

---

---

# VIRGINIA JOURNAL OF INTERNATIONAL LAW

Volume 51 — Number 4 — Page 1005



Note

## Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization

*Jonathan B. Potts*

## Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization

JONATHAN B. POTTS\*

---

Introduction.....	1006
I. Historical Considerations .....	1008
II. The Split Among ICSID Tribunals .....	1011
A. Restrictive Interpretations .....	1012
1. <i>SGS v. Pakistan</i> .....	1012
2. <i>Joy Mining v. Egypt</i> .....	1015
3. <i>El Paso v. Argentina</i> .....	1016
4. <i>Hamester v. Ghana</i> .....	1018
B. Expansive Interpretations .....	1019
1. <i>SGS v. Philippines</i> .....	1019
2. <i>CMS v. Argentina</i> .....	1022
3. <i>Noble Ventures v. Romania</i> .....	1023
4. <i>BIVAC v. Paraguay</i> .....	1025
III. The Proper Interpretation of Umbrella Clauses .....	1028
A. What is at Stake .....	1028
B. Intent.....	1032
C. Relevant Contracts.....	1035
D. Internationalization and Forum Selection Clauses .....	1039

---

\* University of Virginia School of Law, J.D. expected 2011; Sorbonne Law School, Master 2 Professionnel expected 2011; Sciences Po Law School, Master expected 2011; University of Virginia, B.A. 2008. The author wishes to thank the staff of the *Virginia Journal of International Law* for their time and dedication throughout the editorial process. Additionally, he would like to thank Mr. Christopher Ryan, whose course in international investment law served as the inspiration for this Note. Finally, the author wishes to thank his parents; without their unflinching support over the years, this piece would have never been possible.

## INTRODUCTION

Throughout the past half-century, the field of international investment law has been largely defined by the rise of bilateral investment treaties (BITs). Meant to replace traditional treaties of friendship, commerce, and navigation, these instruments are designed to encourage foreign investment by offering a baseline of substantive protection to investors entering a foreign state. The value of these treaties is especially potent for developing nations, where judicial systems often fail to measure up to investor expectations. Thus, to attract foreign investment, BITs normally permit claimants to bypass these questionable judicial systems and submit certain disputes to international arbitration. Most notably, arbitration is available through the International Centre for the Settlement of Investment Disputes (ICSID), which operates under the auspices of the World Bank. Currently, over 200 cases have been concluded under ICSID,<sup>1</sup> with over 100 pending.<sup>2</sup> Beyond the actual dispute resolution process itself, the pervasiveness of BITs cannot be overlooked: The United States currently has forty BITs in force,<sup>3</sup> among approximately 2600 concluded worldwide.<sup>4</sup>

In the past decade, ICSID tribunals have struggled to determine the proper scope of certain clauses that purport to include contractual claims within the “umbrella” of a BIT’s protections.<sup>5</sup> These “umbrella clauses” are considered innovative because, by general consensus, “mere violation” of a contract cannot trigger treaty protection under customary international law.<sup>6</sup> These provisions attempt to circumvent this traditional notion through a supposedly explicit statement that breaches of contract will be considered breaches of the treaty as well. In their usual formulation, the clauses impose an obligation on the domestic

---

1. *List of Concluded Cases*, INT’L CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, <http://tinyurl.com/24jq8vf> (last visited Mar. 25, 2011).

2. *List of Pending Cases*, INT’L CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, <http://tinyurl.com/4awpcx5> (last visited Mar. 25, 2011).

3. *Bilateral Investment Treaties*, TRADE COMPLIANCE CTR., <http://tinyurl.com/4lusxx5> (last visited Mar. 25, 2011).

4. Damon Vis-Dunbar & Henrique Suzy Nikiema, *Do Bilateral Investment Treaties Lead to More Foreign Investment?*, INVESTMENT TREATY NEWS (Apr. 30, 2009), <http://tinyurl.com/4zcfjnt>.

5. It is estimated that forty percent of BITs contain some form of an umbrella clause. James Crawford, *Treaty and Contract in Investment Arbitration*, 22nd Freshfields Lecture on International Arbitration 18 (Nov. 29, 2007), available at <http://tinyurl.com/49wwkz9>.

6. KARL P. SAUVANT, *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 59 (2008).

government to observe all obligations it undertakes with respect to investors from the foreign state.<sup>7</sup>

The question of whether to permit umbrella clauses to sidestep traditional international law in this manner has proved troubling for a number of tribunals. Fearful of overwhelming the ICSID system with a tide of minor disputes, a number of tribunals have exhibited reluctance to apply the clauses to their full potential, and some have declined to give the terms any substantive force whatsoever. In contrast, a handful of tribunals have demonstrated willingness to allow the clauses to expand coverage beyond the traditional framework. In either event, it is of considerable importance that tribunals reach some form of consistency in their interpretation. Umbrella clauses implicate countless investment contracts, considering that approximately forty percent of BITs possess some version of an umbrella clause.<sup>8</sup>

This Note proposes a systematic approach to resolve the current inconsistencies. Part I provides a brief history of umbrella clauses, beginning with their birth over fifty years ago in the context of an oil dispute between Iran and a British investor. Part II focuses on the split that has developed among ICSID tribunals regarding the interpretation of these provisions within the past decade and demonstrates the wide divergence of interpretations accorded to umbrella clauses. Finally, Part III proposes a resolution to this split by focusing on three elements. First, despite initial reluctance from some tribunals to interpret umbrella clauses broadly, their historical development points to a clear intention for them to be interpreted substantively. Second, to determine the proper scope, it is suggested that the enforcement of umbrella clauses cannot be confined to situations that involve a state's exercise of its sovereign powers. Instead, umbrella clauses should be applicable to situations relating to investments where the relationship is either explicit or founded upon investor reliance, even when an agreement may be considered peripheral to the underlying investment. Finally, from a mechanical perspective, disputed contracts should be considered to undergo a process of "internationalization," where they are elevated to the level of an international agreement. By doing so, parties can tailor their legal rights to fit their own respective needs, which reflects both investor and state autonomy, with the most notable result being the potential to contract out of ICSID arbitration.

---

7. See MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 234 (2008).

8. Crawford, *supra* note 5, at 19.

## I. HISTORICAL CONSIDERATIONS

Before the rise of BITs, investors faced considerable obstacles before pursuing claims against foreign governments. Because traditional international law insulates governments from direct claims asserted by corporations and individuals, foreign investors required a host government's consent to seek redress.<sup>9</sup> Injured investors thus typically relied on their own domestic governments to espouse claims, largely through diplomatic notes, military force, or, beginning in the twentieth century, by resort to the International Court of Justice (ICJ).<sup>10</sup> With only these mechanisms available, many small claims were simply written off by injured investors.

After World War II, however, increased international protection began to develop for foreign investments. Confronted with a shabby framework and high levels of investor uncertainty,<sup>11</sup> the investment community set about redesigning the international system. International instruments steadily began to pick away at the pre-war framework to favor a more global economy. A series of failed multinational schemes ensued, including the Havana Charter of 1948 — which would have established the International Trade Organization to promulgate rules of international investment law — alongside the continued proliferation of traditional treaties of friendship, commerce, and navigation.<sup>12</sup> This early development culminated in the first BIT, signed by Germany and Pakistan in 1959, and later in the creation of the ICSID in 1965.

Over time, BITs have emerged as the favored instrument utilized by countries to solicit foreign investment and likewise to ensure protection of their citizens who invest abroad. The drafting of BITs has become standardized over the past fifty years. Now, in their typical form, they cover four substantive issues: “(1) conditions for the admission of foreign investors to the host State; (2) standards of treatment of foreign

---

9. R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1–2 (2005). The issue of consent accompanies other practical difficulties, including the potential for host states to change domestic laws following investments and the threat of prejudiced local officials. See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 75 (2005).

10. BISHOP ET AL., *supra* note 9, at 1–2.

11. See Salacuse & Sullivan, *supra* note 9, at 68–69. These additional problems included: (1) “applicable international law failed to take account of contemporary investment practices and address important issues of concern to foreign investors”; (2) “the principles that did exist were often vague and subject to varying interpretations”; and (3) “this existing framework prompted disagreement between industrialized countries and newly decolonized developing nations.” *Id.*

12. *Id.* at 72–73. Although treaties of friendship, commerce, and navigation were traditionally aimed toward international trade, they could also delineate rights of foreign ownership and outline the scope of foreign business practices within each state's territory. *Id.* at 72.

investors; (3) protection against expropriation; and (4) methods for resolving investment disputes.”<sup>13</sup>

The development of umbrella clauses ran concurrently with the other progress in international investment law.<sup>14</sup> In particular, all modern umbrella clauses spring from the 1954 draft settlement agreement between the Anglo-Iranian Oil Company (AIOC) and the Iranian government surrounding an oil nationalization dispute.<sup>15</sup> Efforts by the British government to espouse the company’s claim before the ICJ failed, following a previous attempt to arbitrate under a defective clause in the concession agreement.<sup>16</sup> At the time, Elihu Lauterpacht, who was advising the AIOC, suggested that the municipal law of both Iran and the United Kingdom could not govern any potential settlement between the parties. As a result, he suggested that the AIOC consider incorporating the settlement into a treaty that would be automatically governed by international law.<sup>17</sup> Lauterpacht described this clause as creating a system in which

any contract made between, on the one hand, [the AIOC] . . . and [the newly created National Iranian Oil Company] and/or the Iranian Government on the other, shall be incorporated or referred to in a treaty between Iran and the United Kingdom in such a way that a breach of the contract or settlement shall be *ipso facto* deemed to be a breach of the treaty.<sup>18</sup>

He defined two principal goals: (1) “to ensure that the settlement was lifted out of the domain of the Iranian legal system so that it would not be governed exclusively by Iranian law and therefore vulnerable to unilateral variation”; and (2) “to add an inter-state remedy for breach of the settlement agreement to a process of internationalization already

---

13. Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135, 141 (2006).

14. See generally *id.* at 142–51 (discussing the history and early development of umbrella clauses).

15. Although the first evidence of a treaty extending international law protections on municipal legal rights dates back to a 1921 treaty between the United Kingdom and Peru, that treaty can be distinguished from modern umbrella contracts by its status as an *ex post facto* arrangement to secure enforcement of awards resulting from breach between an investor and the state, rather than an agreement to observe contractual obligations themselves. See Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARB. INT’L 411, 413–14 (2004).

16. *Id.* at 413.

17. *Id.* at 415 (quoting Elihu Lauterpacht, Anglo-Iranian Oil Company Ltd. Persian Settlement – Note (Dec. 7, 1953)). Much of the Sinclair article uses Lauterpacht’s unavailable personal documents as evidence of his thought processes during the settlement agreements.

18. Sinclair, *supra* note 15, at 415 (quoting Elihu Lauterpacht, Anglo-Iranian Oil Company Ltd. Persian Settlement – Opinion 4 (Jan. 20, 1954)).

underway in the choice of governing law and the watertight arbitration clause contained in the Consortium Agreement.”<sup>19</sup> In general, the effect would be to give the contract terms “stability guaranteed by treaty between the States most directly concerned.”<sup>20</sup> Importantly, though, claims would not be pursued by the AIOC in international fora. Rather, the umbrella clause would recognize the United Kingdom’s right of diplomatic protection over the investor companies, meaning that an international dispute would be pursued by the countries themselves before the ICJ.<sup>21</sup> Ultimately, however, the original umbrella clause never came to fruition.<sup>22</sup>

Five years later, in 1959, the Abs-Shawcross Draft Convention on Investments Abroad (Abs-Shawcross Draft) developed a new formulation of umbrella clauses. Article II required each state party to “at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party.”<sup>23</sup> The use of the phrase “any undertakings” was immediately interpreted to contemplate contractual undertakings between states and foreign investors.<sup>24</sup> In addition, the clause was construed to encapsulate undertakings as to both subjects *and* objects of international law.<sup>25</sup> Accordingly, the article’s “main significance” was “to transform obligations toward objects of international law, which as such are beyond the pale of international law, into obligations under international law.”<sup>26</sup> This clause made it “unnecessary for a national first to seek justice on the levels of the municipal law . . . or the law specifically provided for under a particular public contract.”<sup>27</sup> Furthermore, this clause covered undertakings beyond contracts, incorporating implied

---

19. Sinclair, *supra* note 15, at 416.

20. *Id.* at 416 (quoting Elihu Lauterpacht, Anglo-Iranian Oil Company Ltd. Persian Settlement – Note 5 (Mar. 12, 1954)).

21. Sinclair, *supra* note 15, at 416–17; *see also* Wong, *supra* note 13, at 166 (“[T]he umbrella clause was specifically designed to ensure that disputes under investor-State contracts would be resolved in a neutral forum and enforced as a matter of international law.”). Several years later Lauterpacht again suggested this idea to companies building an oil pipeline in the Persian Gulf, which would allow “the national state of the relevant company . . . [to] refer the dispute to the ICJ without the need to exhaust local remedies or to have recourse to dispute settlement procedures included in the underlying contract.” Sinclair, *supra* note 15, at 418.

22. Sinclair, *supra* note 15, at 417.

23. Draft Convention on Investments Abroad (Abs-Shawcross Draft) art. II, reprinted in *The Proposed Convention to Protect Private Foreign Investment: A Round Table*, 9 J. PUB. L. 116 (1960).

24. Sinclair, *supra* note 15, at 421–22.

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

26. *Id.* at 154–55.

27. *Id.* at 155. Note that the Abs-Shawcross Draft differs from the ICSID regime in that states continued to espouse claims on behalf of their nationals.

and indirect commitments, which included “general promises in legislative form” that were meant to encourage investment.<sup>28</sup> Later, the drafters verified that they meant to affirm the general principle of *pacta sunt servanda*, a recognition of the binding nature of freely negotiated obligations.<sup>29</sup> Immediately the Abs-Shawcross Draft’s umbrella clause was noted as “a far-reaching departure” from existing law.<sup>30</sup>

Three years later, umbrella clauses reappeared as the Organization for Economic Cooperation and Development (OECD) published its own draft convention. The OECD Draft Convention provided that “[e]ach Party shall at all times ensure the observance of undertakings given by it in relation to *property* of nationals of any other Party.”<sup>31</sup> In turn, “property” was considered to include “all property, rights and interests, whether held directly or indirectly,”<sup>32</sup> and the term was intended to be interpreted “in the widest sense.”<sup>33</sup> Furthermore, the drafters considered “undertakings” to include “‘consensual’ bargains as well as ‘unilateral engagements’ by the host state.”<sup>34</sup> Thus, despite ostensibly narrower wording, the OECD Draft Convention’s umbrella clause possessed similar far-reaching implications to the previous formulations. Although it was never opened for signature, the drafters nevertheless recommended the draft to member states as a model convention.<sup>35</sup>

## II. THE SPLIT AMONG ICSID TRIBUNALS

Although umbrella clauses date from the 1950s, no arbitral tribunal tackled their interpretation until 2003. Since this initial dispute, a notable rift has developed between two general schools of thought. The first tribunal and its progeny have proved hesitant to espouse a broad construction of umbrella clauses. These tribunals have winnowed out arguments to restrict the import of umbrella clauses in order to avoid interference with traditional expectations under international law. On the other hand, multiple tribunals have expressed willingness to interpret umbrella clauses with a scope similar to Lauterpacht’s original vision. Neither view, however, has emerged as the clear victor, and the two general lines of interpretation often prove internally inconsistent.

---

28. Sinclair, *supra* note 15, at 422.

29. *Id.* at 423.

30. Schwarzenberger, *supra* note 25, at 155.

31. Org. for Econ. Co-operation & Dev. [OECD], Draft Convention on the Protection of Foreign Property, at 13, *reprinted in* 2 I.L.M. 241, 247 (1963) [hereinafter OECD Draft] (emphasis added).

32. *Id.* at 41; 2 I.L.M. at 262.

33. *Id.* at 14; 2 I.L.M. at 247.

34. Sinclair, *supra* note 15, at 428.

35. *Id.* at 427.

## A. Restrictive Interpretations

### 1. SGS v. Pakistan

The leading case endorsing a narrow interpretation of umbrella clauses is *SGS Société Générale de Surveillance S.A. v. Pakistan*.<sup>36</sup> The case concerned a Pre-Shipment Inspection Agreement (PSI Agreement) under which SGS, a Swiss company, had agreed to perform certain services for imports entering Pakistan.<sup>37</sup> For breaches of contract, the PSI Agreement included a dispute settlement provision providing for domestic arbitration under Pakistani law.<sup>38</sup> Upon breach, Pakistan argued that, under the ICSID Convention and the principle of *pacta sunt servanda*, the ICSID tribunal lacked jurisdiction and that the negotiated contractual choice of forum should control.<sup>39</sup> In response, SGS pointed to Article 11 of the Swiss–Pakistan BIT — the umbrella clause — and contended that the terms of the BIT elevated all contractual claims to the level of treaty claims.<sup>40</sup> SGS argued that, by virtue of the umbrella clause, “each time you violate a provision of the contract . . . you also violate norms of international law, [and] you violate the treaty by the same token.”<sup>41</sup>

The ICSID tribunal concluded that the forum selection clause within the PSI Agreement was valid “so far as concerns the Claimant’s contract claims which do not also amount to BIT claims.”<sup>42</sup> In other words, as long as the contractual breaches failed to trigger additional protections under the BIT, SGS could not pursue its remedies before the tribunal.<sup>43</sup> To pass judgment on these contractual claims, the ICSID tribunal needed a “special agreement” by the parties outside the current contract, and the tribunal concluded that no such agreement existed.<sup>44</sup> Furthermore, the tribunal added, if a special agreement did exist, the

---

36. *SGS Société Générale de Surveillance S.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction (Aug. 6, 2003), 8 ICSID Rep. 406 (2005).

37. *Id.* ¶¶ 1, 11.

38. *Id.* ¶ 15.

39. *Id.* ¶¶ 48, 51–52.

40. *Id.* ¶ 98. Specifically, the Swiss–Pakistani BIT’s umbrella clause stated, “Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party.” *Id.* ¶ 97.

41. *Id.* ¶ 99.

42. *Id.* ¶ 161 (emphasis omitted).

43. See also *Noble Ventures, Inc. v. Rom.*, ICSID Case No. ARB/01/11, Award, ¶ 53 (Oct. 12, 2005), <http://tinyurl.com/4k8pr35> (“[I]nasmuch as a breach of contract at the municipal level creates at the same time the violation of [customary international law or treaty law], it will give rise to the international responsibility of the host State.”).

44. *SGS v. Pakistan*, Objections to Jurisdiction, ¶ 161.

jurisdiction would be based on the agreement itself and not the Swiss–Pakistani BIT.<sup>45</sup>

The tribunal rejected SGS’s contention that the umbrella clause elevated all contractual claims to treaty claims.<sup>46</sup> In its view, the term “commitments” in the umbrella clause was broad enough to encompass legislative and administrative measures in addition to contractual obligations.<sup>47</sup> Combining this interpretation with the umbrella clause’s language to “constantly . . . guarantee the observance” of these commitments, the tribunal believed that an agreement to constantly guarantee “some statutory, administrative or contractual commitment simply does not . . . necessarily signal the creation and acceptance of a new international law obligation.”<sup>48</sup> Additionally, the word “commitments” could conceivably be interpreted to include all matters surrounding any sub-entity of the state. These matters could involve commitments of the State itself as a legal person as well as any office, entity, subdivision, or legal representative whose acts were attributable to the State.<sup>49</sup> This scope was too broad for the tribunal, which considered such liability “susceptible of almost indefinite expansion.”<sup>50</sup>

The tribunal also noted that the umbrella clause failed to state explicitly that breaches of contract were meant to be elevated to the level of breaches of international treaty law.<sup>51</sup> In general, because the legal consequences would be “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,” it was necessary for BIT drafters to provide more direction for tribunals.<sup>52</sup> Despite the BIT’s arguably broad language, the tribunal refused to read too much substance into the clause.<sup>53</sup> Absent “clear and convincing evidence,” such as shared intent, the tribunal could not interpret the umbrella clause to allow such claims.<sup>54</sup>

---

45. *Id.*

46. *Id.* ¶ 165.

47. *Id.* ¶ 166.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* ¶ 167.

53. *Cf. Noble Ventures, Inc. v. Rom.*, ICSID Case No. ARB/01/11, Award, ¶ 52 (Oct. 12, 2005), <http://tinyurl.com/4k8pr35> (“[A] clause . . . which would otherwise be deprived of practical applicability is naturally to be understood as protecting investors also with regard to contracts with the host State generally in so far as the contract was entered into with regard to an investment.”).

54. *Id.* ¶ 47; *SGS v. Pakistan*, Objections to Jurisdiction, ¶ 167; *see also* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1572 (2005) (criticizing the tribunal for introducing a new evidentiary standard and rendering the umbrella clause a nullity).

Furthermore, the tribunal claimed that undesirable consequences would follow from SGS's requested interpretation. In that case, the umbrella clause "would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments to an investor of the other Contracting Party."<sup>55</sup> This possibility ventured far beyond the tribunal's comfort level. Also, such an interpretation would render the other articles of the BIT — which require violation of substantive treaty standards — superfluous.<sup>56</sup> If an international obligation could be triggered under this lower threshold of mere contract violation, the general principles of the BIT would seem to be extraneous.

The tribunal was also hesitant to allow investors to nullify freely negotiated dispute settlement clauses, like the PSI Agreement's arbitration clause.<sup>57</sup> Investors could easily monopolize the power over dispute settlement clauses because they would always possess the choice between ICSID and the contractually agreed-upon forum. Conversely, the state would be precluded from exercising its right to defend the claim in the contractual forum unless the investor agreed to waive ICSID jurisdiction. Instead, under the tribunal's interpretation, the BIT would "enhance mutuality and balance of benefits in the interrelation of different agreements located in differing legal orders."<sup>58</sup>

Also, from a structural standpoint, the tribunal pointed to the location of the umbrella clause within the treaty. Rather than being placed with substantive obligations, it was buried deep within the BIT.<sup>59</sup> In the tribunal's view, if the drafters had intended for the umbrella clause to provide such significant protection, it would have been placed with the other "first order" obligations of the BIT.<sup>60</sup> Thus, the tribunal questioned why it should permit the umbrella clause to supersede these other obligations.<sup>61</sup>

Nevertheless, in its view, the tribunal had not rendered the umbrella clause a nullity. Instead, the substance of the article came from two places. First, it could be considered a confirmation to "signal an implied affirmative commitment to enact implementing rules and regulations

---

55. *SGS v. Pakistan*, Objections to Jurisdiction, ¶ 168; see also Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Rep. of Para., ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 151 (May 29, 2009), <http://tinyurl.com/63lw97e> (noting additionally that in *SGS v. Pakistan*, the contract predated the entry into force of the BIT).

56. *SGS v. Pakistan*, Objections to Jurisdiction, ¶ 168.

57. *Id.*

58. *Id.*

59. *Id.* ¶ 169.

60. *Id.* ¶ 170.

61. *Id.*

necessary or appropriate to give effect to a contractual or statutory undertaking . . . that would otherwise be a dead letter.”<sup>62</sup> And second, the tribunal refused to eliminate the possibility that in extreme circumstances, “a violation of certain provisions of a State contract with an investor of another State might constitute [a] violation of a treaty provision . . . enjoining a Contracting Party constantly to guarantee the observance of contracts with investors of another Contracting Party.”<sup>63</sup> The tribunal offered two examples: If a state (1) materially impeded the ability of an investor to pursue claims before an international arbitral tribunal, or (2) refused to recognize such arbitration altogether and force the investor to use domestic courts, either could be considered a failure to observe commitments under the umbrella clause.<sup>64</sup> Thus, without completely depriving the umbrella clause of all substance, the tribunal nevertheless hamstrung Switzerland in the clause’s general application.<sup>65</sup>

## 2. Joy Mining v. Egypt

*Joy Mining Machinery Limited v. Egypt* involved a claim under the United Kingdom–Egypt BIT that stemmed from a dispute over bank guarantees for equipment at a desert mining site.<sup>66</sup> Although rooted in dicta, the tribunal’s stance against umbrella clauses was firm. In essence, the tribunal contended that any contract dispute required some form of entanglement with a pure treaty violation to invoke a claim under the BIT. Compared to previous cases, where there were significant opportunities for interwoven contract and treaty issues,<sup>67</sup> the tribunal found the present situation to be “somewhat simpler” due to the nature of bank guarantees.<sup>68</sup> The tribunal referred to a test of “triple identity” to determine when entangled claims grew inseparable.<sup>69</sup> In its

---

62. *Id.* ¶ 172; see also *Noble Ventures, Inc. v. Rom.*, ICSID Case No. ARB/01/11, Award, ¶ 58 (Oct. 12, 2005), <http://tinyurl.com/4k8pr35> (“[T]he provision could be interpreted as laying down a kind of general obligation for the host State as a public authority to facilitate foreign investment . . .”).

63. *SGS v. Pakistan*, Objections to Jurisdiction, ¶ 172.

64. *Id.*

65. Some commentators take the stance that the *SGS* tribunal did render the umbrella clause a nullity. See, e.g., Michael Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY J. INT’L L. 142, 167 (2010) (stating that under this construction, the provision was essentially without any practical effect); Franck, *supra* note 54, at 1572 (stating that the decision “gutted” the umbrella clause of its meaning).

66. *Joy Mining Mach., Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶¶ 15–25 (Aug. 6, 2004), 19 ICSID Rev. 486 (2004).

67. *Id.* ¶ 75.

68. *Id.* ¶ 78.

69. *Id.* ¶ 75.

view, when disputes involved the same (1) parties, (2) objects, and (3) causes of action, the contract and treaty claims would be irreconcilably intertwined.<sup>70</sup> Because bank guarantees were inherently commercial (and thus not subject to expropriation), the tribunal refused to consider the dispute investment-related, although the bank guarantees were peripherally associated with the underlying investment.<sup>71</sup>

The tribunal pointed out that, as in *SGS v. Pakistan*, the BIT's umbrella clause was not featured "prominently" within the treaty.<sup>72</sup> In its opinion, an ill-placed umbrella clause could not elevate all contract disputes (including this commercial dispute) into investment disputes under the BIT "unless . . . there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection."<sup>73</sup> The tribunal considered this missing link between the contract and the treaty to be fatal to the claimant's case.<sup>74</sup> Even if there had been an "investment," the lack of a treaty-based allegation could not confer jurisdiction on the tribunal.<sup>75</sup>

### 3. El Paso v. Argentina

Against the backdrop of the Argentine economic crisis, *El Paso Energy International Co. v. Argentina* concerned the removal of fundamental rights and safeguards from investors in the energy sector.<sup>76</sup> Stressing that a balanced approach was vital to protect both investor and state interests,<sup>77</sup> the tribunal examined an umbrella clause within the United States–Argentina BIT and concluded that umbrella clauses could not transform *any* contract claim into a treaty claim. The tribunal contended that the opposing view would transform all state commitments, no matter how minor, into treaty claims.<sup>78</sup> While reviewing approaches in earlier decisions, the tribunal rejected the idea that differences in drafting had resulted in different outcomes.<sup>79</sup> Nevertheless, the tribunal considered the reasoning in *SGS v. Pakistan*, where the tribunal had explained that while it was possible to draft a

---

70. *Id.*

71. *Id.* ¶¶ 78–79.

72. *Id.* ¶ 81.

73. *Id.*

74. *Id.*

75. *Id.* ¶ 82.

76. *El Paso Energy Int'l Co. v. Argentine Rep.*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 23 (Apr. 27, 2006), 21 ICSID Rev. 488 (2006).

77. *Id.* ¶ 70.

78. *Id.* ¶ 82; *see also* *SGS Société Générale de Surveillance S.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶ 166 (Aug. 6, 2003), 8 ICSID Rep. 406 (2005).

79. *See El Paso Energy*, Decision on Jurisdiction, ¶ 70.

treaty elevating contractual claims, there was no clear and persuasive evidence that it had been the intention of the drafting parties.<sup>80</sup> The tribunal pointed out that neither the term “contract” nor “contractual obligation” was contained in the actual clause.<sup>81</sup> Without clear indications of the countries’ intent, the tribunal refused to apply the umbrella clause broadly.

Not mincing words, the tribunal stated that permitting a broad interpretation (as in *SGS v. Philippines*<sup>82</sup>) would “render[] the whole Treaty completely useless.”<sup>83</sup> In the tribunal’s view, this interpretation — that “violation of *any legal obligation* of a State, and not only of any contractual obligation with respect to investment, is a violation of the BIT” — would prove disastrous.<sup>84</sup> The tribunal contended that BITs would only require an umbrella clause and a dispute settlement mechanism.<sup>85</sup> No other substantive protections would be necessary. Standards such as fair and equitable treatment and full protection and security would be swallowed up by the all-encompassing nature of the phrase “any legal obligation.”<sup>86</sup>

The tribunal further distinguished between the state acting as a merchant and the state acting as a sovereign.<sup>87</sup> It believed that foreign investors must be protected from the state when it exercises its sovereign authority, not when it behaves as a commercial entity.<sup>88</sup> In other words, the umbrella clause could be read to not “extend the Treaty protections to breaches of an ordinary commercial contract entered into by the State or a State-owned entity.”<sup>89</sup> Rather, it would “cover additional investment protections contractually agreed by the State as a

---

80. *Id.* ¶ 74 (quoting *SGS v. Pakistan*, Objections to Jurisdiction, ¶ 173).

81. *El Paso Energy*, Decision on Jurisdiction, ¶ 74.

82. *See infra* Part II.B.1.

83. *El Paso Energy*, Decision on Jurisdiction, ¶ 76.

84. *Id.*

85. *Id.* *But see* Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT’L L. 1, 41 (2009) (“The Tribunal’s argument disregards that other investors’ rights — including fair and equitable treatment, indirect expropriation, and nondiscrimination — concern obligations of host States that are normally not addressed by investor-State contracts.”).

86. *El Paso Energy*, Decision on Jurisdiction, ¶ 76.

87. *Id.* ¶ 79.

88. *Id.* ¶¶ 80–81; *see also* *Impregilo S.p.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 260 (Apr. 22, 2005), 12 ICSID Rep. 245 (2007) (“Only the State in the exercise of its sovereign authority (*puissance publique*), and not as a contracting party, may breach the obligations assumed under the BIT.”).

89. *El Paso Energy*, Decision on Jurisdiction, ¶ 81. *But see* *CMS Gas Transmission Co. v. Argentine Rep.*, ICSID Case No. ARB/01/8, Award, ¶ 299 (Apr. 25, 2005), 44 I.L.M. 1205 (2005) (“Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor.”).

sovereign . . . inserted in an investment agreement.”<sup>90</sup> In general, the tribunal disliked the potential for umbrella clauses to create international liability “far beyond” its obligations regarding standards of protection for foreign investment actually embodied in the treaty.<sup>91</sup> The tribunal did not wish to render states “liable for any violation of any commitment in national or international law ‘with regard to investments.’”<sup>92</sup> The tribunal feared that “investors [would] not use appropriate restraint — and why should they? — if the ICSID tribunals offer them unexpected remedies.”<sup>93</sup>

#### 4. Hamester v. Ghana

The most recent decision narrowing the interpretation of umbrella clauses is *Gustav F W Hamester GmbH & Co KG v. Ghana*, which involved a German company that entered into a joint venture with the Ghana Cocoa Board (Cocobod), a public corporation established by the Ghanaian government, concerning the processing of domestic cocoa beans.<sup>94</sup> After a dispute about prices and incomplete deliveries, Hamester submitted a request for ICSID arbitration claiming, *inter alia*, breaches of contract under the umbrella clause.<sup>95</sup> In response, Ghana contended that even if the umbrella clause applied to purely contractual obligations under domestic law, “it could apply only to contracts entered into by the *Republic of Ghana*,” and excluded Cocobod because of its status as a separate corporation.<sup>96</sup>

The tribunal quickly sided with the government. Believing this to be the “reasonable” interpretation of umbrella clauses, the tribunal articulated the relationship between Cocobod and Ghana as the decisive factor.<sup>97</sup> It noted that the joint venture agreement “was signed by

---

90. *El Paso Energy*, Decision on Jurisdiction, ¶ 81. *But see* Feit, *supra* note 65, at 167 (arguing that, under the functional test provided by the International Law Commission (ILC) Articles, this threshold requirement of “sovereign character” becomes redundant, and that “[t]he relevant question thus only becomes whether one agrees with the tribunal in *SGS v. Pakistan* that the umbrella clause is basically a ‘soft law’ provision”).

91. *El Paso Energy*, Decision on Jurisdiction, ¶ 82.

92. *Id.*

93. *Id.*

94. *Gustav F W Hamester GmbH & Co KG v. Rep. of Ghana*, ICSID Case No. ARB/07/24, Award, ¶¶ 22, 23, 82 (June 18, 2010), <http://tinyurl.com/6xf7b6f>.

95. *Id.* ¶ 342 (citing Article 9(2) of the Germany-Ghana BIT, which reads: “Each Contracting Party shall observe any other obligation it has assumed with regard to its investments in its territory by nationals or companies of the other Contracting Party.” Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Ghana, Feb. 25, 1995, ICSID, INVESTMENT LAWS OF THE WORLD (2003)).

96. *Id.* ¶¶ 340–41 (emphasis in original).

97. *Id.* ¶ 343.

Hamester and Cocobod, with no implication of [Ghana itself].”<sup>98</sup> Ghana was wholly absent from the contract both as a party and as a signatory, and was never intended to be involved in the relationship.<sup>99</sup> Thus, when the tribunal looked at the umbrella clause, which specified obligations “assumed by” host states, it refused “to extend the ambit of the provision to contractual obligations assumed by other separate entities.”<sup>100</sup> Nothing in the umbrella clause justified taking the municipal law obligations negotiated by the parties to the joint venture agreement to be assumed by this state, since this would “completely transform their nature, extent, and governing law.”<sup>101</sup> Furthermore, the tribunal saw no reason under international legal rules of attribution to consider Cocobod’s actions attributable to Ghana.<sup>102</sup> In short, the implication was twofold: Under the circumstances, the tribunal found Cocobod to be too distant from Ghana to “elevate” the alleged breaches into violations of the BIT, and the umbrella clause too weak to otherwise “transform” them.<sup>103</sup>

## B. *Expansive Interpretations*

### 1. *SGS v. Philippines*

The first, and leading, case advocating a broad interpretation of umbrella clauses is *SGS Société Générale de Surveillance S.A. v. Philippines*,<sup>104</sup> which occurred a year after *SGS v. Pakistan*.<sup>105</sup> Like its predecessor, the dispute arose out of services SGS provided for pre-shipment inspection, whereupon SGS made a claim for unfulfilled

---

98. *Id.* ¶ 347.

99. *Id.*

100. *Id.*; see also *Impregilo S.p.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 223 (Apr. 22, 2005), 12 ICSID Rep. 245 (2007) (“[G]iven that the Contracts were concluded by Impregilo with WAPDA, and not with Pakistan . . . Impregilo’s reliance upon Article 3 of the BIT takes the matter no further.”). *But see* Feit, *supra* note 65, at 167 (“It is difficult to imagine how a tribunal could find that the state-owned entity acted with governmental authority in its role as a contractual partner to an investment agreement, and then deny that the contract is of governmental nature.”).

101. *Hamester*, Award, ¶ 347.

102. *Id.* (“With regard to Article 5 [of the ILC Articles on State Responsibility], there is nothing to suggest that the JVA was concluded by Cocobod in the exercise of governmental authority,” and [w]ith regard to Article 8, there is no evidence that the JVA was concluded by Cocobod on the instructions of, or under the direction or control of that State.”); see also Feit, *supra* note 65, at 161–63 (discussing the applicability of the ILC Articles to umbrella clauses).

103. *Hamester*, Award, ¶ 348.

104. *SGS Société Générale de Surveillance S.A. v. Rep. of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

105. *SGS Société Générale de Surveillance S.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction (Aug. 6, 2003), 8 ICSID Rep. 406 (2005).

payments.<sup>106</sup> This tribunal, however, pursued a completely different tack. It began by rejecting the government's contention that, if given effect, the umbrella clause should be limited to obligations under other international law instruments.<sup>107</sup> The government had attempted to cabin coverage to exclude obligations arising under specialized contracts between the state and investors. But this argument was quickly discarded. If the umbrella clause were intended to be interpreted in this manner, the tribunal concluded, that intent could have been expressed in the BIT with relative ease.<sup>108</sup>

Furthermore, after examining the umbrella clause in *SGS v. Pakistan*, the tribunal decided that the current clause was drafted much more clearly.<sup>109</sup> While the Swiss–Pakistan BIT had employed the phrase “the commitments . . . entered into with respect to the investments,” the current BIT referred to “any obligation . . . assumed with regard to specific investments.”<sup>110</sup> In the tribunal's opinion, the usage of the word “obligation” stated much more clearly that each party needed to observe any *legal* obligation it assumed (including those under contract), or would assume in the future.<sup>111</sup>

Beyond the terms themselves, the tribunal then systematically picked apart the *SGS v. Pakistan* decision. First, the tribunal rejected the contention that a less restrictive interpretation was “susceptible of almost indefinite expansion.”<sup>112</sup> Although the umbrella clause was not limited to contractual obligations, it was nevertheless limited to those assumed regarding specific investments and not *any* general legal obligation.<sup>113</sup> Second, the tribunal rejected any presumption against

---

106. *SGS v. Philippines*, Objections to Jurisdiction, ¶¶ 12, 15.

107. *Id.* ¶ 118.

108. *Id.*

109. *Id.* ¶ 119; *Noble Ventures, Inc. v. Rom.*, ICSID Case No. ARB/01/11, Award, ¶ 59 (Oct. 12, 2005), <http://tinyurl.com/4k8pr35> (“[It is] understandable that, without necessarily having recourse to completely different reasoning, the Tribunal in that case reached a position different from that adopted in *SGS v. Pakistan*.”). *But see* Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835, 844–45 (attributing the difference in outcomes not to textual interpretation, but rather to a divide between “disintegrationist” and “integrationist” ideologies toward municipal and international law).

110. *SGS v. Philippines*, Objections to Jurisdiction, ¶ 119; *see also* Bureau Veritas, Inspection, Valuation, Assessment and Control, *BIVAC B.V. v. Rep. of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 141 (May 29, 2009), <http://tinyurl.com/631w97e> (“The words ‘any obligation’ are all encompassing.”).

111. *SGS v. Philippines*, Objections to Jurisdiction, ¶¶ 115, 119. The Tribunal nevertheless failed to explain why it considered this phraseology clearer.

112. *Id.* ¶ 121 (quoting *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶ 166 (Aug. 6, 2003), 8 ICSID Rep. 406 (2005)).

113. *Id.* ¶ 121.

broad interpretation of umbrella clauses founded in international law.<sup>114</sup> In fact, it considered that the *SGS v. Pakistan* tribunal was not faced with a “true” umbrella clause, so its negative presumption was hardly universal, but rather subject to case-by-case analysis.<sup>115</sup> Finally, the tribunal did not find the location of the umbrella clause (toward the end of the BIT, as in *SGS v. Pakistan*) decisive.<sup>116</sup> The tribunal found it “difficult to accept that the same language in other Philippines BITs is legally operative, but that it is legally inoperative in the Swiss Philippines BIT merely because of its location.”<sup>117</sup>

The tribunal further criticized the *SGS v. Pakistan* decision for failing to provide “clear meaning” to the provision,<sup>118</sup> and for the overdramatic statement that giving effect to umbrella clauses would lead to “full-scale internationalisation of domestic contracts,”<sup>119</sup> by which it meant that the contract itself would transform into a treaty. The tribunal did not consider this to be the accurate mechanism behind umbrella clauses. Rather, the tribunal stated, the umbrella clause “[did] not convert non-binding domestic blandishments into binding international obligations”; “[did] not convert questions of contract law into questions of treaty law”; and “[did] not change the proper law of [the contract] from the law of the Philippines to international law.”<sup>120</sup> Thus, the umbrella clause did not concern the *scope* of the commitments, but rather the *performance* of commitments.<sup>121</sup> It was “a conceivable function” of the clause to provide assurances to investors regarding the performance of obligations by the host state under its own law with respect to specific investments.<sup>122</sup> In other words, the umbrella clause’s role was to “secure the rule of law in relation to investment protection.”<sup>123</sup> Importantly, the extent of obligations would still be governed by the contract, and *only*

---

114. *Id.* ¶ 122. This revolved around an annulment decision by an ICSID *ad hoc* Committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Rep.*, ICSID Case No. ARB/97/3, ¶ 95-98, 101 (July 3, 2002), Annulment, 41 I.L.M. 1135 (2002) (explaining the general principle that whether an act of a State is internationally wrongful is governed by international law, while the issue of whether the same act is lawful under internal law is an entirely separate question).

115. *SGS v. Philippines*, Objections to Jurisdiction, ¶ 122.

116. *Id.* ¶ 124.

117. *Id.* (footnote omitted).

118. *Id.* ¶ 125.

119. *Id.* ¶ 126.

120. *Id.*

121. *Id.*

122. *Id.*; see Wong, *supra* note 13, at 166 (“This ties in with the fact that a core, if not the most significant, advantage afforded to investors under the BIT is their right to resolve relevant investment disputes with the host State in accordance with the BIT’s dispute settlement provisions.”).

123. *SGS v. Philippines*, Objections to Jurisdiction, ¶ 126.

determined by reference to the contract's terms.<sup>124</sup> Thus, a breach would arise if the government failed to observe binding obligations, but the umbrella clause would not "convert the issue of the *extent* or *content* of such obligations into an issue of international law."<sup>125</sup>

Nevertheless, the tribunal declined to exercise jurisdiction over the contractual allegations.<sup>126</sup> The tribunal echoed the concern in *SGS v. Pakistan* that a broad interpretation had the potential to nullify freely negotiated dispute settlement clauses in the contracts themselves.<sup>127</sup> Because the service contract contained a specific dispute settlement clause, the tribunal elected to honor the parties' specific commitments. In the tribunal's opinion, general provisions of BITs should not override such arrangements in the contracts themselves absent clear expression to do so.<sup>128</sup> Accordingly, an umbrella clause would "only have effect in one of two scenarios: (a) where the contract's forum selection clause designates the same forum as the BIT; and (b) where the contract does not contain a forum selection clause."<sup>129</sup> Thus, the tribunal placed the terms of the contract superjacent to the terms of the treaty. Citing fear that a company could "approbate and reprobate in respect of the same contract," the tribunal felt obligated to honor the investor-negotiated arrangements.<sup>130</sup>

## 2. CMS v. Argentina

In *CMS Gas Transmission Co. v. Argentina*, a privatized gas transmission company disputed a number of legal and regulatory measures undertaken by the Argentine government in the midst of their economic crisis.<sup>131</sup> CMS claimed breaches of obligations under the umbrella clause with respect to commitments derived from both legislation and contractual agreements.<sup>132</sup> At first, the tribunal agreed with Argentina, declaring that not all contract breaches result in

---

124. *Id.* ¶ 127; *see also* Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Rep. of Para., ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 149 (May 29, 2009), <http://tinyurl.com/631w97e> ("If the Tribunal was to find that there was a breach of the Contract . . . it would have to find also a breach of the BIT. But if the Tribunal were to find no breach of the Contract, there would be no breach of the BIT.")

125. *SGS v. Philippines*, Objections to Jurisdiction, ¶ 128.

126. *Id.* ¶ 155. More precisely (and somewhat perplexingly), the tribunal stayed the proceedings until the Philippines courts had decided the issue. *Id.*

127. *Id.* ¶ 123.

128. *Id.* ¶ 134.

129. Wong, *supra* note 13, at 166.

130. *SGS v. Philippines*, Objections to Jurisdiction, ¶ 155.

131. *See CMS Gas Transmission Co. v. Argentine Rep.*, ICSID Case No. ARB/01/8, Award, ¶¶ 53–73 (Apr. 25, 2005), 44 I.L.M. 1205 (2005).

132. *Id.* ¶ 297.

breaches of the BIT.<sup>133</sup> Only when there were breaches of enumerated treaty rights and obligations or violations of specifically protected contract rights would the BIT's protections actually be triggered.<sup>134</sup> The tribunal pointed to previous cases<sup>135</sup> where commercial disputes were differentiated from breaches of treaty standards.<sup>136</sup>

Nevertheless, the tribunal stated that in some circumstances, commercial aspects of contracts could be protected when there was "significant interference" by the government or a public agency with the rights of the investor.<sup>137</sup> Under the facts of the case, commercial claims themselves were not at issue, but rather government actions.<sup>138</sup> Specific contract terms required the Argentine government to refrain from interference with the existing tariff regime and from altering the agreement unilaterally.<sup>139</sup> Because these were "closely related" to other standards of protection, the tribunal was willing to consider these violations as implicating the umbrella clause.<sup>140</sup> In other words, the government failed to observe its obligations under the umbrella clause "to the extent that legal and contractual obligations pertinent to the investment [had] been breached and [had] resulted in the violation of the standards of protection under the Treaty."<sup>141</sup>

### 3. Noble Ventures v. Romania

*Noble Ventures, Inc. v. Romania* involved the privatization of a steel mill by a U.S. corporation.<sup>142</sup> In its submissions, Romania disputed that umbrella clauses elevate breaches of contract into treaty claims, contending instead that umbrella clauses merely create treaty obligations on states preventing the use of sovereign powers that interfere with contractual commitments and other legal obligations related to the investments.<sup>143</sup> The tribunal disagreed. After reviewing previous cases, the tribunal pointed out that the BIT's umbrella clause appeared in the article that contained the primary obligations of the parties.<sup>144</sup> This in turn implied that the umbrella clause was intended to

---

133. *Id.* ¶¶ 298–99.

134. *Id.* ¶ 299.

135. *See supra* Parts II.A.2–3.

136. *CMS, Award*, ¶ 300.

137. *Id.* ¶ 299.

138. *Id.* ¶ 301.

139. *Id.* ¶ 302.

140. *Id.*

141. *Id.* ¶ 303.

142. *Noble Ventures, Inc. v. Rom.*, ICSID Case No. ARB/01/11, Award, ¶ 2 (Oct. 12, 2005), <http://tinyurl.com/4k8pr35>.

143. *Id.* ¶ 44.

144. *Id.* ¶ 51; *see also* Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Rep. of Para., ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 141 (May

create independent obligations beyond the other enumerated obligations within the BIT.<sup>145</sup>

From a pragmatic standpoint, the tribunal rejected the notion that the umbrella clause could refer only to other international treaties for specific investments. Not only was this not a typical practice, but those agreements would already be protected by the principle of *pacta sunt servanda*.<sup>146</sup> Looking at the exact formulation, the clause must refer to investment contracts (making it a “true” umbrella clause) because of the words “entered into,” with reference to “investments.”<sup>147</sup> Thus, the tribunal concluded, umbrella clauses did not pertain to actions solely in the exercise of a state’s sovereign powers.<sup>148</sup>

The tribunal also noted that any other interpretation would eradicate the umbrella clause’s practical content.<sup>149</sup> It stated, “While it is not the purpose of investment treaties *per se* to remedy such problems, a clause that is readily capable of being interpreted in this way and which would otherwise be deprived of practical applicability is naturally to be understood as protecting investors” with respect to investment contracts.<sup>150</sup> With an eye on traditional international law — where a contract breach does not give rise to direct international responsibility — the tribunal determined that this rule was not a peremptory norm, and that parties had the right to freely negotiate out of such a limitation.<sup>151</sup> In general, “internationalizing” the contract did not pose a problem for the tribunal, which felt bound “to give useful effect to the provision.”<sup>152</sup>

Nevertheless, the tribunal noted its duty to interpret specific terms of the umbrella clause strictly and to require a clear intention of the parties to contract out of international law.<sup>153</sup> In fact, the tribunal attributed the split among other tribunals to differences in formulations of umbrella clauses among BITs.<sup>154</sup> In that vein, the *Noble Ventures* tribunal considered the umbrella clause at issue to be more “general and straightforward” than the umbrella clause in *SGS v. Philippines*.<sup>155</sup>

---

29, 2009), <http://tinyurl.com/63lw97e> (giving weight to the umbrella clause’s location among other substantive treaty provisions).

145. *Noble Ventures*, Award, ¶ 51.

146. *Id.*

147. *Id.* The umbrella clause read, “Each Party shall observe any obligation it may have entered into with regard to investments.” *Id.* ¶ 32.

148. *See id.* ¶ 51.

149. *Id.* ¶ 52.

150. *Id.*

151. *See id.* ¶¶ 53–54.

152. *Id.* ¶ 54.

153. *Id.* ¶¶ 55–56.

154. *Id.* ¶ 56.

155. *Id.* ¶ 60. *Compare id.* ¶ 32 (“Each Party shall observe any obligation it may have entered

Holding that, under the facts of the case, the umbrella clause allowed the elevation of breaches of contract to breaches of the BIT,<sup>156</sup> the tribunal nevertheless declined to determine whether the umbrella clause elevated *any* breach of *any* contractual obligation as determined by domestic law or whether the phrase “any obligation” should be limited based on the “nature and objects” of the BIT.<sup>157</sup>

#### 4. BIVAC v. Paraguay

In a final case concerning the pre-shipment inspection of goods, the tribunal in *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay* closely and conscientiously tracked *SGS v. Philippines*.<sup>158</sup> The dispute centered on a number of unpaid invoices stemming from a contract between a Dutch company and the Paraguayan Ministry of Finance.<sup>159</sup> While BIVAC asserted the full legitimacy of the Netherlands-Paraguay BIT’s umbrella clause “as a provision which incorporates the obligations of the Contract into the BIT,”<sup>160</sup> the government adopted inconsistent positions as the dispute progressed. Initially, Paraguay attempted to classify the agreement as an administrative contract governed by domestic administrative law and thus inappropriate for resolution under the rules of private law.<sup>161</sup> However, Paraguay later switched to the contention that the umbrella clause had not been intended to protect investors involved in “ordinary private party” disputes such as this, but rather those disputes involving the exercise of the state’s sovereign powers.<sup>162</sup> Paraguay then characterized this as a domestic commercial contract, unsuitable for resolution the international arena.

The tribunal disagreed with this approach. After stating that the umbrella clause “establishes an international obligation for the parties to the BIT to observe contractual obligation [sic] with respect to

---

into with regard to investments.”), with *SGS Société Générale de Surveillance S.A. v. Rep. of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 115 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005) (“Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.”).

156. *Noble Ventures*, Award, ¶ 62.

157. *Id.* ¶ 61.

158. *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Rep. of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 58 (May 29, 2009), <http://tinyurl.com/631w97e>.

159. *Id.* ¶¶ 7, 9.

160. *Id.* ¶ 129. The Netherlands-Paraguay BIT’s umbrella clause reads, “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party.” *Id.* ¶ 128.

161. *Id.* ¶ 130.

162. *Id.* ¶ 131.

investors,” the tribunal observed the broad language of the umbrella clause, contending:

The words “any obligation” are all encompassing. They are not limited to international obligations, or non-contractual obligations, so that they appear without apparent limitation with respect to commitments that impose legal obligations. On a plain meaning they are undoubtedly capable of being read to include a contractual arrangement entered into by BIVAC and the Ministry of Finance of Paraguay, whereby the alleged breaches of the Ministry are attributable to the State.<sup>163</sup>

Next, the tribunal noted the placement of the umbrella clause with other significant provisions of the BIT.<sup>164</sup> Additionally, the tribunal felt obligated to interpret the umbrella clause “in such a way as to give it some meaning and practical effect” instead of functionally depriving it of any use.<sup>165</sup> Having made these observations, the tribunal concluded that the BIT provided jurisdiction for any claim arising from or produced directly in relation to the parties’ contract.<sup>166</sup>

More important to the tribunal’s analysis, however, was a forum selection clause within the pre-shipment agreement. Under this clause, the courts of Asunción, Paraguay, possessed exclusive jurisdiction for “any conflict, controversy or claim” arising from or related to the agreement.<sup>167</sup> To faithfully follow the terms of the umbrella clause, the tribunal determined that it was obligated to honor the parties’ contractual choice of forum. It noted that, like the umbrella clause itself, the text in the forum selection clause was broad — broad enough “to include not only disputes relating directly to alleged breaches of the Contract but also disputes concerning acts that may be connected with the Contract which may give rise to claims under other instruments, including the BIT.”<sup>168</sup>

---

163. *Id.* ¶ 141; *see also* *SGS Société Générale de Surveillance S.A. v. Rep. of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 115 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005) (“The term ‘any obligation’ is capable of applying to obligations arising under national law, e.g. those arising from a contract.”). *But see* *El Paso Energy Int’l Co. v. Argentine Rep.*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 76 (Apr. 27, 2006), 21 ICSID Rev. 488 (2006) (contending that the *SGS v. Philippines* interpretation renders the BIT useless).

164. *BIVAC*, Objections to Jurisdiction, ¶ 141.

165. *Id.*; *see also* *Eureka B.V. v. Republic of Pol.*, ICSID, Partial Award, ¶ 248 (Aug. 19, 2005), 12 ICSID Rep. 335 (2007) (“[E]ach and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law . . . that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.”).

166. *BIVAC*, Objections to Jurisdiction, ¶ 142.

167. *Id.* ¶ 144.

168. *Id.* ¶ 145.

As a result, BIVAC attempted to contort the meaning of the umbrella clause to avoid losing ICSID jurisdiction. The company contended that the tribunal's jurisdiction was not based upon breach of the contract *per se*, but rather because of the umbrella clause created a separate, general treaty obligation under which contractual breaches were subsumed.<sup>169</sup> Any jurisdiction was premised upon the treaty, and not the contract itself.

But the tribunal disagreed, equating this method to “picking and choosing” the most desirable elements of the contract.<sup>170</sup> BIVAC's interpretation was an “entirely artificial” attempt to contort the terms of the BIT.<sup>171</sup> It stated in clear terms that “[t]here is no freestanding international treaty obligation, under the BIT or anywhere else, which would allow this Tribunal to determine whether the acts of Paraguay gave rise to a violation of Article 3(4) of the BIT.”<sup>172</sup> Rather, the tribunal looked solely to the contract for guidance:

The reality is that the Tribunal would have to interpret and apply the Contract, to determine whether Paraguay was or was not in breach of its obligations thereunder . . . . If the Tribunal was to find that there was a breach of the Contract, on BIVAC's argument it would have to find also a breach of the BIT. But if the Tribunal were to find no breach of the Contract, there would be no breach of the BIT. Everything turns on the meaning and effect of the Contract. BIVAC has provided no explanation as to where in the BIT, or anywhere else in the rules of international law, the Tribunal might find the “independent standard” that might allow it to determine whether or not Article 3(4) has been breached.<sup>173</sup>

Having narrowed its focus to the contract alone, the tribunal considered the forum selection clause. Somewhat generously, the tribunal indicated a presumption that the parties should have been advised of the existence of the umbrella clause during the drafting of the contract.<sup>174</sup> As a result, they had every opportunity to draft the forum selection clause so that it would not prejudice any rights under the BIT.<sup>175</sup> In that case, the forum selection clause would be rendered null under the circumstances. But with this sort of guidance missing, the tribunal considered itself

---

169. *Id.*

170. *Id.* ¶ 148.

171. *Id.* ¶ 149.

172. *Id.*

173. *Id.*

174. *Id.* ¶ 146.

175. *Id.*

obligated to fulfill the freely negotiated wishes of the parties to avoid infringing upon their autonomy.<sup>176</sup>

Running beneath the surface in its discussion is the tribunal's justification for giving effect to the forum selection clauses. A forum selection clause offering exclusive jurisdiction to domestic courts would appear to favor the state rather than the investor. Yet, the umbrella clause imposed a requirement that the host state alone was required to honor its contractual obligations. To resolve this issue, the tribunal suggested that Paraguay had an "implicit obligation" to ensure that the courts of Asunción were equipped and willing to resolve any disputes that arose out of the contract.<sup>177</sup>

### III. THE PROPER INTERPRETATION OF UMBRELLA CLAUSES

#### A. *What is at Stake*

The jurisprudence surrounding umbrella clauses has proved inconsistent and problematic. In particular, the two SGS cases, as the progenitors of each line of decisions, only increase confusion "by adopting conflicting yet self-defeating interpretations of the umbrella clause that result in its nullification."<sup>178</sup> Ensuing tribunals have looked heavily to these decisions for guidance, whether in attempts to reconcile the two decisions or to discredit one or the other.<sup>179</sup> On the most concrete level, a minority of decisions have attributed the outcomes to the specific wording employed in the respective SGS BITs.<sup>180</sup> In all likelihood, however, the different lines of cases indicate a deeper ideological divide among the various tribunals.<sup>181</sup> Thus, before continuing, it is worth taking the time to isolate the underlying fears created by each approach toward umbrella clauses.

---

176. *Id.* ¶ 148.

177. *Id.* ¶ 147.

178. Wong, *supra* note 13, at 137; *see also BIVAC*, Objections to Jurisdiction, ¶ 138 (stating that the two decisions cannot be reconciled).

179. *See, e.g., BIVAC*, Objections to Jurisdiction, ¶¶ 151–54, 160–61; *El Paso Energy Int'l Co. v. Argentine Rep.*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶¶ 71–82 (Apr. 27, 2006), 21 ICSID Rev. 488 (2006); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, ¶¶ 124–26 (Nov. 29, 2004), 20 ICSID Rev. 148 (2005).

180. *See Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 58–60 (Oct. 12, 2005), <http://tinyurl.com/4k8pr35>; *SGS Société Générale de Surveillance S.A. v. Rep. of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 119 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

181. *See Shany*, *supra* note 109, 844–49 (pointing to a divide between "disintegrationist" and "integrationist" methodologies).

If applied to their full breadth, umbrella clauses could be implicated in numerous low-level disputes, perhaps with the potential to overwhelm the practical benefits of the international investment arbitration system. Precisely because of this perceived threat, a number of tribunals have balked at applying umbrella clauses to an appreciable extent, including those in *SGS v. Pakistan* and *El Paso v. Argentina*.<sup>182</sup> Although there are other, more legal, arguments surrounding issues of state sovereignty and lack of clarity in drafting, this practical fear appears to exist as an undercurrent to all the narrow decisions.

Admittedly, this position can probably be dismissed as “a classic floodgates argument to which standard floodgates responses may be made.”<sup>183</sup> Nevertheless, a broad universal interpretation of umbrella clauses will certainly result in an increased number of investor claims. With a lower threshold to trigger international protection, investors will certainly explore their options. Any sort of estimate on the precise extent of new claims or cases would be nearly impossible to define, but one imagines that it will not be negligible.

But the floodgates argument requires a few further, more targeted comments beyond a casual dismissal. First, it is necessary to realize that the ultimate threat is not the entire universe of investor-state contracts themselves. These contracts exist along a spectrum of value, and many claims would simply not be economical under the expensive ICSID regime. In other words, despite the number of low-level disputes granted access to international arbitration, a significant portion would not survive the costs and time required by ICSID. In addition, it cannot be forgotten that these claims exist independently of the umbrella clauses. Umbrella clauses have nothing to do with assigning liability; rather, they are jurisdictional clauses that provide for international dispute resolution.<sup>184</sup> Increased exposure would only exist because host states could no longer stifle these claims.

A better argument against a broad interpretation is that it is unclear how adaptable the ICSID system may be to increased availability. While ICSID’s role has been significant over the past few decades,<sup>185</sup> its docket remains in the hundreds, which is manageable given the typical lifespan of disputes.<sup>186</sup> If claims double or mount into quadruple digits,

---

182. See *El Paso Energy*, Decision on Jurisdiction, ¶ 76; *SGS Société Générale de Surveillance S.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶ 168 (Aug. 6, 2003), 8 ICSID Rep. 406 (2005).

183. Crawford, *supra* note 5, at 20.

184. Umbrella clauses may, however, have choice-of-law implications. See *infra* Part III.D.

185. See *List of Pending Cases*, *supra* note 2.

186. The average length of time to reach a final decision in ICSID arbitration is around three-and-a-half years, with an additional seventeen months if the losing party seeks an annulment. Mikita Weaver, *Creating a Better ICSID: the “New Design”*, ADR TIMES (Sept. 10, 2010),

the fundamental mechanics of the arbitration system must be ready to accommodate them.

Accordingly, it is the current convenience and desirability of ICSID arbitration itself that poses the true threat. Investors are inherently fearful of entering foreign countries that may contain a potentially biased, and often painfully slow, foreign judicial system. Given the opportunity to pursue all their high-yield basic contract claims in an ostensibly neutral arbitral forum, sophisticated companies would likely seek dispute resolution in an international forum. After a certain threshold value, contractual claims would rarely see the inside of a traditional courtroom. And as stated before, host states would be deprived of their sovereign ability to sweep problematic disputes under the rug based on the traditional requirement of state consent.

A narrow interpretation produces practical issues of its own, however. In practice, even a null interpretation of an umbrella clause does no affirmative harm to investors. Rather, it only places an investor in the same position as he would find himself in the sixty percent of all BITs that lack an umbrella clause,<sup>187</sup> and as he would find himself under traditional international law. Umbrella clauses were overlooked for five decades with no lasting damage to the international investment system. But it hardly seems productive to render bargained-for treaty terms all but useless. This nullification appears to signal an unhealthy level of power vested in individual arbitrators. Instinct tells us to assign meaning to all substantive provisions of a BIT, and umbrella clauses can hardly be considered a drafter's flourish. Thus, it is troubling that these panels are potentially ignoring the conscientious decision of sovereign nations.

Furthermore, there is a tendency to overcomplicate matters when tribunals strip the clauses of their natural meaning. When tribunals attempt to offer some substance outside contractual obligations, there is a noticeable strain in their efforts. The *SGS v. Pakistan* tribunal's effort to shoehorn an "implied affirmative commitment" to enact appropriate regulations into its construction seems much more dubious than a common-sense reading to include explicit contractual commitments. And these evasions seem just as troubling as the recognition of contractual commitments themselves. Finding a state failed to enact appropriate domestic regulations to accommodate the needs of a private foreign investor is, at the least, an interesting approach to the concept of state sovereignty.

Likewise, the split that has developed between the two camps is itself just as problematic as either interpretive extreme. Investors looking for

---

<http://tinyurl.com/4232huo>.

187. Crawford, *supra* note 5, at 18.

consistency in pursuing claims and states contemplating new BITs have been placed in a quandary. ICSID proceedings are expensive and cannot be treated lightly.<sup>188</sup> Parties need and deserve a basic conception of what claims may be worthless before undertaking a process that will ultimately consume several years and thousands of man-hours. Furthermore, investors need to understand the full scope of their BIT rights before they venture into foreign jurisdictions. At the moment, there is only minimal predictive power in the current jurisprudence. With more certain knowledge, investors can negotiate better contracts within foreign jurisdictions<sup>189</sup> and even pick and choose between different host countries based on the availability of contractual protection under an umbrella clause.

On this note, the interpretation of umbrella clauses can be seen as a byproduct of the struggle between developed and developing nations in the field of foreign investment.<sup>190</sup> BITs typically follow a basic pattern of connecting the developed world to the developing. When disputes arise, the host state will more likely than not be a developing country (with an investor from a developed country) instead of the other way around.<sup>191</sup> Because of this asymmetry in the makeup of disputes, “developing countries will seek to interpret restrictively any BIT provision that accords rights to the investor and imposes obligations on the Host state favoring investors, whereas developed countries will read the same provision expansively.”<sup>192</sup> There has been a constant tug-of-war between these two factions throughout the past fifty years in terms of clarifying the standards of international investment law.<sup>193</sup> And the umbrella clause is no stranger to this paradigm. Each decision has contributed to this power struggle, as developing countries have sought to keep contractual claims a matter for their own municipal courts, while investors from the developed world seek refuge in international tribunals. When they fail to do so, developing countries then seek to restrict the range of contracts to a narrow class of relationships with the host government, as demonstrated in *Joy Mining v. Egypt*, *El Paso v. Argentina*, and *Hamester v. Ghana*.

Finally, on a more theoretical note, an ideological divide has emerged involving the actual mechanical function of umbrella clauses once a contract is breached. A subtle distinction arises as to whether

---

188. See LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 92–96 (2004).

189. See *infra* Part III.D.

190. See Wong, *supra* note 13, at 174.

191. See *id.* at 174–75.

192. *Id.* at 175.

193. See *id.* at 176.

jurisdiction is conferred based on a freestanding treaty obligation or whether it exists through the actual breach of contract itself. The implication of this conclusion ultimately decides the standards upon which the breach is to be judged and the interplay of the contract with the underlying BIT. As a corollary to this, the power and validity of contractual forum selection clauses rests almost entirely on this mechanism. Because these clauses may possess the power to divest an ICSID tribunal of its jurisdiction, as claimed in *SGS v. Philippines* and *BIVAC v. Paraguay*, a controlled, systematic approach is necessary to ensure that the umbrella clauses receive their due respect.

### B. Intent

ICSID tribunals' treatment of party intent has proved unstable. In the beginning, the *SGS v. Pakistan* tribunal required "clear and convincing evidence" from the claimant that demonstrated the shared intent of the parties to construe the umbrella clause broadly.<sup>194</sup> The tribunal failed, however, to explain this standard, offering only that the text of the provision before them was insufficient.<sup>195</sup> This heightened scrutiny can be quickly dismissed as excessive. With this standard, "[n]ot only had the tribunal announced a new evidentiary rule for investment treaty arbitration, which was not found in the treaty itself, but the tribunal's conclusion meant that the 'umbrella clause' itself essentially became a nullity even though the two Sovereigns made the effort specifically to include the provision."<sup>196</sup> By rendering the umbrella clause useless, the tribunal undermined the foundational principle of *effet utile*, under which substantive treaty provisions should be given some, rather than no, effect.<sup>197</sup>

But this frontal attack on intent may have been an anomaly. Though it is never mentioned explicitly, one can likely attribute the early resistance to the lack of previous treatment by other tribunals. Because no tribunal had encountered an umbrella clause for nearly fifty years, a not-unnatural level of distrust developed when a company abruptly sought protection beneath one.<sup>198</sup> If umbrella clauses truly were intended to have such significant scope to protect investors, it seems suspicious that no investor had sought the protection of one for five decades.

---

194. *SGS Société Générale de Surveillance S.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶ 167 (Aug. 6, 2003), 8 ICSID Rep. 406 (2005).

195. *See id.*

196. Franck, *supra* note 54, at 1572.

197. *See Crawford, supra* note 5, at 4.

198. *See SGS v. Pakistan*, Objections to Jurisdiction, ¶ 164.

Apprehension is a natural response, but examination of the development of umbrella clauses demonstrates that, from the beginning, umbrella clauses were intended to provide substantive protection for investors.<sup>199</sup> Umbrella clauses were not designed to produce a thin sliver of security, akin to a friendly reminder of the host state's other obligations under the treaty, as the tribunal indicated in *SGS v. Pakistan*.<sup>200</sup> Rather, the intent was to create a system where at least certain straightforward breaches of contract could be redressed in an international forum.<sup>201</sup> And as the contours grew clearer following the Abs-Shawcross Draft, and later the OECD Draft Convention, early commentators noted the novel and expansive nature of the clauses, deeming them a “far-reaching departure” from traditional international law.<sup>202</sup>

For those BITs drafted during this early era, one can easily justify imputing knowledge of their potential breadth to the drafters. At that time, umbrella clauses constituted a novel approach to protect investors, not boilerplate language tossed haphazardly into various BITs. And although more problematic in terms of intent, the similarity of contemporary umbrella clauses to those crafted in the 1950s and early 1960s should encourage tribunals to honor a broad interpretation. But most often, the texts should speak for themselves. For example, the use of “any obligations” is undoubtedly broad enough to suggest drafters contemplated contractual obligations.<sup>203</sup> Such expansive formulations should uniformly be construed to provide generous substantive protection.

Furthermore, it cannot be overlooked that nothing in the original development of umbrella clauses suggests a contrary, narrower interpretation. Lauterpacht's original vision was that utilizing the umbrella clause “would be reserved for particularly important issues or where the procedures under the [contract] failed.”<sup>204</sup> He did not imagine that the governments “would be directly involved in every minor dispute which might arise in connection with the [contract].”<sup>205</sup> While

---

199. See *supra* Part I.

200. See *SGS v. Pakistan*, Objections to Jurisdiction, ¶ 172 (“[Umbrella clauses can be considered to] signal an implied affirmative commitment to enact implementing rules and regulations necessary or appropriate to give effect to a contractual or statutory undertaking . . . that would otherwise be a dead letter.”).

201. See Sinclair, *supra* note 15, at 415 (quoting Lauterpacht's personal notes).

202. Schwarzenberger, *supra* note 25, at 155.

203. See Wong, *supra* note 13, at 164 (“Even assuming the meaning of ‘obligations’ or ‘commitments’ is ambiguous, prior commentary on the umbrella clause's effects and its history support the more inclusive interpretation adopted in *SGS v. Philippines*.”).

204. Sinclair, *supra* note 15, at 417.

205. *Id.* (quoting Lauterpacht, Anglo-Iranian Oil Company Ltd. Persian Settlement – Note 9 (Mar. 12, 1954)).

Lauterpacht's vision demonstrates that umbrella clauses are intended to provide significant, albeit limited, protection, following his personal construction is a different matter altogether. This original vision was purely experimental; he was actively seeking a method to circumvent traditional international law norms to aid his client, the AIOC.<sup>206</sup> Furthermore, this original clause never actually found its way into the target agreement. One cannot feel bound by the intended construction of a clause that never formally drafted. The role of Lauterpacht's creative meanderings is to suggest the initial broadening of treaty protection that was later conclusively defined under the Abs-Shawcross Draft and the OECD Draft.

Short of evidence contradicting the intent of the original formulations, a presumption of broad scope seems justified. When drafters wish to derogate from the historic purpose of umbrella clauses, this intention can be written easily into the provision.<sup>207</sup> As an example, the tribunal in *BIVAC v. Paraguay* noted approvingly the investor's proffer of a separate Dutch BIT whose terms explicitly narrowed the umbrella clause to situations where there was no domestic legal remedy.<sup>208</sup> In the future, the onus should be on drafters to specify in clear terms the nature of the departure. For now, however, tribunals have proven less likely to disregard umbrella clauses completely, and it is quite possible that futile searches for party intent are a vestige of the past.

To infer the intent of state parties, tribunals have occasionally looked to the BIT's structure for guidance. When an umbrella clause appears toward the end of a BIT, some tribunals have shown reluctance to consider its terms seriously. This was the case in *SGS v. Pakistan*, where the tribunal said that if the parties had intended the umbrella clause "to embody a substantive 'first order' standard obligation, they would logically have placed [it] among the substantive 'first order' obligations" located earlier in the document.<sup>209</sup> At least one tribunal has since backed away from this hard-line stance, noting that while some weight should be accorded to the location of the text, tribunals should

---

206. See Sinclair, *supra* note 15, at 414–18.

207. The *SGS v. Pakistan* tribunal wanted the explicit statement to work the other way — so that one would explicitly opt *in* to this broad approach. See *SGS Société Générale de Surveillance S.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶ 166 (Aug. 6, 2003), 8 ICSID Rep. 406 (2005). In other words, the tribunal placed the presumption in favor of customary international law instead of historical intent (which it did not discuss).

208. Bureau Veritas, Inspection, Valuation, Assessment and Control, *BIVAC B.V. v. Rep. of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 141 (May 29, 2009), <http://tinyurl.com/63lw97e>.

209. *SGS v. Pakistan*, Objections to Jurisdiction, ¶ 170.

proceed cautiously, given the potential for identically worded umbrella clauses to have distinct meanings among a state's BITs.<sup>210</sup>

This latter position is almost certainly correct. The text of an umbrella clause, rooted in their historical development, is far more persuasive than structural arguments. Admittedly, the *SGS v. Pakistan* tribunal did not consider location the decisive factor, but nevertheless, it accorded this element excessive weight in its analysis. The history underlying development clauses leaves little question that umbrella clauses were developed to provide substantive protection.<sup>211</sup> As a result, when tribunals consider strongly-worded umbrella clauses, this consideration of location should all but disappear from matters of intent. With only weak or aberrant formulations could this be considered marginally relevant. In these situations, location may help to clarify a clause's scope, but it should still not be used as an argument that the umbrella clause is not actually substantive. Often, it would seem that a more appropriate conclusion would be that the provision is not in reality an umbrella clause at all, but rather some other form of investment protection.

### C. *Relevant Contracts*

After the Abs-Shawcross Draft and the OECD Draft Convention incorporated umbrella clauses into their model texts,<sup>212</sup> disputes within legal academia quickly developed about the proper scope to accord these clauses.<sup>213</sup> Throughout this debate, commentators agreed that the clauses shared a wide breadth of application.<sup>214</sup> It was only the contours of this application that troubled them. But despite finding their way into numerous BITs over the years, umbrella clauses lay dormant as a matter

---

210. *See* *SGS Société Générale de Surveillance S.A. v. Rep. of the Phil.*, ICSID Case No. ARB/02/6, *Objections to Jurisdiction*, ¶ 124 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005) (“[I]t is difficult to accept that the same language in other Philippines BITs is legally operative, but that it is legally inoperative in the Swiss-Philippines BIT merely because of its location.”) (footnote omitted).

211. *See supra* Part I.

212. Before continuing, it is worth reiterating that the formulations of umbrella clauses differ among various BITs. No “true” umbrella clause exists (although many may be drafted identically), but rather a limitless number of potential formulations. Accordingly, Professor Crawford states, “There is no such thing as *the* umbrella clause; rather, there are umbrella clauses. No doubt where these are in identical or nearly identical terms they should be given the same or similar meaning; but where different language is used compared with existing standard formulas, it may be presumed that some difference in meaning was intended.” Crawford, *supra* note 5, at 4. Thus, it is necessary to generalize when discussing the clauses. For the sake of this Note, one can consider all “umbrella clauses” discussed to be clearly drafted as intending to incorporate breaches of contract beneath their protection.

213. *See* Sinclair, *supra* note 15, at 424–28.

214. *See id.*

of jurisprudence. As with matters of intent, tribunals were not afforded the opportunity to develop the appropriate scope of these clauses based upon real-life disputes. By the time *SGS v. Pakistan* commenced, the international legal community had been largely delayed.

From this vacuum, a problem has arisen concerning the distinction made by some tribunals regarding differences in the nature of investor contracts. The tribunals in *Joy Mining v. Egypt* and *El Paso v. Argentina* refused to allow ordinary “commercial” contracts to come under the protection of an umbrella clause.<sup>215</sup> More dramatically, *Joy Mining v. Egypt* demanded a “link” between the contract and the treaty before a tribunal could consider a contractual claim.<sup>216</sup> From the inception of umbrella clauses, there have been commentators who have contended that the scope *ratione materiae* would be limited to only large-scale projects in which a host nation is deliberately “exercising its sovereignty,” thus barring ordinary commercial contracts as an implied exception.<sup>217</sup> And Lauterpacht himself never intended for claims to be universally allowed.<sup>218</sup>

But these formulations are less helpful than they might appear. To be specific, looking for the exercise of state sovereignty “does not provide a reliable or even a determinate test for determining whether a tribunal has jurisdiction.”<sup>219</sup> Instead, this “calls for an appreciation of the character of or motive for the breach which . . . would require a hearing on the merits.”<sup>220</sup> In other words, it would be difficult for tribunals to know whether the umbrella clause is even applicable. It must be remembered that umbrella clauses are *jurisdictional* creations. Investigation into state sovereignty involves placing the cart before the horse. Additionally, by looking to the motives of the breach, an anomalous result would occur where “a State could defend itself against a claim for repudiation of an investment agreement by arguing that it was acting for commercial reasons.”<sup>221</sup> And often, requiring the state to be exercising its powers in accordance with its sovereign authority would be redundant in terms of violating the treaty. For example, if a

---

215. See *El Paso Energy Int’l Co. v. Argentine Rep.*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006), 21 ICSID Rev. 488 (2006); *Joy Mining Mach., Ltd. v. Arab Rep. of Egypt*, ICSID Case No. ARB/03/11, Award (Aug. 6, 2004), 19 ICSID Rev. 486 (2004).

216. *Joy Mining*, Award, ¶ 81.

217. Sinclair, *supra* note 15, at 428 (quoting C.N. Brower, *The Future for Foreign Investment—Recent Developments in the International Law of Expropriation and Compensation*, in PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1975 95 (V.S. Cameron ed., 1976)).

218. See *supra* note 204 and accompanying text.

219. Crawford, *supra* note 5, at 19.

220. *Id.*

221. *Id.*

BIT contains a provision forbidding expropriation, any investor-state contracts would already be implicated following an expropriation.

Furthermore, to require a “link” *between the contract and the treaty* (as did the tribunal in *Joy Mining*) is to overlook the umbrella clause entirely. Traditional international law dictates that a breach of contract, in and of itself, does not give rise to international liability.<sup>222</sup> But to demand that the breach of contract itself violate other treaty protections before receiving consideration is a mere restatement of the definition of a breach of the treaty. Any investigation into the umbrella clause is pointless and deprives it of any power. Moreover, umbrella clauses are formulated very specifically so that they often refer to the observance of obligations entered into *with regard to investments* (or something similar). They do not demand the observance of obligations entered into *with regard to other treaty provisions*, which is the redundant gloss that these tribunals create.<sup>223</sup>

Thus, the only question is how “distant” a contract can be from the underlying investment. Despite what tribunals have contended, commercial breach can rise to the level necessary to implicate the umbrella clause. The commentary to the OECD Draft proves helpful in this respect. Although the commentary placed similar explicit limitations on the scope of its umbrella clause, it proves instructive to future parties. Under its conception, “incidental” links between the undertaking and the underlying property would be insufficient to trigger the clause; instead, the two must relate.<sup>224</sup> Establishing this effective link could be accomplished in two ways: (1) through the form or specific terms of the undertaking that identify the property (i.e., investment) or the recipient of the undertaking; or (2) when it could be “proved or presumed” that the investor “acted in reliance,” even if the undertaking is expressed generally.<sup>225</sup>

Thus, there needs to be a natural relation between the *underlying investment* and the disputed contract between the state and the investor. For example, if the foreign government induces an investor to enter its territory, and the relationship with the state is a vital component on which the investor relied, this would connect even a purely commercial contract to the investment to the point where the contract is considered an obligation “with respect to investment.” The construction of a plant in reliance on the promise of a lucrative government contract would be a

---

222. See BISHOP ET AL., *supra* note 9, at 1–2.

223. *Joy Mining Mach., Ltd. v. Arab Rep. of Egypt*, ICSID Case No. ARB/03/11, Award, ¶¶ 70–71, 75 (Aug. 6, 2004), 19 ICSID Rev. 486 (2004) (reviewing several umbrella clauses).

224. OECD Draft, *supra* note 31, at 14; 2 I.L.M. at 247.

225. See Sinclair, *supra* note 15, at 429 (quoting OECD Draft, *supra* note 31, at 14–15; 2 I.L.M. at 247–48).

basic scenario. However, if the state would be found not to be directly involved in the purposes behind the investment, this would be outside the scope of the umbrella clause. An example of this would involve a company that operates for several years within a host state with no commercial connection whatsoever with the government. If years later an agreement arises between the host government and the company and the host government breaches, this would not implicate the umbrella clause. That is not to say that later on, investment-related reliance could not develop. But this would require the investor to involve itself beyond its normal activities as a company.

In short, it is the element of reliance that triggers the investment and provides a functional test. There could be an initial contract that explicitly contemplates this reliance, or the situation could be more akin to estoppel. Under this formulation, actual government interference in the exercise of sovereign powers is unnecessary, though such interference could, of course, violate the obligations in and of itself. The lack of a workable test in the “exercise of state sovereignty” formulation poses too great a barrier. In contrast, a prima facie showing of reliance is easily applied and evaluated by tribunals. This necessarily implicates a far greater range of claims, but it also comports with the fundamental wording of umbrella clauses to provide a consistent and natural interpretation of the scope of such clauses.

Finally, it is worth considering the recent decision in *Hamester v. Ghana*, which involved a joint venture agreement between an investor and a public corporation established by the state.<sup>226</sup> The tribunal refused to extend the umbrella clause to an entity separate from the state, noting that the contract did not name Ghana as a party and did not include Ghana as a signatory.<sup>227</sup> Thus, under the terms of the umbrella clause, the relevant obligations were never in reality “assumed by” the state itself.<sup>228</sup> In general, Ghana was never intended to be, or implicated as, a party to the agreement.

This situation presents a distinguishable relationship from *Joy Mining v. Egypt* and *El Paso v. Argentina*. Those previous cases concerned relationships with bodies that were unquestionably arms of the host government. Because BITs are negotiated and signed by states, the respective states are responsible for only those actions directly attributable to the host government. The incorporation of an entity by

---

226. See also *Impregilo S.p.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, (Apr. 22, 2005), 12 ICSID Rep. 245 (2007) (concerning a relationship between an investor and an autonomous entity, but one closely handled by the state).

227. *Gustav F W Hamester GmbH & Co KG v. Rep. of Ghana*, ICSID Case No. ARB/07/24, Award, ¶ 347 (June 18, 2010), <http://tinyurl.com/6xf7b6f>.

228. *Id.*

the state provides a degree of separation not contemplated in these earlier cases. No matter how desirable such claims may be to investors, disputes with state-owned entities possessing separate legal personalities cannot automatically lead to ICSID jurisdiction.<sup>229</sup> Despite the goal of the ICSID to protect investors from the abuses of host governments, it is nevertheless necessary to respect the concept of corporate structure.

Such an interpretation may encourage governments to establish corporations to insulate themselves from the reach of the umbrella clause. Nonetheless, states have spun off entities with separate legal personality since long before the advent of umbrella clauses, let alone before umbrella clauses emerged as a high-profile issue.<sup>230</sup> Importantly, though, it should still be possible to reach the host government by piercing the corporate veil if the corporate structure is a sham (or through any other available rules of attribution). If the veil is pierced, and the government is shown to be the guiding hand behind the corporation's actions, the element of reliance will once again enter the picture to determine whether the umbrella clause is applicable.<sup>231</sup>

#### D. *Internationalization and Forum Selection Clauses*

A vital question is what happens to the character and content of the underlying obligations within a breached investor-state contract. In other words, should the contract be considered "internationalized" and transformed into an international instrument itself? Because the appropriate forum is such an important concern in international investment law, the discussion will focus on the role of choice-of-forum clauses in this debate. In Lauterpacht's original vision, companies were meant to have the opportunity to choose whether to pursue the dispute under the dispute settlement provisions within the contract or by utilizing the treaty so that the company's native state could pursue the claim.<sup>232</sup> Although there was early recognition that the two possible

---

229. For a discussion of instances in which the actions of state-owned entities become attributable to the state, see generally Feit, *supra* note 65.

230. See generally Francisco Flores-Macias & Aldo Masacchio, *The Return of State-Owned Enterprises*, HARV. INT'L REV. (Apr. 4, 2009), <http://tinyurl.com/3eut52v> (giving a general history of state ownership of businesses).

231. Questions may arise as to what law should be applied to determine veil-piercing because of the shaky relationship between contracts and BITs. It seems eminently logical that this is a matter of international law. If a state-owned corporation breaches a contract with an investor, no apparent violation has occurred. It is necessary first to look to international law principles to determine whether ICSID jurisdiction exists, so that the umbrella clause may *then* be applied to the contract. This is an echo of *Vivendi*, see *infra* Part III.D, dividing breaches of contract with breaches of treaty.

232. See Sinclair, *supra* note 15, at 416.

mechanisms would conflict with each other, they were conceived to be best considered “alternatives.”<sup>233</sup> This idea may continue to lurk in the background of all contract violations under umbrella clauses, but from a pragmatic standpoint, it can be easily avoided.

The *Vivendi* annulment decision, rendered shortly before *SGS v. Pakistan*, provides useful guidance.<sup>234</sup> Albeit outside the context of umbrella clauses, the *Vivendi* committee had taken the opportunity to offer a rather full discussion of the relationship between a concession contract and a BIT. Like several of the umbrella clause decisions, the relevant contract contained a forum selection clause. In this instance, however, without an umbrella clause, the claimant had been forced to weave together its contractual and treaty-based claims. Because of the forum selection clause, the tribunal had elected to send the case to the local courts.

The annulment committee began by noting that “[a] state may breach a treaty without breaching a contract, and *vice versa*.”<sup>235</sup> After referencing Article 3 of the International Law Commission Articles on State Responsibility,<sup>236</sup> it stated that “[e]ach of these claims will be determined by reference to its own proper or applicable law — in the case of the BIT, by international law; in the case of the Concession Contract, by the proper [municipal] law of the contract.”<sup>237</sup> Thus, “[i]n a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.”<sup>238</sup> But also, when “the fundamental basis of the claim” is a BIT “laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract . . . cannot operate as a bar to the application of the treaty standard.”<sup>239</sup>

From this, the committee concluded that “it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national

---

233. *Id.* at 417.

234. *Compañía de Aguas del Aconquija S.A. v. Argentine Rep.*, ICSID Case No. ARB/97/3, Annulment (July 3, 2002), 41 I.L.M. 1135 (2002).

235. *Id.* ¶ 95.

236. The article reads, “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.” Rep. of the Int’l Law Comm’n, 53d sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 73, UN Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001).

237. *Compañía de Aguas*, Annulment, ¶ 96.

238. *Id.* ¶ 98.

239. *Id.* ¶ 101. The tribunal continued by saying, “At most, it might be relevant — as municipal law will often be relevant — in assessing whether there has been a breach of the treaty.” *Id.*

court.”<sup>240</sup> Having refused to analyze contractual allegations, the tribunal had thus been in error, since that analysis was necessary to decide the treaty allegations. Although these statements may appear innately obvious, even innocuous, their implications are vital to understanding the nature of umbrella clauses. Specifically, if umbrella clauses elevate breaches of contract to be breaches of the BIT, one must pinpoint the mechanical transformation that occurs during this process.

To eliminate any conflict, contracts should be considered to undergo an instantaneous process of “internationalization” after an alleged breach. This is the inherent power of the umbrella clause. In this manner, the breached contract could be considered “appended” to the BIT, becoming part of the treaty itself. Thus, contract terms can be read alongside the existing BIT provisions. Any conflicting terms are resolved in favor of the contract, which, as the more specific instrument, takes precedence over the terms of the BIT, subject to peremptory norms of international law. Thus, after the contract is internationalized, any dispute resolution mechanism for contract claims achieves precedence over the procedures listed by the BIT, which is the approach promulgated in *SGS v. Philippines*.<sup>241</sup> Conversely, if a contract provides for no dispute settlement forum, the breach of the contract still triggers the umbrella clause, and the BIT-designated tribunal has a right to jurisdiction.

In this sense, the umbrella clause treats contracts like a sheet of cellophane with red ink laid over the text of the treaty. Additional contractual obligations fill in the blanks of the treaty, without obscuring the text. But when the two overlap, only the terms of the contract remain visible. Continuing the analogy further, the terms of the contract are nonetheless distinct and separable from the instrument beneath them, which is vital because the contract is still subject to the relevant municipal law. The purpose of this method is to respect the freely negotiated agreements of both investors and host states. Drafters design BITs with an eye to protecting the rights of investors. Yet, if these same investors are willing to sacrifice their rights for some perceived future benefit, they should be free to bargain accordingly. This honors basic concepts of party autonomy and the principle of *pacta sunt servanda*. States may be able to elude some of their commitments within the BIT in return for a profitable offer to investors. In this manner, market forces would be allowed to do their work.

---

240. *Id.* ¶ 102.

241. *SGS Société Générale de Surveillance S.A. v. Rep. of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 134 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

Several arguments have been made against this view. First of all, “a BIT violation arising under the umbrella clause is no less redressible under the BIT for being defined by reference to the contract . . . .”<sup>242</sup> This view stems from the opposing perception that all breaches of contract under the umbrella clause should be construed purely as BIT violations.<sup>243</sup> Unlike in *Vivendi*, where breaches of contract and breaches of the BIT result in separate lines of inquiry, this view treats the umbrella clause as a vacuum, sucking the contract inside the treaty itself and allowing the pro-government contract provisions to tumble back out. Any forum selection clause within a contract is brushed aside during a tribunal’s inquiry. From there, violation of the treaty is merely determined by reference to the contract. Generally speaking, it is a subsuming, rather than complementary, process.

The problem with this argument is that it is too one-sided. There must be a mechanism to hold investors to their freely negotiated commitments. At this point, the only contested procedural issues have involved forum selection clauses, but that does not mean that the application of this principle would be confined to this type of agreement. In theory, a number of basic procedural issues that arise before the proceedings would be jeopardized. For instance, in the absence of a forum selection clause, the parties could agree to select arbitrators by a certain method. But under this interpretation of umbrella clauses, the investor could renege, while the host state remained bound to its obligation.

Furthermore, in the long run, this potentially provides less flexibility for investors to negotiate. Investors may want to negotiate more lucrative contracts by forfeiting the availability of ICSID tribunals. This fits into the developed versus developing country paradigm neatly. Developing and unstable nations have a greater need for investors and are more likely to capitulate to investor demands for ICSID availability. In more stable countries, the domestic legal system will likely be less volatile, thus posing less of a threat to the investor. In turn, the host state will likely have a less desperate need for the investor, so it can make more modest offers in its contracts. An investor can safely sacrifice ICSID availability in order to increase the profitability of the contract, because the driving force behind the availability of the tribunal — investor need — is diminished.

A stronger argument against full-scale internationalization is that “the conflict between BIT provisions and the forum selection clause in the contract arises from an ambiguity that should be resolved against the

---

242. Wong, *supra* note 13, at 173.

243. *Id.* at 170.

State, who alone is party to both the BIT and the contract.”<sup>244</sup> Under this view, because the state has made conflicting obligations, it should be forced to suffer the interpretative consequences.<sup>245</sup> Specifically, “[i]t is entirely open to States to introduce language in their BITs limiting the effect umbrella clauses . . . have on contracts containing a forum selection clause.”<sup>246</sup> The same sort of limiting language could be drafted to cover contracts predating the BIT.<sup>247</sup>

Somewhat perplexingly, one commentator has further argued that “in the case of investment contracts entered into after the BIT was concluded, the State could have inserted language in those contracts excluding the application of any relevant BIT to such contracts.”<sup>248</sup> This last statement makes little sense in that it implies that a contract could exclude the protection of the entire BIT, allowing the contract to override all of the treaty’s provisions, but the state cannot solely override the ICSID jurisdictional provision as a forum for a single class of claims.

There is a point to be made for encouraging states to draft clearer BITs, and in the future, one can expect that states will begin to treat umbrella clauses more carefully. Nevertheless, the argument that states cannot override their previous commitments (with investor consent) cannot withstand close inspection. Outside arguments for party autonomy, it must be noted that the assumption of jurisdiction by a tribunal is not only permitting a breach of a freely negotiated contract, but actively contributing to it. Of course, the reverse argument may be made: By honoring a forum selection clause, the tribunal is contributing to the breach of a treaty obligation. There is a difference, however, in that the forum selection clause exists purely under municipal law. Meanwhile, treaty clauses offering ICSID jurisdiction exist within the realm of international law. Furthermore, the tribunal itself is assembled under international law. At the jurisdictional phase, there is only an allegation of some breach of municipal law, with no formal decision on the merits. Thus, one must ask whether it is really the province of an international tribunal to create a separate, explicit breach of municipal law by humoring each investor who files a contractual complaint with ICSID jurisdiction. This seems to be implicitly intrusive.

At this point, it is worth reiterating that the discussion has specified that although the contract is internationalized, the contractual terms remain governed by municipal law. This may appear to be a matter of

---

244. *Id.* at 173.

245. *Id.* at 172.

246. *Id.* at 171.

247. *Id.*

248. Wong, *supra* note 13, 171–72.

semantics, but the importance of this distinction is clarified by observing the tribunal's maneuvering in *BIVAC v. Paraguay*. Although it was not vital to the holding, the tribunal encountered difficulty justifying the application of the parties' forum selection clause.<sup>249</sup> Because the umbrella clause required the observance of obligations by the host states, *but not the investors*, the tribunal was forced to turn the forum selection clause on its head. Although the purpose of ICSID arbitration is to allow investors to pursue claims in a neutral forum, the tribunal claimed that a forum selection clause specifying the courts of the host state can be considered an obligation undertaken by the state, not the investor.<sup>250</sup>

This immediately rings false. The tribunal contorts this term to be an "implicit" obligation of the host state within the contract to ensure that its national courts were adequate and available to the disgruntled investor. In reality, this weak sense of obligation is inherent within any agreement. The obvious truth is that the forum selection clause was negotiated to favor the host state, not the investor — the obligation is the investor's, not the state's. Otherwise, the implication is that an investor who wished to pursue his contractual claims in national court would bypass those very courts in order to apply to ICSID so that he could be swiftly returned based on the forum selection clause. The court's interpretation can only be understood as an application of the concept of good faith and fair dealing within contracts. In other words, parties must permit each other to fulfill their respective obligations without interference. In short, the tribunal's argument is strained and unpersuasive.

Furthermore, there is an issue whether this "implicit obligation" is even relevant. Tribunals should only consider breaches of contract under the relevant municipal law, and this sort of obligation may not exist under the host state's law. Rather, it may require application of general international law towards the contract, which would contravene the accepted reasoning of *Vivendi*, or it would require framing the violation of good faith as a violation of the BIT, which would also take this out of the scope of the umbrella clause. Thus, difficulty arises when the phrase "any obligations" is interpreted to mean specific contractual terms. The better way to interpret the phrase is as from a broader perspective, where an "obligation" under the umbrella clause is rather a general nexus of lesser, constituent obligations to create the discrete whole. Under this view, the breach of the contract (the discrete whole)

---

249. Bureau Veritas, Inspection, Valuation, Assessment and Control, *BIVAC B.V. v. Rep. of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶¶ 128–61 (May 29, 2009), <http://tinyurl.com/63lw97e>.

250. *Id.* ¶ 141.

would result in the internationalization of the contract. After the contract was appended to the BIT, its terms (which involve the resolution of municipal law disputes) would be considered preemptory upon any sort of discrepancy. Thus, the forum selection clause would “knock out” the ICSID jurisdiction over contract claims provided by the umbrella clause.

At the moment, the applicability of contractual forum selection clauses remains unresolved. Among the tribunals, the current trend seems to gravitate toward honoring the parties’ contractual commitments. Both tribunals in *SGS v. Philippines* and *BIVAC v. Paraguay* allowed the host governments to utilize these clauses to avoid contractual disputes before an ICSID tribunal. There is little indication of what the future may hold as umbrella clauses become increasingly popular before ICSID tribunals.

#### CONCLUSION

Within the field of international investment law, the legal status of umbrella clauses is in a state of disarray. The current jurisprudence provides little predictive power for current and future investors concerning the redress of contractual breaches. Because of the significant number of BITs possessing umbrella clauses, discovering a workable solution would prove beneficial to numerous countries and individual investors. By looking at the history of umbrella clauses, it is clear that they are meant to represent significant protection within investment treaties. In addition, from the plain language of the clauses, they need to factor in a substantial number of breaches by host states, whether or not in exercise of sovereign powers. Finally, the violation of a relevant contract needs to be considered to “internationalize” the contract itself under the umbrella clause. In providing the contract with this privileged status, tribunals can respect terms negotiated beyond the treaty to reflect what parties believe to be a fair bargain. In that way, one protects the autonomy of both foreign investors and the countries themselves.