known as the AbsShawcross Draft. A private push to draft rules for the insurance of the foreign investments, European attorneys made the Abs-Shawcross Draft to some extent to address the sorts of the investment debates that stood up to AIOC. Article II, the umbrella clause, provides as follows:

“Each party shall at all times ensure the observance of the any actions which it may have given in relation to investments made by nationals of the any other Party.”[12]

[7] . Anglo-Iranian Oil Co. Ltd. (U.K. v. Iran), Preliminary objections, 1952 I.C.J. 93 (July 22), available at http://www.icjcij.org/icjwww/idecisions/isummaries/iukisummary520722.html

Also, in requiring “the observance of the any actions,” the Abs-Shawcross Draft doubtlessly incorporated all contractual investment Law and its implementing regulations within its scope, including those between a state and outside private investors, since an "actions" is for the most part comprehended to be more extensive than an agreement and in this way envelops commitments emerging from a contract.13 Commentators at the time reached a similar inference, including Fatouros, who noticed that Article II was "intended to cover the instances of the legally binding duties of the states to aliens,"14 and Schwarzenberger, who noticed that it " covers actions by contracting parties both to subjects and objects of the international law.”[15]

That the umbrella proviso ought to be deciphered to incorporate such contracts is steady with its intended purpose. The writers of thedraft Convention clarified that Article II insists, and credits particular substance to, the generally acknowledged rule Pacta sunt servanda, and unequivocally noticed that the guideline " applies not only to agreements directly concluded between States, but also to those between a State and foreigners”.[16]

6Consequently, the drafters proposed that Article II would lay a remedy under global law for any breach of the a state-investor contract subject to the draft tradition, i.e., that the " purpose of the that clause was to dispel whatever doubts may possibly exist as to whether a unilateral violation of the a concession contract is an international wrong.” [17]

---

12. The Proposed Convention to Protect Private Foreign Investment: A Round Table, 9 J. PUB. L. 116 (1960).

13. Elihu Lauterpacht, Drafting of the Conventions for the Protection of the Investment, in INT’L COMP. L.Q., THE ENCOURAGEMENT AND PROTECTION OF THE INVESTMENT IN DEVELOPING COUNTRIES 218, 229 (3d Ed. Supp. 1962).

14. Arghyrios A. Fatouros, An International Code to Protect Private Investment—Proposals and Perspectives, 14 U. TORONTO L.J. 77, 88 (1961). 15 Georg Schwarzenberger, The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary, 9 J. PUB. L. 147, 154 (1960).

15. Georg Schwarzenberger, The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary, 9 J. PUB. L. 147, 154 (1960).

16. Abs-Shawcross Draft the Proposed Convention to Protect Private Foreign Investment: A Round Table, 9 J. PUB. L. 120 (1960).

17. Ignaz Seidl-Hohenveldern, The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table, 10 J. PUB. L. 100, 104-05 (1961).

Significantly, the Abs-Shawcross Draft went on to impact certain draft conventions of theOrganization for Economic Cooperation and Development ("OECD"), including the 1967 OECD Draft Convention on the Protection of the Foreign Property ("OECD Draft").[18]

Article 2 of theOECD Draft is an umbrella clause that provides as follows: "Each Party shall at all times ensure the observance of the actions given by it in relation to property of the nationals of the any other Party."[19.]

As indicated by the of theficial editorial to the OECD Draft, Article 2 is "a use of thegeneral rule of the pacta sunt servanda" to "assentions amongst States and foreign nationals."[20] Moreover, the critique not just clarifies that "[a]n actions might be epitomized in an agreement or in a concession," yet that "any privilege starting under such an endeavor of thefers ascend to an international right." In aggregate, Article 2 was unmistakably intended to reach out to investor State contracts and its motivation was to permit commitments emerging there under (i.e., contractual commitments) to be portrayed as treaty commitments, in this manner securing their protection under international law.

As Lauterpacht also noted that Article 2's effect was such that "breach of the them becomes immediately a breach of the convention."[21] Likewise, Prosper Weil, another distinguished commentator at that time, pointed out that

18. OECD Draft Convention on the Protection of the Foreign Property and Resolution of theCouncil on the Draft Convention on the Protection of the Foreign Property, adopted Oct. 12, 1967, OECD Publication No. 23081 (Nov. 1967), reprinted in 7 I.L.M. 117 (1968)

19. Id. at 123.

20. Ibid

21. Elihu Lauterpacht, Drafting of the Conventions for the Protection of the Investment, INT'L COMP. L.Q., THE ENCOURAGEMENT AND PROTECTION

OF THE INVESTMENT IN DEVELOPING COUNTRIES 218, 229 (3d ed. Supp. 1962)

"There is, in fact, no particular difficulty when there is an "umbrella treaty" between the contracting State and the State of theother party, which turns the obligation to perform the contract into an international obligation of thecontracting State vis-à-vis the State of theother contracting party. The intervention of the umbrella treaty transforms the contractual responsibilities thereby ensuring, as it has already been stated, "the inviolability of thecontract under threat of the violating the treaty"; any nonperformance of thecontract, even if it is legal under the national law of thecontracting State, gives rise to the international liability of thelatter vis-à-vis the State of theother contracting party."[8]

Also, the International and Comparative Law Section of theAmerican Bar Association considered that that the OECD Draft "would provide for giving effect in an international forum to acquired rights arising from State contracts, and in this way would ensure the application of the an international guidelines where under international law that guidelines should be applied."[9.]

Even though the OECD Draft at last failed to pass, the OECD Board settled at its 150th Gathering in 1967 to prescribe the draft convention to party states as a model for their own BITs and as a general assertion of the international law rules appropriate to foreign investment.

Umbrella provisos had meanwhile of theficially discovered their way into BITs, including the primary known Piece, the Germany-Pakistan BIT of the 1959.67 Article 7 of the that BIT provides as follows: "Either party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of theother Party."[10]

[8] . Christo the theph Schreuer, Travelling the BIT Route -- Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 J. WORLD INVESTMENT & TRADE 250-51 (2004).

[9] . COMM. ON INT'L TRADE & INV., SECTION ON INT'L & COMPARATIVE LAW, AM. BAR ASS'N, The Protection Of Private Property Invested Abroad, 96 (1963).

[10] . Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 25, 1959, 457 U.N.T.S. 28.

The U.S. Demonstrate BIT of the 1983, which was composed with the OECD Draft in mind, likewise contains an umbrella statement giving that "[e]ach Party shall observe any obligation it may have entered into with regard to investors or nationals or companies of theother Party."[25] Ensuing U.S. Demonstrate BITs distributed in 1984 and 1987 incorporate correspondingly worded umbrella clauses. Once more, observers investigating these umbrella conditions concede to their belongings, that such a proviso:

"Raises to a treaty issue any attempt by a BIT partner to invalidate a contract by changes in domestic law or otherwise . . . [such that] a breach of the contract constitutes a breach of the treaty."[26]

Due to some extent to the impact of theOECD Draft, which has in like manner affected the BITs of the other major created economies, including France and the Unified Kingdom, the umbrella proviso is presently ordinary in BITs. Predictable with the analysis noted above concerning specific umbrella clauses, boundless reviews of the BITs by and large assert that umbrella clauses permit breaches of the investor-State contracts to be described as BIT infringement to trigger debate determination systems gave under the BIT.

In this manner, the aggregate of the its history and the practically uniform assortment of the assessment concerning its understanding focuses unambiguously to one conclusion that the umbrella provisions apply to commitments emerging under investor-State contracts to take into consideration their breach to be settled as BIT infringement. Regardless of the this foundation, be that as it may, the initial two choices to consider intently the umbrella provision, SGS v. Pakistan27 and SGS v. Philippines,28 touched base at translations that while conflicting with each other, have the common impact of the deviating from that conclusion.

---

25. Treaty Between the United States of the America and Concerning the Reciprocal Encouragement and Protection of the Investment, Revised Draft of the Jan. 21, 1983, reprinted in Recent Development, Developing a Model Bilateral Investment Treaty, 15 LAW & POL'Y INT'L BUS. 273, Art II (4) (1983).

26. K. Scott Gudgeon, United States Bilateral Investment Treaties: Comments on their Origin, Purposes and General Treatment Guideliness, 4 INT'L TAX AND BUS. L. 72 (1986).

27.Société Général de Surveillance S. A. v. Islamic Republic of the Pakistan

Location of the umbrella clause in the BIT

The placement of the umbrella clauses differs from one bilateral Investment treaty to another bilateral Investment treaty. In Netherlands Model BIT the umbrella clause is placed within an article where substantive protections have been provided under the aforementioned Treaty.[37]A similar structure is common to other BITs including those concluded by the United Kingdom, New Zealand, Japan, Sweden and the US.

If we look at the Swiss Model BIT it locates the clause under the provision entitled "other commitments" and separates it from the substantive provisions by two dispute resolution clauses and a subrogation clause. However, the Switzerland-Kuwait BIT 1998 locates the clause in Article 3 on protection of the investments which is an exception to the format generally followed in Switzerland BITs.

It is also the practice of the some states to locate this clause before the dispute resolution clause which forms a separate provision from the substantive protections. This kind of the practice is visible in the German Model BITs which locate the umbrella clause in Article 8.

The impact of theposition of the umbrella statement inside the general structure of theBIT is questionable. The Tribunal in SGS v Pakistan was of thesentiment that the arrangement of theproviso close to the end of theSwiss-Pakistan BIT, in an indistinguishable way from the Swiss Model BIT, was demonstrative of the a goal with respect to the Contracting Parties not to give a substantive commitment.

[35] Yaung Chi Oo Trading Pte Ltd v. Myanmar, ASEAN Case No. ARB/01/1, Award, ¶79-82 (Mar. 31, 2003)(considering Article 12(1) of the1998 Framework Agreement on the ASEAN Investment Area).

[36] SGS Societe Generale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6,Decision on Jurisdiction, ¶114 (Jan. 29, 2004).

[37] Netherlands Model BIT, Art

Common features of the general nature

Umbrella clauses are a concise and simply worded treaty provision. Whilst there are a number of the variants on the guidelines form, the following model examples are readily recognizable as umbrella clauses:

Article 2 of theUnited Kingdom Model BIT: "each Contracting Party shall observe any obligation it may have entered into with regard to investments of the nationals or companies of theother Contracting
Party". [11]

Article 11(2) of the1984 and the 1987 United States Model BITs: "each Party shall observe any obligation it may have entered into with regard to investments".[12]

Article 8 of the1991 Germany Model BIT: "each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by nationals or companies of theother Contracting Party". [13]

Article 10 of theSwitzerland Model BIT: "each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of theother Contracting Party".[41] Article 3(4) of theNetherlands Model BIT: "each Contracting Party shall observe any obligation it may have entered into with regard to investments of the nationals of theother Contracting Party".[42]

A typical umbrella clause is mandatory and apparently clear in its intended effect. On a plain reading, the clause creates a reciprocal international law obligation owed by and between contracting States requiring them to observe such responsibilities that they may enter into with investors of theother contracting State or with regard to the investments of the such investors, and sometimes both coupled with an investor-State dispute settlement decivce, umbrella clauses apparently afford a direct remedy in international law to foreign investors in respect of the their investment-backed State contracts and

[11] United Kingdom Model BIT, Art.2.

[12] United States Model BIT, Art. 11(2) (1984 & 1987).

[13] The Germany Model BIT, Art. 8 (1991)

other responsibilities that a State may have entered into with them or with regard to their investments. As shall be seen, however, the scope and effect of the umbrella clause continue to trouble and divide both arbitral tribunals and commentators.

Scope of the responsibilities covered by umbrella clauses

Concern as to the scope of the umbrella clause has generated on the one hand, doubts as regards the fundamental question below, concerns the juridical nature of the`commitments', 'responsibilities', or 'actions' protected by an umbrella clause. Issues arise as to whether protected responsibilities may include commercial con-tracts, or only responsibilities of the a governmental nature.

a) Another question is whether the scope of the responsibilities 'entered into' with investors necessarily implies only specific bilateral or contractual arrangements, or

[41] The Switzerland Model BIT, Art. 10.

[42] Netherlands Model BIT, Art 3(4)

c) whether actions of the a general or unilateral nature might also be covered.

The Nature of theProtected Obligation

Umbrella clauses seldom define the 'responsibilities', 'commitments', or 'under-takings' they are intended to protect. In the absence of the guidance, the view that clauses might attach to a great pool of the legal responsibilities of the a State, whether governmental or commercial, contractual or unilateral in nature, and whatever their source,[14] evidently gives rise to strong antipathy to the plain language of the umbrella clause and its apparently intended effect. Thus, the scope of the responsibilities of thehost State to which the umbrella clause may apply is a matter deserving of the detailed attention.

'Governmental' or 'Commercial' Responsibilities

Private law or commercial commitments should not be protected, one justification being that so-called 'commercial contracts' concluded by a State with a foreign investor were allegedly not within the contemplation of theoriginal drafters of the umbrella clause. One interpretative limitation frequently proposed for the scope ratione materiae of the umbrella clause is that it does or should only apply to responsibilities entered into by the host State in a governmental or sovereign capacity. According to this theory[15] A further justification put forward is that inclusion of the commercial contracts could 'give rise to unintended and far-reaching consequences, with the state being held to account for the contractual performance of the entities over which it has little or no practical control'.[16]

Certain tribunals have favored this implied limitation. For example, the concern that the umbrella clause might be 'susceptible of the almost indefinite expansion'[46] seems to have motivated the SGS v. Pakistan tribunal's conclusion that the umbrella clause could not have the effect that 'any alleged violation' of the State contracts or other commitments should

[14] *Ibid*.

[15] Thomas W. Waide, *'The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases'* 6 JWIT 183-236 (2005).

[16] David Faster, *'Umbrella Clauses: A Retreat from the Philippines?'*4 INT'L ARB. L. REV. 100, 107 (2006).

be treated as a breach of theBIT.[17] The tribunals in El Paso and Pan American also declined to give any substantial effect to an umbrella clause, in part as a consequence of the their view of thepotential scope of the claims it might generate. The tribunals each denied that an investment treaty extends at all to the dealings of thehost State 'as merchant', preferring instead a distinction between 'governmental' and 'commercial' responsibilities.[1819] The tribunals concluded that the umbrella clause might 'cover additional investment protections contractually agreed by the State as a sovereign such as a stabilization clause inserted into an investment agreement', [2021] but would not apply to investmentbacked State contracts deemed to be 'merely commercial'.

Polish law characterized the contracts in question as of the a purely civil law character,[22] and did not accept that the umbrella clause only applied to responsibilities of the a governmental or sovereign nature.

The tribunal in Noble Ventures did not accept that the umbrella clause did not apply to commercial matters. The tribunal rightly added that 'there is no common understanding in international law of the what constitutes a governmental or public act'.[23]

In CMS v. Argentina the commitments in question were considered to be public in nature, and not merely commercial, although the tribunal opined that the umbrella clause could afford protection to both public and private law instruments.[53]

---

[17] *Id.* ¶168.

[18] El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 78, 81 (Apr. 27, 2006), https://www.italaw.com/cases/382 (last visited Mar. 08, 2018).;Pan American Energy LLC and BP Argentina Exploration Company v. Argentina, ICSID Case No. ARB/03/l3, Decision on Jurisdiction, ¶ 108 (Jul.

[19] , 2006) https://www.italaw.com/cases/808 (Last visited Mar.08, 2018).

[20] *Ibid.*

[21] Eureko B. V. v. Poland, Ad Hoc, Partial Award, 246 ¶19 August it 2005.

[22] *Id.*, ¶130.

[23] 29 ¶82

In Siemens v. Argentina, the tribunal held that there was no basis to find any distinction[24] between governmental responsibilities, such as so-called 'investment agreements', that might fall within the scope of the umbrella clause, and other responsibilities including 'commercial' agreements and concessions, which would not. The broad definition of the 'investment', coupled with the reference in the umbrella clause to 'any responsibilities', would in the tribunal's view 'cover any binding commitment entered into by Argentina in respect of the such investment'.[25]

In SGS v. Paraguay also, the tribunal expressly declined 'to import into the umbrella clause the nontextual limitations that Respondent proposed'.[26] It did not accept that the umbrella clause excluded commercial contracts or conversely, that it only applied to actions assumed in a sovereign capacity. [27]The tribunal confessed to difficulty in knowing how it might even classify a long-term contract concluded with a government ministry.

It is also unclear that the original intention behind the umbrella clause was to stabilise only governmental commitments. It is true that the projects that motivated Lauterpacht, Abs, Shawcross and others were large concession agreements concerning natural resources, utilities or infrastructure, and these are commonly assumed to have a sovereign juridical character. Discussing the umbrella clause in the OECD Draft Convention, Brower raised the possibility that the provision's scope ratione materiae was intended to be limited so as only:

[24] CMS Gas Transmission Company v Argentina, ICSID Case No ARB/01/08, Award of 12 May 2005.

[25] Siemen AG v Argentina (ICSID Case No ARB/02/8), Award of 17 January 2007.

[26] SGS Societe Generale de Surveillance S.A. v Paraguay, ICSID Case No. ARB/07/29, Decision on Jurisdiction,¶168 (Feb 12, 2010).

[27] *Ibid*

Secondly, the proposed limitation appears at odds with the object and purpose of the promoting and protecting investments abroad since it creates uncertainty as to the application of thetreaty to purely commercial or quasi-commercial ventures, or investment in complex industries which depend on a range of the commercial arrangements with the State.[28]

Thirdly, the distinction between the sovereign or commercial nature of the an underlying obligation gives rise to numerous practical and theoretical difficulties, especially in times of the deregulation and denationalization. The activities of themodern regulatory State are myriad and vary as the political, social and economic needs of the each society vary. It is difficult to predict in advance whether a particular State actions involves acts de jure gestionis or acts de jure imperii. Shawcross himself had considered the act on the part of theState of the concluding a contract with a foreign investor an exercise of the sovereign authority, distinguishable only in degree, not kind, from the conclusion of the a treaty.[29]Some argue that `commercial' responsibilities or commitments involve the 'procurement of the equipment and services', but these types of the transactions may not even qualify as investments, hence the application of the umbrella clause would be moot.[30] Many investment projects also exhibit both public and private characteristics, defeating efforts at neat characterisation.

Fourthly, whether a particular activity or function is regarded as governmental or private can vary depending on the particular political and constitutional balance of the each host State and is reduced to a matter of the legislative choice.[31] With this dichotomy, there is a risk that the same type of the

[28] Craig Miles, 'Where's My Umbrella? An "Ordinary Meaning" Approach to the the Answering Three Key Questions That Have Emerged from the "Umbrella Clause" Debate,' in To the thedd J. Grierson Weiler, Investment Treaty Arbitration and International Law 7 JurisNet, (2008)

[29] Hartley Shawcross, 'The Problems of Foreign Investment in International Law' 102 RC 335-393 (1961).

[30] Joy Mining Machinery Ltd v. Egypt, ICSID Case No. A RB/03/11, Award, 6 August 2004.

[31] Christine Chinkin, *'A Critique of the Public/Private Dimension'* 10 EJIL 387-395 (1999).

transaction might be treated as governmental in the context of the one contracting party, but commercial in another.

With the uncertainty inherent in an elusive distinction between governmental and commercial responsibilities, it is suggested that the proposed distinction is un-likely to have been intended by contracting parties and there is no basis to imply one when interpreting the scope of the application ratione materiae of the umbrella clause.

Contracts Unilateral and General Actions

Since the inception of the umbrella clause, commentators have consistently understood and remarked that the nature of therelevant protected responsibilities would include

responsibilities 'embodied in a contract or in a concession'.[32] This has been confirmed in arbitral practice[33] and supported by the weight of the commentary.

A unilateral actions towards a specific investment might take the form of the a decree, license, permit or approval, targeted regulation, or State guarantees of theperformance of the a local State counterparty.[34] General actions might conceivably arise from statements of the governmental intent, or generally applicable regulation or legislation.

Some of theearliest commentators (and drafters) believed that protected responsibilities could go beyond State contracts. Commenting on the scope of the 'actions' protected by the umbrella clause in the OECD Draft Convention, Lauterbach considered that: "`actions" appears to be a concept wider

[32] Notes and Comments to the the Article 2 of the OECD Draft Convention, para 3(a).

[34] Walid Ben Hamida, *A Fabulous Discovery: The Arbitration Offer under the Organization of Islamic Cooperation Agreement Related to the the Investment*, 30 JOURNAL OF INTERNATIONAL ARBITRATION 637–663 (2013).

than that of the "contract" in the technical sense of theword'.[3536]The Notes and Comments to the OECD Draft confirm that it was intended that protected actions might include 'consensual' bargains to which the host State is party as well as its 'unilateral engagements'. explicit or implied, contractual or non-contractual, undertaken with regard to investment generally.[37] There is arbitral support for the application of the umbrella clause to unilateral commitments too. The SGS v. Philippines tribunal accepted that the umbrella clause in the Philippines— Switzerland BIT was capable of the protecting responsibilities besides contractual ones.[38] The Enron tribunal held that the phrase 'any obligation' refers to responsibilities 'regardless of the

their nature', including both contractual responsibilities 'as well as responsibilities assumed through law or regulation'.[39] The tribunals in Noble Energy v. Ecuador and Total v. Argentina both also affirm that a State may undertake international responsibilities through a variety of the acts, including legislation and unilateral statements.[40]

Generalisations are only so helpful, however. Treaties occasionally expressly clarify the scope of the umbrella clause. Some treaties refer only to 'written responsibilities',[41] responsibilities assumed by

---

[35] Elihu Lauterpacht, *'Drafting of Conventions for the Protection of Investment' in The En-couragement and Protection of Investme t in Developing Countries'*, (1962) 3 ICLQ Suppl. Pub. 18, 29.

[36] Notes ad Comments to the the Article 2, para 3(a).

[37] 34 ¶56.

[38] 36 ¶ 115

[39] *Enron vArgentina* (ICSID Case No ARB/01/3), Award of 22 May 2007.

[40] Noble Energy v. Ecuador, ICSID Case No. ARB/05/12, Decision on Jurisdiction, ¶ 157 (5 March 2008); To the thetal v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 131 (27 December 2010).

[41] Austria—Chile BIT, Article 11; Belgium and Luxembourg—Mexico BIT, Article 9.

way of the 'agreement' with investors of theother contracting party,[42] 'contractual responsibilities',[43] or responsibilities entered in-to with regard to 'approved' investments or investors.[4445] not as a matter of theapplication of the some character'.[46]

As already discussed, the umbrella clause only applies to existing responsibilities, the word 'obligation' implying a relationship of the a legal character, arising under a system of the law.[47]The Philippines tribunal emphasised that the umbrella clause would only protect actions of the a binding legal nature; it would 'not convert non-binding domestic blandishments into binding international responsibilities.'[48]

[42] Germany—Bangladesh BIT, Article 7(2).

[43] Austrian Model BIT, Article 7(2).

[44] Malaysia—UAE BIT, Article 13(3)

[45] Philippines—UK BIT, Article VII; Greece—Mexico BIT, Article 19

[46] Al-Bahloul v. Tajikistan, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, (Sept. 2, 2009).

[48] 36 ¶ 126.

The words 'entered into' may also limit the scope of the umbrella clause. Some commentators argue that the phrase 'entered into' implies an element of the mutuality, to the exclusion of the unilateral commitments,[82] and that `it would require an innovative reading of the these words to conclude that a state can "enter into" legislation, or other unilateral representations'.[83] However, in and of the themselves the words 'entered into' are not conclusive that unilateral commitments may not be covered; the words 'entered into' might be equated with 'undertaken' or 'assumed'. The approach of the tribunals in practice is not necessarily to exclude unilateral actions from the scope of the umbrella clause, but rather, only to admit them in very specific factual circumstances. For instance, the tribunal in Noble Ventures held that the reference to responsibilities 'entered in-to' with regard to investments indicates that 'specific commitments are referred to and not general commitments, for example by way of the legislative acts'.[84] The ad hoc committee in CMS held that legal responsibilities 'entered into' normally de-note consensual responsibilities arising as between the obligor and the obligee, so identified as a matter of theapplicable law.[85]

Equally, the words entered into 'with regard to'[86] or 'with respect to'[87] the investors or investments of the investors have the potential to impose a limit on the scope of the umbrella clause. The commentary to Article 2 of theOECD Draft clarified that these words call for a substantive connection:
actions 'must relate to the property concerned; it is not

[82] Walid Ben Hamida, *'La Clause Relative au Respect des Engagements dans les Traites d'Investissement' in Charles Leben (ed), Contentieux Arbitral Transnational Relatif a linvestissement International: Nouveaux Developpements'* (Pedone, 2006).

[83] Laura alonen, *'Containing the Scope of the umbrella Clause'* in Todd J. Grierson Weiler (2008).

[84]Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 51 (12 October 2005).

[85] CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, Award, ¶ 90 (12 May 2005).

[86] Singapore—UK BIT, Article 2(2).

[87] Iran—Switzerland BIT, Article 11.

sufficient if the link is incidental'.[88]The Commentary indicated that such a link would exist either:

if the 'form or specific terms' of thecommitment identify either the property concerned or the recipient of thecommitment; or

if it can be 'proved or presumed' that the foreign national 'acted in reliance on it', even if the commitment is expressed in general terms.[89]

The Eureko tribunal held that these words mean that for the umbrella clause ‘to be applicable the State must have assumed a legal obligation vis-à-vis the specific investment'.[90]The tribunal in Enron v. Argentina also noted that "responsibilities" covered by the "umbrella clause" are nevertheless limited by their object: "with regard to investments"' [91]

[88] Notes and Comments to Article 2, para 3(a)

[89] W. Michael Reisman and Mahnoush H. Arsanjani, *'The Question of the Unilateral Governmental Statements as Applicable Law in Investment Disputes'* 19 ICSID Rev.—FILJ 328, 343 (2004).

[90] Supra note 50 ¶ 256. [91] Supra note 72 ¶ 274.

[92] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. V. Argentina, ICSID Case No. ARB/02/l, Decision on Liability, ¶ 172 (3 October 2006).

[93] *Id*. ¶ 175.

[94] *Id*. ¶174.

umbrella clause, was that the clause was 'susceptible of the almost indefinite expansion'.[49] This conclusion was arguably affected by insufficient attention to the limits to the scope of the umbrella clause inherent in the words 'obligation', 'entered into' and 'with regard to investments'. Having noted the limitations to the scope of the umbrella clause, the SGS v. Philippines tribunal observed that its effect 'is very far from elevating to the international level all "the municipal legislative or administrative or other unilateral measures of the a Contracting Party".'[50] To acknowledge these conditions goes some way to dispelling the fears of the those who would not give effect to an umbrella clause be-cause of the fears of the unrestricted floods of the investment treaty claims.

Convergence of the International Trade and Investment Arbitration

International trade and investment arbitration are distinct disciplines within the field of the international economic law. Experts and researchers in a single field once in a while work in the vineyards of theother. However, the two disciplines are routinely overlapping and are progressively merging. It can be said that the characteristics of the trade and investment are on parallel tracks headed in the same direction. The ends are similar, but the means towards achieving those ends are different. The reason for this dissertation has been to feature discrete regions where a joining of thetwo orders is developing. These purposes of the meeting are restricted, however noteworthy.

[49] 27 ¶ 166.

[50] 28 ¶ 121

[97] Brooks E. Allen, *The Use of the Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners, in* ASA SPECIAL SERIES NO. 30: PERFORMANCE AS A REMEDY: NONMONETARY RELIEF IN INTERNATIONAL ARBITRATION, 281, 281 (Michael E. Schneider & Joachim Knoll eds., 2011)

CHAPTER 2- Jurisdiction of the international arbitral tribunals over contract claims and the role of the umbrella clause

Distinction between contract claims and treaty claims

As far as the relationship between the claims of the a foreign investor arising from an agreement with the state and the ones stemming from a BIT are concerned, the viewpoint is clear. A host State guarantees certain guideliness of the protection to a foreign investor as per a BIT (or a domestic law, yet for the sake of the convenience we will allude to BITs) it has entered into with the home Stat of theinvestor. In the event that it fails to satisfy these guideliness, this constitutes a violation of thetreaty and the foreign investor is qualified to assert an investment arbitration claim before an international forum as stipulated in the dispute resolution clause of theBIT itself. However, there are other requirements like the procedure involving exhaustion of the domestic remedies first but at the end of theday like in most of thematters the dispute can be anticipated to wind up before an arbitral tribunal. If a State has entered into a contract with particular foreign investor then like an ordinary commercial contract, breaches of the contract are also to be evaluated before the appropriate forum which may be an international commercial arbitration tribunal or a domestic court as per the dispute resolution clause of the that particular contract.

It is pertinent to note that disputes arising out of the breach of the a treaty and the ones stemming from a contract are regarded as analytically distinct and given this scenario such a distinction holds genuine regardless of thefact that the violation of theBIT is because of thebreach of the a contract.

In this event it has been observed that the host State's breach of the a particular contract is to such an extent so as to invoke the breach of theBIT guideliness as well and, subsequently, resort to the BIT dispute resolution decivce. As a general rule each of thebreaches i.e., treaty based or contractual must be resolved in its own institution. However, in the Vivendi case, it was noted that the tribunal interprets the particular contract even before resolving the question as to whether or not there has been a breach of theBIT.

Tribunal also stated that the tribunal first interprets the contract itself because it so happened that the host State violated its responsibilities under the treaty by foregoing the contract. However, this does not imply that the tribunal has jurisdiction to decide upon the contractual breach itself. This distinction also holds true when both the breaches i.e., one of the contract and one of the treaty take place simultaneously.

Practically, It is not always easy to make a distinction between these breaches in reality, but hypothetically there should be no problem about the best possible solution. The lawful situation becomes more muddled when, somehow, the line between BIT dispute decivce and "purely" contractual breaches becomes blurred. The scenario becomes less complicated when the BIT unequivocally states in its jurisdiction clause that it can be used to resolve "any dispute" between the State and the foreign investor. This is the case where the foreign investor can pursue a claim before the BIT designated forum in addition to the one designated contract. As discussed earlier, the noteworthy point lies in the wording of theBIT which ought to be explicit and all inclusive, such as including "all" disputes in this extension of theBIT jurisdiction.[51]The predictability of theresult seems to diminish rapidly as soon as the wording becomes more qualified.

[51] Christo the theph Schreuer, *Investment Treaty Arbitration and the Jurisdiction over Contract Claims-The Vivendi Case Considered, in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTO THE THEMARY INTERNATIONAL LAW 281, 296 (To the thedd Weiler ed., 2005

There exists a more complex case scenario which can be seen as "disguising" contractual claims into treaty-based ones. It may so happen that a foreign investor might be persuaded to assert his claim as a BIT breach when faced with contractual breach on the part of thehost State so as to avoid the dispute resolution decivce designated in the contractual clause which entitles the foreign investor to pursue his claim only in the domestic courts. In view of thetheoretical model clarified over, the conclusion is that the foreign investor's claims are to be dismissed in the jurisdictional phase of the an investment dispute.

The grey area becomes prominent at the factual level where what actually needs to be distinguished is whether the State really acted as a contractual party, and thus committed a contractual breach, or its actions fall within a public/BIT sphere. There is no by and large acknowledged technique for recognizing these two scenarios, yet a few rules have been suggested by some tribunals which will be dealt in detail under Chapter 3 of the this dissertation.

As was clearly explained by the *Vivendi* ad hoc Committee, "[a] treaty cause of the action is not the same as a contractual cause of the action; it requires a clear showing of the conduct which is in the circumstances contrary to the relevant treaty guidelines."[52] The *Impregilo v. Pakistan* tribunal, which also promoted such approach, also set out the rationale for it: "(…) to ensure that, in considering issues of the jurisdiction, courts and tribunals do not go into the merits of the cases without sufficient prior debate."[53]

However, some ICSID tribunals did not approve of the such an approach. In *Joy Mining v. Egypt* it was concluded that, under certain circumstances, "it might be considered to be a dispute where it is

[52] Vivendi v. Argentina, ICSID Case No. ARB97/03, Decision on Annulment, ¶113(3 July 2002).

[53] Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction,

¶ 254 (April 22, 2005).

virtually impossible to separate the contract issues from the treaty issues and to draw any jurisdictional conclusions from a distinction between them." [54]

The scenarios stated in this section indicate the complexity of the certain cases where it becomes difficult to deal with a distinction between contractual breach and a treaty breach at the jurisdictional level thereby, leaving the final decision for the merits phase which by all means, remains warranted. However, it is still recommended to evaluate these issues in the jurisdictional phase whenever it is possible.

Jurisdiction over contract claims and the umbrella clause

A tribunal upheld an umbrella clause claim on the merits for the first time in CMS v. Argentina.[102] The finding on the umbrella clause was later annulled,[103] however, the ad hoc committee did not criticize the tribunal's conclusions as to the umbrella clause's substantive effect, but only that the tribunal had over extended the scope of theprovision.

The clause in question, Article II(2)(c) of theArgentina—United States BIT, provides that 'each Party shall observe any obligation it may have entered into with regard to investments'. The dispute concerned alleged responsibilities found in a licence to transmit and distribute natural gas. Two provisions of thelicence were characterised as 'stabilisation clauses'. These provisions were found to amount to a guarantee on the part of theArgentine government that it would not interfere with the tariff regime for gas transmission and that it would not unilaterally amend the terms of thelicence. The tribunal ruled, on the basis of the these licence terms and in the light of the applicable regulations, that Argentina had entered into commitments with regard to the claimant that it would not freeze the tariff regime for gas distribution, or apply price controls, and would not unilaterally alter the basic rules governing the operation of thelicence.[104] The tribunal added that these were commitments of the a public and not merely commercial nature, and that they had been violated through the exercise of the Argentina's sovereign power. On that basis, the tribunal held that Argentina was in breach of the Article II(2)(c) 'to the extent that legal and contractual responsibilities pertinent to the investment

[54] Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award, ¶ 75 (August 6, 2004), 19 ICSID Review 486 (2004)

have been breached'.[105] Thus, the umbrella clause gave rise to an international remedy in respect of the violations of the domestic law responsibilities entered into by Argentina towards the claimant and its investment.

[102] CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, Award, (12 May 2005). [103]CMS v. Argentina, , ICSID Case No. ARB/01/ 25, Decision on Annulment, ¶87 (September 2007). [104] Supra note 102 ¶ 134, 302-303.

[105] *Id.* ¶303.

The next decision to rule on the merits of the an umbrella clause claim, Eureko v. Poland,[55] contained a more elaborate exposition on the scope and effect of the an umbrella clause. The decision concerned Article 3.5 of theNetherlands—Poland BIT, which provides that each Contracting Party 'shall observe any responsibilities it may have entered into with regard to investments of the investors of theother Contracting Party'. The central finding was the determination that Poland had, through its State treasury, entered into a binding commitment with the claimant that it would hold an initial public of thefering of the shakes in the State insurance company, PZU, in the course of the which the claimant — which already owned 30 per cent of theshares in PZU — would be entitled to acquire a majority stake.[56]The government and State treasury, however, changed their strategy, with the Council of the Ministers resolving that 'it was essential for the State Treasury to maintain control' over PZU. By a majority, the tribunal found that this reversal was 'politically motivated', 'discriminatory', in breach of theactions given to the claimant, and thereby in breach of the Article 3.5 of theBIT.[57] The tribunal

[55] 50.

[56] *Id.* ¶157.

[57] *Id.* ¶ 191, 208, 219, 242, 250.

explained that the plain meaning of the this provision 'is not obscure. The phrase "shall observe" is imperative and categorical'.[58] The tribunal supported its conclusion by reference to the 'provenance' of the umbrella clause in the body of the international investment law.[59] The tribunal in Eureko also cast doubt on the interpretative approach to the umbrella clause taken by the tribunal in SGS v. Pakistan, preferring instead the SGS v. Philippines tribunal's analysis.[60] The tribunal insisted that the umbrella clause must be given effect, and that effect must be something different from or additional to the other investment protection guideliness set out in the treaty.[61]

He criticised this aspect of theaward, in particular, for insufficient treatment of the'basic rules applicable under Polish law', describing it as an exercise in interpretation 'sans

loi'.[62] In addition, the arbitrator disputed the substantive effect attributed to the umbrella clause by the majority,[63]believing it to be 'a potentially dangerous precedent capable of the producing negative effects on the further development of the foreign capital participation in privatizations of the State-owned companies'.[115]

Noble Ventures v. Romania is also an endorsement for umbrella clause claims, although the tribunal did not in fact find that the clause had been breached. The umbrella clause in question, in the

---

[58] *Id*. ¶246.

[59] *Id*. ¶21.

[60] *Id*. ¶257.

[61] *Id*. ¶249.

[62] Zachary Douglas, `*Nothing if Not Critical for Investment Treaty Arbitration: Occidental. Eureko and Methanex'* 22(1) ARB. IN'L 27, 40 (2006).

[63] *Id.* ¶1. [115]

Id. ¶1.

Romania—United States BIT, provides that 'each Party shall observe any obligation it may have entered into with regard to investments'. The tribunal observed that the wording of theclause in question was 'general and straightforward', in Contrast to the provisions discussed in the SGS v. Pakistan and Salini v. Jordan cases.[646566]

"the host state may incur international responsibility by reason of the a breach of the its contractual responsibilities towards the private investor of theother Party, the breach of the contract being thus Internationalized', i.e. assimilated to a breach of the a treaty".[67]

The tribunal insisted that 'the principle of the effectiveness (effet utile)' required that the umbrella clause must create an obligation 'beyond those specified in other provisions of theBIT itself'.[68] The tribunal concluded that the umbrella clause was intended to provide the investor with an 'internationally secured legal remedy in respect of the investment contracts that it has entered into with the host State',[69] endorsing the view that the

umbrella clause is an intentional departure from the general separation of the State responsibilities under municipal and under international law.[70]

In LG&E v. Argentina,[71] the tribunal accepted that Argentina violated Article II(2)(c) of theArgentina United States BIT. Argentina was found to have assumed certain legal responsibilities with regard to investments and foreign investors participating in its gas distribution sector and, subsequently, to have

---

[64] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, ¶60 (12 Octo the theber 2005).

[65] *Id.* ¶158.

[66] *Id.* ¶53.

[67] *Id.* ¶54.

[68] *Id.* ¶50-51.

[69] *Id.* ¶5

[70] *Id.* ¶55.

[71] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentina, ICSID Case No. ARB/02/l, Decision on Liability, (3 Octo the theber 2006).

repudiated these without compensation. Unlike preceding cases, the underlying commitments did not arise out of the a State contract. Rather, the tribunal found that guarantees, set forth in the Gas Law and its implementing regulations, and subsequently included in promotional material for a privatisation targeted at foreign investors, generated legal responsibilities falling within the scope of the umbrella clause. According to the tribunal:

these laws and regulations became responsibilities within the meaning of the Article 11(2)(c), by virtue of the targeting foreign investors and applying specifically to their investments, that gave rise to liability under the umbrella clause.[7273]

Such responsibilities receive extra protection by virtue of the their consideration under the bilateral treaty.[74]

In Enron v. Argentina,[75] Argentina was again found to have violated the umbrella clause in Article II(2)(c) of theArgentina—United States BIT. The award was later annulled on grounds unrelated to the present discussion. In the award, Argentina was found to have reneged on responsibilities contained in certain contracts and arising out of the unilateral

actions expressed in its energy sector laws and regulations.[76] The tribunal confirmed that Article II(2)(c) covered both these contractual and unilateral actions.[77] These responsibilities were 'not observed' as a matter of the Argentinean law.[130]

---

[72] *Id.* ¶175.

[73] *Ibid.*

[74] *Id.* ¶170.

[75] Enron Corporation and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Award, (22 May 2007).

[76] *Id.* ¶102-103, 127, 136, 151.

[77] *Id.* ¶274. [130]

Id. ¶231.

In Siemens v. Argentina, a claim was advanced under Article 7(2) of theArgentina— Germany BIT, which provides that 'each Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of theother Contracting Party in its territory' .[78] The claim was rejected due to the absence of the an obligation owed to the claimant,[79] as discussed further below, but in obiter remarks the tribunal accepted that:

Article 7(2) has the meaning that its terms express, namely, that failure to meet responsibilities undertaken by one of theTreaty parties in respect to any particular investment is converted by this clause into a breach of theTreaty.' [80]

Sempra v. Argentina closely followed the analysis in CMS, Enron, and LG&E.[81] Sempra held interests in certain Argentinean companies operating in the gas transmission and distribution sector.[82] These companies held licences for the distribution and sale of the gas to customers in the Republic Argentine ..[136] These were held to be responsibilities of the Argentina entered into with the claimant and its investment.[137] The tribunal determined that Argentina had breached these commitments as a matter of the Argentinean law and concluded that Argentina was therefore

also internationally responsible for violating of theBIT, and specifically the umbrella clause.[138] A later decision to annul the award did not focus on this aspect of thecase.

BIVAC v. Paraguay concerned a claim in respect of the unpaid invoices under a contract with the Ministry of the Finance of the Paraguay for the provision of the technical services for pre- shipment inspection of the imports into Paraguay. The claim was brought under the Netherlands—Paraguay BIT, Article 3(4) of the which provides: ‘each Contracting Party shall observe any obligation it may have entered into with regard to investments of theother Contracting Party'. The claimant alleged that Article 3(4) had been breached by the respondent's failure to make payments that were undisputed

---

[78] Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Award, (6 February 2007).

[79] *Id.* ¶81, 204.

[80] *Id.* ¶204.

[81] Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award, (28 September 2007).

[82] *Id.* ¶83.

and due under the contract. The tribunal upheld jurisdiction in respect of the those claims. First, the words 'any obligation' were `without apparent limitation', and certainly broad enough to encompass commitments contained in the contract.[139] Secondly, the words of the Article 3(4) had to be interpreted in such a way as to give them some meaning and practical effect, separate from the other provisions of thetreaty. On that basis, and in the light of thenatural and ordinary meaning of thelanguage, the tribunal concluded that it had jurisdiction over claims arising from or produced directly in relation to the contract.[140]

This clear ruling on the effect of the umbrella clause was not, however, the end of thematter. Article 9 of thecontract provided that disputes should be sub-mitted to the exclusive jurisdiction of thecourts of the Asuncion. The tribunal took the position that ‘assuming that Article 3(4) does import the responsibilities under the Contract into the BIT' then it must have imported all of the Paraguay's responsibilities including to ensure the courts of the Asuncion were available to resolve disputes, in accordance with Article 9. the tribunal considered that it was open to the parties to have included a provision in Article 9 carving out possible umbrella clause

[138] *Id.* ¶309-310.

[139] Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.k. v. Paragucy, ICSID Case No. ARB/079, Decision on Jurisdiction, ¶141 (29 May 2009).

[140] *Id.* ¶142.

claims. The tribunal took the failure to do so to be an indication that the parties to the contract intended the exclusive jurisdiction clause 'to be absolute and without exception'.[83] The tribunal held that the umbrella clause does not mean a claimant is 'free to pick and choose those parts of theContract that they may wish to incorporate' and to ignore others.[84] To allow otherwise would `seriously and

[83] *Id.* ¶146.

[84] *Id.* ¶18.

negatively undermine contractual autonomy'.[85] Counter arguments based en the separation of the contract and treaty claims were dismissed 'as being entirely artificial' since, according to the tribunal, 'the reality' is that to determine an umbrella clause claim, a treaty tribunal must interpret and apply the underlying contract.[86] The tribunal concluded that the fundamental basis of theclaim could only be the contract, and that accordingly, the umbrella clause claim was inadmissible. The proper forum for the resolution of thecontractual claim that had been raised, albeit under Article 3(4) of theBIT, was the courts of the Asuncion. The tribunal left open for the next phase of theproceedings the question whether the consequence of the this ruling was that the claims should be dismissed, or whether the proceedings might be stayed, as in SGS v. Philippines, although the tribunal indicated serious doubt as to the latter course.[87]

Toto Costruzioni Generali v. Lebanon bears similarities in outcome and ap- 38 proach to the BI VAC case, yet nevertheless confirms that the umbrella clause might give rise to a treaty remedy in respect of the a breach of the a State contract. The dispute concerned non- performance of the a contract between Toto and the Conseil Executif de Grands Projects (the CEGP) and its successor, the Council for Development and Reconstruction (the CDR). The tribunal was satisfied that the contract would have fallen within the scope of the Article 9(2), given that CEGP and CDR

were public entities for which the respondent State was responsible.[88] The tribunal was also prepared to accept that the umbrella clause might provide a remedy in respect of the breach of the State contracts. Ultimately, however, the tribunal ruled that it did not have jurisdiction to determine the

[85] *Ibid.*

[86] *Id.* ¶149.

[87] *Ibid.*

[88] To the theto the the Costruzioni Generali S.p.A. v. Lebanon, ICSID Case No ARB/07/12, Decision on Jurisdiction, ¶190 (11 September 2009).

claims since the contract provided that disputes should be referred to the Lebanese courts. The tribunal's assessment was that:

Although Article 9.2 of theTreaty may be used as a decivce for the enforcement of the claims, it does not elevate pure contractual claims into treaty claims. The contractual claims remain based up-on the contract; they are governed by the law of thecontract and may be affected by the other provisions of thecontract.[89]

For the tribunal, the consequence of thecontract containing an exclusive jurisdiction in favour of theLebanese courts was that the tribunal lacked jurisdiction to determine what it called the 'contractual claims' advanced under Article 9(2) of theBIT.[90]

Factually similar to the two earlier SGS cases, and the BIVAC case, SGS v. Paraguay concerned a claim under Article 11 of theParaguay—Switzerland BIT,[91] Paraguayan law.

The tribunal ruled that the contract was a 'commitment' falling with the scope of the Article 11 and as such, it had jurisdiction to hear the claim. It denied that the term commitment in Article 11 only referred to commitments of the a certain nature. Rather, it held that 'the

obligation has no limitations on its face — it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally, etc'.[92]

---

[89] *Id.* ¶202.

[90] *Ibid*

[91] SGS Societe Generale de Surveillance S.A. v Paraguay, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶169 (12 February 2010).

[92] *Id.* ¶167.

Jurisdiction was not displaced by the existence of thedispute settlement clause in the contract and nor were the claims rendered inadmissible. The tribunal held that it was consistent with the intentions of thecontracting parties to the treaty to allow the claimant to advance its claim under the umbrella clause, notwithstanding the jurisdiction clause in the contract, since:

the State parties to the BIT intended to provide this Treaty protection in addition to whatever rights the investor could negotiate for itself in a contract or could find under domestic law, and they gave the investor the option to enforce it, including through arbitrations such as this one.[93]

The tribunal thought it would defeat the purpose of the umbrella clause if it could not rule on a claim without the contractual aspects of thedispute having first been referred to the contractually chosen forum.[94]

Turning to the merits of the umbrella clause claim, the tribunal rejected the contention that the umbrella clause may only be breached by conduct involving the exercise of the sovereign power.[95] Breach of the contract is a failure to observe commitments, the tribunal held, regardless of the whether the State has also abused its sovereign authority.[9697]

Decisions questioning the impact of the umbrella clauses

In upholding a breach of the an umbrella clause, the tribunal in Sempra v. Argentina extolled that ‘various recent decisions have dealt with the meaning and extent of the"umbrella clause", and the mystery surrounding the matter seems to be gradually lessening'.[156] As the following discussion

[93] *Id.* ¶16.

[94] SGS Societe Generale de Surveillance S.A. v Paraguay, ICSID Case No. ARB/07/29, Award, ¶101, 104 (10 February 2012).

[95] Id. ¶89.

[96] Id. ¶91.

[97] 55 ¶168.

reveals, that statement was rather hopeful. The sceptical view of the umbrella clause continues to be voiced by many tribunals, besides the tribunal in the initial Pakistan case.

Joy Mining v. Egypt contains highly sceptical remarks about the effect of thealleged umbrella clause in the Egypt—United Kingdom BIT.[157] In that case, the tribunal denied that the umbrella clause had any substantive effect independent of the a violation of theBIT's other rights and responsibilities or, in an apparent non sequitur, a breach of the contract of the sufficient 'magnitude'. The tribunal opined that:

in this context, it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of the transforming all contract disputes into investment disputes on der the Treaty, unless of the course there would be a clear violation of theTreaty rights and responsibilities or a violation of the contract rights of the such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect.[158]

Salini v. Jordan also casts doubt on the effect of the umbrella clause as posited in SGS v. Philippines, for example. However, as already discussed, the treaty in question contained a very differently worded provision, which could not be compared with an umbrella clause as properly understood.

The tribunal, rightly, gave the clause a quite different effect.

[156] Supra note 134 ¶309.

[157] Joy ining Machinery Ltd v. Egypt, ICSID Case No. ARB/03/11, Award, (6 August 2004). [158] Id. ¶81

In contrast, El Paso v. Argentina and Pan American v. Argentina squarely addressed the same umbrella clause applied in CMS, LG&E, Enron and Sempra and also considered in Azurix. The decisions, issued by tribunals with two common members, are materially identical on this point. Both decisions reject the unqualified suggestion that the clause in the Argentina—United States BIT creates an international law obligation to observe investment-related State contracts or commitments arising

under municipal law in the manner pleaded by the claimants or adopted in other cases. Each decision endorses the sceptical approach of thetribunal in SGS v. Pakistan.

The umbrella clause claims related to Argentina's alleged failure to observe arrangements governing the claimants' energy sector investments set forth in the applicable general regulatory frameworks and confirmed by contracts and licences.[98]The conclusions of theEl Paso and Pan American tribunals on the effect of the umbrella clause are foreshadowed by the manner in which the tribunals introduced the issue:

the question for the Tribunal is whether Article I1(2Xc) of theU.S.—Argentina BIT is an umbrella clause whose effect would be, according to the Claimants, to transform all contractual actions into international law responsibilities and, accordingly, to turn breaches of theslightest such responsibilities by the Respondent into breaches of theBIT.[99]

One considers that it elevates contract claims to the status of the treaty claims, it should result as an unavoidable consequence that all claims based on any commitment in legislative or administrative or other unilateral acts of theState or one of the its entities or subdivisions are to be considered as treaty claims.[100]

The tribunals' view that the umbrella clause might attach to 'any legal obligation of the a State and not only of the any contractual obligation with respect to investment whatever the source of

[98] El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, Decision on Jurisdiction, (27 April 2006).

[99] Id. ¶67.

[100] Id. ¶71, 77.

theobligation'[101] evidently gave rise to strong antipathy to other arguments as to the effect of the umbrella clause. Both tribunals rejected the interpretation of the umbrella clause given by the SGS v. Philippines tribunal, finding the arguments put forward by the tribunal in SGS v. Pakistan 'more than conclusive'.[163] The tribunals doubted the interpretative approach of thePhilippines tribunal for 'favoring one party over another' [102] and being unbalanced, [103104] emphasizing that 'a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of the economic activities, and the necessity to protect foreign investment and its continuing flow'.[105106107]

Dis- agreeing with the tribunal in Noble Ventures, the tribunals thought that the foreign party would already have access to an 'internationally secured legal remedy',[108]and no additional remedy was intended, or if the transaction was merely commercial, it would

[101] Id. ¶76. [163]

Id. ¶71.

[102] Hakeem Seriki, *'Umbrella Clauses and Investment Treaty Arbitration. All Encompassing or a Respite for Sovereign States and State Entities'* J. BUS. L. 570, 573 (2007)

[103] El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, Decision on Jurisdiction, (Apr.
[104] , 2006), https://www.italaw.com/cases/382 (last visited Mar. 08, 2018).

[105] *Ibid.*

[106] Id. ¶73, 76.

[107] Id. ¶77.

[108] *Ibid.*

fall within the jurisdiction of thelocal courts, and in the tribunals' opinion, no 'internationally secured remedy' would be justified.[109]

The tribunal considered that one of the'far-reaching consequences' of the a broad interpretation of the umbrella clause would be the destruction of the 'the distinction between national legal orders and the international legal order'.[171]The tribunal doubted that the contracting parties had intended to create potential international responsibility of the a State for breach of the a contract governed by domestic law.

At best, the El Paso and Pan American tribunals considered that the umbrella clause was intended to safeguard 'additional investment protections contractually-agreed by the State as a sovereign',[110] without articulating what these might be, and only in respect of the conduct that would otherwise violate the guideliness of thetreaty.[173] In other words, the tribunals found little or no additional substantive effect for the umbrella clause in the Argentina—United States BIT.[174]

Harmonizing the restrictive and the expansive divide

The two SGS cases have led to two branches of the divergent jurisprudence, which can be classified the restrictive and the expansive theory. Taking a closer look at the two approaches one may conclude that those tribunals in favour of theformer have held that the legal consequences of the such a construction were 'so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party. In view of the such an impact it will be prudent on the part of thetribunals to exercise great care and caution while dealing with umbrella clauses. Likewise the *El Paso* tribunal has stated in the above context: *"(...)far-reaching consequences of the a broad interpretation of theso-called umbrella clauses, quite destructive of thedistinction between national legal orders and the international legal order, have been well understood and clearly explained(...)".*[111]

---

[109] *Ibid.*[171] Id. ¶82.

[110] Id. ¶81, 82.

[111] 165 ¶82.

The ambit of the umbrella clauses is further widened when the other substantive provisions like MFN come into play which allows importation of the umbrella clauses from other treaties. A foreign investor becomes capable of the multiplying the quantum of the contracts in which he could could assert treaty jurisdiction for contractual breaches. In all practical terms this cannot be assumed to be the underlying intention of thehost State. On the contrary, assumption (narrowing of thejurisdiction) is the thing that appears as a more conceivable commonplace goal.

Nonetheless, the contentions for a wide approach are very solid as well. Above all, it isn't clear what might be the reason for umbrella statements if not precisely to broaden the jurisdiction. Giving a wide agree to arbitration by a State isn't something incomprehensible since of thefering more extensive assurance to a foreign investor is viewed as an essential objective, at that point a more extensive approach can be viewed as better in accomplishing it. As the Sempra tribunal observed,

"[t]he fact that the Treaty also includes the specific guarantee of the a general 'umbrella clause' (...) creates an even closer link between the contract, the context of theinvestment and the Treaty."[112]

By and large, it does appear that the wide approach is at present the favored one in insightful writings. The question is still not answered as to what is in fact the correct approach. As is so regularly the case, there is no clear answer or immovable run the show

What is exceptionally ideal is that such augmenting is unambiguously obvious from the wording of the BIT itself. In this way, tribunals ought to be cautious when translating expansive and rather uncertain statements which require, for instance, keeping up of the a satisfactory lawful system for

[112] 134 ¶101.

the security of the investments. Such broad and wide wording may demonstrate something much the same as a guidelines of the treatment, rather than implying consent to intervention by tribunals. Likewise, regardless of the far reaching contradicting suppositions, there may be influential elective clarifications for the importance of the umbrella statement regardless of the whether its wording may appear to show expansion of the treaty jurisdiction to contractual breaches.

For example, it has been proposed that an umbrella clause may have a substantive angle as in it is a changed interpretation of the a stabilization proviso. Moreover, the wording of the a clause calling for recognition of the commitments towards an investment may really imply that the State is just stretching out the bargain debate determination to any commitment it has gained close by the BIT, yet not contractually with a specific foreign investor. This could incorporate any arrangement of the national enactment, or even an announcement of thehost State that would appear to infer a specific commitment towards investors. In spite of thefact this doctrine proposes that the extension of the jurisdiction to commitments expected outside the BIT is an additional purpose of the umbrella proviso (notwithstanding development of the jurisdiction to authoritative debate), in my conclusion there is no motivation behind why this purpose couldn't really be the sole one.

It is undeniable that the primary purpose of the any tribunal should always be to find out what was the actual intention of theContracting State at the time of the entering into a BIT. The initial focus of thetribunal should essentially be to discover the underlying intent, response to the historical backdrop of thespecific BIT arrangement and going negotiations prior to entering into the treaty. However, in the event that looked with a hard case that can genuinely go in any case, the court should decline treaty jurisdiction. It ought to be borne as a top priority that the issue of the elucidation of the umbrella provisions is really one more part of thelong standing clash between the selfish interests of the developed and developing nations. Some commentators have pointed out that investment law is all.

Relic of the imperialistic arrangements of the incredible powers. Therefore, a balance must be maintained to prevent conflicting interests of the investors and host States and sensible interpretation is of the key significance in doing the same. Widened protection to investors could seriously hinder the whole investment disputes settlement system by causing a backlash against it by the host States

CHAPTER 3 - Debate on the effect of the umbrella Clause

The presumed intentions of theContracting Parties

In SGS v. Pakistan, the tribunal could not accept that the contracting parties to the Pakistan—Switzerland BIT had intended Article 11 of the that treaty to create a new international obligation in respect of the municipal responsibilities 'where clearly there was none before'.[113][114] The tribunal in Joy Mining v. Egypt could not accept that such a brief and unobtrusive treaty provision could have been intended to have the effect of the creating a treaty remedy in respect of the breach of the investment-backed State contracts.

The difficulty with the positions taken by these tribunals is that they seem un-prepared to accept the words of the umbrella clause at face value and the possibility that the very intention of thecontracting parties was to create an international remedy in respect of the violation of the a State contract.[115]State sovereignty necessarily admits the possibility that States may so agree to bind themselves and permit international institutions and processes to scrutinize and even intervene in their domestic affairs and confirms their capacity to do so.[116] At least one State has of thefered contemporaneous confirmation that this was indeed

[113] 27 ¶166.

[114] 63 ¶81.

[115] Stanley D. Metzger, *'Multilateral Conventions for the Protection of Private Foreign Investment'* ,9 J. PUB. L. 133, 137 (1960); Ignaz Seidl-Hohenveldem, *'The Abs-Shawcross Draft Convention to the the Protect Private Foreign Investment: Comments on the Round Table'* 10 J. PUB. L. 100, 104-105 (1961).

[116] Anne-Marie Slaughter, *'Sovereignty and Power in a Networked World Order'* 40 STAN. I. INT'L L. 283, 286 (2004).

its intention in negotiating umbrella clauses in its treaties.[117] In addition, if the `broad' or 'generic claims clause' is conceded to allow investors to submit to a treaty-based tribunal true contractual disputes related to investments,[118] this assumption underlying the restrictive interpretation of the umbrella clauses — namely that States did not intend to create a jurisdiction to determine investment related State contract disputes - is yet further undermined). [119] Yet, whilst these tribunals acknowledged that States might so agree, they were not convinced that by the wording of theclauses in question, they had.

Evidence of theorigins of the umbrella clause, including the stated intentions of the drafters involved in producing the first formulations of the umbrella clause and the contemporaneous commentaries of the scholars and practitioners, suggests that the better view is that the clause as originally devised was intended to achieve two definite objectives.[120] The first was the creation of the an international law obligation breach which would give rise to international responsibility. The second was to establish an international law dispute settlement procedure to enforce this obligation. What is qualitatively different about the umbrella clause from a simple contractual claim is the coming together in a single legal device of the these two elements.

The clause may have been originally conceived to remedy some of theinadequacies of the purely contractual investment protection techniques. The effectiveness of the contractual provisions designed to

insulate investors from sovereign power and to ensure that an arbitration tribunal would apply international legal principles to disputes cannot be assured if the contract remains subject to local law and thus local legislative and executive power. Prevailing doctrine at the time of the umbrella clause's

---

[117] *'Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan'* in Light of Decision of the Tribunal on Objections to the the Jurisdiction of ICSID in Case No. ARB/01/13 SGS Societe Generale de Surveillance S.A. versus Islamic Republic of Pakistan', Note under Cover of Letter from Swiss Government to the the ICSID Deputy Secretary-General, 1 Octo the theber 2003, 19 MEALEY'S ARB. REP. E-1 (2004).

[118] ANTHONY SINCLAIR, 'BRIDGING THE CONTRACT/TREATY DIVIDE' IN CHRISTINA BINDER, URSULA KRIEBAUM, AUGUST REINISCH AND STEPHAN WITTICH (EDS), INTERNATIONAL INVESTMENT LAW FOR THE 21S` CENTURY: ESSAYS IN HONOUR OF CHRISTO THE THEPH SCHREUER 92 (Oxford University Press, 2009).

[119] 55 ¶ 129, 183; 165 ¶ 84; 31 ¶ 109.

[120] 182.

inception held that a host State could not give an effective promise in an investment contract that it would not change laws affecting the transaction; in many countries that is still the case. Moreover, the law of thehost State would very of theten govern such contracts, given relative negotiating strengths and doctrine at the time that all State contracts must be 'based on the municipal law of the some country'.[121]The conclusion that a State's international responsibility could be invoked when a State merely breached a contract with a foreign investor, without proof the of the some further internationally wrongful element, such as a refusal to adjudicate claims locally or unilateral repudiation of the contractual rights and responsibilities through legislative intervention, had some advocates but was never well supported and was ultimately not sustainable."[122] Theories that argued that certain types of the 'investment agreements' or 'economic development agreements' could be 'internationalised' or equated with treaties in order to attract the treaty law principle pacta sunt servanda were only ever marginally successful in a handful of the concession contract arbitrations in the 1960s and 1970s.[123]Such arguments were theoretically unsatisfactory, not least because they lacked the essential mutuality of the international law rights and responsibilities.[124] In time it was accepted that rules of the international law might be chosen to apply to an investment agreement, but this did not necessarily mean that breach of the that agreement invoked the State's international

[121] Payment of Various Serbian Loans Issued in France (Fra. v. Ser.), Judgment, 1929 P.C.I.J (Ser. A) No. 20, at 41 (July 12).

[122] International Law Commission (F.V. Garcia-Amador, Rapporteur), *Report of the International Law Commission on the work of its eleventh session*, 20 April to the the 26 June 1959, UN Doc.A/4169; Robert Y. Jennings, '*State Contracts in International Law'* 37 BYIL 156-182 (1961); Louis B. Sohn and Richard R. Baxter, `*Responsibility of States for Injuries to the the the Economic Interests of Aliens'* 55 AJIL 545-584, Article 12(1) (1961).

[123] Saud Arabia v. Arabian American Oil Company, ad hoc, Award, (23 August 1958) 27 ILR 117 (1963).

[124] Robert Y. Jennings, *'State Contracts in International Law'* 37 BYIL 156-182(1961)

The Separation between international and domestic legal orders

Certain tribunals have reacted negatively to umbrella clause claims on grounds that treaty claims in respect of the commercial contracts governed by municipal law would be 'quite destructive of thedistinction between national legal orders and the international legal order'.[191] A simple answer to this concern might be that the umbrella clause provision was intended to be a progressive development on the position under customary international law.[192] Closer analysis also casts doubt on its basic premise. As shall be seen, there is a clear and distinct role in the analysis of the an umbrella clause claim for both international law and any applicable national law. This is evident both in establishing the existence of theprotected obligation and in analyzing whether there has been any wrongful nonobservance.

a) The Existence of theProtected Obligation

A legally binding and enforceable obligation owed by the host State is inherent in the term 'obligation', which has been described as the 'operative term' of the umbrella clause.[193] Investment treaties typically do not define the terms `obligation', 'commitment', or 'actions', nor typically do they specify the applicable legal rules by which to determine their existence or content. The issues of the what responsibilities are protected by the umbrella clause and how they may be identified have arisen frequently in those cases in which tribunals have acknowledged the effect of the umbrella clause.

---

[189] GUNTHER JAENICKE, 'CONSEQUENCES OF THE A BREACH OF THE AN INVESTMENT AGREEMENT GOVERNED BY INTERNATIONAL LAW, BY GENERAL PRINCIPLES OF THE LAW, OR BY DOMESTIC LAW OF THEHOST STATE' IN DETLEV C. DICKE (ED), FOREIGN INVESTMENT IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 177, 179 (Fribourg University Press, 1987).

[190]Delphine Nougayrede, *'Binding States: A Commentary on State Contracts and Investment Treaties'* 6 BUS. L. INT'L 373-395 (2005).

[191] Supra note 165 ¶82; Supra note 31 ¶110.

[192] Supra note 52 ¶ 55.

[193] Burlington Resources v. Ecuador, ICS113-Case ARB/08/5, Decision on Liability, ¶214 (14 December 2012).

In SGS v. Philippines it was held that the umbrella clause only applied in respect of the binding commitments, including contractual commitments, which the State had assumed with regard to specific investments.[125] The existence of the such commitments was 'a matter for determination under the applicable law, normally the law of thehost state'.[126] For the most part, other tribunals have also followed this approach. For instance, in Enron v. Argentina, the tribunal found that 'through the Gas Law and its implementing legislation, the Respondent assumed "responsibilities with regard to investments"', which amount to 'responsibilities' arising as a matter of the Argentinean law.[127] The tribunal in Burlington v. Ecuador agreed that 'an obligation does not exist in a vacuum. It is subject to a governing law. Although the notion of the obligation is used in In international treaty, the court or tribunal interpreting the treaty may have to look to municipal law to give it content.'[128]

Other tribunals have suggested a broader approach in determining the existence of the a protected obligation. In Eureko v. Poland, the tribunal interpreted various agreements governed by Polish law to which the State treasury was a party and found that, by these agreements, Poland had itself entered into a binding commitment to hold an initial public of thefering of the shares in the State insurance companyincluding indirectly by bringing an umbrella clause claim.[129]The dissenting arbitrator added that mere non-enforceable expectations on the part of theinvestor should not attract the protection of the umbrella clause.[130] The majority of thetribunal was convinced that there was an obligation and it bound the Polish State. Yet the majority went further and opined that even if the result under Polish law were otherwise, the tribunal was an international tribunal, applying an international legal guidelines to which international law applied. Under international law, it was clear

---

[125] 28 ¶128.

[126] Id. ¶117.

[127] 91 ¶275.

[128] 193 ¶214. [198] 106 ¶157.

[129] Eureko B. V. v. Poland, Ad Hoc, Dissenting Opinion of Arbitrato the ther Rajski,, 246 ¶4 (9August 2005).

[130] Id. ¶7.

that the responsibilities of the a State's treasury were responsibilities of the its State.[131] The dissenting arbitrator described this analysis as an exercise in interpretation 'sans loi'.[132] In this last respect, at least, the majority decision in Eureko on the application of the umbrella clause has been subject to criticism,[133] since if the majority had been of theopinion that there was no obligation under Polish law, all other things being equal, the natural consequence should have been to find that the umbrella clause was not invoked.

LG&E v. Argentina is another case in which the tribunal held that in order to determine whether there was an obligation to which the umbrella clause might apply, it was necessary to decide whether certain representations in Argentine legislation, and repeated in tender documentation, created not merely responsibilities under Argentine law but 'international responsibilities-with respect to LG&E and its investment'.[134] It held that they were, and their abrogation breached the umbrella clause in the Argentine—United States BIT.[135]

In other cases tribunals have applied the putative proper law to determine the existence of the an obligation to which the umbrella clause applies, and found that no such obligation exists,[136] or that it may not be enforced as between the parties to the treaty proceeding.[137] which it was not a party.[138] The committee emphasized that the responsibilities protected by the umbrella clause are only legal

---

[131] 50 ¶247

[132] Eureko B. V. v. Poland, Ad Hoc, Dissenting Opinion of Arbitrato the ther Rajski,, 246 ¶5 (9August it 2005).

[134] 123 ¶174.

[135] Id. ¶175.

[136] Link-Trading v. Department for Custo the thems Control of Moldova, Award, ¶76-86 (18 April 2002).

[137] Corp Azurix.

[138] 103 ¶97.

responsibilities, arising between the obligor and the obligee, so identified as a matter of theapplicable law.[139]

The predominant approach in arbitral practice is for tribunals to investigate whether an obligation exists to which the umbrella clause might apply as a matter of thelaw applicable to that putative obligation. This is the better view, and indeed it has always been understood that umbrella clauses attach to existing legal responsibilities, which necessarily arise under an applicable system of the law; they do not create new ones where none already existed. The ABA commentary on the OECD Draft Convention concluded that the umbrella clause would only 'mirror' and 'affirm what already exists' and 'would not create responsibilities where none arose under the applicable law'.[140]The philosophy behind the um-brella clause was to give security to those responsibilities that States do in fact choose to enter into with foreign investors:

'governments are not required to contract away the power of the eminent domain, or for that matter to assume binding commitments of the any nature. The Convention would be designed merely to give effect to whatever commitments they do accept and to protect aliens in the enjoyment of the acquired rights.'[141]

In summary, the proper law of theputative obligation is relevant to confirm the existence and content of the that obligation. This will of theten be the law of thehost State, made relevant in the context of the a treaty claim by implication in the term 'obligation'. Tribunals must nevertheless be prepared to act as check against a host State's attempts to frustrate claims simply by denying the existence of the an obligation to which the umbrella clause may attach, particularly by manipulating its law-making processes to that end. Tribunals have confirmed that their power of the scrutiny properly extends to

[139] Id. ¶90.

[140] 80.

[141] *Ibid*

ensuring that a host State may not evade treaty jurisdiction by wrongfully asserting illegality or nullity of thealleged obligation under its internal law.[142]

Against this, there are decisions that support implying a governmental limitation to the umbrella clause. The jurisdictional decision in Impregilo v. Pakistan stressed that for the claimant to have a treaty remedy it must identify an exercise of the governmental authority or puissance publique going beyond that which an ordinary co-contractor could adopt.[143] The tribunal in Joy Mining also suggested that it is a basic general distinction that State interference with the operation of the a contract would amount to be a breach of the international law whereas an ordinary commercial breach of the a State contract would not.[144]

In CMS v. Argentina, the tribunal agreed with Argentina that the umbrella clause would not be breached in every case of the contractual non-performance. The tribunal considered that for there to be a breach of the umbrella clause, the host State must have deployed its sovereign or governmental power in disregarding or violating its prior commitments. The violations complained of the by the claimant were held unequivocally to involve the exercise of the puissance publique, therefore the issue of the how to distinguish purely `commercial' breaches by a State from so-called 'governmental' breaches did not arise.[145] The decision to annul this aspect of theaward did not turn on this point of the interpretation.[146]

Statements favoring a governmental qualification also exist in the El Paso and Pan American decisions. The tribunals rejected the view that 'any violation' of the a State contract or commitment

[142] IBM v. Ecuador, Decision on Jurisdiction, ICSID Case No. ARB/02/10, ¶13,17 (Dec. 22, 2003); Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

entered into with regard to an investment could give rise to a treaty claim, 'whatever the seriousness of thebreach'.[147][148]

Aversion to the very possibility that it could 'turn breaches of theslightest such responsibilities by the Respondent into breaches of theBIT'.[149]

Finally, the Sempra tribunal claimed that there was a growing consensus that only governmental breaches of the investment-related contracts would amount to a violation of the umbrella clause.[150] The tribunal insisted that:

"The decisions dealing with the issue of the umbrella clause and the role of the contracts in a Treaty con-text have all distinguished breaches of the contract from Treaty breaches on the basis of the whether the breach has arisen from the conduct of the an ordinary contract party, or rather involves a kind of the conduct that only a sovereign State function or power could effect".[151]

That appears to be an overstatement of thetrue position and is supported, in the text of theaward itself, only by reference to Impregilo.[152] In the circumstances, the Sempra tribunal did not need to decide whether a 'non-governmental' breach of the an obligation would amount to a violation of the umbrella

[147] 159 ¶71, 76.

[148] *Id.* ¶80.

[149] *Id.* ¶67, 77.

[150] 134 ¶309.

[151] *Id.* ¶310.

[152] *Ibid*

clause, since the measures in question were 'not mere ordinary contractual breaches of the a commercial nature' .[153]

There are also many commentators who deny any legal basis to impose a 'governmental' qualification on the effect of the a plainly worded umbrella clause.[154]

The way therefore remains open for a future tribunal to prefer one approach or the other. Quite apart from the fact that there is no justification for the limitation in the plain text of the umbrella clause, for the reasons set out below it is suggested that the better view is that the law does not include, or warrant implying, any governmental limitation into the scope or effect of the umbrella clause.

First, it is a weak argument in support of the an implied governmental limitation to assert a mere belief that investment treaties are intended solely to regulate the manner in which States act as States. Yet from this, it is thought to follow that the umbrella clause can be concerned only with the nature of the a
State's acts in its capacity as a State, not in any commercial capacity. The argument must be wrong. There is nothing inherent in investment treaties generally to require one to conclude that States could not have intended the umbrella clause to extend to commercial non-performance of the State contracts. It is a tautology to construe the effect of the umbrella clause from a prior conclusion, not based in evidence, as to what it must have been 'intended' or 'designed' to do. Even in SGS v. Pakistan, the tribunal considered that nothing in principle prevented two States from agreeing to apply an umbrella clause to all contractual disputes:

The Tribunal is not saying that States may not agree with each other in a BIT that henceforth, all breaches of the each State's contracts with investors of theother State are forthwith converted into and to be treated as breaches of theBIT.[155]

---

[153] *Id.* ¶31.

[154] R. SCOTT GUDGEON, 'ARBITRATION PROVISIONS OF US BILATERAL INVESTMENT TREATIES' IN SEYMOUR RUBIN AND RICHARD NELSON, INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT 41-

[155] 27 ¶173.

Secondly, the historical evidence in fact suggests that the umbrella clause was intended not merely to restate the customary international law position that expropriation of the contractual rights as well as uncompensated repudiation or breach of the a State contract, where the breach is discriminatory or motivated by non-commercial considerations, can amount to an internationally wrongful act,[156] but rather, to go beyond it. Commenting on one of th eearliest iterations of the umbrella clause, SeidlHohenveldern insisted that while there may be doubt as to the protection of the private rights arising out of the State contracts in customary inter-national law, the very purpose of the umbrella clause proposed in the Abs-Shawcross Draft Convention was 'to dispel whatever doubts may possibly exist as to whether a unilateral violation of the a concession contract is an international wrong'.[157]Reviewing early British treaty practice, Mann also argued that the umbrella clause was a progressive provision, the effect of the which was to provide additional protection for State contracts, beyond the protection of the investors provided by customary international law:[158]

The variation of theterms of the a contract or license by legislative measures, the termination of thecontract or the failure to perform any of the its terms, for instance, by non-payment, the dis-solution of thelocal company with which the investor may have contracted and the transfer of the its assets (with or without the liabilities) — these and similar acts the treaties render wrongful.'[159]

This view is shared by Vandevelde, one of theleading commentators on US BITs. He has explained that under the umbrella clause, 'a party's breach of the an investment agreement with an investor becomes a breach of theBIT .[160] In Dolzer and Stevens' review of the BIT practice, umbrella clause

---

[156] Stephen M. Schwebel, *'International Protection of Contractual Arrangements*' (1959) ASH, PROC. 266- 280 (1959); STEPHEN M. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS, American Law

Institute, Restatement (Third) Foreign Relations Law of the United States, ¶712 (1987).

[157] Ignaz Seidl-Hohenveldem, *'The Abs-Shawcross Draft Convention to the the Protect Private Foreign Investment: Comments on the Round Table'* 10 J. PUB. L. 104-105 (1961).

[158] Frederick A. Mann, *'British Treaties for the Promotion and Protection of Investments'* 52 BYIL 249, 250 (1981).

[159] *Id.* ¶246.

[160] KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE, 78 (Kluwer,1992)

protection is described as of thefering protection 'against any interference which might be caused by either a simple breach of the contract or by administrative or legislative acts'. [161]

Thirdly, the implied limitation is also contrary to the principle of the effectiveness.[242] Investment treaties already provide remedies in respect of the expropriatory, arbitrary, discriminatory or unfair and inequitable treatment, whether such conduct is directed

towards a State contract or otherwise. That the scope of the umbrella clause is potentially wider than these other provisions, albeit in the context of the an existing State commitment, is no reason to require a restrictive interpretation, not found in the text, which would eliminate much of thedistinctive substantive effect of the umbrella clause.[243]

Fourthly, the proposed distinction is fraught with practical difficulty. Analogies may be brought to bear to determine what is governmental and what is commercial — the issue arises in other spheres of the international law, notably in respect of the sovereign immunity. These may assist to some extent in identifying the issues.[244] But such analysis is problematically subjective, being influenced by one's cultural, political and economic preferences, and therefore susceptible of the great inconsistency. What is considered to be within the sovereign's domain can vary considerably from State to State.[245] It is also difficult to differentiate be-tween sovereign and commercial conduct where a State organ is a direct party to the contract. Tribunals have confessed to difficulty in knowing where or how to draw the line.[246] The distinction appears so unworkable, in fact, that one can legitimately wonder whether it was the intention of theoriginal drafters to adopt it. The most likely answer is that it was not.

Finally, on closer analysis it is an explicit yet misguided fear, for many arbitrators and commentators, that motivates their call for a 'governmental' conduct limitation. That fear is the magnitude of the potential umbrella clause claims that may be brought against States if the umbrella clause were applied without additional limits.[247] The members of theEl Paso tribunal openly doubted whether claimants would show

[161] RUDOLF DOLZER AND MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 81-82 (Martinus Nijhoff, 1995)

perceived need to bring some 'political realism' to the interpretation of the umbrella clause.[162]

It is true that when an investor's only remedy lay with diplomatic protection, a political and diplomatic filtering process inevitably limited the claims that the investor's government would choose to espouse. It is also true that direct recourse arbitration frees investors to choose to prosecute their claims without the further assistance or consent of the their own States, and without exhausting local remedies. And it is desirable that treaty dispute settlement procedures are not abused. However, the decision to commence arbitral proceedings against the State in which one has an investment is more complex than simply to ascertain the technical existence of the a remedy. It is also the case that investor-State arbitra-tion proceedings are not cheap to conduct; it is unlikely that claimants will spend large amounts in fees on trivial claims. There is nothing unique to the umbrella clause that lends itself to abuse by way of the trivial claims. There can also be trivial invocations of the other treaty guideliness. The risk that some investors might attempt to misuse the umbrella clause provision does not mean they would be successful and does not justify reading into the umbrella clause a sovereign/ commercial distinction that is not there in the text. Finally, it is highly doubtful that the substance of the an investor's rights should be construed in the light of the procedural advancements in the way it may enforce those rights. It is also the case that concerns as to a possible flood of the umbrella clause claims, such as they are, could be alleviated by closer attention to the proper scope of the responsibilities to which the umbrella clause applies.

The umbrella clause gives rise to a problem of the apparently overlapping claims to jurisdiction: on the one hand, jurisdiction conferred by treaty to decide treaty claims; on the other, the contractually

Impact of the contractually agreed dispute settlement procedures

[162] Thomas W. Walde and George Ndi, *'Stabilizing International Investment Commitments: International Law versus Contract Interpretation'* (1996) 31 TEX. INT'L L. J. 255 (1996).

tribunal declining to give effect to the umbrella clause. On the one hand, the tribunal insisted that its jurisdiction to decide treaty claims, including inter alia breach of the umbrella clause, was not ‘to any degree shared' with the tribunal chosen by the parties under the State contract in question, and that the ICSID tribunal's decision was not dependent upon that arbitrator's findings.[163] Applying the differentiation between contract and treaty claims articulated by the ad hoc committee in the Vivendi case,[164] which has become known as the Vivendi principle', the tribunal held that it was itself competent to`consider all facts relevant to the determination of theBIT causes of the action, including facts relating to the terms of thePSI Agreement'.[165] Nevertheless, the tribunal declined to embark upon such investigations in relation to the umbrella clause claim. The tribunal rejected the legal effect of the umbrella clause advocated by the claimant because it would necessarily 'supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent.'[166] in other words, the tribunal could not accept that the investor would enjoy a unilateral right of the election be-tween contractually agreed or treaty dispute settlement decivces, and thereby avoid the contractually specified forum.[167] The tribunal therefore rejected the proposed legal effect of the umbrella clause 'in the face of the a valid forum selection contract clause'.[168] The El Paso and Pan American tribunals were also concerned to maintain the distinction between contractually agreed and treaty-based legal orders, with this again affecting the interpretation of the umbrella clause. One of thereasons the tribunals gave for declining to give effect to the umbrella clause was that it was thought that such a remedy was unnecessary, since State contracts will invariably contain their own negotiated dispute settlement decivce.[169]

---

[163] 27 ¶155.

[164] 99 ¶101-102.

[165] 27 ¶186.

[166] *Id.* ¶161.

[167] *Id.* ¶168.

[168] *Id.* ¶165.

[169] 159 ¶77

Conclusions on the Impact of the an Exclusive Choice of the Contractual Forum

The tribunals that have acknowledged the effect of the umbrella clause have come to different conclusions on the impact of the an exclusive jurisdiction clause in the underlying contract; some have declined jurisdiction, some have suggested a stay of the proceedings is appropriate pending resolution of thecontractual aspects of thedispute in the chosen forum; others have simply proceeded to the merits.

These different approaches are discussed next.

(1) Decisions in which Tribunals have declined Jurisdiction

The decision on jurisdiction in Toto Costruzioni Generali v Lebanon confirms that the umbrella clause might give rise to a treaty remedy in respect of the a breach of the a State contract. However, the tribunal ruled that it did not have juris diction to determine the claims since the contract provided that disputes should be referred to the exclusive jurisdiction of theLebanese courts.[170] The tribunal explained that the umbrella clause claim remained governed by the terms of theunderlying contract and was susceptible to those terms.[171]

(2) Decisions in which Tribunals have stayed the Proceedings

The decision on jurisdiction in SGS v. Philippines gained some notoriety in so-far as the tribunal accepted that the umbrella clause 'means what it says' and confirmed its jurisdiction yet by a majority declined to proceed to the merits of theclaim, at least at that time, because the underlying State contract contained an exclusive reference to the

[170] 146.

[171] *Id.* ¶202.

courts of the Makati or Manila. The tribunal was concerned not to undermine the utility of the exclusive jurisdiction agreements in contractual relations,[172]

Investment treaties to have such an effect. At the same time, the tribunal did not consider it plausible that the 'general language in BITs dealing with all investment disputes should be limited because in some investment contracts the parties stipulate exclusively for different dispute settlement arrangements' [173] The tribunal considered the contractual jurisdiction clause to be the lex special is, in contrast to the generic of thefer to submit disputes to arbitration in the BIT and, given its exclusivity, that it should therefore have priority over treaty arrangements.[174] Accordingly, the tribunal concluded that it would be premature to rule on the treaty claim until such time as 'the question of theRespondent's obligation to pay is clarified' by the chosen courts,[175] staying its proceedings on grounds that the claims were inadmissible.[176] The tribunal explained that the umbrella clause did not override the exclusive jurisdiction clause in the contract, nor did it permit a party to a contract to claim on that con-tract (even via the treaty) without itself first complying with it.[177]

Crivellaro, dissenting, disagreed that the two dispute settlement arrangements — one under the treaty, the other specified in the contract — must be mutually exclusive.[178] To his mind, a BIT does not override the dispute settlement procedures in the State contract, but provides an alternative to them. He also considered the treaty jurisdiction, once crystallized by the investor's request for arbitration, to be both more specific as it concerned a specific dispute and the lex posteriori.[267] He would have allowed the claimant to select amongst those options, with questions concerning the extent and

[172] 28 ¶134.

[173] *Id.* ¶134.

[174] *Id.* ¶139-143.

[175] *Id.* ¶155.

[176] *Id.* ¶154, 169, 175.

[177] *Id.* ¶143, 154.

[178] *Ibid.*

performance of the responsibilities under the contract 'fully admissible' before the treaty tribunal without first being processed by the contractually chosen courts.[268] In his view, the stay of theproceedings was therefore inappropriate.[269]

In the BIVAC case, the tribunal ruled that, in principle, the umbrella clause in the applicable BIT gave rise to a potential treaty remedy for breach of the a State contract. However, as already seen, the tribunal was troubled by the presence in the relevant contract of the an exclusive choice of the jurisdiction in favor of thecourts of the Asuncion. The tribunal considered that the effect of the umbrella clause must be to invite consideration of the whether the host State had complied with all of the its responsibilities under the contract, including the obligation to submit to the jurisdiction of thespecified courts. Moreover, since the contract was concluded after the BIT, and the parties had not carved out from their dispute settlement arrangements possible umbrella clause claims, the tribunal inferred that parties intended the reference to the courts of the Asuncion 'to be absolute and without exception'.[179] In its Decision on Jurisdiction, the tribunal concluded that the claim un-der the umbrella clause was inadmissible because the claimants had failed to refer the dispute first to the courts of the Asuncion. The tribunal joined to the merits the question whether the result of thedecision on inadmissibility should be the dismissal of the umbrella clause claim on the merits, or whether it should follow the Philippines approach and stay proceedings on grounds of the inadmissibility. [180] Whilst the tribunal indicated that it preferred the former conclusion, what is clear is that the tribunal believed, at least at that time, that it was not entitled or appropriate to proceed to the merits. In a further Decision on Objections to Juris- diction, the tribunal ruled that 'a continued stay of the proceedings is the

[179] 139 ¶ 146.

[180] *Id.* ¶149.

appropriate way forward', with the parties periodically reporting to the tribunal on the status of the any reference to the local courts.[181]

It expressed the view that in any event the claimants would have been obliged first to refer their dispute to the contractually chosen courts.[182] In the event that those courts have declined to find that they had any remaining rights that they could properly assert under the umbrella clause.[183]

(3) Decisions in which Tribunals have proceeded to Merits

There are also awards upholding umbrella clause claims that reject the Philippines and BIVAC approach. In Eureko v. Poland,[184] the respondent argued that the investor's claims were inadmissible because they stemmed from a contract that contained a clause referring disputes to the exclusive jurisdiction of thecompetent 'Polish public court' [185] The respondent also argued that international law generally required that the extent of theState's contractual responsibilities and any allegation of the breach first had to be determined before the forum selected in the contract before an investment treaty tribunal could determine whether the State had breached its treaty responsibilities. The tribunal rejected these arguments, relying on the characterization of the contract and treaty claims advanced by the Vivendi ad hoc committee. The tribunal explained that the 'fundamental basis' of the umbrella clause claim is the treaty, as it lays down an independent guidelines by which the conduct of theparties may be judged. A treaty-based tribunal is mandated to adjudicate treaty claims and the exclusive jurisdiction clause in the contract should not prevent it from doing so.[186]

---

[181] BIVAC v. Paraguay, ICSID Case No. ARB/07/9, Further Decision on Objections to the the Jurisdiction, ¶290 (9 Octo the theber 2012).

[182] Bosh International v. Ukraine, ICSID Case No. ARB/08/11, Award, ¶251-252 (25 Octo the theber 2012).

determined that the claimants' rights had been validly extinguished, the tribunal would

[183] *Id*. ¶259.

[184] 50 ¶112.

[185] *Id.* ¶92.

[186] *Id.* ¶112-113.

First, with regard to jurisdiction the tribunal concluded that the 'well established' distinction between treaty and contract claims disposed of the Paraguay's objection that the tribunal could not exercise jurisdiction in respect of the umbrella clause claim because the contract referred disputes to the courts of the Asunci6n.[187]Applying a strict separation of the legal categories, the tribunal explained that an umbrella clause claim is, by definition, a treaty claim and, as such, treaty jurisdiction

be wholly consistent with the statement on the distinction between contract and treaty[188] claims by the ad hoc committee in Vivendi. The tribunal further explained that, in its view, the essential basis of the an umbrella clause claim is in fact a breach of the a treaty obligation to abide by commitments, contractual or otherwise, and cannot be said to be merely a breach of the contract.[189] The tribunal thus disposed of thedifferentiated approach the Vivendi ad hoc committee proposed where the `essential' or 'fundamental' basis of the a breach of the treaty is in substance a breach of the contract.

Having upheld its jurisdiction, the tribunal declined to adopt the approach in SGS v. Philippines and stay its proceedings until such time as the contractual aspects of thedispute had been decided in the contractually chosen forum. The tribunal's overarching concern was that to do so would place it at risk of the failing to carry out its mandate.[190] In the tribunal's view it was the intention of thecontracting parties to the BIT to provide, through the umbrella clause, protection over and above whatever rights an investor could negotiate for itself in its contract or could find under domestic law. The tribunal thought it would defeat that intention if tribunals would decline to determine umbrella clause claims based on those very contractual terms. The tribunal explained that the existence of the umbrella clause jurisdiction does not extinguish the contractual forum selection clause; the two co-exist, with

---

[187] 152 ¶128.

cannot be displaced by a term of a contract.[279] The tribunal considered this conclusion to the the

[188] *Ibid.*

[189] *Id.* ¶138, 142.

[190] *Id.* ¶172.

the umbrella clause merely supplementing the con-tract with an option for the investor of the an alternative treaty remedy.[191][192] The tribunal also considered that a stay was inappropriate since the treaty claims required it to determine issues going beyond the four corners of thecontract.

[191] *Id.* ¶182.

[192] 152 ¶177.

CHAPTER 4- ANALYSING ANDRECONCILING THE FAR REACHING SCOPE AND EFFECT OF THE UMBRELLA CLAUSES

A disputable yet possibly broad improvement is expanding the utilization of the MFN provisions to umbrella provisions. The intricacy of the such application is obvious, as it involves the interplay of the two of the'most debated treaty decivces' in international investment law.[193] The use of theMFN guidelines relies upon a basic treaty and a third party treaty whereby the former contains the MFN clause and the latter decides the degree of thefavors that the recipient of theMFN provision may appreciate. The favors invoked are confined by the *ejusdem generis* principle, which means MFN clauses only attract rights of thesame subject matter.

"Investments having been the subject of the a particular the specific commitment of the one of theContracting Parties towards the nationals and companies of theother Contracting Party, are regulated, without prejudice to the dispositions of thepresent Agreement, by the provisions of the such commitment as far as it contains more favorable provisions than those provided for in the present Agreement."[194]

[193] Gaillard, *Emmanuel Establishing Jurisdiction Through a Most-Favoured-Nation Clause* 1 NYLJ 233 (2005).

[194] Franck Charles Arif v Moldova, ICSID Case No ARB/11/23, Award, (Apr. 8, 2013), http://cisarbitration.com/wp-content/uploads/2013/04/Mr-Franck-Charles-Arif-v-Republic-of-Moldova- ICSIDArbitration-No.-ARB1123-Award-dated-8-April-2013.pdf.

The exact definition of the this proviso, which had minor deviations from Art.9 of themost recent French Model BIT, is exceptionally compelling as the Tribunal here decided that Art.9 was not an umbrella provision but rather a 'preservation of the rights' proviso:

"Firstly, the ordinary meaning of the these Articles within their context and in light of theBIT's object and purpose makes the Tribunal find that Article 9 (and Article 5(2) to the extent that it refers to "a specific commitment") has its own specific meaning and purpose, separate from that of the an "umbrella" clause, and agrees with Respondent in this regard. According to the ordinary meaning of thetext, the specific purpose of the these clauses is not to guarantee the observation of the responsibilities assumed by the host State vis-à- vis the investor, but rather to provide investors with the right to claim the application of the any rule of the law more favourable than the provisions of theBIT. The doctrine refers to such clauses as preservation of the rights clauses."[195]

"This type of the clause, in its usual wording, simply says that in applying or enforcing the existing protections of thefered by the BIT, attention should be paid to any more favourable provisions contained in domestic law or specific agreements. It therefore confirms that the investor may benefit from more favourable treatment, but does not add a new, specific or distinct, treaty obligation to respect commitments made".[196]

However, the Tribunal did not concur with Moldova that umbrella statements were simply procedural in nature, yet that they were substantive and equipped for importation through a MFN provision. The Tribunal at that point presumed that since the MFN proviso was comprehensively drafted, it could import an umbrella statement from either the Moldova-UK or Moldova-US BIT, and found jurisdiction over Arif's specific commitments claim by importing a more favourable guidelines of the protection granted by either of the umbrella clauses.[197] Gazzini and Tanzi bring up that the Arif v Moldova Tribunal neglects to make any reference to the ejusdem generis guidelines. They contend that the Arif v Moldova Tribunal ought to have rejected the joining of the umbrella condition through MFN treatment following its rationale, as the basic treaty did not

[195] *Id.* ¶38.

[196] *Id.* ¶389.

[197] *Id.* ¶395.

confer rights on a similar topic. They additionally contend that Art. 9 was purported to be an umbrella clause.

It is suggested that the core of the this issue is the detailing of theparticular commitments clause. With regards to China-France protection of the rights statements, Shan contends that umbrella provisos and conservation of the rights conditions vary as it is stated:

"Unlike the umbrella clauses, which address the issue (of the assurance of the special investment projects) from the perspective of thehost state by forcing it to observe its responsibilities/commitment towards investments, these "preservation of the rights" clauses address the same issue from the angle of theforeign investors, by entitling them to the more favourable treatment under such special actions or commitments. In other words, both of the them serve the same aim, although the routes taken to achieve it are different".[198]

Following this examination, the importation of the umbrella statement is supported in Arif v Moldova, as it doesn't insult the ejusdem generis guidelines. Protection of the rights provisions and umbrella conditions manage rights on an indistinguishable topic from they are basically two sides of the a similar coin. This legitimization extends the extent of the security for investors and is in accordance with the question and reason for BITs in advancing and ensuring investments. The overall effect being that investors will have the capacity to import a more gainful umbrella condition from a third party treaty through MFN treatment, subject to the presence of the an effective MFN clause, even where the particular commitments clause in the basic treaty has an unorthodox formulation or where it isn't completely evident whether the proviso ought to be classified as a preservation of the rights clause or an umbrella clause.

The expansive result of the stretching out MFN treatment to umbrella provisions is multilateralization. The augmentation makes the interaction of the treaties more probable as rights presented to one state party as an umbrella proviso could be reached out to another through MFN treatment.

---

[198] Shan, Wenhua *Umbrella Clauses and Investment Contracts under Chinese BITs: Are the Latter Covered by the Former?* 11 J WORLD INVESTMENT & TRADE 144 (2010).

Taking into account the general lack of the responsiveness and modernization in currenttreaty practice, the impact of the multilateralization is all the more risky with regards to umbrella clauses, as opposed to other substantive protections in BITs such as expropriation and the inability to expect these improvements by method of the effective treaties not only affects state interests in terms of the onus, it could additionally sloppy the open deliberation concerning umbrella clauses by making the deception that there was an absence of the agreement in interpreting the umbrella provisos when in reality the formulation was itself faulty.

Privity of the Contract: Who can rely on umbrella clauses

A further question of the scope concerns the parties who may invoke an umbrella clause. The answer to this question has the potential to have a bearing on a tribunal's disposition as to the umbrella clause's intended effect.

Again, the specific wording of the umbrella clause in question ought to point to a conclusion.[199] At its more narrow, umbrella clauses may refer only to responsibilities entered into in writing or with approved investments.[200] Such language imposes certain limits to the persons who might seek to enforce an obligation through the umbrella clause. However, most umbrella clauses are broader, referring variously to responsibilities entered into 'with regard to investors', 'with regard to investments', and sometimes as in the case of theEnergy Charter Treaty, 'entered into with an investor or an investment of the an investor'. This wording is open to some interpretation and here arbitral practice and doctrine is again split. The wording of the more common umbrella clauses, at first glance, does not seem to call for the application of the traditional notions of the privity of the contract. Many commentators concur. Discussing the umbrella clause in the Energy Charter Treaty, the Energy Charter Secretariat's Readers' Guide asserts that: This provision covers any contract that a host country has concluded with a subsidiary of theforeign investor in the

[199] 67, at 33-37.

[200] E.g.,Philippines—Switzerland BIT.

host country, or a contract between the host country and the parent company of thesubsidiary:" [201][202]

Walde expressed the view of the umbrella clauses generally that there is 'little if any serious disagreement that the clause was intended to cover, and should be read to cover, contracts between foreign investors (including their domestic subsidiaries) and states relating to an investment.'[203]

Nevertheless, a number of the tribunals have declined to permit the parent company of the a local subsidiary to bring a claim in its own name under the umbrella clause in respect of the responsibilities entered into by the State with the subsidiary, even when considering a broadly worded clause.[204] This was the conclusion of thetribunals in Azurix and Siemens, for instance.[205][206][207]

The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of theobligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.[208]

In finding that CMS could bring a claim, the committee considered that the tribunal had failed to state its reasons and left a lacuna, which made it 'impossible for the reader to follow the reasoning on this point'. [209] The tribunal's finding that Argentina had violated the umbrella clause was therefore

---

[201] ENERGY CHARTER TREATY SECRETARIAT, THE ENERGY CHARTER TREATY: A READER'S GUIDE (Energy Secretariat, 2002)

[202]

[203] Thomas W. Wilde, *'The "Umbrella" (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*' 1(5) OGEL 1,35 (2003) (emphasis added).

[204] 66.

[205] 207 ¶384.

[206] 103 ¶90.

[207] *Id.* ¶95(b).

[208] *Id.* ¶95(c).

[209] *Id.* ¶97.

annulled.[210] The issue was discussed at length in Hamester v. Ghana.[211] The case concerned a joint venture agreement concluded between the claimant and 'Coco-bod', a State entity having separate legal personality under Ghanaian law. The claimant argued that breach of theagreement was a breach of theclause in the applicable treaty which provided that 'each Contracting Party shall observe any other obligation it has assumed with regard to its investments in its territory by nationals or companies of theother Contracting Party'. The tribunal was not persuaded that an umbrella clause claim against the Republic of the Ghana could arise from the terms of the a contract Ghana had not itself signed, on grounds of the lack of the privity:

"Applying the actual words of the Article 9(2) of theBIT, the contractual responsibilities which the Claimant seeks to impose upon the ROG were not 'assumed by it'. The JVA was signed by Hamester and Cocobod, with no implication of theROG. The ROG was not named as a party, and did not sign the contract. There has been no suggestion that the ROG was intended to be a party thereto (and indeed there may well have been reasons why it was not a party thereto). Having considered carefully all relevant circumstances, the Tribunal concludes as follows:

(i) If the municipal law responsibilities which were negotiated between the parties to the JVA, and assumed by Cocobod in this case, are to be taken as responsibilities assumed by the State to Hamester, this would - in effect - completely transform their nature, extent, and governing law. The Tribunal considers that nothing in Article 9(2) of theBIT here would justify this. Put the other way, given the wording of the Article 9(2) of the this BIT, the Tribunal concludes that the Contracting States did not intend to so transform domestic law contractual responsibilities concluded by separate entities.

(ii) Given that the umbrella clause in this BIT is specifically delimited by reference to responsibilities that have been 'assumed by the State,' the Tribunal sees no basis to ignore these words, and to extend the ambit of theprovision to contractual responsibilities assumed by other separate entities."

---

[210] *Id.* ¶97-98.

[211] Hamester v. Ghana, ICSID Case No. ARB/08/24, Award, ¶347 (18 June 2010).

In these circumstances, the contractual commitments of the Cocobod, being a separate entity from the State, cannot be considered as elevated - and transformed in nature - by Article 9(2) of theBIT, into treaty commitments of theState itself. It follows that a violation by Cocobod - if such a violation had been found - could not have constituted a violation of theBIT.[305]

In Burlington v. Ecuador the question was whether an umbrella clause applied to contracts between Ecuador and a company in which Burlington indirectly held shares. The tribunal echoed the analysis of thead hoc committee in CMS v. Argentina:

The word 'obligation' is thus the operative term of the umbrella clause. The Treaty does not define 'obligation'. The Parties agree and rightly so that the clause refers to legal responsibilities. This is of the little assistance, however, to resolve the question of the privity. To answer this question, the Tribunal relies primarily on two elements which in its view inform the ordinary meaning of the 'obligation'. First, in its ordinary meaning, the obligation of the one subject is generally seen in correlation with the right of the another. Or, differently worded, someone's breach of the an obligation corresponds to the breach of the another's right. An obligation entails a party bound by it and another one benefiting from it, in other words, entails an obligor and an obligee. Second, an obligation does not exist in a vacuum. It is subject to a governing law. Although the notion of the obligation is used in an international treaty, the court or tribunal interpreting the treaty may have to look to municipal law to give it content.[306]

Following an analysis of thetext of the umbrella clause in question and a re-view of the arbitral practice, the tribunal held that:

“it is certain that the majority of theICSID cases law supports the Tribunal's conclusion that the protection granted under the umbrella clause requires privity between the investor and the host State”.[212]

[212] *Id.* ¶233.

The tribunal, by a majority, dismissed the umbrella clause claim on grounds that there was no obligation to which it could apply for reason of the lack of the privity. There are sound reasons to respect rules of the privity of the contract.

First, an obligation is a legal relationship involving privity as between an obligor (debtor) and an obligee (creditor). It is the law applicable to the putative 'obligation' which defines the content, scope and parties to the actions.

Secondly, the identity of the one's counterparty is a matter of the party autonomy deserving of the respect. A contract may have been negotiated in a particular context with specific parties in mind.[213]

Thirdly, shareholders cannot typically enforce the contracts of the their companies under domestic legal systems; it is not obvious that a shareholder should be able to enforce a company's contractual rights though a BIT.

Finally, an approach that adheres to principles of the privity is consistent with the conventional view that the umbrella clause would merely mirror existing responsibilities arising under their own proper law.

The common reasoning in these cases was that since the respective claimants could not, in their own name, enforce the responsibilities owed to their subsidiaries pursuant to the proper law, they could not do so by invoking an umbrella clause. Here there is a tension between the proper law approach and a plain reading of thewords of thetreaty since this approach seems to equate responsibilities 'entered into with regard to investments' to responsibilities 'entered into with' claimant investors. The CMS committee acknowledged this interpretative problem. How-ever, the CMS award had not been issued on the basis that the words 'entered into with regard to' investments might create a right of the standing on the

part of the parent companies to invoke responsibilities to which they were not strictly a party.[214] Although its analysis is couched in more narrow terms, the CMS annulment does not rule out that this may be an appropriate construction of theclause. The tribunal in Burlington Resources v. Ecuador

[213] David Faster, *'Umbrella Clauses: A Retreat from the Philippines?*' 4 INT'L ARB. L. REV. 100, 108 (2006)

[214] *Id.* ¶92, 94 96.

said that 'no general rule' should be extrapolated from the CMS annulment decision on this point.[215] In its further Decision on Liability, however, the tribunal ruled that the words 'entered into' 3nly reinforce the requirement of the privity.[216] According to the tribunal the phrase with regard to investments' narrows the scope of the responsibilities to which the umbrella clause relates and the responsibilities must relate to investments but does not dispense with the requirement of the a pre-existing underlying obligation.[217] This law to the extent that a proper construction of thecontract leads to the conclusion that the parties intended to exclude such changes, or to the extent that the change in law would otherwise breach international law. Only wrongful non-observance will breach the umbrella clause.

Attribution and the Umbrella Clause.

Misconception and disagreement as to the range of the responsibilities that would fall within the meaning of the an obligation *the host State has itself* entered into with an investor or investment has also tainted the analysis of theeffect of the umbrella clause. One reason why the SGS v. Pakistan tribunal declined to give effect to the umbrella clause is because of the its view of theextent of thecommitments it would impact:

the 'commitments' subject matter of the Article or legal representative thereof the whose acts are, under the law on state responsibility, attributable to the State itself.[218]

Some treaties clarify this point, for instance, by identifying the agencies that may enter into an obligation in the name of thehost State or the manner in which an obligation may

---

[215] 193 ¶195, 199.

[216] *Id.* ¶214.

[217] *Id.* ¶216.

[218] 28.

be concluded. Article 11 of theAustralia—Chile BIT, for example, covers only 'written actions given by a competent authority'.[219] Such guidance is the exception. Sometimes the conclusion may be reached as a matter of the construction. Where a treaty refers to an obligation of the a `party' in an umbrella clause, yet for certain purposes the treaty contains a definition of the a 'State enterprise', it may be possible to infer that contracts concluded with State enterprises should not be equated with responsibilities of theState party to which the umbrella clause might apply. That was the conclusion in

Bosh International

v. Ukraine,[220] which concerned a contract concluded by the Taras Shevchenko National University of the Kiev, and it was corroborated by the finding that the university's conduct could not be attributable to Ukraine.[221][222] In the absence of the clear assistance from the language of theclause, the principal disagreement is whether responsibilities of thehost State are responsibilities of the persons or entities for whom the State would be responsible applying international law rules of the attribution, or whether the umbrella clause only covers responsibilities binding upon the State itself, applying the proper law applicable to the putative obligation.

There is faint support for the former approach in the cases. As already seen in the passage just quoted, it was this approach that affected the analysis of the umbrella clause in the *SGS v. Pakistan* case. The tribunal in *Nykomb v. Latvia* did not decide the point, but appeared ready to find that an obligation concluded by a State enterprise could be an obligation of theState of the Latvia under the law of the State responsibility. A majority of thetribunal rejected any reliance on Polish law to the effect that responsibilities of theState treasury were not responsibilities of theState.[223] The tribunal considered that this submission 'flies in the face of the well recognized rules and

---

[219] E.g., ustria—Chile BIT, Article II; also Australia—Poland BIT, Article 10.

[220] 273 ¶245.

[221] *Id.* ¶246.

[222] Nykomb Svnergetics Technology Holding AB v. Latvia, SCC, Award, (16 December 2003).

[223] 50 ¶134.

principles of the international law'.[224] On the basis that it was 'an international arbitral tribunal constituted under the Treaty', the tribunal applied international law rules of the attribution, specifically that the State is responsible for the conduct of the State organs,[225] in deciding that the responsibilities of theState treasury fell with-in the scope of the umbrella clause.[226] Romania had entered into for the purpose of the an umbrella clause claim. In doing so, the tribunal took guidance from Article 5 of theInternational Law Commission's Articles on Responsibility of the States for Internationally Wrongful Acts (the ILC Articles).[227] *Toto v. Lebanon* appears to follow a similar approach. The tribunal was of the a view that a certain contract would have been covered by the umbrella clause, under an approach applying the ILC Articles, despite the contract having been entered into by separate legal entities and not Lebanon itself.[228]

Bosh International is clearly in favour of the applying rules of the attribution to determine the subject matter scope of the umbrella clause. The tribunal ruled that

the term 'Party' in the umbrella clause refers to any situation where the Party is acting qua State. This means that where the conduct of the entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of theILC Articles on State Responsibility), such entities are considered to be 'the Party' for the purposes of the Article I1(3Xc).[229]

---

[224] *Id.* ¶125.

[225] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARY 74(Cambridge University Press 2002).

[226] 50 ¶126-128.

[227] 29 ¶85-86.

[228] *Id.* ¶190.

[229] 273 ¶246.

The tribunal declined to find that the umbrella clause applied to a contract concluded by a State university on grounds that, applying the international law of the State responsibility, 'the conduct of theUniversity is not attributable to Ukraine'.[230]

Other tribunals reject this broader approach and hold that the objects of the umbrella clause are to be identified in accordance with their proper law, which is a distinct process from applying international law rules of the attribution. In Nagel v. Czech Republic,[231] the tribunal dismissed Nagel's claim in part because whilst a State-owned enterprise was a party to a contract with the investor, the Czech Republic itself was not. The State enterprise was 'a separate legal person whose le-gal actions did not as such engage the responsibility of the [the Czech Republic]'.[232]

In Impregilo v. Pakistan, the claimant argued that the tribunal had jurisdiction in respect of the certain allegations of the breach of the contract and an umbrella clause claim by operation of themost favoured nation provision in Article 3 of thePakistan—Switzerland BIT. The tribunal held that 'given that the Contracts were concluded by Impregilo with WAPDA, and not with Pakistan' and that WAPDA was a separate legal entity distinct from the Republic of the Pakistan, Impregilo's attempts to invoke an umbrella clause claim were futile. The contracts in question were not responsibilities to which Pakistan was a party.[233][234] The tribunal emphasised that there is a 'clear distinction' between the entities or persons concerned'.[235] The tribunals in Azurix v. Argentina and EDF v. Romania also

---

[230] *Id.* ¶246, 249

[231] Nick Gallus, '*An Umbrella Just For Two? BIT Responsibilities Observance Clauses and the Parties to the the a Contract'* 24(l) ARB. INTL 157, 162 (2008).

[232] Nagel v. Czech Republic, SCC Case 49/2002, Final Award ¶162, 165 (2003).

[233] 100 ¶223.

[234] *Id.* ¶20.

[235] *Id.* ¶211.

declined to find that an umbrella clause applied in circumstances where the relevant obligation was not concluded with the State itself.[236]

Those in support of theformer approach, involving the application of the rules of the attribution to determine whether the State has entered into an obligation with a foreign investor,

are separate legal entities, as well as companies of the which it is the sole shareholder'.[237] Other commentators support this conclusion on grounds that otherwise a State would all too easily avoid its international responsibilities by interposing a State-controlled corporate entity between it and the foreign investor.[238] These commentators call for coherence through the application of thesame rules of the attribution to the identification of the protected responsibilities as to questions of the breach. Schramke, for instance, said that 'a formalistic approach which is only geared to the formal legal status of the an entity under municipal law would allow a state to circumvent the effects of the an umbrella clause by creating or using separate entities as vehicles for that purpose'.[239]

These arguments rest on the fallacy that there is some a priori list of the responsibilities to which the umbrella clause must apply. To the contrary, it may be presumed that a State has at least the same freedom to organise its commercial activities as private persons, and so decide that for certain activities it will create an enterprise possessing separate personality and, as an initial presumption,

---

[236] 207 ¶384.

[237] Supra note, at 246.

[238] 59, at 191.

[239] Hein-Jurgen Schramke, *'The Interpretation of Umbrella Clauses in Bilateral Investment Treaties'* TDM 1, 22 (May, 2007).

enjoy the normal legal consequences of the that form.[240] It is not realistic to conclude — as the tribunals in SGS v. Pakistan, El Paso and Pan American evidently did —that by agreeing to an umbrella clause a State is to be presumed to commit itself to comply with local legal responsibilities of the separate entities.[241] Long-standing sup-port exists for the conclusion that the umbrella clause applies only to the responsibilities that States themselves choose to assume vis-a-vis investors or their invest- ments.[242]

[240] E.g., First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 626-27 (1983).

[241] Ahmed S. El-Kosheri, *'Parallel State and Arbitral Procedures in International Arbitration'* (Unpublished paper presented at the ICC Institute of World Business Law 24th Annual Meeting, Paris, 15 November 2004).

[242] 80, at 95-96 (emphasis added).

Reliance on international law rules of the attribution to determine the scope of the a primary obligation is also misconceived. It is certainly true that to establish a host State's responsibility for breach of the an umbrella clause, it is necessary to identify the conduct of the an entity that is attributable to the State according to principles of the State responsibility.[243] Questions of the breach of the primary international law responsibilities invoke the secondary rules of the international law concerning State responsibility for breach of the responsibilities, of the which rules of the attribution form an integral part.[244] However, identifying the content of theprimary obligation — including the responsibilities, commitments or actions entered into by the host State that the umbrella clause is intended to protect — is a different analysis. Secondary rules cannot dictate the scope of the a primary obligation and do not address inherently internal law concepts concerning formation of the legal responsibilities and identification of theparties bound by them. Although investment arbitration frequently exhibits parallel features of the both contractual liability and international responsibility, these remain conceptually distinct issues. A coherent understanding of the umbrella clause therefore requires that the existence of the a legal obligation assumed by the host State be determined by reference to the putative proper law of the that obligation,[340] which is a distinct process from applying the secondary international law rules of the State responsibility pertaining to attribution,[245] and only then turn to questions of the breach. This approach would tend to limit the population of the host State responsibilities to which the umbrella clause may apply.

[243] EnCana Corporation v. Ecuador, UNCITRAL, LCIA Case No. UN3481, Award, ¶154 (3 February 2006).

[244] James Crawford, *'Revising the Draft Articles on State Responsibility*' 10 EJIL 435, 436 (1999). [340] La Generale des Carrieres et des Mines v. F.G. Hemisphere Associates LLC, UKPC 27 [2012].

[245] 100 ¶ 210.

CONCLUSION

The part of the umbrella provision will undoubtedly keep giving rise to interpretative challenges. This thesis, it is trusted, indicates the way a valid arrangement remembering the principles applicable in treaty interpretation. Starting with a review of the a portion of theclashing methodologies taken by courts on the issues under thought, this thesis rejects any endeavor to locate a widely inclusive hypothesis to harmonize the different surges of the thought. The issue, as this dissertation proposes, should be illuminated by picking between various procedures and not by making endeavors to unite all distinctions under a solitary umbrella clarification. Having thought about the distinctive surges of the choices, it is recommended that an umbrella statement can't be so wide in scope as to include all commitments; yet the condition should likewise not be rendered futile.

There is nothing in the terms of the a guidelines umbrella clause from which to conclude that a violation should only be triggered by a breach of the a state contract involving the exercise of the governmental power. Whilst arbitral - practice is mixed, there is a well-supported view that any breach should give rise to a violation of the umbrella clause. Indeed, a bright line distinction between governmental and commercial breach on the part of the a State contractual partner is not so easily drawn. The inquiry at this point swings to finding an instrument – a legitimate test – to understand what commitments are secured under the umbrella provision and what are most certainly not. A test proposed by a few courts – the “sovereignty” test – stands dismissed by this note; and a test in view of thesignificance of the "investment" seems.

BIBLIOGRAPHY

BOOKS: -

1. Dolzer, Rudolf and Schreuer, Christoph Principles of the International Investment Law (Oxford University Press, 2012)

2. Salacuse, Jeswald The Law of the Investment Treaties (Oxford University Press, 2010)

3. MCLACHLAN, International Investment Law (2008)

4. Kaczorowska A, Public International Law (Routledge 2010).

5. Schill S, International Investment Law and Comparative Public Law (OUP 2010).

6. Oppenheim's International Law 927 (Sir Robert Jennings & Sir Arthur Watts eds., 1992)

INTERNATIONAL TREATIES: -

1. The Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) (1995) 34 ILM 360

2. North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289

3. Vienna Convention on the Law of the Treaties (adopted on 22 May 1969, open for signature 23 May 1969, entered into force on 27 January 1980) (1969) 1155 UNTS 331

4. Treaty for the Promotion and Protection of the Investments, F.R.G.-Pak., Nov. 25, 1959, 457 U.N.T.S. 28 (1963).

5. Austria—Chile BIT, Article 11

6. Belgium and Luxembourg—Mexico BIT, Article 9.

7. Germany—Bangladesh BIT, Article 7(2).

8. Austrian Model BIT, Article 7(2).

9. Malaysia—UAE BIT, Article 13(3)

10. Greece—Mexico BIT, Article 19

11. Singapore—UK BIT, Article 2(2).

OTHER LEGAL DOCUMENTS: -

1 http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised2010e.pdf

2. http://ustraderep.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf

3. OECD, The Multilateral Agreement on Investment: Draft Consolidated Text, DAFFE/MAI (98)7/REV1

4. ILC, 'Draft Articles on Responsibility of the States for Internationally Wrongful Acts with commentaries' (2001) II (2) ILC Yearbook 40.

JOURNALS & ARTICLES

1. Jarrod Wong, Umbrella Clauses in Bilateral Investment Treaties: Of the Breaches of the Contract, Treaty Violations, and the Divide between Developing and Developed Counties in Foreign Investment Disputes, 7 GEO. MASON L. REV. 135 (2006).

2. Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 FORDHAM L. REV. 1526 (2005).

3. Salacuse & Nicholas P. Sullivan, Do BITs Really Work? An Evaluation of the Bilateral Investment Treaties and Their Grand Bargain, 46 HARV. INT'L L. J. 73 (2005);

4. Michael F, 'Attribution and the Umbrella Clause: Is there a Way out of theDeadlock?' (2012) 21 Minn. J. Int'l L. 21.

5. Crawford J and Lenaerts A, 'Chapter 3: The Use of theILC's Attribution Rules in Investment Arbitration', in Meg N. Kinnear, Geraldine R. Fischer , et al. (eds), Building International Investment Law: The First 50 Years of the ICSID (Kluwer Law International 2015).

6. Pereira de Souza Fleury R, 'Umbrella Clauses: A Trend Towards Its Elimination' (2015) 31 Arbitration International 679.

7. George M. von Mehren et al., Navigating Through Investor-State Arbitrations: An Overview of the Bilateral Investment Treaty Claims, DISP. RESOL. J., Feb.-Apr. 2004, at 69, 70

8. Jan Paulsson, Arbitration Without Privity, 10 ICSID REV.-FOREIGN INVESTMENT L.J. 232 (1995)

9. Anthony C. Sinclair, The Origins of the umbrella Clause in the International Law of the Investment Protection, 20 ARBS. INT'L 411, 413- 18 (2004).

10. Leo T. Kissam and Edmond K. Leach, 'Sovereign Expropriation of the Property and Abrogation of the Concession Contracts' (1959) 28 Fordham L. Rev. 177

11. The Proposed Convention to Protect Private Foreign Investment: A Round Table, 9 J. PUB. L. 116 (1960)

12. Arghyrios A. Fatouros, An International Code to Protect Private Investment—Proposals and Perspectives, 14 U. TORONTO L.J. 77, 88 (1961).

13. Georg Schwarzenberger, The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary, 9 J. PUB. L. 147, 154 (1960).

14. Abs-Shawcross Draft is reprinted in The Proposed Convention to Protect Private Foreign Investment: A Round Table, 9 J. PUB. L. 120 (1960)

15. Ignaz Seidl-Hohenveldern, The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table, 10 J. PUB. L. 100, 104-05 (1961).

16. Christoph Schreuer,

17. K. Scott Gudgeon, United States Bilateral Investment Treaties: Comments on their Origin, Purposes and General Treatment Guideliness, 4 INT'L TAX AND BUS. L. 72 (1986).

18. Ole Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties' (2004) 20 Arb. Intl 179-211.19. Thomas W. WAIde, 'The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases' (2005) 6 JWIT 183-236.

20. David Faster, 'Umbrella Clauses: A Retreat from the Philippines?' (2006) 4 Int'l Arb. L. Rev. 100, 107

21. Christine Chinkin, 'A Critique of thePublic/Private Dimension' (1999) 10 EJIL 387-395.

22. Charles N. Brower, 'The Future for Foreign Investment - Recent Developments in the International Law of the Expropriation and Compensation' in Virginia Shook Cameron (ed), Private Investors Abroad — Problems and Solutions in International Business in 1975.

23. Brooks E. Allen, The Use of the Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners, in ASA SPECIAL SERIES NO. 30: PERFORMANCE AS A REMEDY: NONMONETARY RELIEF IN INTERNATIONAL ARBITRATION.

24. Hakeem Seriki, 'Umbrella Clauses and Investment Treaty Arbitration. All Encompassing or a Respite for Sovereign States and State Entities' (2007) J. Bus. L. 570.

25. Emmanuel Gaillard, 'A Black Year for ICSID' (2007) TDM 1-9.

26. David Faster, 'Umbrella Clauses: A Retreat from the Philippines?' (2006) 4 Int'l Arb. L. Rev. 100.

27. Stanley D. Metzger, 'Multilateral Conventions for the Protection of the Private Foreign Investment' (1960) 9 J. Pub. L. 133

28. Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 Stan. I. Int'l L. 283

29. Shan, Wenhua Umbrella Clauses and Investment Contracts under Chinese BITs: Are the Latter Covered by the Former? (2010) 11J World Investment & Trade 144.

30. Roger P. Alford, The Convergence of the International Trade, and Investment Arbitration, 12 Santa Clara J. Int'l L. 35 (2014)

31. Antony, Jude Umbrella Clauses Since SGS v Pakistan and SGS v Philippines–A Developing Consensus (2013) 29(4) Arb Int'l607

32. Blyschak, Paul Michael Arbitrating Overseas Oil and Gas Disputes: Breaches of the Contract Versus Breaches of the Treaty (2010) 27(6) Arb Int'l579

WEB SOURCES

1. Investment Claims (http://oxia.ouplaw.com)

2. Umbrella Clauses in Bilateral Investment Treaties: Of the Breaches of the Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes.

Available at: http://scholarlycommons.pacific.edu/facultyarticles

3. Developments in Investment Treaty Jurisprudence, 2003-2008: Arbitrating Contract Claims Under Umbrella Clauses, Available at:

https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/IA08_Chapter%201_DevelopmentsInvestmentTreatyJurisprudence.pdf

4. Investment Treaty Arbitration Investment Treaties, http://www.italaw.com/investment-treaties