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XV. Umbrella Clauses

A. Introduction

15.01 As explained in the prior chapters, most investment treaties provide investors with a relatively standard set of protections, including the rights to national treatment, most-favoured-nation treatment, protection and security, fair and equitable treatment, and compensation for expropriation. (1) Some treaties provide an additional layer of protection by specifically requiring host states to observe the obligations and honour the commitments that they have undertaken vis-à-vis foreign investors or investments. Known as 'umbrella clauses', (2) these provisions appear to provide a route through which investors can seek to transform their contractual rights into treaty rights, although the interpretation and application of such clauses is one of the most controversial areas of substantive investment law.

15.02 These clauses were originally conceived in light of the generally accepted principle that a breach of a contract by a state does not necessarily amount to a breach of international law. (3) In the mid-twentieth century, when foreign investment mainly took
P 487 place through● concession contracts involving oil and gas as well as minerals, investors had little non-contractual protection against a state's failure to honour those contracts. (4) Umbrella clauses were an answer to this shortcoming; they effectively created a cause of action under international law for breach of contract, thus providing additional remedies and protections to foreign investors. One of the main rationales for this extension was to make clear that the concept of *pacta sunt servanda*, which applies to state-to-state relationships, also applies to relationships between qualifying individuals and states as well. (5)

B. Historical Background and Various Formulations of Umbrella Clauses

15.03 The history of the emergence of these clauses in investment protection instruments was succinctly explained in *Eureko v. Poland*.

> ***Eureko BV v. Republic of Poland*,**
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> **Partial Award and Dissenting Opinion, ad hoc UNCITRAL Arbitration, IIC 98, 19 Aug. 2005**
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> 251. The provenance of 'umbrella clauses' has been traced to proposals of Elihu Lauterpacht in connection with legal advice he gave in 1954 in respect of the Iranian Consortium Agreement, described in detail in an article in Arbitration International by Anthony Sinclair. (6) It found expression in Article 11 of a draft Convention on Investments Abroad ('the Abs-Shawcross Draft') of 1959, which provided: 'Each Party shall 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.' (7) It was officially espoused in Article 2 of the OECD Draft Convention on the Protection of Foreign Property of 1967, in whose preparation, Lauterpacht, as a representative of the United Kingdom, played a part. It provided that: 'Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.' (8) The commentary to the draft Convention stated that, 'Article 2 represents an application of the general principle of pacta sunt servanda—the
> P 488 maintenance of the pledged word—which● also applies to agreements between States and foreign national.' (9) Commenting on this article in his Hague Academy lectures in 1969, Professor Prosper Weil concluded that: 'The intervention of the umbrella treaty transforms contractual obligations into international obligations . . .' ('Problèmes relatifs aux contrats passés entre un état et un particulier.'). (10) The late Dr. F. A. Mann described the umbrella clause as 'a provision of particular importance in that it protects the investor against any interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act, and independently of the question whether or not such interference amounts to expropriation . . .' (11) The leading work on bilateral investment treaties states that: 'These provisions seek to ensure that each Party to the treaty will respect specific undertakings towards nationals of the other Party. The provision is of particular importance because it protects the investor's contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts . . .' (12) The United Nations Centre on Transnational Corporations, in a 1988 study on BITS, found that an umbrella clause 'makes the respect of such contracts [between the host State and the investor] ... an obligation under the treaty.' (13) These and other relevant sources are authoritatively surveyed in Christoph Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road,' (14) as well in as Stanimir A. Alexandrov, 'Breaches of Contract and Breaches of Treaty.' (15)

15.04 Umbrella clauses have been drafted in a variety of forms and may be grouped into three broad categories. The first, which is the most general, is typified by Article II(2)(c) of the Argentina–US BIT, which provides that '[e]ach Party shall observe any obligation it may have entered into with regard to investments.' (16) Second, there is the type found in agreements such as the France–Mexico BIT, which provides that '[e]ach Contracting Party shall observe any other obligation it has assumed in writing, with regard to investments in its territory by investors of the other Contracting Party.' (17) Article 2 of the UK Model BIT provides in relevant part that '[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.' (18) Third, the US Model BITs of 2004 and 2012, unlike the US Model BIT
P 489 of 1992, limit the protection for contracts● to claims arising out of a breach of an 'investment agreement'. (19) A substantial proportion of investment treaties have no umbrella clause. NAFTA Chapter 11 is one example. (20) It should be noted that in recent years, states have moved away from the inclusion of umbrella clauses in investment treaties. (21) According to UNCTAD, of the seventy-five international investment agreements signed in 2016–18, the vast majority had no such clause. (22)

C. Arbitral Decisions Involving Umbrella Clauses

15.05 As a consequence of these clauses, and instead of relying on specific contractual agreements and remedies, investors have sought to bring their contractual claims within the ambit of bilateral and multilateral investment treaties. The response of arbitral tribunals to such claims has been remarkably mixed; indeed, the proper interpretation of umbrella clauses is one of the most contentious issues in international investment law. As the tribunal in *BIVAC BV v. Paraguay* noted: 'there is no *jurisprudence constante* on the effect of umbrella clauses'. (23)

15.06 Three broad approaches have emerged in relation to umbrella clause claims. The first views such clauses restrictively, limiting their application to, perhaps, sovereign acts, and refusing to extend treaty protection to 'mere' contractual breaches. The second accepts in principle the invocation of an umbrella clause in cases of contractual breach, but considers that arbitral proceedings should be stayed pending a decision from the contractual forum (normally a domestic court or tribunal) adjudicating the allegations of contract breach. The third camp insists that umbrella clauses 'mean what they say', elevating contractual breaches into treaty breaches and providing redress via the
P 490 umbrella clause. The tribunal in *Eureko* summarized these approaches:●

Eureko BV v. Republic of Poland

Partial Award and Dissenting Opinion, ad hoc UNCITRAL Arbitration, IIC 98, 19 Aug. 2005

(4) Art. 3.5—The Umbrella Clause

244. Article 3.5 of the Treaty provides that each Contracting Party 'shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.' (A clause of such substance is often called 'the umbrella clause.') Thus, insofar as the Government of Poland has entered into obligations vis-a-vis Eureko with regard to the latter's investments, and insofar as the Tribunal has found that the Respondent has acted in breach of those obligations, it stands, prima facie, in violation of Article 3.5 of the Treaty.

245. The Tribunal has found that Respondent bound itself, by the combined effect of the terms of the [Share Purchase Agreement (SPA)] and its First Addendum [, which were entered into between Eureko B.V., a Dutch company, and Big Bank Gdanski S.A., on one hand, and Polish Treasury, on the other], to conduct an IPO that would afford Eureko the facility of gaining control of PZU, [a Polish company] and that it deliberately violated that obligation. It has found that obligation pertains to an investment of Eureko. The question accordingly arises, quite apart from the Government of Poland being in breach of Articles 3.1 and 5 of the Treaty on the grounds stated above, is it in further breach of Article 3.5? In the view of the Tribunal, the answer to that question must be in the affirmative, for the reasons that follow.

246. The plain meaning—the 'ordinary meaning'—of a provision prescribing that a State 'shall observe any obligations it may have entered into' with regard to certain foreign investments is not obscure. The phrase, 'shall observe' is imperative and categorical. 'Any' obligations is capacious; it means not only obligations of a certain type, but 'any'—that is to say, all—obligations entered into with regard to investments of investors of the other Contracting Party.

247. This Tribunal is interpreting and applying a Treaty, a bilateral investment treaty, one of more than two thousand such treaties. In so doing, as stated earlier in this Award, it applies public international law. The authoritative codification of the law of treaties is the Vienna Convention on the Law of Treaties, a treaty in force among the very great majority of the States of the world community. Article 31, paragraph 1, of that Convention provides that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

248. The ordinary meaning of Article 3.5 has been set out in paragraph 244 above. The context of Article 3.5 is a Treaty whose object and purpose is 'the encouragement and reciprocal protection of investment,' a treaty which contains specific provisions designed to accomplish that end, of which Article 3.5 is one. It is a cardinal rule of the interpretation of treaties that each and
P 491 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, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.

249. It follows that the effect of Article 3.5 in this proceeding cannot be overlooked, or [folded into] the Treaty's provisions for fair and equitable treatment, national treatment, most-favored-nation treatment, deprivation of investments, and full protection and security. On the contrary, Article 3.5 must be interpreted to mean something in itself.

250. The immediate, operative effects of Article 3.5 are two. The first is that Eureko's contractual arrangements with the Government of Poland are subject to the jurisdiction of the Tribunal, a conclusion that reinforces the jurisdictional conclusions earlier reached in this Award. The second is that breaches by Poland of its obligations under the SPA and its First Addendum, as read together, that are not breaches of Articles 3.1 and 5 of the Treaty nevertheless may be breaches of Article 3.5 of the Treaty, since they transgress Poland's Treaty commitment to 'observe any obligations it may have entered into' with regard to Eureko's investments.

. . .

252. There have been only a few cases that treat the umbrella clause. The earliest appears to be *Fedax v. The Republic of Venezuela*. (24) The Respondent had failed to honor promissory notes issued by the Government of Venezuela. The bilateral investment treaty—the Agreement between the Netherlands and Venezuela provided . . . that: 'Each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals of the other Contracting Party.' The Tribunal found that the non-payment of the contractual obligation to pay amounted to a violation of the BIT. The Tribunal held: '. . . the Republic of Venezuela is under the obligation to honor precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Agreement, as well as to honor the specific payments established in the promissory notes issued, and the Tribunal so finds. ...'

253. In *SGS Société Générale de Surveillance S.A. vs. Islamic Republic of Pakistan*, (25) the Tribunal passed upon the meaning of an umbrella clause that provided, in Article 11 of the BIT: 'Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of investors of the other Contracting Party.' The Claimant maintained that that clause 'had the effect of elevating a simple breach of contract claim to a treaty claim under international law.' (Para. 98.) The
P 492 Tribunal held to the contrary, principally on the following● grounds: (a) the text of Article 11 is not limited to contractual commitments. If the Claimant's position were to be accepted, the meaning of Article 11 'appears susceptible of almost indefinite expansion' (Para. 166). (b) The legal consequences that the Claimant attributes to Article 11 'are 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,' that clear and convincing evidence must be adduced by the Claimant that such was the shared intent of the Contracting Parties to the BIT (Para. 167). No such evidence had been introduced. (c) Acceptance of the Claimant's reading would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments (Para. 168). (d) It would also tend to make the substantive protections of the BIT 'substantially superfluous' (ibid). There would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract would suffice to constitute a treaty violation. (e) Such acceptance would also enable an investor at will to nullify any freely negotiated dispute settlement clause in a State contract (ibid.) (f) Article 11 was located not among the substantive obligations of the BIT ('fair and equitable treatment' etc.) but at the end of the Treaty, before its final provisions. (g) In respect of the expansive interpretation of the Claimant of the obligations of the State, the approach rather should prudentially be in dubio mitius (Para. 171). The Tribunal acknowledged that Switzerland and Pakistan could have agreed that breaches of each State's contracts with investors of the other State shall be treated as breaches of the BIT, but it concluded that evidence of such agreement—which Pakistan denied—had not been submitted (Para. 173).

254. In a letter to ICSID of October 1, 2003, the Swiss Government stated that it was 'alarmed about the very narrow interpretation given to the meaning of [the umbrella clause] by the Tribunal, which not only runs counter to the

intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITS concluded by other countries nor by academic comments on such provisions.'

255. *In SGS Société Générale de Surveillance S.A. vs. Republic of the Philippines*, a subsequent Tribunal took a decidedly different approach. It interpreted a BIT provision, Article X(2), reading: '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.' It observed that that provision 'uses the mandatory term 'shall' in the same way as substantive' articles of the treaty. It held that the term 'any obligation' is capable of applying to obligations arising under national law, e.g., those arising from a contract. 'Interpreting the actual text of Article X(2), it would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation that it has assumed, or will in the future assume, with regard to specific investments covered by the BIT.' It added that that article was adopted within the framework of the BIT, 'and has to be construed as intended to be effective within that framework.' It continued: 'The object and purpose of the BIT
P 493 supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments . . . It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.' It added, '. . . if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they areincorporated and brought within the framework of the BIT by Article X(2).' (26) (Paras. 115–118.)

256. This [*SGS v. Phillippines*] Tribunal's conclusion that 'Article X(2) means what it says,' the Tribunal acknowledged, 'is however contradicted by the decision of the Tribunal in *SGS v. Pakistan*.' The Tribunal proceeded to consider, and trenchantly criticize, the essential reasoning of that latter Award. It held that this umbrella clause was not susceptible of almost indefinite expansion, because to be applicable the State must have assumed a legal obligation vis-a-vis the specific investment. 'This is very far from elevating to the international level all the municipal legislative or administrative or other unilateral measures of a Contracting Party.' It further held that the question is not determined by a presumption against a broad interpretation of an umbrella clause. An umbrella clause need not be interpreted to override dispute settlement clauses of particular contracts. The Tribunal gave some weight to the location of the umbrella clause apart from the substantive articles of the BIT but that was not decisive. 'Not only are the reasons given by the Tribunal in *SGS v. Pakistan* unconvincing: the Tribunal failed to give any clear meaning to the “umbrella clause.” ' It went on to hold that the Tribunal in *SGS v. Pakistan* found that a broad interpretation of the umbrella clause would convert investment contracts into treaties, but that that is not what the clause says. 'It does not convert questions of contract law into questions of treaty law.' It 'addresses not the scope of the commitments entered into with regard to specific investments but the performance of these obligations, once they are ascertained.' '. . . Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law.' (Paras. 121–128.)

257. This Tribunal finds the foregoing analysis of the Tribunal in *SGS v. the Republic of the Philippines*, a Tribunal which had among its distinguished members Professor Crawford, cogent and convincing. While having the greatest respect for the distinguished members of the Tribunal in *SGS v. the Islamic Republic of Pakistan*, it is constrained to say that it finds its analysis of the umbrella clause less convincing.

258. The Tribunal adds to the considerations advanced in the Philippines Award its conclusion that to give effect to the plain meaning of an umbrella clause by no means renders the other substantive protections of a BIT superfluous. As Professor Schreuer points out in his cited article, 'The BIT's substantive provisions deal with non-discrimination, fair and equitable
P 494 treatment, national treatment, MFN treatment, free transfer of payments and protection from expropriation. These issues are not normally covered in contracts.' (At p. 253.) This Tribunal feels bound to add that reliance by the Tribunal in *SGS v. Pakistan* on the maxim *in dubio mitius* so as effectively to presume that sovereign rights override the rights of a foreign investor could be seen as a reversion to a doctrine that has been displaced by contemporary customary international law, particularly as that law has been reshaped by the conclusion of more than 2000 essentially concordant bilateral investment treaties.

259. Moreover, insofar as the placement of the umbrella clause in the BIT—among the substantive obligations or with the final clauses—is of any significance (in this Tribunal's view, little), it should be noted that Article 3.5 of the BIT between the Netherlands and Poland places its umbrella clause

amidst the rendering of the Parties' substantive obligations.

260. In view of the foregoing analysis, the Tribunal concludes that the actions and inactions of the Government of Poland that are in breach of Poland's obligations under the Treaty—those that have been held to be unfair and inequitable and expropriatory in effect—also are in breach of its commitment under Article 3.5 of the Treaty to 'observe any obligations it may have entered into with regards to investments of investors' of the Netherlands.

15.07 The differing approaches embodied in the *SGS (Pakistan), SGS (Philippines)*, and *Eureko* decisions have framed the general debate on umbrella clauses. The issues that determine how an umbrella clause will be interpreted include: textual interpretation, negotiating history of the contracting states' intent, practical consequences, context and interplay with other substantive protections, and competing dispute resolution procedures. These elements have been applied to reach varying results in different cases.

15.08 The tribunal in *El Paso v. Argentina* aligned itself with the restrictive camp, and provided a further useful summary of some of the cases on both sides:

El Paso Energy International Company v. Argentina

ICSID Case No. ARB/03/05 (Decision on Jurisdiction of 26 Apr. 2006) (27)

67. Considering that the Claimant's case comprises some claims which concern breaches of purported contractual relationships between the foreign investor and the Respondent—whose existence will be determined at the merits level—the question for the Tribunal is whether Article II(2)(c) of the U.S.–Argentina BIT is an umbrella clause whose effect would be, according to the Claimants, to transform all contractual undertakings into international law obligations and, accordingly, to turn breaches of the slightest such obligations by the Respondent into breaches of the BIT.

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70. This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow. It is bearing this in mind that the Tribunal will deal with the controversial question of the so-called 'umbrella clause,' which is still not moot: as stated recently by Emmanuel Gaillard, '[t]his question has divided practitioners and legal commentators and remains unsettled in the international arbitral case law,' (New York Law Journal, Thursday, 6 October 2005). The question is whether, through an 'umbrella clause,' sometimes also called an 'observance-of-undertakings clause,' in a BIT, contractual claims of an investor having a contract either with the State or with an autonomous entity are automatically and ipso jure 'transformed' into treaty claims benefiting from the dispute settlement mechanism provided for in the BIT. There is an ongoing debate on that question, as divergent positions have been adopted by different ICSID tribunals. Umbrella clauses are not always drafted in the same manner, and some decisions insist on the variations in the drafting to explain different analyses. This Tribunal is not convinced that the clauses analysed so far really should receive different interpretations. The broadest clauses read like that contained in the relevant clause of Article II(2)(c) in the U.S. Argentina BIT, which provides that:

> 'Each Party shall observe any obligation it may have entered into with regard to investments.'

71. The first tribunal to be faced with the interpretation of such clause on the availability of international arbitration based on a BIT for purely contractual claims was the Tribunal, presided by Judge Feliciano, in *SGS v. Pakistan* . . . The Tribunal did not consider, as is well known, that this clause 'elevates' all contract claims stemming from a contract with the State to the level of claims for a breach of the Treaty, in other words that it transforms any contract claim into a treaty claim. The arguments put forward by the Tribunal are, in the view of this Tribunal, more than conclusive. These arguments can be summarised in the following manner.

72. Firstly, Article 11 refers to commitments in general, not only to contractual commitments. Therefore, if one considers that it elevates contract claims to the status of treaty claims, it should result as an unavoidable consequence that all claims based on any commitment in legislative or administrative or other unilateral acts of the State or one of its entities or subdivisions are to be considered as treaty claims . . .

73. Secondly, and consequently, if any violation of any commitment of the State is a violation of the Treaty, this renders useless all substantive standards of protection of the Treaty . . .

74. A last point to be made, however, which brings some nuances to its findings in the *SGS v. Pakistan* case, is that the Tribunal does not exclude the

possibility that States decide to consider, in a BIT, that the slightest violation of a contract between a State and a foreign investor amounts to a violation of the Treaty, but then this has to be stated● clearly and unambiguously . . . This general reasoning is quite convincing, keeping in mind that the words 'contract' or 'contractual obligations' do not even appear in the so-called umbrella clause.

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75. As is also well known, this analysis was strongly criticised by another ICSID Tribunal, presided by Dr. El-Kosheri, in a similar case, *SGS v. Philippines*, in its 2004 Decision on Jurisdiction (above, § 69), in which it had to deal with an 'umbrella clause' embodied in Article X(2) of the BIT:

> '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.'

Here too, it seems useful to this Tribunal to summarise the main steps of the reasoning followed. First, the Tribunal in *SGS v. Philippines* indeed considered that this general provision transformed any contractual obligation of the State into a treaty obligation:

> 'It uses the mandatory term "shall" in the same way as substantive Articles III-VI. The term "any obligation" is capable of applying to obligations arising under national law, e.g., those arising from a contract . . . Interpreting the actual text of Article X(2), it would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT (Decision, § 115, emphasis by this Tribunal).'

Second, after having underscored the difference in the language of the umbrella clauses in *SGS v. Pakistan* and *SGS v. Philippines*, the Tribunal criticised the reasoning of its predecessor and mainly emphasised that if it does not elevate the contract claims, into treaty claims the umbrella clause has no real far-reaching meaning.

76. This Tribunal should like to stress, on the contrary, that the interpretation given in *SGS v. Philippines* does not only deprive one single provision of far-reaching consequences but renders the whole Treaty completely useless: indeed, if this interpretation were to be followed—the 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, whatever the source of the obligation and whatever the seriousness of the breach—it would be sufficient to include a so-called 'umbrella clause' and a dispute settlement mechanism, and no other articles setting standards for the protection of foreign investments in any BIT. If any violation of any legal obligation of a State is ipso facto a violation of the treaty, then that violation need not amount to a violation of the high standards of the treaty of 'fair and equitable treatment' or 'full protection and security.' Apart from this general and very important remark, the Tribunal also wishes to point to the fact that quite contradictory conclusions have been drawn by the Tribunal in *SGS v. Philippines*: among other things, the Tribunal stated that, although the umbrella clause transforms the contract claims into treaty claims, first 'it does not convert the issue of the extent or content of such obligations into an issue of international law' (Decision, § 128, original emphasis), which means that the 'contract claims/treaty claims' should be assessed according to the national law of the contract● and not the treaty standards, and, second, that the umbrella clause does not 'override specific and exclusive dispute settlement arrangements made in the investment contract itself' (Decision, § 134), which explains that the Tribunal has suspended its proceedings until the 'contract claims/treaty claims would be decided by the national courts in accordance with the dispute settlement provisions of the contract,' stating that 'the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively'(Decision, § 155). In other words, the Tribunal asserts that a treaty claim should not be analysed according to treaty standards, which seems quite strange, and that it has jurisdiction over the contract claims/treaty claims, but at the same time that it does not really have such jurisdiction—until the contract claims are decided. This controversy has been going on ever since these two contradictory decisions.

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77. Some have adopted the *SGS v. Philippines* position but not drawn the same consequences from it. [I]n *Eureko B. V. v. Poland* (Partial Award of 19 August, 2005), [for example,] the Tribunal, presided by Mr. Yves Fortier, accepted the idea that, as a result of the umbrella clause in the BIT—Article 3(5) of the BIT provided that '[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investors of the other Contracting Party'—the smallest obligation of a State with regard to investments was protected by the BIT and could give rise to an ICSID obligation. This decision was, however, accompanied by a strong dissent of the arbitrator Rajski, who emphasised the

systemic consequences a broad interpretation of so-called 'umbrella clauses.' . . .

In *Noble Ventures Inc. v. Romania* (above, § 69), the Tribunal, presided by Professor Bockstiegel, followed the same line of reasoning [as Eureko], stating quite generally that '[a]n umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law' (Award, § 53). The Tribunal, while it considered the umbrella clause as an exception to the 'well established rule of general international law that in normal circumstances per se a breach of a contract by the State does not give rise to direct international responsibility on the part of the State,' certainly did not interpret that exception restrictively, as exceptions should be interpreted, although it mentioned the necessity theoretically to adopt such an interpretation when it stated: 'as with any other exception to established general rules of law the identification of a provision as an umbrella clause can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms' (Decision, § 55). In the words used by the Tribunal in *Noble Ventures Inc. v. Romania*, the breach of a contract being assimilated by the umbrella clause to a breach of the BIT, is thus 'internationalized' (Decision, § 54). Again, the problem faced by such reasoning, according to this Tribunal, is that, by necessary implication, all municipal law commitments must necessarily be as well 'internationalised,' as the so-called umbrella clause does not differentiate among obligations; it refers to any obligation and not specifically to contractual obligations, the consequence being that the division between the national legal order and the international legal order is completely blurred. One of the arguments presented by the ICSID Tribunal in Noble Ventures was that the 'elevation' theory was prompted by the object and purpose of the BIT, and that '[a]n interpretation to the contrary would deprive the investor of any internationally secured legal remedy in respect of investment contracts that it has entered into with the host State' (Decision, § 52). In this Tribunal's opinion, this is not a good reason, and it can explain why. Either the foreign investor has a commercial contract with an autonomous State entity or it has an investment agreement with the State, in which some 'clauses exorbitantes du droit commun' (28) are inserted. In both cases, it is more than likely that the foreign investor will have managed to insert a dispute settlement mechanism into the contract; usually, in a purely commercial contract, that mechanism will be commercial arbitration or the national courts, while in an investment agreement it will generally be an international arbitration mechanism such as that of ICSID. In other words, in the so-called State contracts, there is usually an 'internationally secured legal remedy,' while in the mere commercial contracts governed by national law, there is no reason why such a mechanism should be available, as stated by Judge Schwebel, when he said that 'it is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach ... but involves an obviously arbitrary or tortuous element. ...' (International Arbitration: Three Salient Problems, Cambridge, Cambridge University Press, 1987, p. 111).

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78. Some have adopted the *SGS v. Pakistan* position, either by insisting on certain specificities of the case, or by presenting a general approach. In *Salini v. Jordan*, decided in 2004 (*Salini Costruttori S.p.A. & Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, Decision on Jurisdiction, 29 November 2004, ICSID case No. ARB/02/13 []), the Tribunal, presided by Judge Gilbert Guillaume, answered in the negative the question of the 'elevation' of contract claims into treaty claims, insisting on the generality of the language used in the so-called umbrella clause in Article 2(4), which stated that '[e]ach Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor.' In *Joy Machinery Limited v. Arab Republic of Egypt*, (Award of 6 August 2004, ICSID case No. ARB/02/11[]), the Tribunal, presided by Professor Orrego Vicuna, noted that a discussion of the 'umbrella clause' was not necessary for the outcome of the case but, in order to 'make certain clarifications,' took a firm position against the transformation of all contractual claims into treaty claims in the specific case . . .

79. In this Tribunal's view, it is necessary to distinguish the State as a merchant from the State as a sovereign. This is not new: in the above case of *Joy Machinery Limited v. Arab Republic of Egypt*, the ICSID Tribunal stated: 'A basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the contract involved' (Decision, § 72). The same approach was taken by the ad hoc Committee on annulment presided by Mr. Yves Fortier in the Vivendi II case, where the distinction between contract claims and treaty claims was clearly stated . . . (*Compania de Aguas del Aconquija, S.A. et Compagnie Générale des Eaux (Vivendi Universal) v. Argentine Republic*, Decision on Annulment of 3 July 2002, ILM, Vol. 41, 2002, p. 1135 § 96). (29)

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80. The view that it is essentially from the State as a sovereign that the foreign investors have to be protected through the availability of international arbitration is confirmed, in the Tribunal's opinion, by the language in the new 2004 US Model BIT, which clearly elevates only the contract claims stemming from an investment agreement stricto sensu, that, is an agreement in which the State appears as a sovereign, and not all contracts signed with the State or one of its entities to the level of treaty claims, as results from its Article 24(1)(a).

81. In view of the necessity to distinguish the State as a merchant, especially when it acts through instrumentalities, from the State as a sovereign, the Tribunal considers that the 'umbrella clause' in the Argentine-US BIT, which prescribes that '[e]ach Party shall observe any obligation it may have entered into with regard to investments,' can be interpreted in the light of Article VII
P 500 (1), (30) which clearly includes among● the investment disputes under the Treaty all disputes resulting from a violation of a commitment given by the State as a sovereign State, either through an agreement, an authorisation, or the BIT . . . Interpreted in this way, the umbrella clause in Article II of the BIT, read in conjunction with Article VII, will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign—such as a stabilization clause—inserted in an investment agreement.

82. In conclusion, in this Tribunal's view, following the important precedents set by Tribunals presided over by Judge Feliciano, Judge Guillaume and Professor Orrego Vicuna, an umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims. These far-reaching consequences of a broad interpretation of the so-called umbrella clauses, quite destructive of the distinction between national legal orders and the international legal order, have been well understood and clearly explained by the first Tribunal which dealt with the issue of the so-called 'umbrella clause' in the *SGS v. Pakistan* case and which insisted on the theoretical problems faced. It would be strange indeed if the acceptance of a BIT entailed an international liability of the State going far beyond the obligation to respect the standards of protection of foreign investments embodied in the Treaty and rendered it liable for any violation of any commitment in national or international law 'with regard to investments.' A well known specialist of ICSID, Christoph Schreuer, has strikingly described what some of the practical consequences of a broad interpretation of the umbrella clauses could be . . . ('Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road,' Journal of World Investment & Trade, Vol. 5, 2004, p. 255). It is the firm conviction of this Tribunal that the investors will not use appropriate restraint—and why should they?—if the ICSID tribunals offer them unexpected remedies. The responsibility for showing appropriate restraint rests rather in the hands of the ICSID tribunals.

. . .

84. In the Tribunal's view, this umbrella clause does not extend its jurisdiction over any contract claims that the Claimants might present as stemming solely from the breach of a contract between the investor and the Argentine State or an Argentine autonomous State entity. Moreover, in the Tribunal's view, it is especially clear that the umbrella clause does not extend to any contract claims when such claims do not rely on a violation of the standards of protection of the BIT, namely, national treatment, MFN clause, fair and equitable treatment, full protection and security, protection against arbitrary and discriminatory measures, protection against expropriation or nationalisation either directly or indirectly, unless some requirements are respected. However, there is no doubt that if the State interferes with contractual rights by a unilateral act, whether these rights stem from a contract entered into by a foreign investor with a private party, a State
P 501 autonomous entity or the State itself, in such a● way that the State's action can be analysed as a violation of the standards of protection embodied in a BIT, the treaty-based arbitration tribunal has jurisdiction over all the claims of the foreign investor, including the claims arising from a violation of its contractual rights. Moreover, Article II, read in conjunction with Article VII(I), also considers as treaty claims the breaches of an investment agreement between Argentina and a national or company of the United States.

85. In other words, the Tribunal, endorsing the interpretation first given to the so-called 'umbrella clause' in the Decision *SGS v. Pakistan*, confirms what it mentioned above (§ 65), namely, that it has jurisdiction over treaty claims and cannot entertain purely contractual claims, which do not amount to a violation of the standards of protection of the BIT. It adds that, in view of Article VII(1) of the US-Argentina BIT, a violation of an investment agreement entered into by the State as a sovereign and a national or company of the United States is deemed to be also a violation of the Treaty and can thus give

rise to a treaty claim.

86. The answer to the question raised above (§ 66), that is, whether the existence of a so-called umbrella clause changes the Tribunals intermediary conclusion to the effect that it has no jurisdiction over purely contractual claims, and that it can only entertain treaty claims, is clearly in the negative. Indeed, the Tribunal has jurisdiction only over the treaty claims, the latter including, pursuant to the wording of Article VII(1), the claims based on the violation of an investment agreement entered into by the foreign investor with the State as a sovereign.

15.09 The distinction drawn in *El Paso v. Argentina* between the state acting as merchant and as a sovereign (31) for the purposes of distinguishing mere contractual breaches from treaty violations has been considered by other arbitral tribunals in defining the scope of 'obligations' and 'commitments' subject to international law strictures. Tribunals have generally upheld umbrella clause claims in respect of obligations that involve the exercise of state power, such as those arising out of legislative or judicial acts. For example, umbrella clauses have been held to cover legislation (32) and regulatory measures (where guarantees had been made under a national statutory framework aimed at attracting foreign investors). (33) In *Chevron v. Ecuador*, (34) the tribunal held that Ecuador's failure to release Chevron from liabilities, as required under a settlement agreement, was a breach of the umbrella clause in the US–Ecuador BIT. The breach was attributable to Ecuador because it had been committed by Ecuador's judicial branch.

15.10 However, some tribunals have adopted more restrictive interpretations of 'sovereign' acts. For example, the tribunal in *Philip Morris v. Uruguay* held that the award
P 502 of a trademark was not a 'commitment' capable of protection under an umbrella clause as Uruguay had not entered into any specific obligation by granting the trademark. Rather, it had simply allowed the investor to access the same domestic system of intellectual property as was available to anyone eligible to register a trademark. (35) Similarly, the tribunal in *WNC Factoring Ltd v. Czech Republic* held that an umbrella clause could not cover general legal obligations, such as the breach of good faith in contractual negotiations, as 'it is uncontroversial that umbrella clauses do not elevate states' domestic laws to the level of the BIT or convert them into promises'. (36)

Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia

ICSID Case No. ARB/12/39 (Award of 26 Jul. 2018)

420. The distinction between treaty claims and contract claims is well established, and it disposes of the Respondent's second admissibility objection. The Tribunal adopts the analysis of the *SGS v Paraguay* tribunal, which held that a claimant may invoke an umbrella clause when 'the alleged breach of the treaty obligation depends upon a showing that a contract or other qualifying commitment has been breached, [because] the source of the obligation cited by the claimant, and hence the source of the claim, remains the treaty itself.'

422. If, in order to assess whether there was a treaty breach, the Tribunal must first determine whether or not the relevant contractual obligations have been observed, then the Tribunal may hear evidence and make that determination. That some of the facts underlying the umbrella clause claim could also be the basis for a separate breach of contract claim—in another forum, on another day—is immaterial. The Claimants' umbrella clause claim requires a determination of whether the Respondent breached the BIT. Because that inquiry, in turn, requires a determination of whether or not the Respondent observed its contractual obligations, the Tribunal should and will proceed to make that determination.

15.11 Although arbitrators' approaches vary as to the scope of the 'obligations' or 'commitments' that are covered by umbrella clauses, in most cases tribunals have closely examined the specific wording of the umbrella clause in the context of the relevant treaty as a way to determine its scope.

15.12 Some tribunals, for example, have considered the issue of the contractual privity between the host state and the claimant who seeks to rely on an umbrella clause. The
P 503 majority of the tribunal in *Burlington Resources v. Ecuador* (37) explained this issue and summarized the relevant case law. In that case, a subsidiary of the claimant acquired a minority interest in two production-sharing contracts with Ecuador. The majority, dismissed the umbrella clause claim because there was no contractual privity between the claimant and Ecuador. Arbitrator Vicuna submitted a dissenting opinion on this issue.

***Burlington Resources Incorporated v. Ecuador*, Decision on liability, ICSID Case No. ARB/08/5, IIC 568 (Award of 14 Dec. 2012) (some internal notes omitted)**

222. The decisions in *Azurix, Siemens* and the *CMS* annulment proceedings appear to require privity of contract between the investor and the host State for purposes of the umbrella clause. In an award rendered in July 2006, the *Azurix* tribunal dealt with an umbrella clause contained in the United States-Argentina BIT, the wording of which is identical to the umbrella clause under examination here. The *Azurix* tribunal held as follows:

'As already stated by the Tribunal in affirming its jurisdiction within the limits permitted by the Convention and the BIT, the Tribunal finds that none of the contractual claims as such refer to a contract between the parties to these proceedings; neither the Province [of Buenos Aires] nor ABA are parties to them. While Azurix may submit a claim under the BIT for breaches by Argentina, there is no undertaking to be honored by Argentina to Azurix other than the obligations under the BIT. *Even if for argument's sake, it would be possible under Article II(2)(c) to hold Argentina responsible for the alleged breaches of the Concession Agreement by the Province, it was ABA and not Azurix which was the party to this Agreement*.' (emphasis added). (38)

223. The implication of this reasoning is evident. The parties to the underlying agreement were the Province of Buenos Aires and ABA, Azurix's subsidiary. Azurix itself was not a party to the agreement. For this reason, even assuming arguendo that Argentina had been bound by the agreement, Azurix could not have relied on the treaty's umbrella clause to bring claims based on that contract against Argentina. The unstated but obvious premise is that the umbrella clause required privity between the investor and Argentina. (39)

224. Some time later, the tribunal in *Siemens* (40) dealt with an umbrella clause contained in the Germany-Argentina BIT. This umbrella clause provided that '[e]ach Contracting Party shall observe any other obligation it has
P 504 assumed with regard to investments by● nationals or companies of the other Contracting Party in its territory.' In its award of February 2007, the Siemens tribunal stated as follows:

'The Tribunal considers that Article 7(2) has the meaning that its terms express, namely, that failure to meet obligations undertaken by one of the Treaty parties in respect to any particular investment is converted by this clause into a breach of the Treaty. *Whether an arbitral tribunal is the tribunal which has jurisdiction to consider that breach or whether it should be considered by the tribunals of the host State of the investor is a matter that this Tribunal does not need to enter. The Claimant is not a party to the Contract and SITS is not a party to these proceedings*.' (41) (emphasis added).

225. Just like in *Azurix*, the implication is clear. The parties to the underlying contract were Argentina and SITS, Siemens' subsidiary. (42) Siemens itself was not a party to the contract. Therefore, Siemens could not invoke the treaty's umbrella clause in order to bring contract claims against Argentina. Once again, the implicit premise is that the umbrella clause requires privity.

226. In September 2007, the *CMS* ad hoc Committee issued its decision. While this Tribunal stated in the Decision on Jurisdiction [DJ] that 'no general rule' (43) on privity could be extrapolated from the CMS annulment decision, it joined the issue to the merits because the Parties had not sufficiently discussed it in the course of the jurisdictional phase. (44) Now with the benefit of the Parties' extensive submissions and legal authorities, the Tribunal is better poised to construct the scope of the Treaty's umbrella clause.

227. In the *CMS* annulment proceedings, Argentina alleged that the tribunal had manifestly exceeded its powers because it had allowed CMS to bring claims against Argentina under the umbrella clause even though CMS 'was not a party to any of the applicable instruments.' (45) As in *Azurix*, the applicable umbrella clause was that of the United States-Argentina BIT, which is identical to the present one. Although the ad hoc Committee annulled the award for failure to state reasons and not for manifest excess of powers, it made the following observation in the context of its umbrella clause analysis:

'The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that
P 505 the parties to the obligation (i.e., the persons● bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause' (46) (emphasis in original).

228. The *CMS* ad hoc Committee expressed the premise which the *Azurix* and the *Siemens* tribunals had left unstated. First, in keeping with this Tribunal's analysis, the ad hoc Committee stated that an obligation has an obligor ('the person bound by it') and an obligee ('the person . . . entitled to rely on it'). Second, still in conformity with the Tribunal's view, the ad hoc Committee stated that the obligation remains governed by its proper law and that the parties to the obligation are not changed by reason of the umbrella clause. Thus, the umbrella clause does not expand the universe of obligees who may rely on the underlying obligation.

. . .

229. Burlington has sought to distinguish the *CMS* annulment decision on the

ground that CMS was a minority shareholder, whereas in this case Burlington wholly owns the special investment vehicle party to the PSCs — Burlington Oriente. The Tribunal does not see why this is a distinguishing factor. Both the CMS annulment Committee and this Tribunal held that the notion of 'obligation' presupposes a person entitled to rely on it or an obligee. Not being a party to the PSCs, Burlington is not an obligee and cannot become one for the reason that it owns all the shares of a signatory party.

. . .

232. Finally, Burlington relies on *Continental Casualty*, a decision of September 2008. (47) Construing the umbrella clause of the United States-Argentina BIT invoked in *Azurix* and *CMS*, the *Continental Casualty* tribunal stated that it was 'conscious that the interpretation of umbrella clauses . . . remains controversial and that there is a lack of consistency' with respect to its scope. (48) It eventually dismissed all umbrella clause claims because the underlying obligations were either too general or covered by the necessity defense. (49) It also mentioned that the obligations covered by the umbrella clause 'may have been entered with persons or entities other than foreign investors themselves.' (50)

233. It is debatable whether the *Azurix*, *Siemens*, and *CMS* annulment decisions constitute a 'series of consistent cases' stating that the umbrella clause requires privity. Indeed, the views expressed in these cases are supported by few reasons, if any, and a different opinion is adopted in *Continental Casualty*. Be this as it may, it is certain that the majority of the ICSID cases law supports the Tribunal's conclusion that the protection granted under the umbrella
P 506 clause requires privity between the investor and the host State.

234. For these reasons, the majority concludes that the Tribunal has no jurisdiction over Burlington's umbrella clause claims according to which Ecuador would have failed to adjust the contractor's oil production share and to guarantee the contractor's participation in oil production.

15.13 One further area of controversy concerns the situation where the instrument from which the 'undertaking' or 'obligation' derives includes a dispute resolution clause allocating jurisdiction to national courts or domestic commercial arbitration. There is authority for the proposition that contractual and treaty-based causes of action are separate and coexist. (51) However, some arbitrators have observed that the same factual determination would need to be made in parallel proceedings if both claims are allowed to advance, giving rise to a risk of conflicting judgments. This risk is compounded in situations where multiple investors assert breaches of the same obligation or commitment against a state by way of a treaty claim. These questions lead to another still more complex issue: whether a determination by an earlier tribunal (presumably operating under the contract) could bind later tribunals by operation of *res judicata*. Perhaps in light of these issues, a few tribunals adjudicating umbrella clauses have refrained from making determinations on the underlying contractual breach and instead stayed the case pending the domestic tribunal's determination. (52)

Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine

ICSID Case No. ARB/08/11 (Award of 25 Oct. 2012)

251. The Tribunal takes the position that in order to present a contractual claim under the umbrella clause in the BIT, the Claimants (here B&P) are required to have their rights and obligations under the 2003 Contract determined by the applicable dispute settlement forum, i.e., in accordance with Article 13(1) of the 2003 Contract, which refers the parties to dispute settlement 'in accordance to the Ukrainian legislation'. In other words, B&P is obliged to follow the dispute settlement provision included in the 2003 Contract. The Tribunal agrees with the ICSID tribunal in *Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v Paraguay*, which, in
P 507 the context of the Netherlands – Paraguay BIT, stated that:

> 'Assuming that Article 3(4) does import the obligations under the Contract into the BIT, giving this Tribunal jurisdiction to interpret and apply the Contract as such, then it must have imported into the BIT all of the obligations owed by Paraguay to BIVAC under the Contract. This would include not only the obligation to make payment of invoices in accordance with the requirements of the Contract, but also the obligation (implicit if nothing else) to ensure that the Tribunals of the City of Asunción were available to resolve any “conflict, controversy or claim which arises from or is produced in relation to” the Contract.'

252. The present Tribunal agrees, and concludes that where a contractual claim is asserted under an umbrella clause, the claimant in question must comply with any dispute settlement provision included in that contract.

253. This conclusion is also consistent with that of the ICSID tribunal in *SGS Société Générale de Surveillance SA v Philippines*, which held that the Switzerland – Philippines BIT 'did not purport to override the exclusive

jurisdiction clause in the CISS Agreement, or to give SGS an alternative route for the resolution of contractual claims which it was bound to submit to the Philippine courts under that Agreement.' The ICSID tribunal concluded that it

> 'should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively. SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim.'

254. The Tribunal also agrees with the tribunals *in Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v Paraguay* and *SGS Société Générale de Surveillance SA v Philippines* that the question whether the Claimants can submit contractual claims under the umbrella clause in Article II(3)(c) of the BIT will depend on an analysis of the contractual forum selection provision in question, namely Article 13(1) of the 2003 Contract.

255. As has been set out above, Article 13(1) provides that:

> 'All disputes between the Parties in connection to which no agreement has been reached shall be settled in accordance to the Ukrainian legislation.'

256. The Claimants have submitted that Article 13(1) should be interpreted as requiring the dispute between B&P and the University to be submitted for settlement under the BIT. This is because the BIT 'forms part of the national legislation of Ukraine', and that it did so in 2003, at the time of the conclusion of the 2003 Contract. For its part, the Respondent rejects the Claimants' position as 'absurd', and submits that under Article 12 of Ukraine's Code of Commercial Procedure, the jurisdiction of the Ukraine courts extends to 'cases on disputes arising out conclusion, amendment, denunciation and execution of commercial contracts.' Further, the BIT only provides for the resolution of disputes where the investor is the claimant. This means that, if Article 13(1) of the
P 508
2003 Contract were interpreted as requiring any disputes under the Contract to be resolved in accordance with the BIT's dispute settlement procedures, the University—one of the parties to the 2003 Contract—would have no standing to assert a claim, for the BIT does not cater for claims to be brought by the Contracting Parties against an investor, let alone by an entity such as the University.

257. The Tribunal accepts the position of the Respondent, and finds that Article 13(1) of the 2003 Contract is an exclusive jurisdiction clause that requires any dispute arising under the Contract to be submitted to the Ukrainian courts. The Tribunal observes that this conclusion was also reached by three levels of Ukrainian courts in the litigation concerning the termination of the 2003 Contract, although it had initially been rejected.

258. Were it necessary to decide this issue, the Tribunal would accordingly find that in order to invoke the umbrella clause in Article II(3)(c) of the BIT, the Claimants would first have to submit their claims under the contract for settlement in accordance with the jurisdictional clause in Article 13(1) of the 2003 Contract, i.e., to the Ukrainian courts. . . .

D. Conclusion

15.14 The debate concerning umbrella clauses continues to this day. The tribunals remain divided on proper interpretation of the umbrella clauses, which is why it has been identified as one of the areas of 'concern' by UNCITRAL Working Group III's work on the reform of the investor-state dispute settlement. (53)

15.15 The proponents of a broad interpretation of the clauses continue to focus on the ordinary meaning of the clauses, which in most cases, save for clauses that do not incorporate mandatory language, such as those clauses at issue in *Joy Machinery* (54) and *Salini v. Jordan*, (55) seem to be definitive in their meaning: words such as *shall* and *any* would not appear to allow tribunals to step away from strict application because they find the consequences of an ordinary-meaning interpretation to be too severe and far reaching.

15.16 The proponents also point to the interpretive rule of effectiveness, noting that all the words and clauses of a legal instrument should be given effect. If, for example, the word *commitments* does not cover specific investment contract commitments made by a state to investors, then what does it cover? Both the *SGS v. Pakistan* and *El Paso* tribunals
P 509
suggest that tribunals should read the word *sovereign* into umbrella clauses, limiting their reach to sovereign or non-commercial acts. This restrictive interpretation could, if applied to all umbrella clauses, contradict the intention of the drafters where that intention would seem to be clear. (56) It could also lead to non-application of the clause, given that sovereign breaches are likely covered by other standards such as the fair and equitable treatment. (57)

15.17 The opponents of the broad interpretation have tried to limit the umbrella clauses' application in three major ways. First, by requiring 'privity', as noted in *Burlington v.*

Ecuador, which seems to be based on the ordinary meaning of most umbrella clauses. Second, by giving effect to contractual dispute resolution procedures in an investment contract vis-à-vis recourse to investment treaty, which is another way of keeping contractual disputes out of investment treaty arbitration. As some tribunals have noted, creating a treaty remedy for an investment contract dispute may create a dispute resolution procedure never contemplated by the contract parties, and displace the procedure that was expressly contemplated and bargained for. It is at least surprising that a treaty would allow a private investor the option of abandoning a freely selected contractual dispute resolution procedure. (58) Third, by introducing the idea that umbrella clauses would only apply to 'sovereign acts', which seems to be more of a policy reason meant to ensure that umbrella clauses are not used to bring claims for small commercial disputes (e.g. a contract for the sale of ten pencils).

15.18 Overall, umbrella clauses so far have rarely (if ever) been the sole basis of liability in investment treaty cases, which makes them probably less important for litigators. This also may suggest that the fears that the umbrella clauses could open the flood gates or displace the whole investment arbitration system appear to be illusory. (59)

15.19 Nonetheless, various states have taken steps to try to clarify the scope of umbrella clauses. The United States, as noted, removed the umbrella clauses in their classic formulation from its 2004 Model BIT (and subsequent treaties based on that model), and in lieu of that extended protection 'investment contracts' and 'investment authorizations' which are narrowly defined to capture major projects (avoiding the so-called 'ten pencils' claims). An indirect way of narrowing down the scope of the claims has been through introducing the notion of characteristics of investment into the definition of investment (risk, return, certain duration) which we covered in Chapter X on Investment. A number of states, as UNCTAD surveys show, seem to have gradually eliminated umbrella clauses or replaced them with narrower provisions similar to the 2004 US Model BIT. Nonetheless, thousands of treaties with umbrella clauses remain in effect. It remains to be seen how these trends would evolve.

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References

1) Calvin A. Hamilton and Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment through Bilateral and Multilateral Treaties*, 18 N.Y. Int'l L. Rev. 1, 14–16 (2005).
2) These clauses are variously referred to as 'mirror effect', *pacta sunt servanda*, observance of undertakings, sanctity of contract, and respect clauses. On umbrella clauses in general, *see* Thomas W. Wälde, *The 'Umbrella' Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6(2) J. World Inv. & Trade 184, 192 (2005); Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5(2) J. World Inv. & Trade 231 (2004); Anthony Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 Arb. Int'l 411 (2004); Katia Yanaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements* (OECD, Working Papers on International Investment 2006/3, 2006); Craig Miles, 'Where's My Umbrella? An 'Ordinary Meaning' Approach to Answering Three Key Questions That Have Emerged from the 'Umbrella Clause' Debate,' Chapter 1, in T.J. Grierson Weiler, *Investment Treaty Arbitration and International Law* (2008); Maria Cristina Griton Salias, Do Umbrella Clauses Apply to Unilateral Undertakings?, in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Binder et al eds. 2009); Raul Pereira de Souza Fleury, *Umbrella Clauses: A Trend Towards Its Elimination*, 31(4) Arb. Int'l (2015); Shotaro Hamamoto, *Parties to the 'Obligations' in the Obligations Observance ('Umbrella') Clause*, 30(2) ICSID Review 449 (2015); Katia Yannaca-Small, The Umbrella Clause: Is the Umbrella Closing?, in *Arbitration under International Investment Agreements: A Guide to Key Issues* 395 (Yannaca-Small ed., Oxford University Press 2nd ed. 2018).
3) *Oppenheim's International Law* 927 (Sir Robert Jennings and Sir Arthur Watts eds, 1992); Stephen Schwebel, On Whether the Breach by a State of a Contract with an Alien Is a Breach of International Law, in *International Law at the Time of Its Codification* 401 (1987); *see also* International Law Commission Articles on State Responsibility, art. 3, which provides in the relevant part that '[t]he 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.' James Crawford, *The International Law Commission's Articles on State Responsibility* 86 (Cambridge University Press 2002).
4) *See generally* Chapter II *supra*.
5) Wälde, *supra* note 2, at 192; *see also* GA Res. 1803, ¶ 8 (1962) (this resolution, which some believe reflected the status of customary law at the time, provided in relevant part that 'Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith . . .').
6) SN: *The Origin of Umbrella Clause in International Law of Investment Protection*, 20 Arbitration International 411, 414–18.
7) SN: Ibid. at 421.
8) SN: Ibid. at 427–33.
9) SN: Ibid. at 123, note 1(a).
10) SN: *Receuil des Cours* III (1969), 130.

11) SN: *British Treaties for Protection and Promotion of Investments*, 52 British Yearbook of International Law 241, 246 (1941).
12) SN: R. Dolzer and M. Stevens, *Bilateral Investment Treaties* 81–2 (1995).
13) SN: United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* 39 (1988).
14) SN: 5 The Journal of World Investments & Trade, 249–55 (2004).
15) SN: 5 J. World Inves. & Trade, 564–72 (2004).
16) Argentina–US BIT (1994), art. II(2)(c).
17) France–Mexico BIT (2000), art. 10(2). It should be noted that this particular treaty goes on to narrow the *jurisdictional* scope of umbrella clause claims: 'Dispute arising from such [contractual] obligations shall be settled under the terms of the contracts underlying the obligations.'
18) U.K. Model BIT, art. 2, *available at*http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847.
19) 'Investment agreement' under the 2004 and 2012 US Model BITs is defined as a written agreement between a national authority of a party and a covered investment or an investor of the other party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale; (b) to supply services to the public on behalf of the party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.
20) *See also* Unified Agreement for the Investment of Arab Capital in the Arab States (1980). Most favoured nation clauses have often been invoked to 'import' umbrella clauses into treaties that lack them. *See MTD Equity Sdn. Bhd. and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7 (Award of 25 May 2004) ¶ 187.
21) *See*http://investmentpolicyhub.unctad.org/Pages/mapping-of-iia-clauses; Raul Pereira de Souza Fleury, *Closing the Umbrella: A Dark Future for Umbrella Clauses?*, Kluwer Arbitration Blog, 13 Oct. 2017.
22) Based on data collected through the UNCTAD IIA Mapping Project: *see*http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu, visted in November 2018.
23) *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. The Republic of Paraguay*, ICSID Case No. ARB/07/9 (Decision of the Tribunal on Objections to Jurisdiction of 29 May 2009) ¶ 141.
24) SN: 37 ILM 1391 (1998).
25) SN: ICSID Case No. ARB/01/13.
26) SN: 19 Mealey's Int'l Arb. Rep. Feb. 2004, at E-1.
27) *See also BP Am. Prod. Co. v. Argentina*, ICSID Case No. ARB/04/8 (Decision on Jurisdiction of July 2006). This decision was rendered three months after *El Paso*.
28) In French administrative law, the phrase *clauses exorbitantes du droit commun* refers to certain terms that are not usually found in private civil contracts. The inclusion of such terms in a contract implies that the contract is administrative and hence subject to administrative law including to special powers of the government to unilaterally modify or alter it.

29) The *El Paso* tribunal emphasized that the state acting as a merchant must be distinguished from state acting as a sovereign, which reflects the classic distinction between actions *jure gestionis* and *jure imperii* in international law. A state's actions in the former capacity do not violate international law, whereas those in the latter capacity do. Distinguishing between these two categories of state actions is, however, easier said than done. In fact, tribunals have so far refrained from suggesting any criteria for this purpose. Instead, they have provided examples of each category. For instance, *Fedax v. Venezuela, supra* note 24, applied the umbrella clause to a promissory note (arguably a commercial contract). *Joy Machinery*, however, characterized a bank guarantee as a commercial contract and refused to apply the umbrella clause. *El Paso* characterized a contract containing a stabilization clause as an investment contract, which presumably a government would enter into as a sovereign. Regardless of whether an umbrella clause's coverage should be limited to government's actions in its capacity as a sovereign or not, development of criteria for distinguishing the two categories would make the application of the law more predictable and hence is desirable. The United Nations Convention on Jurisdictional Immunities of States, which was adopted by UN General Assembly in December 2004 (*see* GA Res. 59/38, UN Doc. A/RES/59/38 (16 Dec. 2004)) could provide some initial guidance for this purpose. The Convention in art. 2(1) and (2) provides in relevant part that: (c) 'commercial transaction' means: (i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons. 2. In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1(c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the state of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction. *See also* Section 1605(a)(2) of the United States Foreign Sovereign Immunities Act, which limits a foreign sovereign's immunity to its 'commercial activity.' Section 1603(d) provides in the relevant part that '[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.'

30) Art. VII(1) of Argentina–US BIT provides that: 'For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.'

31) *See El Paso v. Argentina, supra*, at ¶¶ 79–81 and note 29.

32) *Sempra Energy v. Argentina*, ICSID Case No. ARB/02/16 (Award of 28 Sept. 2007) ¶¶ 305–14; *Enron Corp. et al v. Argentina*, ICSID Case No. ARB/01/3 (Award of 22 May 2007) ¶¶ 273–7.

33) *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1 (Decision on Liability of 3 Oct. 2006) ¶¶ 169–75.

34) *Chevron Corp. and Texaco Petroleum Company v. Ecuador* (Second Partial Award on Track II of 30 Aug. 2018) Part VIII, ¶ 8.8.

35) *Philip Morris et al. v. Uruguay*, ICSID Case No. ARB/10/7 (Award of 8 July 2016) ¶¶ 473–82.

36) *WNC Factoring Ltd v. The Czech Republic* (Award of 22 Feb. 2017) ¶ 343. Compare *Bosh International et al. v. Ukraine* (Award of 25 Oct. 2012) where a breach of a contract by reason of early termination was sufficient in principle for an umbrella clause claim.

37) *Burlington Resources Inc. v. Ecuador*, Decision on liability, ICSID Case No. ARB/08/5, IIC 568 (Award of 14 Dec. 2012). See also *WNC Factoring Ltd v. Czech Republic* (Award of 22 Feb. 2017) ¶¶ 326–33 ('the Claimant's contention that there is no requirement of privity in relation to umbrella clauses finds no authoritative support in the case law of international investment tribunals. To the contrary, tribunals have rather consistently resolved that they have no jurisdiction under umbrella clauses to consider contractual obligations between host states and investors' locally incorporated subsidiaries.').

38) SN: *Azurix Corp. v. The Argentine Republic*, (Award of 14 July 2006) ¶ 384.

39) SN: The contract between ABA and the Province of Buenos Aires was governed by Argentine law. The *Azurix* Tribunal held that, while its inquiry on the merits was governed by the ICSID Convention, by the BIT, and by applicable international law, the law of Argentina would assist its inquiry 'into the alleged breaches of the Concession Agreement to which Argentin[e] law applies'. *Azurix* Award, *supra* note 38, at ¶ 67.

40) SN: The *Azurix* and the *Siemens* Tribunals were both chaired by the same arbitrator, Andrés Rigo Sureda.

41) SN: *Siemens AG v. Argentine Republic*, (Award and Separate Opinion of 6 Feb. 2007) at ¶ 204.

42) SN: Once again, Argentine law governed the contract—that is, the underlying obligation that Siemens was seeking to enforce via the umbrella clause.

43) SN: [*Burlington v. Ecuador*, Decision on Jurisdiction of 2 June 2010], ¶ 195. The reason being that the ad hoc Committee annulled the tribunal's award for failure to state reasons, not for manifest excess of powers. *CMS Gas Transmission Company v. Argentine Republic*, Annulment Proceeding, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic of 25 Sept. 2007.
44) SN: [*Burlington v. Ecuador*, Decision on Jurisdiction of 2 June 2010], ¶¶ 197–8.
45) SN: Ibid at ¶ 46.
46) SN: *CMS* Annulment Decision, *supra* note 43, at ¶ 95(c).
47) SN: *CMS* Annulment Decision, *supra* note 43, at ¶ 95(c).
48) SN: [*Continental Casualty Co. v. Argentina*, Award, ICSID Case No. ARB/03/9, IIC 336 (2008), despatched 5 Sept. 2008,] ¶ 296.
49) SN: Ibid. at ¶¶ 302–3.
50) SN: Ibid. at ¶ 297.
51) *See, e.g. Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/97/3 (Decision on Annulment of 3 July 2002) ¶¶ 95–6 ('As to the relation between breach of contract and breach of treaty . . . [a] state may breach a treaty without breaching a contract, and vice versa. . . . In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions.'). *See also SGS Société Générale de Surveillance SA v. Pakistan*, ICSID Case No. ARB/01/13 (Decision of the Tribunal on Objections to Jurisdiction of 6 Aug. 2003) ¶ 147 ('As a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders.').
52) But compare *Gavrilović v. Republic of Croatia*, ICSID Case No. ARB/12/39 (Award of 26 July 2018) ¶ 422 ('While a contractual forum selection clause may refer contract disputes to another forum that will decide whether a breach of contract occurred, with the consequences that may follow under the applicable law, this Tribunal must decide whether or not contractual obligations have been observed and, as a consequence, whether or not there has been a violation of the umbrella clause. The Tribunal would not fulfil its mandate if it refused to do so').
53) *See* UNCITRAL, Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, A/CN.9/WG.III/WP.150, 28 Aug. 2018, ¶ 14.
54) *Joy Mining, supra* note 29.
55) *Salini Costruttori SpA & Italstrade SpA v. Hashemite Kingdom of Jordan*, ICSID case No. ARB/02/13 (Decision on Jurisdiction of 29 Nov. 2004) .
56) *See, e.g.* art. 11(1) of the Austria–Kyrgyzstan BIT which provides that: '[E]ach Contracting Party shall observe any obligation in respect of specific investments. This means that a breach of contract will amount to a violation of this treaty.' An arbitral tribunal would need to be creative indeed to restrict the scope of the clause to certain types of 'sovereign' contracts or breaches.
57) *See, e.g. Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1 (Final Award of 30 Aug. 2000) ¶¶ 97–101.
58) However, the problem of competing dispute resolution procedures is an intrinsic part of the investment treaty legal landscape. *See generally* Chapter XIV *supra*.
59) One can, in fact, easily imagine situations in which a state has neither signed an investment contract nor made any specific commitments with respect to a particular investment. For example, a foreign investor could build a pharmaceutical factory, as to which there were no specific state commitments. Any decision by the state to nationalize the factory without adequate compensation, or to nationalize the factory because it was owned by an investor from a disfavoured country, would likely violate prohibitions against expropriation and discrimination, but not an umbrella clause. Many similar scenarios can be readily articulated. Thus, the fear that umbrella clauses could displace the whole of international investment protection appears to be illusory.