VII. Umbrella Clause

Anthony Sinclair

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Chapter 8: Standards of Protection


A. Introduction

1 This chapter considers arbitral practice and doctrine concerning umbrella clause claims. It addresses the two main areas of debate: the fundamental question of the effect of the ‘so-called umbrella clause’, and the clause’s scope of application. Part A. identifies what is meant by an umbrella clause. Part B. provides an overview of the arbitral practice on the umbrella clause, focusing on the meanings given (or not given) to umbrella clauses in the decisions to date. Part C. contains an analysis of the particular features of the debate on the effect of the umbrella clause. Part D. summarises the status of the debate and contains a brief outlook on the major outstanding issues.

1. Umbrella Clauses

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

- Article 2 of the United Kingdom Model BIT: ‘[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’.
- Article II(2) of the 1984 and the 1987 United States Model BITs: ‘[e]ach Party shall observe any obligation it may have entered into with regard to investments’.
- Article 8 of the 1991 Germany Model BIT: ‘[e]ach Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party’.
- Article 10 of the Switzerland Model BIT: ‘[e]ach Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party’.
- Article 3(4) of the Netherlands Model BIT: ‘[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party’.

3 A typical umbrella clause is mandatory and apparently clear in its intended effect. On a plain reading, the clause creates a reciprocal international law obligation owed by and between contracting States requiring them to observe such obligations that they may enter into with investors of the other contracting State or with regard to the investments of such investors, and sometimes both. Coupled with an investor-State dispute settlement mechanism, umbrella clauses apparently afford a direct remedy in international law to foreign investors in respect of their investment-backed State contracts and other obligations that a
State may have entered into with them or with regard to their investments. As shall be seen, however, the scope and effect of the umbrella clause continue to trouble and divide both arbitral tribunals and commentators.

2. Other Similar Provisions That are Not Umbrella Clauses

Variations in wording from treaty to treaty can yield subtle and sometimes radical differences in scope and effect. Such differences in drafting of treaties are to be presumed to have been intended in order to bring about different effects and should be carefully observed.1 It is possible to find many provisions in treaties that appear deceptively similar to an umbrella clause but on closer inspection may not have the same effect and should not be described as such. For example, Article 10 of the Austria–Poland BIT provides that:

A Contracting Party shall, subject to its law, do all in its power to ensure that a written undertaking given by a competent authority to a national of the other Contracting Party with regard to an investment is respected (emphasis added).

This provision appears to call upon the contracting parties merely to exercise their best endeavours to ensure undertakings are met, and does not, in terms, create an obligation that State authorities observe relevant ‘undertakings’. Different again is Article 2(4) of Italy–Jordan BIT, which provides that:

Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor (emphasis added).

The language implies a commitment to provide a system of tolerably settled norms, and independent institutions and tribunals to give effect to such norms, for the protection of investors, rather than an obligation to observe commitments per se. In Salini v. Jordan, this provision was found to be ‘appreciably different’ from the language of umbrella clauses and held not to have any effect akin to an umbrella clause.2

1 Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 50. Cf. El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 and Pan American Energy LLC and BP Argentina Exploration Company v. Argentina, ICSID Case No. ARB/03/13, Decision on Jurisdiction, 27 July 2006, in which the similarly composed tribunals took the following contrary view: ‘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’: El Paso v. Argentina, para. 70; Pan American v. Argentina, para. 99. For a criticism of this approach see John P. Gaffney and James L. Loftis, ‘The “Effective Ordinary Meaning” of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims’ (2007) 8 JWIT 5–67; and Craig Miles, ‘Where’s My Umbrella? An “Ordinary Meaning” Approach to Answering Three Key Questions That Have Emerged from the “Umbrella Clause” Debate,’ in Todd J. Grierson Weiler, Investment Treaty Arbitration and International Law (JurisNet, 2008) 7 concluding that ‘Tribunals have applied at least five different versions of the Umbrella Clauses in recent cases’.

Umbrella clauses are also distinct from so-called ‘preservation of rights’ clauses, which clarify that investment contracts ‘prevail’ over treaty obligations insofar as they stipulate treatment that is more favourable than that accorded by the treaty. Some commentators have suggested that the effect of these provisions is to create a positive treaty obligation on the part of States to observe contractual commitments, indistinguishable from an umbrella clause. The wording of these clauses, however, does not indicate that they are intended to impose a distinct obligation upon the host State enforceable through treaty arbitration, or at all. The tribunal in *Yaung Chi Oo Trading v. Myanmar* held that a provision of this kind merely preserves the sphere of legal application for the rights and obligations found in separate legal instruments, but does not create any enforceable treaty obligation to observe the terms of that instrument. The tribunal in the *SGS v. Philippines* was equally doubtful, remarking that ‘the phrase “shall prevail over”, used in relation to other commitments, may not have the effect of incorporating those commitments into a BIT’. It is clear that this particular category of treaty provision is distinct from an umbrella clause and does not create an enforceable treaty right to the observance of the obligations in State contracts.

### B. Overview of Arbitral Practice Concerning Umbrella Clause Claims

Part B. looks at arbitral practice on the fundamental question, namely the effect of the umbrella clause. In order to frame the debate, in section 1. there is an overview of the leading decisions, the early *SGS* cases against Pakistan and Philippines, which addressed in detail for the first time the scope and effect of the umbrella clause. Section 2. summarises the subsequent decisions – the progeny of the Pakistan and Philippines cases – and the divisions that still characterise the current state of the law.

#### 1. Framing the Debate: the Early SGS Cases

A few relatively early decisions, in the time frame of modern treaty arbitration, offered *obiter dicta* remarks, or considered but swiftly dismissed, umbrel-
la clause claims and, consequently, did not construe or significantly contribute to our understanding of the provision. *Fedax v. Venezuela* is occasionally cited as the first decision to apply an umbrella clause on the merits. In fact the parties settled this aspect of their dispute, and the award contains no discussion of the clause’s effect.\(^9\) *Fedax* cannot truly be said to mark the modern emergence of umbrella clause claims. The meaning and effect of the umbrella clause received a detailed treatment for the first time by separate ICSID tribunals in two widely-cited decisions: *SGS v. Pakistan*,\(^10\) and *SGS v. Philippines*.\(^11\) These decisions have framed the debate as to the effect of the umbrella clause and continue to inspire and divide tribunals and commentators alike.

*SGS v. Pakistan*, which was rendered first, discussed the effect of a claim brought under Article 11 of the Pakistan–Switzerland BIT. Article 11 provided that each Contracting Party ‘shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the other Contracting Party’. The tribunal analysed this clause as if it might be an umbrella clause, however, the undertaking to ‘constantly guarantee the observance’ invites argument that it entails something different from a directive ‘to observe’ or ‘to respect’ commitments entered into with foreign investors. At least one subsequent tribunal expressed the view that the promise to ‘constantly guarantee the observance’ of commitments might have been intended to create a different effect, such as to create ‘an international obligation of result for each Party to be fulfilled through appropriate means at the municipal level but without necessarily elevating municipal law obligations to international ones’.\(^12\) The tribunal in the *SGS v. Philippines* case described the clause as having ‘arguably similar language’\(^13\) to the umbrella clause in the Philippines–Switzerland BIT, implying

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9  *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award, 9 March 1998, paras. 25, 29. Similarly, *IBM World Trade Corporation v. Ecuador*, ICSID Case No. ARB/02/10, which was settled, with the settlement embodied in an award yet no pronouncement by the tribunal on the substance of the umbrella clause: Decision on Jurisdiction, 22 December 2003; Award, 22 July 2004 (unpublished). An umbrella clause claim was upheld in *Duke Energy Electroquiel Partners & Electroquiel S.A. v. Ecuador*, ICSID Case No. ARB/04/15, Award, 18 August 2008, paras. 317–325. The case turned on its particular facts, including Ecuador’s express acceptance by Presidential Decree that certain contractual obligations were obligations of the State and that these fell within the scope of jurisdiction under the BIT; para. 322.


11  *SGS* v. *Philippines* (n. 6).

12  *Noble Ventures v. Romania* (n. 1) para. 58; cf. *SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 169, fn. 95, stating that the tribunal would have found the clause in the *Pakistan* case to be an umbrella clause.
that the wording in the Pakistan–Switzerland BIT might be sufficiently different to call for a different construction. One of the arbitrators in the *SGS v. Pakistan* case itself subsequently emphasised that a ‘properly worded clause could convert breaches of contract, ordinarily considered to fall within the municipal legal order, into breaches of a BIT’.\(^7\) If indeed the *SGS v. Pakistan* tribunal was grappling with a different type of clause, its decision should fall outside the pool of ‘authorities’ that have discussed the meaning of the umbrella clause. However, the parties and the tribunal in *SGS v. Pakistan* approached the issue on the basis that Article 11 might have the effect, as properly understood, of an umbrella clause and the present analysis approaches the decision on that same basis. Moreover, as shall be seen, at least one later tribunal, in the *SGS v. Paraguay* case, had no difficulty in concluding that an identically worded clause was an ‘umbrella clause’.

SGS v. Pakistan concerned an alleged breach of a Pre-Shipment Inspection Agreement (PSI Agreement) entered into between SGS, an airport and customs services company, and the Government of Pakistan. When a dispute arose, the claimant asserted that an alleged breach of the PSI Agreement also amounted to a breach of Article 11 of the BIT, because:

> through the juridical medium of Article 11 of the BIT, SGS’s claims grounded on alleged violation of the PSI Agreement have been transmuted or ‘elevated’ into claims grounded on alleged breach of the BIT, specifically Article 11 thereof.\(^5\)

Taking what it described as a ‘prudential’ approach to interpretation,\(^6\) the tribunal rejected the suggestion that a breach of a State contract could, through the operation of the clause, be ‘transmuted or “elevated” into claims grounded on alleged breach of the BIT’.\(^7\) First, as a textual matter, the tribunal noted that Article 11 did not in so many words declare that breaches of contract ‘are automatically “elevated” to the level of breaches of international treaty law’.\(^8\) The tribunal denied that the words of Article 11 were sufficient to create ‘a new international law obligation on the part of the Contracting Party, where clearly there was none before’.\(^9\) Secondly, the tribunal suggested that the proposed legal effect attributed to the umbrella clause by the claimant would render superfluous the other substantive protections of the BIT.\(^10\) Thirdly, the tribunal refused to accept that the umbrella clause could supersede jurisdiction agreements inserted in contracts between the investor and the State, which it understood the umbrella clause to do.

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\(^{13}\) *SGS v. Philippines* (n. 6) paras. 97, 119.


\(^{15}\) *SGS v. Pakistan*, Decision on Jurisdiction, 6 August 2003, para. 158.


\(^{17}\) *Ibid.*, para. 158.


\(^{19}\) *Ibid*.

\(^{20}\) *Ibid*.
Fourthly but also of considerable concern to the tribunal was the fear that to give effect to the claimant’s view of the umbrella clause raised the possibility of opening the ‘floodgates’, exposing States to unexpected and expansive international responsibility. The tribunal thought ‘[a]s a matter of textuality therefore, the scope of Article 11 of the BIT, while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion’. Clearly, the arbitrators recoiled from giving any substantial effect to a clause that, in their minds, would otherwise result in ‘an unlimited number of State contracts’ or other undertakings of myriad State entities and subdivisions being incorporated into a treaty by reference such that ‘any alleged violation of those contracts and other instruments would be treated as a breach of the BIT’.

The tribunal concluded that the legal consequences of the claimant’s construction were ‘so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party’, that the claimant must produce compelling positive evidence that such was indeed the Contracting Parties’ intention. Unpersuaded, the Pakistan tribunal concluded:

we do not find a convincing basis for accepting the Claimant’s contention that Article 11 of the BIT has had the effect of entitling a Contracting Party’s investor, like SGS, in the face of a valid forum selection contract clause, to ‘elevate’ its claims grounded solely in a contract with another Contracting Party, like the PSI Agreement, to claims grounded on the BIT, and accordingly to bring such contract claims to this tribunal for resolution and decision.

The tribunal was evidently mindful that it had interpreted away much, if not all, of the substantive legal effect of Article 11, because it attempted to pre-empt criticism on this basis by suggesting that ‘confirmation in a treaty that a Contracting Party is bound under and pursuant to a contract, or a statute or other municipal law’ is not ‘devoid of appreciable normative value’. The tribunal added that in exceptional circumstances:

a violation of certain provisions of a State contract with an investor of another State might constitute a violation of a treaty provision (like Article 11 of the BIT) enjoining a Contracting Party constantly to guarantee the observance of contracts with investors of another Contracting Party.

Examples of such exceptional circumstances, the tribunal ventured, might be a host State’s efforts to frustrate an arbitration clause having previously agreed to arbitrate disputes, or its refusal to appear in an arbitration proceeding.

21 Ibid.
22 Ibid.
23 Ibid., para. 168.
24 Ibid., para. 167.
25 This approach appears to have reversed the burden of proof, arguing that the burden was on Pakistan to establish that a meaning was intended that was different from the ordinary meaning of the words used in Article 11 (see Craig Miles, n. 1), but the tribunal had already taken the view that the ordinary meaning of the text was not clear.
26 SGS v. Pakistan (n. 15) para. 165.
27 Ibid., para. 172.
28 Ibid.
SGS v. Philippines ascribes to an umbrella clause a strikingly different meaning, in direct contradiction of the Pakistan ruling. This case concerned a government contract for pre-shipment ‘Customs Inspection Services’ (CISS Agreement). The claims arose out of an alleged failure on the part of the Philippines to pay approximately USD 140 million it was said to owe to the claimant under the CISS Agreement.

Like in the Pakistan case, the Philippines tribunal accepted that it had jurisdiction to hear claims for breach of Article X(2) of the Philippines–Switzerland BIT, which requires that contracting parties observe ‘any obligation it has assumed with regard to specific investments’. Unlike the earlier decision, however, the Philippines tribunal insisted that the object and purpose of the BIT required that the umbrella clause be found to have an effective meaning.

First, on a simple textual analysis, the Philippines tribunal’s ‘provisional conclusion’ was that Article X(2) ‘means what it says’. Secondly, the tribunal was influenced by the context in which the umbrella clause arose, and the object and purpose of the treaty. The tribunal considered that given that the BIT was intended to achieve ‘the promotion and reciprocal protection of investment (…) [i]t is legitimate to resolve uncertainties in this interpretation so as to favour the protection of covered investments’. The Philippines tribunal emphasised, in particular, the value to investors of an international law remedy in respect of obligations that may be governed by the internal law of the host State:

> It is a conceivable function of a provision such as Article X(2) of the Swiss–Philippines BIT to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments – in effect, to help secure the rule of law in relation to investment protection. In the Tribunal’s view, this is the proper interpretation of Article X(2).

In the event that a contracting party entered into binding commitments towards investments, the tribunal’s view was that a subsequent breach of those commitments could give rise to a treaty claim for violation of Article X(2), on the basis that ‘they are incorporated and brought within the framework of the BIT by Article X(2)’. The tribunal accordingly concluded that ‘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’.

The Philippines tribunal did not immediately proceed to the merits phase of the claim for breach of the umbrella clause for reasons of admissibility, since it found that amounts due under the CISS Agreement and the parties legal rights and obligations thereto were, in the first instance, to be referred to the courts of Makati or Manila pursuant to the exclusive jurisdiction clause in the CISS

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29 SGS v. Philippines (n. 6) para. 128.
30 Ibid., para. 116.
31 Ibid., para. 126.
32 Ibid., para. 117.
33 Ibid., para. 128.
Agreement. Determination of amounts contractually owing did not ‘become a


treaty matter’ in the sense that the prior existence of an obligation to which the
umbrella clause might attach, and the necessary forensic and legal investigation
into the amounts owing under Philippine law pursuant to that obligation, were
not questions that themselves engaged the application of the treaty’s provisions
or international law generally. Accordingly, the tribunal held by a majority that,
until such time as ‘the question of the Respondent’s obligation to pay is clarified
a decision by this tribunal on SGS’s claims to payment would be premature’.34

An umbrella clause claim is a treaty cause of action but the tribunal consid-
ered that it has as its ‘essential basis’ an underlying obligation, typically a con-
tractual one, created and sustained by a municipal law. In the circumstances, the
tribunal considered that it would be consistent with the principles governing the
distinction between contractual and treaty claims, articulated in the Decision on
Annulment in *Vivendi v. Argentina*, not to proceed with the umbrella clause
claim but rather, to ‘give effect to any valid choice of forum clause in the con-
tract’.35

Some perceive similarities in the outcomes of the *Pakistan* and the *Philipp-
ines* cases, however, their analysis is very different. The *Philippines* tribunal
ascribed to the umbrella clause in question a substantial legal effect. The *Pak-
istan* tribunal did not. Although the *Philippines* case settled, the proceedings had
by this time been restarted,36 with it still open to the tribunal to render a final
award on the merits of the umbrella clause claim.

2. Continuing Divisions in Arbitral Practice on the Effect of the Umbrella
Clause

The two early *SGS* decisions continue to polarise the umbrella clause debate,
both in the discussions of the growing number of tribunals to have considered
umbrella clause claims and in the commentaries. The decided cases in which tri-

bunals have considered umbrella clauses, and their contribution to understanding
on the effect of these particular provision, are discussed below, grouped first into
decisions confirming the effect of the umbrella clause, even if not ultimately ap-
plying it in the particular circumstances, and secondly, those decisions which
have disavowed or doubted its effect.

34 *Ibid.*, para. 155. The dissenting arbitrator considered a stay of the proceedings inappropriate:
Declaration of Antonio Crivellaro, 29 January 2004, paras. 2–7, 11.

35 *Compañía de Aguas del Aconcagua S.A.* and *Vivendi Universal S.A.* v. *Argentina*, ICSID Case
No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 98. It is not fully explained in *SGS*
v. *Philippines* (n. 6) why the tribunal also stayed the claimant’s claims for violation of the
obligation to ensure fair and equitable treatment.

36 *SGS* v. *Philippines*, ICSID Case No. ARB/02/6, Order of the Tribunal on Further Proceedings,
17 December 2007.
Decisions Confirming the Effect of Umbrella Clauses

A tribunal upheld an umbrella clause claim on the merits for the first time in *CMS v. Argentina*. The finding on the umbrella clause was later annulled, however, the *ad hoc* committee did not criticise the tribunal’s conclusions as to the umbrella clause’s substantive effect, but only that the tribunal had over-extended the scope of the provision, as discussed further in Part C. below.

The clause in question, Article II(2)(c) of the Argentina–United States BIT, provides that ‘[e]ach Party shall observe any obligation it may have entered into with regard to investments’. The dispute concerned alleged obligations found in a licence to transmit and distribute natural gas. Two provisions of the licence were characterised as ‘stabilisation clauses’. These provisions were found to amount to a guarantee on the part of the Argentine government that it would not interfere with the tariff regime for gas transmission and that it would not unilaterally amend the terms of the licence. The tribunal ruled, on the basis of these licence terms and in the light of applicable regulations, that Argentina had entered into commitments with regard to the claimant that it would not freeze the tariff regime for gas distribution, or apply price controls, and would not unilaterally alter the basic rules governing the operation of the licence. The tribunal added that these were commitments of a public and not merely commercial nature, and that they had been violated through the exercise of Argentina’s sovereign power. On that basis, the tribunal held that Argentina was in breach of Article II(2)(c) ‘to the extent that legal and contractual obligations pertinent to the investment have been breached’. Thus, the umbrella clause gave rise to an international remedy in respect of violations of domestic law obligations entered into by Argentina towards the claimant and its investment.

The next decision to rule on the merits of an umbrella clause claim, *Eureko B.V. v. Poland*, contained a more elaborate exposition on the scope and effect of an umbrella clause. The decision concerned Article 3.5 of the Netherlands–Poland BIT, which 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’. The central finding was the determination that Poland had, through its State treasury, entered into a binding commitment with the claimant that it would hold an initial public offering of shares in the State insurance company, PZU, in the course of which the claimant – which already owned 30 per cent of the shares in PZU – would be entitled to acquire a majority stake. The government and State treasury, however, changed their strategy, with the Coun-

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40 Ibid., para. 303.
42 Ibid., para. 157.
The tribunal explained that the plain meaning of this provision ‘is not obscure. The phrase “shall observe” is imperative and categorical’. The tribunal supported its conclusion by reference to the ‘provenance’ of the umbrella clause in the body of international investment law. The tribunal in Eureko also cast doubt on the interpretative approach to the umbrella clause taken by the tribunal in SGS v. Pakistan, preferring instead the SGS v. Philippines tribunal’s analysis. The tribunal insisted that the umbrella clause must be given effect, and that effect must be something different from or additional to the other investment protection standards set out in the treaty.

The dissenting arbitrator in Eureko rejected the majority’s conclusion that Poland had entered into a binding commitment to which the umbrella clause might apply. He criticised this aspect of the award, in particular, for insufficient treatment of the ‘basic rules applicable under Polish law’, describing it as an exercise in interpretation ‘sans loi’. In addition, the arbitrator disputed the substantive effect attributed to the umbrella clause by the majority, believing it to be ‘a potentially dangerous precedent capable of producing negative effects on the further development of foreign capital participation in privatisations of State-owned companies’.

Noble Ventures v. Romania is also an endorsement for umbrella clause claims, although the tribunal did not in fact find that the clause had been breached. The umbrella clause in question, in the Romania–United States BIT, provides that ‘[e]ach Party shall observe any obligation it may have entered into with regard to investments’. The tribunal observed that the wording of the clause in question was ‘general and straightforward’, in contrast to the provisions discussed in the SGS v. Pakistan and Salini v. Jordan cases. The claim failed on the merits not for any doubt or confusion as to the effect of the clause, but rather, because the tribunal found on the facts that Romania had not breached any of the obligations it had assumed towards the claimant. Nevertheless, the tribunal helpfully ex-

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43 Ibid., paras. 191, 208, 219, 242, 250.
44 Ibid., para. 246.
46 Ibid., para. 257.
47 Ibid., para. 249.
49 Ibid., paras. 4, 11.
50 Ibid., para. 11.
51 Noble Ventures v. Romania (n. 1) para. 60.
52 Ibid., para. 158.
plained that in its view, an umbrella clause renders municipal law obligations ‘directly cognizable in international law’, and that by its application:

(…) the host state may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus ‘internationalized’, i.e. assimilated to a breach of a treaty.

The tribunal insisted that ‘the principle of effectiveness (effet utile)’ required that the umbrella clause must create an obligation ‘beyond those specified in other provisions of the BIT itself’. The tribunal concluded that the umbrella clause was intended to provide the investor with an ‘internationally secured legal remedy in respect of investment contracts that it has entered into with the host State’, endorsing the view that the umbrella clause is an intentional departure from the general separation of State obligations under municipal and under international law.

In LG&E v. Argentina, the tribunal accepted that Argentina violated Article II(2)(c) of the Argentina–United States BIT. Argentina was found to have assumed certain legal obligations with regard to investments and foreign investors participating in its gas distribution sector and, subsequently, to have repudiated these without compensation. Unlike preceding cases, the underlying commitments did not arise out of a State contract. Rather, the tribunal found that guarantees, set forth in the Gas Law and its implementing regulations, and subsequently included in promotional material for a privatisation targeted at foreign investors, generated legal obligations falling within the scope of the umbrella clause. According to the tribunal:

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

Abrogation of these commitments gave rise to a violation of Article II(2)(c) of the BIT, which the tribunal held:

creates a requirement for the host State to meet its obligations towards foreign investors, including those that derive from a contract. Hence such obligations receive extra protection by virtue of their consideration under the bilateral treaty.

53 Ibid., para. 53.
54 Ibid., para. 54.
55 Ibid., paras. 50–51.
56 Ibid., para. 52.
57 Ibid., paras. 55, 173.
59 Ibid., para. 175.
60 Ibid.
61 Ibid., para. 170.
In *Enron v. Argentina*, Argentina was again found to have violated the umbrella clause in Article II(2)(c) of the Argentina–United States BIT. The award was later annulled on grounds unrelated to the present discussion. In the award, Argentina was found to have reneged on obligations contained in certain contracts and arising out of unilateral undertakings expressed in its energy sector laws and regulations. The tribunal confirmed that Article II(2)(c) covered both these contractual and unilateral undertakings. These obligations were ‘not observed’ as a matter of Argentinean law.

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

> Article 7(2) has the meaning that its terms express, namely, that failure to meet 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.

*Sempra v. Argentina* closely followed the analysis in *CMS, Enron*, and *LG&E*. *Sempra* held interests in certain Argentinean companies operating in the gas transmission and distribution sector. These companies held licences for the distribution and sale of gas to customers in the Argentine Republic. The tribunal held that by legislative acts and in the terms of the gas distribution licences Argentina had assumed certain obligations in relation to *Sempra*’s investment falling within the scope of protection of an umbrella clause. These were held to be obligations of Argentina entered into with the claimant and its investment. The tribunal determined that Argentina had breached these commitments as a matter of Argentinean law and concluded that Argentina was therefore also internationally responsible for violations of the BIT, and specifically the umbrella clause. A later decision to annul the award did not focus on this aspect of the case.

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67 *Ibid.*, paras. 81, 204.
73 *Ibid.*, paras. 309–310. In a further decision arising out of the Argentine economic crisis, an umbrella clause claim, invoked by operation of the MFN treatment clause in the Argentina–France BIT, was upheld in: *EDF International S.A., SAUR International S.A. and León Partic-
BIVAC v. Paraguay concerned a claim in respect of unpaid invoices under a contract with the Ministry of Finance of Paraguay for the provision of technical services for pre-shipment inspection of imports into Paraguay. The claim was brought under the Netherlands–Paraguay BIT, Article 3(4) of which provides: ‘[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party’. The claimant alleged that Article 3(4) had been breached by the respondent’s failure to make payments that were undisputed and due under the contract. The tribunal upheld jurisdiction in respect of those claims. First, the words ‘any obligation’ were ‘without apparent limitation’, and certainly broad enough to encompass commitments contained in the contract.74 Secondly, the words of Article 3(4) had to be interpreted in such a way as to give them some meaning and practical effect, separate from the other provisions of the treaty. On that basis, and in the light of the natural and ordinary meaning of the language, the tribunal concluded that it had jurisdiction over claims arising from or produced directly in relation to the contract.75

This clear ruling on the effect of the umbrella clause was not, however, the end of the matter. Article 9 of the contract provided that disputes should be submitted to the exclusive jurisdiction of the courts of Asunción. The tribunal took the position that ‘[a]ssuming that Article 3(4) does import the obligations under the Contract into the BIT’ then it must have imported all of Paraguay’s obligations including to ensure the courts of Asunción were available to resolve disputes, in accordance with Article 9. For the tribunal, this raised doubt as to its authority to hear the claims. Given that Article 9 of the contract was concluded after the BIT, and assuming the parties to the contract to have knowledge as to the content of the BIT, the tribunal considered that it was open to the parties to have included a provision in Article 9 carving out possible umbrella clause claims. The tribunal took the failure to do so to be an indication that the parties to the contract intended the exclusive jurisdiction clause ‘to be absolute and without exception’.76 The tribunal held that the umbrella clause does not mean a claimant is ‘free to pick and choose those parts of the Contract that they may wish to incorporate’ and to ignore others.77 To allow otherwise would ‘seriously and negatively undermine contractual autonomy’.78 Counter arguments based on the separation of contract and treaty claims were dismissed ‘as being entirely artificial’ since, according to the tribunal, ‘the reality’ is that to determine an umbrella clause claim, a treaty tribunal must interpret and apply the underlying

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74 Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay, ICSID Case No. ARB/07/9, Decision on Jurisdiction, 29 May 2009, para. 141.
75 Ibid., para. 142.
76 Ibid., para. 146.
77 Ibid., para. 148.
78 Ibid.
contract. The tribunal concluded that the fundamental basis of the claim could only be the contract, and that accordingly, the umbrella clause claim was inadmissible. The proper forum for the resolution of the contractual claim that had been raised, albeit under Article 3(4) of the BIT, was the courts of Asunción. The tribunal left open for the next phase of the proceedings the question whether the consequence of this ruling was that the claims should be dismissed, or whether the proceedings might be stayed, as in \textit{SGS v. Philippines}, although the tribunal indicated serious doubt as to the latter course.

\textit{Toto Costruzioni Generali v. Lebanon} bears similarities in outcome and approach to the \textit{BIVAC} case, yet nevertheless confirms that the umbrella clause might give rise to a treaty remedy in respect of a breach of a State contract. The dispute concerned non-performance of a contract between Toto and the Conseil Executif de Grands Projects (the CEGP) and its successor, the Council for Development and Reconstruction (the CDR). The claimant invoked Article 9(2) of the BIT, which provides: ‘[e]ach Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party’. The tribunal was satisfied that the contract would have fallen within the scope of Article 9(2), given that CEGP and CDR were public entities for which the respondent State was responsible. The tribunal was also prepared to accept that the umbrella clause might provide a remedy in respect of breach of State contracts. Ultimately, however, the tribunal ruled that it did not have jurisdiction to determine the claims since the contract provided that disputes should be referred to the Lebanese courts. The tribunal’s assessment was that

\begin{quote}
\text{[a]}lthough Article 9.2 of the Treaty may be used as a mechanism for the enforcement of claims, it does not elevate pure contractual claims into treaty claims. The contractual claims remain based upon the contract; they are governed by the law of the contract and may be affected by the other provisions of the contract.\footnote{Ibid., para. 202.}
\end{quote}

For the tribunal, the consequence of the contract containing an exclusive jurisdiction in favour of the Lebanese courts was that the tribunal lacked jurisdiction to determine what it called the ‘contractual claims’ advanced under Article 9(2) of the BIT.\footnote{Ibid., para. 190.}

Factualy similar to the two earlier \textit{SGS} cases, and the \textit{BIVAC} case, \textit{SGS v. Paraguay} concerned a claim under Article 11 of the Paraguay–Switzerland BIT,\footnote{SGS v. Paraguay (n. 12).} which provides that ‘[e]ither Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the invest-
ments of other investors of the Contracting Party’. The claim sought to uphold and enforce the financial obligations of Paraguay under a long-term agreement between SGS and the Ministry of Finance to provide pre-shipment customs inspection services. The contract provided that disputes deriving from or in connection with the agreement should be submitted to the courts of Asunción and resolved according to Paraguayan law.

The tribunal ruled that the contract was a ‘commitment’ falling with the scope of Article 11 and as such, it had jurisdiction to hear the claim. It denied that the term commitment in Article 11 only referred to commitments of a certain nature. Rather, it held that ‘[t]he obligation has no limitations on its face – it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally, etc’. 85

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

[t]he State parties to the BIT intended to provide this Treaty protection in addition to whatever rights the investor could negotiate for itself in a contract or could find under domestic law, and they gave the investor the option to enforce it, including through arbitrations such as this one. 86

The tribunal thought it would defeat the purpose of the umbrella clause if it could not rule on a claim without the contractual aspects of the dispute having first been referred to the contractually chosen forum. 87

Turning to the merits of the umbrella clause claim, the tribunal rejected the contention that the umbrella clause may only be breached by conduct involving the exercise of sovereign power. 88 Breach of contract is a failure to observe commitments, the tribunal held, regardless of whether the State has also abused its sovereign authority. 89 The tribunal concluded that ‘we see no basis on the face of the clause to believe that it should mean anything other than what it says – that the State is obliged to guarantee the observance of its commitments with respect to the investments of the other State party’s investors’. 90 Accordingly, proof that Paraguay had failed to observe its commitments by failing to make payments due, without lawful justification for failing to do so, led to the umbrella clause claim being upheld.

85 Decision on Jurisdiction, 12 February 2010, para. 167.
86 Ibid., para. 176; and Award, 10 February 2012, para. 71.
87 Award, 10 February 2012, paras. 101, 104.
88 Ibid., para. 89.
89 Ibid., para. 91.
90 Decision on Jurisdiction, 12 February 2010, para. 168; Award, 10 February 2012, para. 72.
b) Decisions Doubting or Declining to give Effect to an Umbrella Clause

In upholding a breach of an umbrella clause, the tribunal in *Sempra v. Argentina* extolled that ‘[v]arious recent decisions have dealt with the meaning and extent of the “umbrella clause”, and the mystery surrounding the matter seems to be gradually lessening’. As the following discussion reveals, that statement was rather hopeful. The sceptical view of the umbrella clause continues to be voiced by many tribunals, besides the tribunal in the initial *Pakistan* case.

*Joy Mining v. Egypt* contains highly sceptical remarks about the effect of the alleged umbrella clause in the Egypt–United Kingdom BIT. In that case, the tribunal denied that the umbrella clause had any substantive effect independent of a violation of the BIT’s other rights and obligations or, in an apparent *non sequitur*, a breach of contract of sufficient ‘magnitude’. The tribunal opined that:

> [i]n this context, *it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, *could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course 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, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect.*

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

In contrast, *El Paso v. Argentina* and *Pan American v. Argentina* squarely addressed the same umbrella clause applied in *CMS, LG&E, Enron* and *Sempra* and also considered in *Azurix*. The decisions, issued by tribunals with two common members, are materially identical on this point. Both decisions reject the unqualified suggestion that the clause in the Argentina–United States BIT creates an international law obligation to observe investment-related State contracts or commitments arising under municipal law in the manner pleaded by the claimants or adopted in other cases. Each decision endorses the sceptical approach of the tribunal in *SGS v. Pakistan*.

The umbrella clause claims related to Argentina’s alleged failure to observe arrangements governing the claimants’ energy sector investments set forth in the applicable general regulatory frameworks and confirmed by contracts and licences. The conclusions of the *El Paso* and *Pan American* tribunals on the ef-

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91 Award, 28 September 2007, para. 309.
92 *Joy Mining Machinery Ltd v. Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004.
93 *Ibid.*, para. 81 (emphasis added). This aspect of the Award is necessarily affected by the tribunal’s prior finding that the dispute did not even concern an investment. The comments on the umbrella clause are *obiter*.
fect of the umbrella clause are foreshadowed by the manner in which the tribunals introduced the issue:

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.\(^{55}\)

50 It is clear that the *El Paso* and *Pan American* tribunals, like that in *SGS v. Pakistan*, were influenced by a fear that there were few, if any, limits to the scope of the umbrella clause. This was especially so given the tribunal’s concern that the clause referred to obligations generally, and not only contractual obligations:

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.\(^{96}\)

51 The tribunals’ view that the umbrella clause might attach to ‘*any* legal obligation of a State and not only of any contractual obligation with respect to investment (…) whatever the source of the obligation’\(^{97}\) evidently gave rise to strong antipathy to other arguments as to the effect of the umbrella clause. Both tribunals rejected the interpretation of the umbrella clause given by the *SGS v. Philippines* tribunal, finding the arguments put forward by the tribunal in *SGS v. Pakistan* ‘more than conclusive’.\(^{98}\) The tribunals doubted the interpretative approach of the *Philippines* tribunal for ‘favouring one party over another’\(^{99}\) and being unbalanced,\(^{100}\) emphasising 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’.\(^{101}\)

52 Similar to the view of the *SGS v. Pakistan* tribunal, the *El Paso* and *Pan American* tribunals were also convinced that ‘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’.\(^{102}\) The tribunals rejected the possibility that the clause was intended to provide a remedy in respect of ‘mere’ contractual breaches and saw no need for one, since ‘it is more than likely that the foreign investor will have managed to insert a dispute settlement mechanism into the contract’.\(^{103}\) In investment matters, the tribunals asserted that a State contract is

\(^{95}\) *Ibid.*, para. 67 (emphasis added); and see *Pan American v. Argentina* (n. 1) para. 96.


\(^{97}\) *Ibid.*, para. 76; *Pan American v. Argentina* (n. 1) para. 105.


\(^{100}\) *El Paso v. Argentina* (n. 1) para. 70.

\(^{101}\) *Ibid*.

\(^{102}\) *Ibid.*, paras. 73, 76; *Pan American v. Argentina* (n. 1) paras. 102, 105.

\(^{103}\) *Ibid.*, para. 77; *Pan American v. Argentina* (n. 1) para. 106.
likely to refer to ICSID or international commercial arbitration anyway. Disagreeing with the tribunal in Noble Ventures, the tribunals thought that the foreign party would already have access to an ‘internationally secured legal remedy’,\textsuperscript{104} and no additional remedy was intended, or if the transaction was merely commercial, it would fall within the jurisdiction of the local courts, and in the tribunals’ opinion, no ‘internationally secured remedy’ would be justified.\textsuperscript{105}

The tribunal considered that one of the ‘far-reaching consequences’ of a broad interpretation of the umbrella clause would be the destruction of ‘the distinction between national legal orders and the international legal order’.\textsuperscript{106} The tribunal doubted that the contracting parties had intended to create potential international responsibility of a State for breach of a contract governed by domestic law.

At best, the El Paso and Pan American tribunals considered that the umbrella clause was intended to safeguard ‘additional investment protections contractually agreed by the State as a sovereign’,\textsuperscript{107} without articulating what these might be, and only in respect of conduct that would otherwise violate the standards of the treaty.\textsuperscript{108} In other words, the tribunals found little or no additional substantive effect for the umbrella clause in the Argentina–United States BIT.\textsuperscript{109}

C. Analysing the Debate on the Effect of the Umbrella Clause

Part C. analyses the current state of the law on umbrella clause claims, including the various objections that have been raised to its asserted effect. Section 1. addresses arguments based on the presumed intentions of the contracting parties. Section 2. analyses the concern that to give a broad effect to the umbrella clause would be destructive of the distinction between domestic and international legal orders. Section 3. considers the argument that to give effect to the umbrella clause would risk rendering other treaty provisions superfluous. Section 4. considers the question of whether the umbrella clause may only be triggered by breaches of a governmental nature. Section 5. considers the problematic interaction of the umbrella clause with contractually agreed dispute settlement proce-

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\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid.
\textsuperscript{106} Ibid., para. 82, and see Pan American v. Argentina (n. 1) para. 111.
\textsuperscript{107} Ibid., paras. 81–82.
\textsuperscript{108} Ibid., para. 84. The umbrella clause claim ultimately was dismissed on the merits on grounds that El Paso did not have any basis for a claim in its own right: Award, 31 October 2011, paras. 533, 538.
\textsuperscript{109} Emmanuel Gaillard, ‘A Black Year for ICSID’ (2007) TDM 1–9; David Foster, ‘Umbrella Clauses: A Retreat from the Philippines?’ (2006) 4 Int’l Arb. L. Rev. 100, 107 suggesting that the residual meaning ascribed to the clause was ‘arbitrary’. An interpretation that would render a treaty provision ineffective or meaningless is not likely to be the correct one and should be avoided: Robert Jennings and Arthur Watts (eds), Oppenheim’s International Law (Longman, 1992) 1280.
dures. Lastly, section 6. considers the scope of application of the umbrella clause, and the floodgates fears this issue has generated.

1. The Presumed Intentions of the Contracting Parties

In SGS v. Pakistan, the tribunal could not accept that the contracting parties to the Pakistan–Switzerland BIT had intended Article 11 of that treaty to create a new international obligation in respect of municipal obligations “where clearly there was none before”. The tribunal in Joy Mining v. Egypt could not accept that such a brief and unobtrusive treaty provision could have been intended to have the effect of creating a treaty remedy in respect of breach of investment-backed State contracts. The philosophy of the El Paso and Pan American decisions also appears to rule out the possibility that States might agree as a general matter to afford to each other’s investors, both large and small irrespective of their bargaining strength and ability to negotiate for themselves contractual safeguards, access to an independent and depoliticised dispute settlement mechanism for questions concerning a State’s failure to observe obligations entered into with the foreign party or with respect to its investment.

The difficulty with the positions taken by these tribunals is that they seem unprepared to accept the words of the umbrella clause at face value and the possibility that the very intention of the contracting parties was to create an international remedy in respect of violation of a State contract. State sovereignty necessarily admits the possibility that States may so agree to bind themselves and permit international institutions and processes to scrutinise and even intervene in their domestic affairs and confirms their capacity to do so. At least one State has offered contemporaneous confirmation that this was indeed its intention in negotiating umbrella clauses in its treaties.

In addition, if the ‘broad’ or ‘generic claims clause’ is conceded to allow investors to submit to a treaty-based tribunal true contractual disputes related to investments, this assumption underlying the restrictive interpretation of umbrella clauses – namely that States did not intend to create a jurisdiction to determine investment-related issues – is undermined. The interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in Light of Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 SGS Société Générale de Surveillance S.A. versus Islamic Republic of Pakistan, Note under Cover of Letter from Swiss Government to ICSID Deputy Secretary-General, 1 October 2003, (2004) 19 Mealey’s Int’l L. 100, 104–105.


State contract disputes – is yet further undermined.\textsuperscript{116} Yet, whilst these tribunals acknowledged that States might so agree, they were not convinced that by the wording of the clauses in question, they had.

Evidence of the origins of the umbrella clause, including the stated intentions of drafters involved in producing the first formulations of the umbrella clause and the contemporaneous commentaries of scholars and practitioners, suggests that the better view is that the clause as originally devised was intended to achieve two definite objectives.\textsuperscript{117} The first was the creation of an international law obligation breach which would give rise to international responsibility. The second was to establish an international law dispute settlement procedure to enforce this obligation. What is qualitatively different about the umbrella clause from a simple contractual claim is the coming together in a single legal device of these two elements.

The evidence suggests that the umbrella clause had been intended effectively to ensure that State contracts (and other ‘obligations’ of the host State) are lifted out of the domain of the host State’s legal system so that, at least, the obligation to perform such obligations is not governed exclusively by the proper law (typically the host State’s law) and therefore vulnerable to unilateral variation or termination. The clause may have been originally conceived to remedy some of the inadequacies of purely contractual investment protection techniques. The effectiveness of contractual provisions designed to insulate investors from sovereign power and to ensure that an arbitration tribunal would apply international legal principles to disputes cannot be assured if the contract remains subject to local law and thus local legislative and executive power. Prevailing doctrine at the time of the umbrella clause’s inception held that a host State could not give an effective promise in an investment contract that it would not change laws affecting the transaction; in many countries that is still the case. Moreover, the law of the host State would very often govern such contracts, given relative negotiating strengths and doctrine at the time that all State contracts must be ‘based on the municipal law of some country’.\textsuperscript{118} The conclusion that a State’s international responsibility could be invoked when a State merely breached a contract with a foreign investor, without proof of some further internationally wrongful element, such as a refusal to adjudicate claims locally or unilateral repudiation of contrac-

\textsuperscript{116} SGS v. Paraguay (n. 12) paras. 129, 183; cf. El Paso v. Argentina (n. 1) para. 84; Pan American v. Argentina (n. 1) para. 109 in which the tribunals used the generic offer of jurisdiction over ‘investment agreements’ in Article VII(1)(a) of the treaty to conclude that the umbrella clause did not give rise to the possibility of treaty claims in respect of other types of State contract disputes. This aspect of the reasoning not to give effect to the umbrella clause seems to be based on the view that claims under Article VII(1)(a) would themselves already ‘elevate’ contractual claims stemming from an ‘investment agreement’ to the level of ‘treaty claims’. However, umbrella clause claims and claims under the generic dispute settlement clause are qualitatively different and should not be confused.

\textsuperscript{117} Anthony Sinclair (n. 45).

\textsuperscript{118} Payment of Various Serbian Loans Issued in France (France v. Serbia), PCIJ Judgment of 12 July 1929, (1929) PCIJ (Ser. A) No. 20, 41.
tual rights and obligations through legislative intervention, had some advocates but was never well supported and was ultimately not sustainable. Theories that argued that certain types of ‘investment agreements’ or ‘economic development agreements’ could be ‘internationalised’ or equated with treaties in order to attract the treaty law principle *pacta sunt servanda* were only ever marginally successful in a handful of concession contract arbitrations in the 1960s and 1970s. Such arguments were theoretically unsatisfactory, not least because they lacked the essential mutuality of international law rights and obligations.

In time it was accepted that rules of international law might be chosen to apply to an investment agreement, but this did not necessarily mean that breach of that agreement invoked the State’s international responsibility; amongst the few to suggest otherwise was the sole arbitrator in *Texaco v. Libya*. Other commentators have drawn analogies between the operation of the umbrella clause and the effect of intangibility or stabilisation clauses found in some State contracts. However, the umbrella clause resolves at least one major con-

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ceptual difficulty with the stabilisation clause. As explained, it has never been unambiguously accepted that by a simple contractual clause a State can fetter its sovereign right to legislate and so renounce public responsibilities.\textsuperscript{126} Many have persuasively argued that at best a suitably drafted stabilisation clause, which purports to freeze the applicable legal regime,\textsuperscript{127} might give rise to a special right to compensation in the event of its breach\textsuperscript{128} or, exceptionally, a degree of insulation from repudiation or expropriation but only for a limited period.\textsuperscript{129} Yet with an umbrella clause, where stabilising commitments exist in a State contract, it is arguable that investors might benefit from an international law obligation that attracts the principle \textit{pacta sunt servanda} and the maxim that a State cannot invoke its own law or constitutional requirements to avoid its international obligations.\textsuperscript{130} The umbrella clause can thereby help secure a stabilising effect.

Contemporaneous evidence from the 1950s shows that the umbrella clause was therefore devised in order to avoid the possibility that observance of the obligations a host State entered into with investors or with respect to their investments could be subject exclusively to the host State’s power and therefore open to unilateral change by the host State government. It was hoped that this result could be achieved by supplementing an investor’s contract and whatever contractual safeguards it may contain with the additional protection of a treaty obligation between the State of the investor and the host State. The umbrella treaty provision therefore lends an additional degree of stability to the terms of an investment contract, not by changing those terms, but by ensuring that such commitments that exist are intangible under threat of violating a treaty. Com-


\textsuperscript{127} Clauses in modern long-term contracts more frequently seek to establish a mechanism to maintain the ‘financial equilibrium’ of a project, or create enforceable mechanisms for renegotiation: Peter D. Cameron, \textit{Stabilisation in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil and Gas Investors}, Report for the Association of International Petroleum Negotiations (AIPN, 2006).


\textsuperscript{130} Vienna Convention on the Law of Treaties, Articles 26–27.
mentators, such as Weil and Shihata, agree that the umbrella clause achieves a form of internationalisation of State contracts.\footnote{Prosper Weil, ‘Problèmes relatifs aux contrats passés entre un etat et un particulier’ (1969-III) 128 RC 102, 130; Ibrahim F.I. Shihata, ‘Applicable Law in International Arbitration: Specific Aspects in the Case of the Involvement of States Parties’ in Ibrahim F.I. Shihata and James D. Wolfensohn (eds), The World Bank in a Changing World: Selected Essays and Lectures, vol. 2 (Brill, 1995) 595–603.}

62 The second underlying objective behind the inception of the umbrella clause was to provide an international remedy for a host State’s breach of its obligations owed to investors of another contracting party. Breach of a State contract, which in turns breaches an umbrella clause, would invoke the offending State’s international responsibility and, in principle, might justify a claim for restitution of the investor’s contractual rights although in practice an award of damages is more likely. The umbrella clause therefore seems to have been intended to add to investors’ contractually agreed or local remedies by presenting the opportunity through treaty arbitration to obtain international law redress for breach of a State contract. This was achieved through the language of the treaty provision itself coupled with a watertight treaty dispute settlement clause. The crucial significance of an effective international dispute settlement provision as part of the protection afforded by the umbrella clause was emphasised in the 1963 Report of the Committee on International Trade and Investment of the American Bar Association to the United States State Department (the ABA Report) commenting on Article 2 of the OECD Draft Convention on the Protection of Foreign Property of 1962:

> What the Convention would do in respect of State undertakings to aliens would be to provide a remedy for their enforcement. (…) it would provide for giving effect in an international forum to acquired rights arising from State contracts, and in this way it would ensure the application of an international standard where under international law that standard should be applied.\footnote{Report by the Committee on International Trade and Investment of the Section of International and Comparative Law of the American Bar Association, The Protection of Private Property Invested Abroad (American Bar Association, published privately, 1963) 95–96.}

63 \emph{SGS v. Philippines} and the cases that have followed it are consistent with this philosophy, especially insofar as they confirm that the umbrella clause can ‘help secure the rule of law in relation to investment protection’.\footnote{SGS v. Philippines (n. 6) para. 126.} The value to investors of an international dispute settlement procedure to protect contractual rights was also acknowledged \emph{Noble Ventures}. The tribunal emphasised the role of the umbrella clause in ensuring that the investor could avail itself of an ‘internationally secured legal remedy’ in respect of breaches of investment-related State contracts.\footnote{Noble Ventures v. Romania (n. 1) para. 52.}

64 The above conclusions on the intended legal effect of the umbrella clause, derived from historical research into the origins of the umbrella clause,\footnote{Anthony Sinclair (n. 45).} were
noted in *Eureko v. Poland*,136 and have found the support of practitioners and commentators. Referring to this research, Gaillard has written:

An historical examination of the origins of the observance of undertakings clauses shows in the clearest manner that the intention of States negotiating and drafting such clauses is to permit a breach of contract to be effectively characterised as the breach of an international obligation by the host State.137

Of course, the presumed intentions of contracting parties and treaty drafters are secondary to the task of interpreting the text of the umbrella clause. The first duty of any arbitral tribunal called upon to determine an umbrella clause claim is simply to strive to interpret the words and apply them.138 In contrast, the policy-motivated approaches of the tribunals in *SGS v. Pakistan*, *El Paso*, and *Pan American*, in particular, pay little attention to the accepted maxim in investment arbitration that a treaty provision ‘is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties’.139 There is little textual interpretation at all in these decisions. Others, such as the tribunal in *SGS v. Paraguay*, have rightly declined to adopt the respondent States’ submissions as to the putative ‘true meaning’ of the umbrella clause in the light of ‘the plain language of the umbrella clause that is before us’.140 However, the plain and natural meaning of the words of an umbrella clause, coupled with a historical appreciation of the drafters’ intentions, should dispel lingering suggestions that the meaning of the umbrella clause is ‘obscure’,141 and confirm that it ‘means what it says’.142

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136 *Eureko v. Poland* (n. 41) para. 251.
138 See *Competence of the General Assembly in the Admission of a State to the United Nations*, in which the Advisory Opinion of the ICJ included the observation that ‘the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter’: *Opinion on the Competence of the General Assembly in the Admission of a State to the United Nations*, ICJ Rep. 1950, 4, 8; also International Law Commission (Humphrey Waldock, Special Rapporteur), *Third Report on the Law of Treaties* (1964) 2 YBILC 5, 56 (UN Doc. A/CN. 4/167 and Add.1–3): ‘the text must be presumed to be the authentic expression of the parties; and in consequence the starting point of interpretation is the elucidation of the meaning of the text, not to investigate *ab initio* into the intentions of the parties’.
140 Decision on Jurisdiction, 12 February 2010, para. 168.
141 *Eureko v. Poland* (n. 41) para. 246.
142 *SGS v. Philippines* (n. 6) para. 128.
Chapter 8: Standards of Protection

2. The Separation between International and Domestic Legal Orders

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

a) The Existence of the Protected Obligation

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

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

143 El Paso v. Argentina (n. 1) para. 82; Pan American v. Argentina (n. 1) para. 110; Hamester v. Ghana (n. 8) para. 349.
144 Noble Ventures v. Romania (n. 1) para. 55.
146 SGS v. Philippines (n. 6) para. 128.
147 Ibid., para. 117.
149 Burlington Resources v. Ecuador (n. 145) para. 214.
Other tribunals have suggested a broader approach in determining the existence of a protected obligation. In *Eureko v. Poland*, the tribunal interpreted various agreements governed by Polish law to which the State treasury was a party and found that, by these agreements, Poland had itself entered into a binding commitment to hold an initial public offering of shares in the State insurance company, PZU in which the claimant would have an opportunity to acquire a majority stake. The dissenting arbitrator disputed the majority’s analysis of Polish law, insisting that the proper conclusion was that the State treasury had not assumed any obligation of result binding upon and enforceable against the State under Polish law, including indirectly by bringing an umbrella clause claim. The dissenting arbitrator added that mere non-enforceable expectations on the part of the investor should not attract the protection of the umbrella clause. The majority of the tribunal was convinced that there was an obligation and it bound the Polish State. Yet the majority went further and opined that even if the result under Polish law were otherwise, the tribunal was an international tribunal, applying an international legal standard to which international law applied. Under international law, it was clear that the obligations of a State’s treasury were obligations of its State. The dissenting arbitrator described this analysis as an exercise in interpretation ‘sans loi’. In this last respect, at least, the majority decision in *Eureko* on the application of the umbrella clause has been subject to criticism, since if the majority had been of the opinion that there was no obligation under Polish law, all other things being equal, the natural consequence should have been to find that the umbrella clause was not invoked.

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

In other cases tribunals have applied the putative proper law to determine the existence of an obligation to which the umbrella clause applies, and found that no such obligation exists, or that it may not be enforced as between the parties to the treaty proceeding. An *ad hoc* committee annulled the award in *CMS v.*

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150 *Eureko v. Poland* (n. 41) para. 157.
152 *Ibid.*., para. 7.
153 *Eureko v. Poland* (n. 41) para. 247.
154 Dissenting Opinion of Arbitrator Rajski, 19 August 2005, para. 5.
155 Zachary Douglas (n. 48).
156 *LG&E v. Argentina* (n. 58) para. 174 (emphasis added).
158 *Link-Trading v. Department for Customs Control of Moldova*, Award, 18 April 2002, paras. 76–86.
Argentina on the ground that the tribunal had failed to state reasons for the finding that there had been a breach of the umbrella clause. The committee held that the tribunal had not supplied reasons for its conclusion that CMS could bring an umbrella clause claim in respect of obligations in a licence to which it was not a party. The committee emphasised that the obligations protected by the umbrella clause are only legal obligations, arising between the obligor and the obligee, so identified as a matter of the applicable law.

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

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

It is clear from the term ‘obligation’ that what is covered by the umbrella clause are legally enforceable rights and obligations, and that mere policy statements or declarations of intention would not be covered, even if they might give rise to ‘legitimate expectations’. Moreover, such obligations must be pre-existing independently of the relevant investment treaty; they are not summoned into existence by the application of the umbrella clause itself. There is nothing in principle which would exclude obligations arising under either national or international law, although generally speaking, general international law has few appropriate or developed rules of form or substance for determining when and how, as a matter of law, a State enters into a commitment or gives a legal undertaking towards a private, foreign investor.

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159 Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 384; Siemens v. Argentina (n. 66) paras. 81, 204.
161 Ibid., para. 90.
162 ABA Report (n. 132) 95–96 (emphasis added).
163 Ibid (emphasis added).
164 SGS v. Philippines (n. 6) para. 126; CMS v. Argentina (n. 160) para. 89.
165 Some treaties make this point expressly. The Belarus–Republic of Korea BIT creates, in Article 10, an obligation to ‘observe any other obligation’ the host State may have entered into with regard to the investments of an investor of the other State.
Some commentators contend that umbrella clauses apply only to other international law obligations entered into between the Contracting Parties, albeit relating to investments. Whilst it is clear that the provision can cover other international obligations provided they would specifically relate to the investment, special international agreements relating to specific investments are relatively uncommon, and so, quite apart from the absence of any textual support for such a restrictive reading, it is unlikely that obligations of this nature constitute the entire class of obligations to which the umbrella clause was intended to apply. Nor would such a limited interpretation satisfy the effectiveness test, for it adds nothing to the existing state of international law; international obligations are already binding upon States.

In summary, the proper law of the putative obligation is relevant to confirm the existence and content of that obligation. This will often be the law of the host State, made relevant in the context of a treaty claim by implication in the term ‘obligation’. Tribunals must nevertheless be prepared to act as check against a host State’s attempts to frustrate claims simply by denying the existence of an obligation to which the umbrella clause may attach, particularly by manipulating its law-making processes to that end. Tribunals have confirmed that their power of scrutiny properly extends to ensuring that a host State may not evade treaty jurisdiction by wrongfully asserting illegality or nullity of the alleged obligation under its internal law.

b) The Question of Non-Observance

Exceptionally, a BIT may expressly stipulate the laws that govern the merits of an umbrella clause claim. The Austria–Armenia BIT clarifies that disputes arising under the umbrella clause:

shall be decided, absent other agreement, in accordance with the law of the Contracting Party, in whose territory the dispute arose, the law governing the authorization or agreement and such rules of international law as may be applicable.

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169 Noble Ventures v. Romania (n. 1) para. 51.

The Australia–Mexico BIT and Denmark–India BIT are further examples to similar effect. Each clarifies how the umbrella clause is to be applied by providing that ‘disputes arising from such obligations shall be settled under the terms of the contract underlying the obligation’. The ‘terms of contracts’ would presumably include any express choice of law clause, but also raises questions as to the application of any contractually agreed dispute settlement procedures, discussed in section 5. below.

Even in the absence of specific wording, again, there is as a general matter a role for both national and international legal orders in assessing whether there has been a breach of an umbrella clause. Tribunals have elaborated on this interplay of legal orders and the proper role of an international tribunal. The Philippines tribunal explained that an umbrella clause does not alter the law primarily applicable to the underlying protected obligation: ‘it does not convert the issue of the extent or content of such obligations into an issue of international law’. These remain matters for their proper law, with the umbrella clause addressing the performance of obligations ‘once they are ascertained’.

The El Paso tribunal said the reasoning of the tribunal in SGS v. Philippines was ‘contradictory’, insofar as the umbrella clause exists in a treaty, yet the interpretative exercise involves the application of the proper law of the covered obligation. However, there is no contradiction. Notwithstanding that the umbrella clause involves the application of international law, the existence and content of the underlying protected obligations, commitments or undertakings must be identified. This can only be done by reference to their proper law. Neither the treaty nor international law generally may substitute for the applicable law of the contract on such questions. The CMS committee later confirmed this approach, stating that: ‘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’.

Tribunals that have upheld umbrella clause claims have consistently referred to the proper law of the protected obligation as the primary source of guidance on the question of ‘non-observance’. In Enron v. Argentina the tribunal determined that the relevant commitments had been breached as a matter of the applicable Argentinean law, only subsequently confirming this analysis by reference to principles of international law. Similarly, in LG&E v. Argentina, the tribunal explained that it would apply Argentinean law to the merits of the dispute.

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171 E.g., Australia–Mexico BIT, Article 9; Denmark–India BIT, Article 2(4).
173 Ibid., para. 126.
174 El Paso v. Argentina (n. 1) para. 76.
175 SGS v. Philippines (n. 6) para. 127.
176 CMS v. Argentina (n. 160) para. 95(c).
177 Enron v. Argentina (n. 62) paras. 231, 275–276.
– in addition to the terms of the relevant BIT and general international law – ‘in view of its relevance for determining the Argentine Republic’s liability (…)’.178 There was a detailed analysis of whether the State had any defences to the non-payment of invoices in the SGS v. Paraguay case on grounds of the claimant’s own breach. This involved analysis both of the terms of the contract in question and rules existing in the applicable Paraguayan law.179

The umbrella clause is however a treaty claim, ultimately governed by international law. In Noble Ventures v. Romania, the tribunal noted that an umbrella clause renders municipal law obligations ‘directly cognizable in international law’.180 The tribunal observed that ‘an umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of State obligations under municipal and international law’.181 This does not substitute the existing proper law of a contract or other obligation, although it does imply that international law has a controlling effect on the merits of the claim.

Tribunals have also been careful to spell out the limits of the role of international law. In MTD v. Chile the tribunal rejected an argument that the contracts were fully ‘internationalised’ by operation of the umbrella clause in the Chile–Denmark BIT. Chilean law was the law chosen to govern the agreement in question, and continued to apply to determine the scope of the parties’ obligations and whether any of these had been breached.182 Although the umbrella clause claim was not upheld in Azurix v. Argentina, the tribunal helpfully explained that in determining umbrella clause claims, both municipal and international legal orders had ‘a role to play’,183 with international law exercising a controlling function. The tribunal stated that:

(…) the law of Argentina should be helpful in the carrying out of the Tribunal’s inquiry into the alleged breaches of the Concession Agreement to which Argentina’s law applies, but it is only an element of the inquiry because of the treaty nature of the claims under consideration.184

Similarly, in Sempra v. Argentina, the tribunal explained that when determining an umbrella clause claim, the relevance of domestic law is not consigned to ‘the determination of factual questions’.185 Both international law and domestic law ‘have a role to perform in the resolution of the dispute’.186 The licences were governed by Argentinean law and interpreted pursuant to that law,187 with the tribunal concluding that, as a matter of Argentinean law, Argentina had violated the terms of the licences.188

178 LG&E v. Argentina (n. 58) para. 82.
179 Award, 10 February 2012, paras. 119–121, 129–132, 146–149, 152.
180 Award, 12 October 2005, para. 53.
181 Ibid., paras. 55, 173.
182 MTD v. Chile (n. 8) para. 187; Decision on Annulment, 21 March 2007, para. 73.
183 Azurix v. Argentina (n. 159) para. 66.
184 Ibid., para. 68.
185 Sempra v. Argentina (n. 69) para. 235.
186 Ibid., para. 236.
187 Ibid., paras. 235, 241 et seq.
188 Ibid.
Turning to the commentaries, there is a lack of precision in some of the writings on the umbrella clause and its effect, particularly when considering the relationship between the treaty obligation itself, and the underlying contractual or other obligation and its proper law. Weil spoke of the umbrella clause ‘transforming’ contractual rights into treaty obligations.\(^{189}\) Shihata described the effect of the umbrella clause as ‘elevating’ a contractual undertaking into an international law obligation.\(^{190}\) Drafters of the unfinalised Multilateral Agreement on Investment (MAI) suggested that the umbrella clause would ‘in effect, amend investor-state agreements’.\(^{191}\) According to one UNCTAD publication, the umbrella clause ‘might possibly alter the legal regime’ of a State contract ‘and make the agreement subject to the rules of international law’.\(^{192}\) The salient question underlying these somewhat vague statements is by reference to what applicable law is the merits of an umbrella clause claim to be determined.\(^{193}\)

There are commentators who argue that a tribunal should not consider the question of performance of the relevant underlying obligation by reference to its proper law.\(^{194}\) Rather, it is asserted that since the umbrella clause is a treaty claim, ‘only international public law is applicable to them’.\(^{195}\) A further rationale for this conclusion is that applying the law of the host State to the merits of an umbrella clause claim, even though it concerns a State contract governed by local law, would be at odds with the stabilisation function of the umbrella clause. Zolia argues that the effect of the umbrella clause is that ‘contractual commitments are to be respected even if internal [proper] law allows their non-execution’,\(^{196}\) concluding therefore that international law should apply to the substantive question whether the umbrella clause has been violated, if necessary to the exclusion, of the governing law of the contract or obligation.\(^{197}\) Without going so far as to disapply the proper law, other commentators have said that an

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\(^{189}\) Prosper Weil (n. 121) 130, suggesting that the provision: ‘fait de l’obligation d’exécuter le contrat une obligation internationale à la charge de l’État contractant envers l’État national du contractant. L’intervention du traité de couverture transforme les obligations contractuelles en obligations internationales’ (emphasis added).


\(^{192}\) UNCTAD (n. 3) 56 (emphasis added).


\(^{195}\) Ibid., at 47.

\(^{196}\) Ibid., at 19.

\(^{197}\) Ibid., at 43.
alleged breach of an umbrella clause is ‘a subject-matter that is altogether different from evaluating a domestic contract under domestic law’. 198

On the other hand, there is no reason to believe that the umbrella clause operates as a choice of law clause to alter the applicable law of a State contract. 199

As the American Bar Association concluded in its commentary on the OECD Draft Convention, the umbrella clause does ‘not turn private contracts into treaties’ or transform a contract governed by the law of a host State into an obligation governed by international law. 200

The majority of cases that have applied an umbrella clause recognise that whilst it is a treaty claim, ultimately governed by public international law, the proper law of any underlying contractual obligation is also fundamental to a proper analysis of the claim. The consensus, summarised by Crawford, is that whilst it may provide a basis for a treaty claim, ‘the umbrella clause does not change the proper law of the contract or its legal incidents’. 201 Rather than transforming the provisions of a State contract into an international obligation, the umbrella clause makes the observance of such provisions, so identified according to their proper law, an obligation under the treaty. 202 The legality of conduct applying the governing law of the protected obligation is therefore central to the question of non-observance.

The El Paso and Pan American tribunals said this interplay of international and national law was ‘quite strange’, 203 but plainly national law may be relevant in the context of a treaty claim simply because the treaty ‘makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it’. 204 By its very object, the umbrella clause itself makes the proper law of the covered obligation relevant. 205 It fol-

200 ABA Report (n. 132) 95–96.
203 El Paso v. Argentina (n. 1) para. 76.
204 ILC, Articles on Responsibility of States for Internationally Wrongful Acts, adopted in Annual Report of the International Law Commission on its Fifty-third Session (23 April–1 June and 2 July–10 August 2001), A/56/10, ch. IV, and endorsed by the UN General Assembly by Resolution 56/83 of 12 December 2001, reprinted with a commentary in James Crawford, The International Law Commission’s Articles on State Responsibility (Cambridge University Press, 2002) 90, para. 7, containing commentary to Article 3 and e.g., Payment of Various Serbian Loans Issued in France (n. 118); Case Concerning the Payment in Gold of Brazilian Loans Issued in France, Judgment of 12 July 1929, (1929) PCIJ (Ser. A) No. 21; Panevezys-Saldutiskis Railway Case, (1939) PCIJ (Series A/B) No. 76; Lighthouses Case, (1934) PCIJ (Series A/B) No. 62, 19–23; Lighthouses in Crete and Samos Case, (1937) PCIJ (Series A/B) No. 71; Lighthouses Arbitration between France and Greece, Award, 24 July 1956, (1956) 12 RIAA 155; 23 ILR 659; Robert Jennings and Arthur Watts (n. 109) 927, fn. 5; Clarence W. Jenks, The Prospects of International Adjudication (Stevens, 1964) 547 et seq.
lows that a tribunal seized of an umbrella clause claim is competent to consider and make determinations on the parties’ rights and obligations in an underlying contract and in the light of the proper law because the treaty requires it.\textsuperscript{206} Absent an exclusive jurisdiction clause in the contract, as to which the law, discussed in section 5. below, is still divided, there is no obstacle to a treaty-based tribunal from making determinations as to the parties’ respective rights and obligations under the contract, and no justification for asserting that there must first be a determination by a local court or tribunal that there has been a breach of the underlying contract. The international tribunal is competent to consider and apply the proper law, and in doing so, obliged to strive to apply the law in the same manner as the relevant national courts.\textsuperscript{207}

The consequence of this incorporation of the contractual legal order is that a treaty-based tribunal may be called upon to consider and potentially apply terms in the underlying contract or applicable legal order giving rise to objections to jurisdiction or admissibility, defences on the merits, set-off, or stipulating the extent and availability of certain remedies.\textsuperscript{208} It is an open question whether an umbrella clause claim might open the door to host State counterclaims.\textsuperscript{209}

It is implicit that only \textit{wrongful} non-observance will breach the umbrella clause. Wholly innocent or justified non-performance on the part of the host State – for instance, as a result of the claimant’s prior breach, some other defect under the applicable law, or as part of the exercise of a State’s police powers\textsuperscript{210} – should not breach the umbrella clause.\textsuperscript{211} Like any other treaty obligation, non-

\textsuperscript{205} Stanimir Alexandrov (n. 193) 562.

\textsuperscript{206} \textit{Cf.} Link-Trading \textit{v. Department for Customs Control of Moldova} (n. 158) para. 61 in which the tribunal (wrongly) stated that it was ‘not competent to determine whether the contractual provisions have been respected by the parties thereto, since said contracts create civil law relations and are governed by their own specific arbitration agreements between the parties thereto’.

\textsuperscript{207} Soufraki \textit{v. United Arab Emirates}, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, para. 96 discussing \textit{Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France}, (1929) PCIJ (Ser. A) No. 21, 27–28; \textit{Case Concerning the Payment of Various Serbian Loans Issued in France} (n. 118) 36; and see \textit{Case concerning Elettronica Sicula S.p.A. (USA v. Italy)}, Award of ICJ Chamber, 20 July 1989, ICJ Rep. 1989, 15, 51, para. 73, and 74, para. 124.

\textsuperscript{208} E.g., Nykomb \textit{v. Latvia} (n. 7) section 5.2; also ILC Articles, Commentary to Article 20, in James Crawford (n. 204) 165 confirming that in determining the international legal consequences of an internationally wrongful act, a tribunal might take into account any consequences of wrongfulness that might have been contractually agreed. It is an open question whether an umbrella clause claim might succeed in respect of an underlying contractual violation that would otherwise be time-barred, just as the umbrella clause does not create new obligations where none would otherwise exist, nor should it restore them, but \textit{cf.} SGS \textit{v. Paraguay}, ICSID Case No. ARB/07/29, Award, 10 February 2012, para. 166, permitting an umbrella clause claim to proceed given that the BIT at issue did not contain a limitation period.


\textsuperscript{210} See also ABA Report (n. 132) 93.
The observance of an umbrella clause obligation may be excused at the international level too, for instance on grounds of necessity or fundamental change of circumstances (the *rebus sic stantibus* concept). Thus, Weil was arguable incorrect when he opined that the effect of the umbrella clause was that:

*any non-performance of the contract, even if it is legal under the national law of the contracting State, gives rise to the international liability of the latter vis-à-vis the national State of the co-contracting party.*

The analysis is more complex in the case of change in law. A sovereign may ordinarily make and unmake its laws without transgressing any obligation governed by local law entered into with a foreign investor, absent a specific stabilising provision or other binding commitment that would insulate the investor from such effects. Thus, if an investor has entered into a State contract with the host State governed by local law, a subsequent legislative enactment might legitimately vary the terms of the host State’s obligations and, potentially, not give rise to any failure to observe an obligation in violation of an umbrella clause. All things being equal, conduct lawful under the proper law of the obligation is unlikely to involve a failure to observe a breach of an umbrella clause. However, it is not incapable of being so.

In the absence of other specific wording, international law ultimately governs the merits of an umbrella clause claim and controls any reference to the law of the host State or any other applicable law. International law characterises whether a State’s acts are lawful or not as a matter of international law and there is, ‘no exception for cases where rules of international law require a State to conform to the provisions of its internal law’. In analysing an umbrella clause claim, it is and must be international law that determines the scope and limits of any reference to internal law.

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211 E.g., *MTD v. Chile* (n. 8) para. 188; *Link-Trading v. Department for Customs Control of Moldova* (n. 156) paras. 76–86.


213 Prosper Weil (n. 121) 130.


215 ILC Articles, Commentary to Article 3, para. 7 in James Crawford (n. 204) 89. See also *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ, Advisory Opinion, ICJ Rep. 1949, 174, 180: ‘[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible (…) the Member cannot contend that this obligation is governed by municipal law’.

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International law ultimately governs the merits of umbrella clause claims, thereby lending additional security to any specific stabilisation or intangibility clauses the State may have agreed, and providing protection against any attempt to extinguish its obligations by manipulation of its own laws. Any reference to national law must be taken to mean only the legitimate pronouncements of the competent judicial authorities as to which the international tribunal must be entitled to decide. Thus, it should follow that in specific instances an umbrella clause claim may be upheld in respect of a failure to observe a State contract governed by the host State’s law, even if a local court would be bound to decide otherwise.

3. The Concern that the Umbrella Clause might render Superfluous Other Treaty Provisions

A shared concern in the SGS v. Pakistan, El Paso and Pan American cases was that the legal effect sought for the umbrella clause would render superfluous the other substantive provisions of the BIT is also unconvincing. This argument bolstered the tribunals’ conclusion not to uphold the effect of the umbrella clause as asserted, or to acknowledge only a very limited effect.

This criticism is superficial. In advancing this argument, these tribunals did not seek to elaborate on how the umbrella clause might render redundant other treaty provisions. The argument does not differentiate, for instance, between expropriation claims and the other substantive provisions of the BIT, including standards of national and MFN treatment, obligations to ensure transfers of capital and income, and fair and equitable treatment, each of which are manifestly distinct substantive obligations that cannot be subsumed in a breach of contract claim.

4. Whether the Umbrella Clause provides Protection Only from ‘Governmental’ Conduct

It is widely advocated that the application of the umbrella clause should be limited to conduct on the part of the host State that is governmental in nature. This view derives from a broader assertion that for a breach of a treaty provision

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216 Ibid., para. 8.
217 Frederick Mann (n. 119) 245–246.
218 ILC Articles (n. 204) Article 3.
to arise there must be wrongful conduct of a government nature, since this is the type of conduct investment treaties were conceived of to address. By inserting an umbrella clause in their treaties, it is argued that States have agreed only to curb their sovereign power to breach or unilaterally vary State contracts – powers that many States from time to time have claimed in accordance with their own legal systems and domestic legal theories. Thus, it is argued, only breaches of obligations involving the abusive exercise of sovereign power can give rise to a breach of the umbrella clause. Conversely, it is asserted that ‘merely commercial’ breaches of obligations cannot. Commercial conduct, it is argued, may well breach the underlying obligation, but would not itself breach a treaty’s umbrella clause. In essence, those who ascribe to this view ask for an implied ‘governmental’ limitation upon the application of the umbrella clause.

Several arbitral decisions have touched upon the question, yet evidence from arbitral practice of support for an implied governmental threshold is, at best, mixed. The SGS v. Philippines tribunal couched its remarks in terms of preservation of the rule of law for investments in the host State generally, without regard to categories or degrees of breach. Indeed, the rule of law would require redress for both governmental and commercial breaches. There was nothing inherently ‘governmental’ about the Philippines’ bare refusal to pay sums alleged to be due under a contract. The tribunal even questioned whether a ‘governmental’ element is essential to all treaty claims. SGS v. Philippines therefore rejects any implicit condition that the umbrella clause can only be breached by governmental conduct.

Other tribunals, including Eureko v. Poland, Noble Ventures v. Romania, Duke Energy v. Ecuador, BIVAC v. Paraguay and Burlington Resources v. Ecuador expressed support for the view that a simple breach of contractual obligations could amount to a violation of the umbrella clause. In SGS v. Paraguay, the tribunal expressly declined ‘to import into [the umbrella clause] the non-textual limitations that Respondent proposed’. Specifically, the tribunal rejected the submission that the umbrella clause may be breached ‘only through actions that

221 Thomas Wälde and Todd Weiler (n. 220) 174–175.
223 Richard Happ (n. 220) 344 et seq.; Thomas Wälde and Todd Weiler (n. 220) 175, 185, 202.
224 SGS v. Philippines (n. 6) para. 126.
226 Eureko v. Poland (n. 41) para. 244; Noble Ventures v. Romania (n. 1) para. 61; Duke Energy v. Ecuador (n. 9) para. 320; BIVAC v. Paraguay (n. 74) para. 141; Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 190.
227 Decision on Jurisdiction, 12 February 2010, para. 168.
a commercial counterparty cannot take, through abuses of state power, or through exertions of government influence’. The tribunal expressed doubt that there could even be a bright line distinction between governmental and ‘ordinary commercial’ breach of contract, especially in the context of a contract concluded directly with a State organ.

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

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

Statements favouring a governmental qualification also exist in the *El Paso* and *Pan American* decisions. The tribunals rejected the view that ‘any violation’ of a State contract or commitment entered into with regard to an investment could give rise to a treaty claim, ‘whatever the seriousness of the breach’. The tribunals proceeded on the basis that ‘it is essentially from the State as a sovereign that the foreign investors have to be protected’. Yet the awards seem internally inconsistent on this point, since apparently a major factor influencing the interpretation of the umbrella clause in these cases was an aversion to the very possibility that it could ‘turn breaches of the slightest such obligations by the Respondent into breaches of the BIT’.

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

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231 *Joy Mining v. Egypt* (n. 92) para. 72.
232 *CMS v. Argentina* (n. 37) para. 301.
233 *CMS v. Argentina* (n. 160).
234 *El Paso v. Argentina* (n. 1) paras. 71, 76; and see *Pan American v. Argentina* (n. 1) para. 105.
The decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.\textsuperscript{238}

That appears to be an overstatement of the true position and is supported, in the text of the award itself, only by reference to \textit{Impregilo}\.\textsuperscript{239} In the circumstances, the \textit{Sempra} tribunal did not need to decide whether a ‘non-governmental’ breach of an obligation would amount to a violation of the umbrella clause, since the measures in question were ‘not (…) mere ordinary contractual breaches of a commercial nature’\.\textsuperscript{240}

The alleged emerging consensus in favour of an implied governmental limitation does not bear out on analysis. The cases to date do contain several positive statements in favour of a requisite governmental element for there to be a breach of an umbrella clause but, as already seen, \textit{SGS v. Philippines} and \textit{SGS v. Paraguay} adopt the opposite position. There is no clear preponderance of arbitral authority in support of a ‘governmental’ limitation, and there are strong statements in favour of the opposite approach. There are also many commentators who deny any legal basis to impose a ‘governmental’ qualification on the effect of a plainly worded umbrella clause.\textsuperscript{241}

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

First, it is a weak argument in support of an implied governmental limitation to assert a mere belief that investment treaties are intended solely to regulate the manner in which States act as States. Yet from this, it is thought to follow that

\begin{itemize}
\item \textsuperscript{237} \textit{Sempra v. Argentina} (n. 69) para. 309. See also \textit{EDF International v. Argentina} (n. 73) para. 941.
\item \textsuperscript{238} \textit{Ibid}., para. 310.
\item \textsuperscript{239} \textit{Ibid}.
\item \textsuperscript{240} \textit{Ibid}., para. 311. Although the award was subsequently annulled, the tribunal’s reasoning on the umbrella clause was not called into question: Decision on Annulment, 29 June 2010.
\end{itemize}
the umbrella clause can be concerned only with the nature of a State’s acts in its capacity as a State, not in any commercial capacity. The argument must be wrong. There is nothing inherent in investment treaties generally to require one to conclude that States could not have intended the umbrella clause to extend to commercial non-performance of State contracts. It is a tautology to construe the effect of the umbrella clause from a prior conclusion, not based in evidence, as to what it must have been ‘intended’ or ‘designed’ to do. Even in *SGS v. Pakistan*, the tribunal considered that nothing in principle prevented two States from agreeing to apply an umbrella clause to all contractual disputes:

The Tribunal is *not saying* that States may *not agree* with each other in a BIT that henceforth, all breaches of each State’s contracts with investors of the other State are forthwith converted into and to be treated as breaches of the BIT.242

Secondly, the historical evidence in fact suggests that the umbrella clause was intended not merely to restate the customary international law position that expropriation of contractual rights as well as uncompensated repudiation or breach of a State contract, where the breach is discriminatory or motivated by non-commercial considerations, can amount to an internationally wrongful act, but rather, to go beyond it. Commenting on one of the earliest iterations of the umbrella clause, Seidl-Hohenveldern insisted that while there may be doubt as to the protection of private rights arising out of State contracts in customary international law, the very purpose of the umbrella clause proposed in the Abs-Shawcross Draft Convention was ‘to dispel whatever doubts may possibly exist as to whether a unilateral violation of a concession contract is an international wrong’.244 Reviewing early British treaty practice, Mann also argued that the umbrella clause was a progressive provision, the effect of which was to provide additional protection for State contracts, beyond the protection of investors provided by customary international law:245

This is 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. The variation of the terms of a contract or license by legislative measures, the termination of the contract or the failure to perform any of its terms, for instance, by non-payment, the dissolution of the local company with which the investor may have contracted and the transfer of its assets (with or without the liabilities) – these and similar acts the treaties render wrongful.246

This view is shared by Vandevelde, one of the leading commentators on US BITs. He has explained that under the umbrella clause, ‘a party’s breach of an investment agreement with an investor becomes a breach of the BIT’.247 In Dolz-

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242 *SGS v. Pakistan* (n. 15) para. 173 (emphasis added).
244 Ignaz Seidl-Hohenveldern (n. 112) 104–105 (emphasis added).
245 Frederick Mann (n. 119) 249–250.
er and Stevens’ review of BIT practice, umbrella clause protection is described as offering protection ‘against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts’.

Thirdly, the implied limitation is also contrary to the principle of effectiveness. Investment treaties already provide remedies in respect of expropriatory, arbitrary, discriminatory or unfair and inequitable treatment, whether such conduct is directed towards a State contract or otherwise. That the scope of the umbrella clause is potentially wider than these other provisions, albeit in the context of an existing State commitment, is no reason to require a restrictive interpretation, not found in the text, which would eliminate much of the distinctive substantive effect of the umbrella clause.

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

Finally, on closer analysis it is an explicit yet misguided fear, for many arbitrators and commentators, that motivates their call for a ‘governmental’ conduct limitation. That fear is the magnitude of potential umbrella clause claims that may be brought against States if the umbrella clause were applied without additional limits.

The members of the El Paso tribunal openly doubted whether

249 See e.g., Cayuga Indians Claims, American and British Claims Arbitration Tribunal, Award, 22 January 1926, (1926) 20 AJIL 574, 587: ‘A clause must be interpreted as to give it a meaning rather than so as to deprive it of meaning’; Asian Agricultural Products Ltd v. Sri Lanka, ICSID Case No. 87/3, Award, 27 June 1990, para. 40, ‘rule E’. The tribunal in Noble Ventures v. Romania (n. 1) expressly observed that any interpretation of the umbrella clause must take into account ‘the principle of effectiveness (effet utile)’, Award, 12 October 2005, para. 50.
250 Prosper Weil (n. 121) 130; Christoph Schreuer (n. 219) 250–251; Vlad Zolia (n. 194) 35.
252 Cf. James Crawford (n. 204) 101.
253 SGS v. Paraguay (n. 12) para. 135.
254 Cf. SGS v. Pakistan, Decision on Jurisdiction, paras 167–168; Thomas Wälde (n. 251) 191.
claimants would show restraint in advancing claims, and insisted that it fell to tribunals to set limits to prevent abuse. The case for an implied governmental limitation is thus, in large measure, a reaction to the availability and efficacy of modern investor-State arbitration. On this line of reasoning, there is a perceived need to bring some ‘political realism’ to the interpretation of the umbrella clause.

It is true that when an investor’s only remedy lay with diplomatic protection, a political and diplomatic filtering process inevitably limited the claims that the investor’s government would choose to espouse. It is also true that direct recourse arbitration frees investors to choose to prosecute their claims without the further assistance or consent of their own States, and without exhausting local remedies. And it is desirable that treaty dispute settlement procedures are not abused. However, the decision to commence arbitral proceedings against the State in which one has an investment is more complex than simply to ascertain the technical existence of a remedy. It is also the case that investor-State arbitration proceedings are not cheap to conduct; it is unlikely that claimants will spend large amounts in fees on trivial claims. There is nothing unique to the umbrella clause that lends itself to abuse by way of trivial claims. There can also be trivial invocations of other treaty standards. The risk that some investors might attempt to misuse the umbrella clause provision does not mean they would be successful and does not justify reading into the umbrella clause a sovereign/commercial distinction that is not there in the text. Finally, it is highly doubtful that the substance of an investor’s rights should be construed in the light of procedural advancements in the way it may enforce those rights. It is also the case that concerns as to a possible flood of umbrella clause claims, such as they are, could be alleviated by closer attention to the proper scope of obligations to which the umbrella clause applies, discussed in section 6. below.

5. The Impact of Contractually Agreed Dispute Settlement Procedures

The umbrella clause gives rise to a problem of apparently overlapping claims to jurisdiction: on the one hand, jurisdiction conferred by treaty to decide treaty claims; on the other, the contractually chosen jurisdiction for disputes arising out of the underlying State obligation. It was this apparent conflict that contribut-

255 El Paso v. Argentina (n. 1) para. 82.
256 Thomas Wälde and George Ndi (n. 126) 255.
ed to the *SGS v. Pakistan* tribunal declining to give effect to the umbrella clause. On the one hand, the tribunal insisted that its jurisdiction to decide treaty claims, including *inter alia* breach of the umbrella clause, was not ‘to any degree (…) shared’ with the tribunal chosen by the parties under the State contract in question, and that the ICSID tribunal’s decision was not dependent upon that arbitrator’s findings. Applying the differentiation between contract and treaty claims articulated by the *ad hoc* committee in the *Vivendi* case, which has become known as the ‘*Vivendi* principle’, the tribunal held that it was itself competent to ‘consider all facts relevant to the determination of the BIT causes of action, including facts relating to the terms of the PSI Agreement’. Nevertheless, the tribunal declined to embark upon such investigations in relation to the umbrella clause claim. The tribunal rejected the legal effect of the umbrella clause advocated by the claimant because it would necessarily ‘supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent.’ In other words, the tribunal could not accept that the investor would enjoy a unilateral right of election between contractually agreed or treaty dispute settlement mechanisms, and thereby avoid the contractually specified forum. The tribunal therefore rejected the proposed legal effect of the umbrella clause ‘in the face of a valid forum selection contract clause’.

The *El Paso* and *Pan American* tribunals were also concerned to maintain the distinction between contractually agreed and treaty-based legal orders, with this again affecting the interpretation of the umbrella clause. One of the reasons the tribunals gave for declining to give effect to the umbrella clause was that it was thought that such a remedy was unnecessary, since State contracts will invariably contain their own negotiated dispute settlement mechanism. Very often this will be a reference to ICSID or international commercial arbitration. This perspective contributed to the tribunals declining to find that the umbrella clause created an overarching internationally secured remedy.

258  *SGS v. Pakistan* (n. 15) para. 155.
260  *SGS v. Pakistan* (n. 15) para. 186.
264  *El Paso v. Argentina* (n. 1) para. 77, and see *Pan American v. Argentina* (n. 1) para. 106.
Only a small minority of treaties provide any direct guidance on the question of competing claims to jurisdiction. Article 13 of the India–Switzerland BIT provides as follows:

Each Contracting Party shall observe any obligation it may have entered into with regard to an investment of an investor of the other Contracting Party. In relation to such obligations dispute resolution under Article 9 of this Agreement shall however only be applicable in the absence of normal judicial remedies being available.

The second sentence seems to regulate treaty and local jurisdiction to decide claims in respect of host State obligations, with preference given to local judicial procedures. Only if normal judicial procedures are unavailable should claims under the umbrella clause be heard. The Denmark–India BIT and Germany–India BIT are more direct, each providing:

Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party, with disputes arising from such obligations being only redressed under the terms of the contracts underlying the obligations.

The Australia–Mexico BIT also provides that ‘disputes arising from such obligations shall be settled under the terms of the contract underlying the obligation’. This language seems to limit the scope of a treaty-based tribunal to hear umbrella clause claims to those circumstances in which an underlying State contract lacks any agreed dispute settlement mechanism.

In the absence of such wording, tribunals have struggled to mediate between these apparently conflicting dispute settlement arrangements. The existence of an exclusive choice of forum clause in the underlying obligation has been a vexed problem even for those tribunals that have acknowledged the effect of the umbrella clause. However, as shall be seen, it should not be determinative of the effect to be given to the umbrella clause. This must be so, since not all umbrella clause claims arise out of State contracts, and not all State contracts contain exclusive jurisdiction clauses.

Conclusions on the Impact of an Exclusive Choice of Contractual Forum

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

Decisions in which Tribunals have declined Jurisdiction

The decision on jurisdiction in Toto Costruzioni Generali v. Lebanon confirms that the umbrella clause might give rise to a treaty remedy in respect of a breach of a State contract. However, the tribunal ruled that it did not have juris-

265 E.g., Australia–Mexico BIT, Article 9; see also Denmark–India BIT, Article 2(4).
dition to determine the claims since the contract provided that disputes should be referred to the exclusive jurisdiction of the Lebanese courts.\textsuperscript{266} The tribunal explained that the umbrella clause claim remained governed by the terms of the underlying contract and was susceptible to those terms.\textsuperscript{267}

(2) Decisions in which Tribunals have stayed the Proceedings

The decision on jurisdiction in \textit{SGS v. Philippines} gained some notoriety insofar as the tribunal accepted that the umbrella clause ‘means what it says’ and confirmed its jurisdiction yet by a majority declined to proceed to the merits of the claim, at least at that time, because the underlying State contract contained an exclusive reference to the courts of Makati or Manila. The tribunal was concerned not to undermine the utility of exclusive jurisdiction agreements in contractual relations,\textsuperscript{268} and did not believe that States would have intended generic investment protection agreements in investment treaties to have such an effect. At the same time, the tribunal did not consider it plausible that the ‘general language in BITs dealing with all investment disputes should be limited because in some investment contracts the parties stipulate exclusively for different dispute settlement arrangements’.\textsuperscript{269} The tribunal considered the contractual jurisdiction clause to be the \textit{lex specialis}, in contrast to the generic offer to submit disputes to arbitration in the BIT and, given its exclusivity, that it should therefore have priority over treaty arrangements.\textsuperscript{270} Accordingly, the tribunal concluded that it would be premature to rule on the treaty claim until such time as ‘the question of the Respondent’s obligation to pay is clarified’ by the chosen courts,\textsuperscript{271} staying its proceedings on grounds that the claims were inadmissible.\textsuperscript{272} The tribunal explained that the umbrella clause did not override the exclusive jurisdiction clause in the contract, nor did it permit a party to a contract to claim on that contract (even via the treaty) without itself first complying with it.\textsuperscript{273}

Crivellaro, dissenting, disagreed that the two dispute settlement arrangements – one under the treaty, the other specified in the contract – must be mutually exclusive.\textsuperscript{274} To his mind, a BIT does not override the dispute settlement procedures in the State contract, but provides an alternative to them. He also consid-

\textsuperscript{266} \textit{Toto v. Lebanon} (n. 81). Judge Schwebel, appointed to fill a gap on the tribunal at a late stage of proceedings, issued a brief opinion casting doubt on this finding: Concurring Opinion, 24 May 2012.
\textsuperscript{267} \textit{Ibid.}, para. 202.
\textsuperscript{268} \textit{SGS v. Philippines} (n. 6) para. 134.
\textsuperscript{269} \textit{Ibid.}, para. 134.
\textsuperscript{270} \textit{Ibid.}, paras. 139–143.
\textsuperscript{271} \textit{Ibid.}, para. 155.
\textsuperscript{273} \textit{Ibid.}, paras. 143, 154.
\textsuperscript{274} \textit{Ibid.}
ered the treaty jurisdiction, once crystallised by the investor’s request for arbitration, to be both more specific as it concerned a specific dispute and the *lex posteriori*. He would have allowed the claimant to select amongst those options, with questions concerning the extent and performance of obligations under the contract ‘fully admissible’ before the treaty tribunal without first being processed by the contractually chosen courts. In his view, the stay of the proceedings was therefore inappropriate.

It was only three years later that the tribunal held that the open issues, mostly relating to quantum, had been sufficiently clarified for the benefit of the parties and the tribunal through the work of an audit commission such that it was possible to resume the BIT proceedings. The dispute settled shortly thereafter, without a final award on the merits.

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

279 *BIVAC v. Paraguay* (n. 74) para. 146.
281 *BIVAC v. Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012, para. 290.
**VII. Umbrella Clause**

*Bosh International v. Ukraine* favours the Philippines and BIVAC approach to applicable contractual dispute settlement procedures. Although the tribunal had already decided that the umbrella clause did not apply to the contract in question, it expressed the view that in any event the claimants would have been obliged first to refer their dispute to the contractually chosen courts.\(^{282}\) In the event that those courts determined that the claimants’ rights had been validly extinguished, the tribunal would have declined to find that they had any remaining rights that they could properly assert under the umbrella clause.\(^{283}\)

(3) **Decisions in which Tribunals have proceeded to Merits**

There are also awards upholding umbrella clause claims that reject the Philippines and BIVAC approach. In *Eureko v. Poland*,\(^{284}\) the respondent argued that the investor’s claims were inadmissible because they stemmed from a contract that contained a clause referring disputes to the exclusive jurisdiction of the competent ‘Polish public court’.\(^{285}\) The respondent also argued that international law generally required that the extent of the State’s contractual obligations and any allegation of breach first had to be determined before the forum selected in the contract before an investment treaty tribunal could determine whether the State had breached its treaty obligations. The tribunal rejected these arguments, relying on the characterisation of contract and treaty claims advanced by the *Vivendi ad hoc* committee. The tribunal explained that the ‘fundamental basis’ of the umbrella clause claim is the treaty, as it lays down an independent standard by which the conduct of the parties may be judged. A treaty-based tribunal is mandated to adjudicate treaty claims and the exclusive jurisdiction clause in the contract should not prevent it from doing so.\(^{286}\)

The tribunal in *SGS v. Paraguay* likewise proceeded to the merits in the face of an exclusive jurisdiction clause in the relevant contract. First, with regard to jurisdiction the tribunal concluded that the ‘well established’ distinction between treaty and contract claims disposed of Paraguay’s objection that the tribunal could not exercise jurisdiction in respect of the umbrella clause claim because the contract referred disputes to the courts of Asunción.\(^{287}\) Applying a strict separation of legal categories, the tribunal explained that an umbrella clause claim is, by definition, a treaty claim and, as such, treaty jurisdiction cannot be displaced by a term of a contract.\(^{288}\) The tribunal considered this conclusion to be wholly consistent with the statement on the distinction between contract and treaty claims by the *ad hoc* committee in *Vivendi*. The tribunal further explained

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\(^{284}\) *Eureko v. Poland* (n. 41) para 112.


\(^{287}\) *SGS v. Paraguay* (n. 12) para. 128.

\(^{288}\) *Ibid.*
that, in its view, the essential basis of an umbrella clause claim is in fact a breach of a treaty obligation to abide by commitments, contractual or otherwise, and cannot be said to be merely a breach of contract.\textsuperscript{289} The tribunal thus disposed of the differentiated approach the \textit{Vivendi ad hoc} committee proposed where the ‘essential’ or ‘fundamental’ basis of a breach of treaty is in substance a breach of contract.

Having upheld its jurisdiction, the tribunal declined to adopt the approach in \textit{SGS v. Philippines} and stay its proceedings until such time as the contractual aspects of the dispute had been decided in the contractually chosen forum. The tribunal’s overarching concern was that to do so would place it at risk of failing to carry out its mandate.\textsuperscript{290} In the tribunal’s view it was the intention of the contracting parties to the BIT to provide, through the umbrella clause, protection over and above whatever rights an investor could negotiate for itself in its contract or could find under domestic law. The tribunal thought it would defeat that intention if tribunals would decline to determine umbrella clause claims based on those very contractual terms. The tribunal explained that the existence of umbrella clause jurisdiction does not extinguish the contractual forum selection clause; the two co-exist, with the umbrella clause merely supplementing the contract with an option for the investor of an alternative treaty remedy.\textsuperscript{291} The tribunal also considered that a stay was inappropriate since the treaty claims required it to determine issues going beyond the four corners of the contract.

The tribunal rejected reading any implied waiver of umbrella clause protection into investment agreements simply by the inclusion of a forum selection clause.\textsuperscript{292} The tribunal disagreed with \textit{BIVAC}, stating that it should not be readily assumed that treaty rights have been waived. If a waiver were to be intended by an agreement concluded later in time, that intention should be express and categorical.\textsuperscript{293} The tribunal endorsed the view of the tribunal in \textit{Aguas del Tunari v. Bolivia}\textsuperscript{294} that the mere designation of an alternative forum in a contract is insufficient to amount to a waiver of treaty protection.\textsuperscript{295}

\textbf{b) Analysis of the Question of Jurisdiction}

Almost without exception, the decided cases confirm that a treaty tribunal’s jurisdiction is unaffected by a contractual jurisdiction clause. One exception is the \textit{Toto v. Lebanon} case, which declined to hear claims arising under an umbrella clause because of a clause in the relevant contract referring disputes to the exclusive jurisdiction of the Lebanese courts. The \textit{BIVAC} tribunal also thought that

\begin{footnotesize}
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\item \textsuperscript{289} \textit{Ibid.}, paras. 138, 142.
\item \textsuperscript{290} \textit{Ibid.}, para. 172.
\item \textsuperscript{291} \textit{Ibid.}, para. 182; Award, 10 February 2012, para. 107; also \textit{SGS v. Philippines}, Declaration of Antonio Crivellaro, 29 January 2004, para. 4.
\item \textsuperscript{292} \textit{SGS v. Paraguay} (n. 12) para. 177.
\item \textsuperscript{293} \textit{Ibid.}, para. 178.
\item \textsuperscript{294} \textit{Aguas del Tunari S.A. v. Bolivia}, Decision on Jurisdiction, 21 October 2005, para. 115.
\item \textsuperscript{295} \textit{SGS v. Paraguay} (n. 12) paras. 179–180.
\end{itemize}
\end{footnotesize}
the incompatibility of dispute settlement arrangements might have jurisdictional consequences. However, the weight of authority is against this conclusion.

Most tribunals consistently apply the *Vivendi* principle and confirm their jurisdiction on grounds that the umbrella clause claim concerns an independent international law standard. The *Philippines* tribunal explained that ‘unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract’. Most umbrella clauses do not express such terms. However, given that some States do expressly specify exceptions to treaty jurisdiction for umbrella clause claims (noted above), this reinforces the argument that in the absence of an express exclusion, the investor should indeed enjoy a choice to proceed under treaty or contract. Neither the mere fact that the same events might give rise to different claims grounded in different legal orders, nor the existence of a jurisdiction agreement in the relevant contract, should derogate from, or be inferred to amount to a waiver of, a tribunal’s jurisdiction conferred by treaty.

c) Analysis of the Question of Admissibility and the Philippines’ Solution

Assuming treaty jurisdiction is properly established, the problem tribunals have grappled with is how to reconcile or do justice to these two apparently conflicting jurisdiction agreements: the exclusive jurisdiction clause in the relevant State contract, and the jurisdiction agreement formed under the auspices of the investment treaty when a claimant submits its request for arbitration. Maxims based on which agreement is the more specific, or which is the later in time, can be wielded in support of either provision; moreover, it is doubtful whether such principles should apply at all to instruments subsisting in different legal orders.

Instead of trying to reconcile the two fora, the *Philippines* tribunal tried to give effect to both. International authority recognises that while the jurisdiction of an international court or tribunal may be properly seized, exceptionally it is not obliged to exercise it in every instance. The International Court of Justice has on separate occasions confirmed that it may stay its proceedings if it is ‘satisfied (…) that to adjudicate on the merits of an application would be inconsistent with its judicial function, it should refuse to do so’, but only if it is ‘confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice’. It was accordingly open to the *Philippines* tribunal to rule, as a question of admissibility, that in all the circumstances it was incompatible with its judi-

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296 *SGS v. Pakistan* (n. 15) paras. 147, 155; *SGS v. Philippines* (n. 6) paras. 158, 163 citing *Vivendi v. Argentina* (n. 259) para. 112; see also Stanimir Alexandrov (n. 193) 562–564.
297 *SGS v. Philippines* (n. 6) para. 154.
298 *Ibid.*, para. 142; and see Christoph Schreuer (n. 219) 281.
The tribunal did so because it did not believe that the jurisdiction conferred by the BIT was intended ‘to override or replace, the actually negotiated investment arrangements made between the investor and the host State’. Crawford, one of the arbitrators in the Philippines case, has explained that whilst it may provide a basis for a treaty claim, ‘the umbrella clause does not change the proper law of the contract or its legal incidents, including provisions for dispute settlement’.

Some commentators favour the Philippines solution on grounds that it affords tribunals flexibility, allowing for the possibility of a reference to the chosen forum, whilst preserving the power ultimately to issue an award on the treaty claim. Other commentators say the solution is in accord with tribunals’ ‘general duty to act judicially’, and potentially ‘a very efficient way of coordinating parallel or multiple proceedings’.

There are, however, a number of difficulties with the stay. First, given the prevalence of exclusive jurisdiction clauses in State contracts, the Philippines decision risks rendering the umbrella clause otiose. Following the Philippines solution, the umbrella clause becomes no longer a provision that adds to the protection of investors but rather, one which forces claimants to submit their disputes first to local or other agreed courts or tribunals. For this reason, commentators have criticised the majority decision for being ‘an indirect affirmation of the doctrine of exhaustion of local remedies’. Gaillard, counsel to the claimant in the Philippines case, describes the tribunal’s conclusion as an ‘impossible situation’ because the two instruments are contradictory. He criticises the tribunal for simultaneously accepting jurisdiction over the umbrella clause claims but staying the proceedings, thereby asserting ‘jurisdiction over an empty shell and depriving the BIT dispute resolution provision of any meaning’.

Moreover, there is some support in the older commentaries for the view that the umbrella clause was indeed intended to create an additional jurisdictional option, albeit originally for the investor’s home State. It is also true that um-

301 Case Concerning the Factory at Chorzów, Jurisdiction, (1927) PCIJ (Series A) No. 9, 29, 30.
303 SGS v. Philippines (n. 6) para. 141.
304 James Crawford (n. 201).
305 SGS v. Philippines (n. 6) para. 155; see also John Gaffney and James Loftis (n. 1) 29.
308 Emmanuel Gaillard (n. 137) 334.
309 Ibid.; also Stanimir Alexandrov (n. 193) 575, fn. 119.
310 Anthony Sinclair (n. 45).
brella treaty protection as first conceived was to be drafted in conjunction with a particular contractual framework, so inconsistency would presumably be avoided. Nevertheless, in early advice on the subject, it was said that the language of the umbrella treaty sought to eliminate any possibility that the respondent State might argue that the treaty claim ought to be resolved by the contractually chosen forum.311 Schwarzenberger noted as well, as far back as 1960, that the wording of the umbrella clause ‘make[s] it unnecessary for a national first to seek justice on the levels of the municipal law of a capital-importing state (or a state granting a concession) or the law specifically provided for under a particular public contract’.312 Modern support for this conclusion exists in the views of the dissenting arbitrator in the Philippines case, and the subsequent tribunal in SGS v. Paraguay. Both insisted that the effect of the investment treaty is not to ‘override’ existing contractual dispute settlement arrangements, but rather, to confer on the investor another option.313 These decisions deny that there is any requirement that a disputed contract first be adjudicated upon by a local judge before an international tribunal may pass on an umbrella clause claim in respect of its breach.

Secondly, without express guidance from the tribunal, the Philippines solution creates uncertainty as to how long the stay should be maintained, what precise events might bring it to an end, and the weight to be given to any determinations of the chosen courts or tribunal.314 As a practical matter, the outcome is unsatisfactory for both claimants and respondents. For the claimant, it is forestalled in potentially obtaining an international remedy; for the respondent, long drawn-out investment disputes can have a negative impact on the host State’s investment credibility.315

Thirdly, it also presents difficulty where the dispute before the treaty tribunal presents claims or involves elements going beyond mere issues of contract. A piecemeal approach is unlikely to be satisfactory, but at the same time, it is at odds with the Vivendi principle to stay other treaty claims besides the umbrella clause because of a contractual choice of forum.

Finally, for many commentators, a stay is wholly inconsistent with the fact that as a matter of strict characterisation, an umbrella clause is fundamentally a claim for breach of treaty.316 This question as to the proper characterisation of an umbrella clause claim is in fact at the heart of the problem and on this, the cases are sharply divided.

311 Ibid.
312 Georg Schwarzenberger (n. 167) 155.
313 The existence of separate potential jurisdictional arrangements arising out of the same facts is not ‘pathological’: Bayindir v. Pakistan (n. 225) paras. 166–167; see also Emmanuel Gaillard (n. 137) 345; Emmanuel Gaillard, ‘Vivendi and Bilateral Investment Treaty Arbitration’ (2003) 229 NYLJ 3–6.
314 See also Impregilo v. Pakistan (n. 225) paras. 289–290.
The ad hoc committee in *Vivendi* famously ruled that a contractual jurisdiction clause cannot impinge on treaty claims properly characterised as such.\(^{317}\) The ‘*Vivendi* principle’ affirms that where the ‘fundamental basis of the claim’ is a breach of treaty laying down an independent standard by which to judge the respondent’s conduct, no term in any related State contract should deny the jurisdiction of a tribunal established under that treaty to determine those claims.\(^{318}\) A long line of decisions now exists applying this well-established rule.

On the other hand, the ad hoc committee stated that: ‘in 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’.\(^{319}\) In support for this last proposition, the *Vivendi* committee cited *Woodruff*, a decision of Umpire Barge of the American–Venezuelan Mixed Commission.\(^{320}\) The Commission in *Woodruff* had held that it lacked jurisdiction to hear claims for breach of a contract because the contract contained a clause emphatically referring disputes to the laws and tribunals of Venezuela. The jurisdiction clause could not preclude Woodruff’s government (as opposed to Woodruff himself) from exercising its own rights of diplomatic protection insofar as the dispute was in substance not only a claim for breach of contract but also a breach of international law.\(^{321}\) But Woodruff’s contractual claims were dismissed since ‘by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of this Commission’.\(^{322}\) Underpinning the decision was a desire to uphold the efficacy of contractually agreed dispute settlement procedures.\(^{323}\)

Applying *Woodruff* the tribunals in both *SGS v. Philippines* and *BIVAC v. Paraguay* both thought that the fundamental basis of an umbrella clause claim is, in substance, a breach of contract. Indeed, the *BIVAC* tribunal asserted that it would be ‘entirely artificial’ to suggest otherwise, since an umbrella clause claim turns on the interpretation and application of the underlying contract.\(^{324}\) Others concur, emphasising the need to look to the substance of the claim,\(^{325}\) although given that treaty protections are not typically violated by evidence of a

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317 *Vivendi v. Argentina* (n. 259) para. 103.
319 *Ibid.*, para. 98, observing in a footnote ‘unless the treaty in question otherwise provides’ (emphasis added).
320 *Woodruff* case, (1903) 9 RIAA 213, 222, cited in *Vivendi* (n. 35) paras. 98–99.
324 *BIVAC v. Paraguay* (n. 74) para. 149.
breach of a State contract, the only treaty claim, if any at all, that ought properly to have as its ‘fundamental basis’ a breach of contract is an umbrella clause claim.

Other cases take the wholly opposite view. As already seen, the majority in Eureko v. Poland thought that the ‘fundamental basis’ of the umbrella clause claim is the treaty, as it lays down an independent standard by which the conduct of the parties may be judged.\textsuperscript{326} The SGS v. Paraguay tribunal also focused on the legal nature of the claim before it, ruling that the essential basis of the claim could be nothing other than a breach of treaty. The characterisation of claims expressed in these last two cases finds support from Amerasinghe, for instance:

The general proposition that, where a state performs an act which is prohibited by a treaty to which it is a party, it will be responsible for a breach of international law to the other party or parties to the treaty requires no substantiation. In accordance with the same principle, an act which constitutes a breach of contract would be a breach of international law, if it is an act which that state is under an obligation not to commit by virtue of a treaty to which it and the national state of the alien are parties.\textsuperscript{327}

In other words, a breach of State contract only breaches the treaty because the treaty itself has established an independent international law obligation to observe the terms of State contracts. The Paraguay tribunal explained that it was tasked to rule on the respondent’s international responsibility for breach of a specific treaty obligation, not merely to decide whether it was liable for breach of contract. Although some may consider the distinction ‘artificial’, it is clear that a claim for breach of an umbrella clause is a treaty claim properly defined. It is not breach of the underlying contract \textit{per se} that engages the host State’s international responsibility, it is breach of an ‘additional element’, namely the additional promise contained in the treaty to observe such obligations.\textsuperscript{328} The umbrella clause thus has some content independent from the underlying contract. Not only do the two obligations exist on a different legal plane, there is also a potential controlling role for international law with umbrella clause claims that is not present with mere questions of contract.

Although the law awaits further clarification, with strength to the arguments on both sides, there is some logic in concluding that the ‘fundamental basis’ of an umbrella clause claim is truly a breach of treaty, not a breach of contract, and ought not to be affected by a conflicting exclusive jurisdiction agreement in the underlying investment contract. An approach based on strict legal categories also has the advantage of certainty. The alternative, based on an assessment of the relevant facts and their relation to any putative contractual or treaty claim, may be a challenging undertaking in a complex case, especially early in a proceeding, is inherently subjective, and may be prone to inconsistent results.

\textsuperscript{326} Eureko v. Poland (n. 41) paras. 112–113.

\textsuperscript{327} Chittharanjan F. Amerasinghe, ‘State Breaches of Contracts with Aliens and International Law’ (1964) 58 AJIL 881, 910–912 (emphasis added); and ILC Articles (n. 204) Article 4, Commentary, para. 6; Article 12, Commentary, paras. 9–10.

\textsuperscript{328} Robert Jennings and Arthur Watts (n. 109) 927.
Applying the *Eureko* and *Paraguay* approach would still leave scope for the *Woodruff* principle. It would still follow that where a claim was characterised as a breach of contract – perhaps advanced under the so-called broad or generic dispute settlement clauses found in some treaties\(^{329}\) – then the tribunal would be right to defer to the contractually agreed forum, but not otherwise.

6. The Disputed Scope of the Umbrella Clause

The umbrella clause debate is strongly influenced by perceptions as to the proper scope of the umbrella clause: as the scope of potential umbrella clause claims is perceived to expand, whether such perceptions are justified or not, hostility to the clause’s putative effect also seems to grow. The approach to the umbrella clause of some of the more sceptical tribunals – *SGS v. Pakistan*, *El Paso* and *Pan American* – is clearly influenced by their view of its potential scope of application.\(^{330}\)

Concern as to the scope of the umbrella clause has generated on the one hand, doubts as regards the fundamental question of the clause’s effect. On the other hand, it has led to tribunals and commentators seeking to read into umbrella clauses limitations or conditions that would circumscribe their effect. This section seeks to address these concerns by elucidating the proper scope of the umbrella clause. It focuses on three fields of inquiry.

The first, discussed in section a) below, concerns the juridical nature of the ‘commitments’, ‘obligations’, or ‘undertakings’ protected by an umbrella clause. Issues arise as to whether protected obligations may include commercial contracts, or only obligations of a governmental nature. Another question is whether the scope of obligations ‘entered into’ with investors necessarily implies only specific bilateral or contractual arrangements, or whether undertakings of a general or unilateral nature might also be covered.

The second field of inquiry, discussed in section b) is determination of whether the host State has itself assumed an obligation. There is some dispute as to how to determine whether a State has entered into an obligation or commitment to which the umbrella clause attaches. Finally, section c) addresses the contentious matter of whether umbrella clause claims may be brought by parent investors or shareholders that are not the direct counterparty to a particular undertaking, or whether only the signatories or parties to the obligation in question are entitled to claim.

a) The Nature of the Protected Obligation

Umbrella clauses seldom define the ‘obligations’, ‘commitments’, or ‘undertakings’ they are intended to protect. In the absence of guidance, the view that umbrella clauses might attach to a great pool of legal obligations of a State,

\(^{329}\) Anthony Sinclair (n. 115).

\(^{330}\) E.g., *El Paso v. Argentina* (n. 1) para. 76; *Pan American v. Argentina* (n. 1) para. 105.
whether governmental or commercial, contractual or unilateral in nature, and whatever their source,\textsuperscript{331} evidently gives rise to strong antipathy to the plain language of the umbrella clause and its apparently intended effect. Thus, the scope of obligations of the host State to which the umbrella clause may apply is a matter deserving of detailed attention.

(1) ‘Governmental’ or ‘Commercial’ Obligations

One interpretative limitation frequently proposed for the scope \textit{ratione materiae} of the umbrella clause is that it does or should only apply to obligations entered into by the host State in a governmental or sovereign capacity. According to this theory, private law or commercial commitments should not be protected, one justification being that so-called ‘commercial contracts’ concluded by a State with a foreign investor were allegedly not within the contemplation of the original drafters of the umbrella clause.\textsuperscript{332} A further justification put forward is that inclusion of commercial contracts could ‘give rise to unintended and far-reaching consequences, with the state being held to account for the contractual performance of entities over which it has little or no practical control’.\textsuperscript{333}

Certain tribunals have favoured this implied limitation. For example, the concern that the umbrella clause might be ‘susceptible of almost indefinite expansion’\textsuperscript{334} seems to have motivated the \textit{SGS v. Pakistan} tribunal’s conclusion that the umbrella clause could not have the effect that ‘any alleged violation’ of State contracts or other commitments should be treated as a breach of the BIT.\textsuperscript{335} The tribunals in \textit{El Paso} and \textit{Pan American} also declined to give any substantial effect to an umbrella clause, in part as a consequence of their view of the potential scope of claims it might generate. The tribunals each denied that an investment treaty extends at all to the dealings of the host State ‘as merchant’, preferring instead a distinction between ‘governmental’ and ‘commercial’ obligations.\textsuperscript{336} The tribunals concluded that the umbrella clause might ‘cover additional investment protections contractually agreed by the State \textit{as a sovereign} – such as a stabilization clause – inserted into an investment agreement’,\textsuperscript{337} but would not apply to investment-backed State contracts deemed to be ‘merely commercial’.

On the other hand, there is a line of decisions emphatically rejecting any implied governmental limitation to the scope of obligations protected by the umbrella clause. In \textit{Eureko v. Poland}, the tribunal stated that the scope of obligations protected by the umbrella clause is ‘capacious’, and encompasses ‘not only obligations of a certain type’ but ‘\textit{all}’ obligations entered into with regard to in-

\begin{itemize}
\item \textsuperscript{331} \textit{Ibid.}
\item \textsuperscript{332} Thomas Wälde (n. 251).
\item \textsuperscript{333} David Foster (n. 109).
\item \textsuperscript{334} \textit{SGS v. Pakistan} (n. 15) para. 166.
\item \textsuperscript{335} \textit{Ibid.}, para. 168.
\item \textsuperscript{336} \textit{El Paso v. Argentina} (n. 1) paras. 78, 81; and see \textit{Pan American v. Argentina} (n. 1) para. 108; also David Foster (n. 109) 106.
\item \textsuperscript{337} \textit{Ibid.}, para. 81.
\end{itemize}
vestments of investors of the other contracting party.\textsuperscript{338} The tribunal said it was ‘irrelevant’ that Polish law characterised the contracts in question as of a purely civil law character\textsuperscript{339} and did not accept that the umbrella clause only applied to obligations of a governmental or sovereign nature.

The tribunal in \textit{Noble Ventures} did not accept that the umbrella clause did not apply to commercial matters. The tribunal rightly added that ‘there is no common understanding in international law of what constitutes a governmental or public act’.\textsuperscript{340}

In \textit{CMS v. Argentina} the commitments in question were considered to be public in nature, and not merely commercial, although the tribunal opined that the umbrella clause could afford protection to both public and private law instruments.\textsuperscript{341}

In \textit{Siemens v. Argentina}, the tribunal held that there was no basis to find any distinction between governmental obligations, such as so-called ‘investment agreements’, that might fall within the scope of the umbrella clause, and other obligations including ‘commercial’ agreements and concessions, which would not. The broad definition of ‘investment’, coupled with the reference in the umbrella clause to ‘any obligations’, would in the tribunal’s view ‘cover any binding commitment entered into by Argentina in respect of such investment’.\textsuperscript{342}

In \textit{SGS v. Paraguay} also, the tribunal expressly declined ‘to import into [the umbrella clause] the non-textual limitations that Respondent proposed’.\textsuperscript{343} It did not accept that the umbrella clause excluded commercial contracts or conversely, that it only applied to undertakings assumed in a sovereign capacity.\textsuperscript{344} The tribunal confessed to difficulty in knowing how it might even classify a long-term contract concluded with a government ministry.

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

\begin{quote}

to apply specifically to large-scale investment and concession contracts – in the making of which the state is deliberately ‘exercising its sovereignty’ – and thus it might be argued that the ordinary commercial contract is an implied exception to the general rule set forth in Article 2.\textsuperscript{345}
\end{quote}
To the contrary, however, Lauterpacht expressly considered it beneficial to the foreign parties for the way to remain open for their governments to take up even relatively minor – and presumably commercial – disputes arising between the parties to the settlement agreement ‘in case overall considerations of Governmental and Company policy should require this course of action’. Moreover, there is nothing to indicate a governmental limitation ratione materiae was intended either in the text of the OECD Draft or the Abs–Shawcross Draft. Nevertheless, more recent commentaries continue to argue that the umbrella clause should only protect State contracts concluded *de iure imperii*, as opposed to merely commercial obligations. Against this, there are commentators who maintain that there is no basis to add a governmental qualification to the scope of the umbrella clause that is not evident in the text.

The latter view is the better one, in the absence of words to the contrary in the particular treaty at hand. First, there is no language requiring that obligations must be ‘governmental’, ‘sovereign’ or ‘non-commercial’ in common umbrella clauses.

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

Thirdly, the distinction between the sovereign or commercial nature of an underlying obligation gives rise to numerous practical and theoretical difficulties, especially in times of deregulation and denationalisation. The activities of the modern regulatory State are myriad and vary as the political, social and economic needs of each society vary. It is difficult to predict in advance whether a particular State undertaking involves acts *de jure gestionis* or acts *de jure imperii*. Shawcross himself had considered the act on the part of the State of concluding a contract with a foreign investor an exercise of sovereign authority, distinguishable only in degree, not kind, from the conclusion of a treaty. Some argue that ‘commercial’ obligations or commitments involve the ‘procurement of equipment and services’, but these types of transactions may not even qualify as investments, hence the application of the umbrella clause would be moot. Many

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*Investors Abroad – Problems and Solutions in International Business in 1975* (Matthew Bender, 1976) 93, 105, fn. 27.


348 E.g., Christoph Schreuer (n. 219) 255; Craig Miles (n. 1).

349 Craig Miles (n. 1).

350 Hartley Shawcross (n. 212) 351.
investment projects also exhibit both public and private characteristics, defeating efforts at neat characterisation.

Fourthly, whether a particular activity or function is regarded as governmental or private can vary depending on the particular political and constitutional balance of each host State and is reduced to a matter of legislative choice. With this dichotomy, there is a risk that the same type of transaction might be treated as governmental in the context of one contracting party, but commercial in another.

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

(2) *Contracts, Unilateral and General Undertakings*

Since the inception of the umbrella clause, commentators have consistently understood and remarked that the nature of the relevant protected obligations would include obligations ‘embodied in a contract or in a concession’. This has been confirmed in arbitral practice and supported by the weight of commentary.

Where questions have arisen is whether covered obligations or commitments might include unilateral undertakings, of various forms, and whether they must be specific, directed towards a particular investment, or may be general. A unilateral undertaking towards a specific investment might take the form of a decree, licence, permit or approval, targeted regulation, or State guarantees of the performance of a local State counterparty. General undertakings might conceivably arise from statements of governmental intent, or generally applicable regulation or legislation.

Some of the earliest commentators (and drafters) believed that protected obligations could go beyond State contracts. Commenting on the scope of ‘undertakings’ protected by the umbrella clause in the OECD Draft Convention, Lauterpacht considered that: "‘undertakings’ appears to be a concept wider than that of ‘contract’ in the technical sense of the word". The Notes and Comments to

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351 *Cf.* Joy Mining v. Egypt (n. 92).
353 Notes and Comments to Article 2 of the OECD Draft Convention, para 3(a).
354 *SGS v. Pakistan* (n. 15) para. 166; *SGS v. Philippines* (n. 6) para. 121; *Noble Ventures v. Romania* (n. 1) para. 51; *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 297; *BIVAC v. Paraguay* (n. 74) para. 147; *SGS v. Paraguay* (n. 12) para. 168.
355 Walid Ben Hamida (n. 168) 14.
the OECD Draft confirm that it was intended that protected undertakings might include ‘consensual’ bargains to which the host State is party as well as its ‘unilateral engagements’. The same view exists in relation to the language of modern BITs. According to one UNCTAD study, the common umbrella clause is broad enough to cover all kinds of obligations, explicit or implied, contractual or non-contractual, undertaken with regard to investment generally. There is arbitral support for the application of the umbrella clause to unilateral commitments too. The SGS v. Philippines tribunal accepted that the umbrella clause in the Philippines–Switzerland BIT was capable of protecting obligations besides contractual ones. The Enron tribunal held that the phrase ‘any obligation’ refers to obligations ‘regardless of their nature’, including both contractual obligations ‘as well as obligations assumed through law or regulation’. The tribunals in Noble Energy v. Ecuador and Total v. Argentina both also affirm that a State may undertake international obligations through a variety of acts, including legislation and unilateral statements.

Generalisations are only so helpful, however. Treaties occasionally expressly clarify the scope of the umbrella clause. Some treaties refer only to ‘written obligations’, obligations assumed by way of ‘agreement’ with investors of the other contracting party, ‘contractual obligations’, or obligations entered into with regard to ‘approved’ investments or investors. Other treaties only apply to commitments, and sometimes ‘particular commitments’ entered into with ‘specific’ investors or with respect to ‘specific’ investments, thereby presumably excluding a State’s general commitments. The SGS v. Philippines tribunal did not exclude the possibility that an umbrella clause of this last type might protect unilateral commitments, but did identify a need for a particular qualifying connection between the commitment and the investment. In its words, the host State must have assumed a legal obligation ‘vis-à-vis the specific investment – not as a matter of the application of some legal obligation of a general character.’

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357 Notes and Comments to Article 2, para 3(a).
358 UNCTAD (n. 3) 56.
359 SGS v. Philippines (n. 6) para. 115.
360 Enron v. Argentina (n. 62) para. 274.
361 Noble Energy v. Ecuador, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para. 157; Total v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 131.
362 E.g., Austria–Chile BIT, Article 11; Belgium and Luxembourg–Mexico BIT, Article 9. The consensus seems to be that, in the absence of specific wording, a covered obligation need not be recorded in writing, provided its existence may be established by other means: Frederick Mann (n. 119) 246; cf. Thomas Wälde and Todd Weiler (n. 220) 203.
363 E.g., Germany–Bangladesh BIT, Article 7(2).
364 Austrian Model BIT, Article 7(2).
365 Malaysia–UAE BIT, Article 13(3) and see UNCTAD (n. 3) 54, 56 and Table III.6.
366 ASEAN, Article III; Philippines–UK BIT, Article VII; Greece–Mexico BIT, Article 19; and see Walid Ben Hamida, para. 11.
367 SGS v. Philippines (n. 6) para. 121 (emphasis added); also Al-Bahloul v. Tajikistan, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009.
Even with the language of more common umbrella clauses, whilst a unilateral undertaking might be protected, it is clear that there are limits implicit in the terms ‘obligation’, ‘entered into’ and ‘with regard to’. As already discussed, the umbrella clause only applies to existing obligations, the word ‘obligation’ implying a relationship of a legal character, arising under a system of law.\footnote{ABA Report (n. 132) 95–96.} The \textit{Philippines} tribunal emphasised that the umbrella clause would only protect undertakings of a binding legal nature; it would ‘not convert non-binding domestic blandishments into binding international obligations’.\footnote{\textit{SGS v. Philippines} (n. 6) para. 126.} The words ‘entered into’ may also limit the scope of the umbrella clause. Some commentators argue that the phrase ‘entered into’ implies an element of mutuality, to the exclusion of unilateral commitments,\footnote{Thomas Wälde and George Ndì, 240, fn. 94. \textit{Cf.} Walid Ben Hamida (n. 168) para. 16.} and that ‘it would require an innovative reading of these words to conclude that a state can “enter into” legislation, or other unilateral representations’.\footnote{Laura Halonen, ‘Containing the Scope of the Umbrella Clause’ in Todd J. Grierson Weiler (n. 1) 27.} However, and of themselves the words ‘entered into’ are not conclusive that unilateral commitments may not be covered; the words ‘entered into’ might be equated with ‘undertaken’ or ‘assumed’. The approach of tribunals in practice is not necessarily to exclude unilateral undertakings from the scope of the umbrella clause, but rather, only to admit them in very specific factual circumstances. For instance, the tribunal in \textit{Noble Ventures} held that the reference to obligations ‘entered into’ with regard to investments indicates that ‘specific commitments are referred to and not general commitments, for example by way of legislative acts’.\footnote{\textit{Noble Ventures v. Romania} (n. 1) para. 51.} The \textit{ad hoc} committee in \textit{CMS} held that legal obligations ‘entered into’ normally denote consensual obligations arising as between the obligor and the obligee, so identified as a matter of the applicable law.\footnote{\textit{CMS v. Argentina} (n. 160) para. 90.} A statement of governmental intent, or a commitment of the host State existing in a general law, are not readily thought of as obligations \textit{entered into} with any particular foreign investor. In either case, what is called for is a specific connection between the obligation and the investor or investment, rather than a blanket denial of coverage for unilateral commitments.

Equally, the words entered into ‘with regard to’\footnote{E.g., Singapore–UK BIT, Article 2(2).} or ‘with respect to’\footnote{E.g., Iran–Switzerland BIT, Article 11.} the investors or investments of investors have the potential to impose a limit on the scope of the umbrella clause. The commentary to Article 2 of the OECD Draft clarified that these words call for a substantive connection: undertakings ‘must relate to the property concerned; it is not sufficient if the link is incidental’.\footnote{Notes and Comments to Article 2, para 3(a) (emphasis in original).} The Commentary indicated that such a link would exist either: (1) if the ‘form or
specific terms’ of the commitment identify either the property concerned or the recipient of the commitment; or (2) if it can be ‘proved or presumed’ that the foreign national ‘acted in reliance’ on it’, even if the commitment is expressed in general terms.\textsuperscript{377}

The \textit{Eureko} tribunal held that these words mean that for the umbrella clause ‘to be applicable the State must have assumed a legal obligation vis-à-vis the specific investment’.\textsuperscript{378} The tribunal in \textit{Enron v. Argentina} also noted that “[o]bligations” covered by the “umbrella clause” are nevertheless limited by their object: “\textit{with regard to investments}”.\textsuperscript{379} In other words, there must be a sufficient link between the particular commitment, even if unilateral in nature, and a particular investor or investment. An umbrella clause claim was upheld in \textit{LG&E v. Argentina} based on failure to observe provisions of the Argentine Gas Law and its implementing regulations.\textsuperscript{380} The tribunal was satisfied that these were obligations, and albeit unilateral, they were entered into ‘with regard to’ the claimant, due to the manner in which specific provisions had been emphasised in an offering memorandum aimed at inducing foreign investors to enter the market.\textsuperscript{381} The tribunal held that \textit{LG&E} invested in reliance upon the representations set out in the prospectus material and the applicable laws. Although the laws and regulations were themselves general in nature, their terms were restated and specifically addressed to the claimant in the offering memorandum addressed to the claimant.\textsuperscript{382}

Thus, there are limits to the scope\textit{ ratione materiae} of an umbrella clause. One of the concerns of the \textit{SGS v. Pakistan} tribunal, justifying its restrictive interpretation of the umbrella clause, was that the clause was ‘susceptible of almost indefinite expansion’.\textsuperscript{383} This conclusion was arguably affected by insufficient attention to the limits to the scope of the umbrella clause inherent in the words ‘obligation’, ‘entered into’ and ‘\textit{with regard to} (…) investments’. Having noted the limitations to the scope of the umbrella clause, the \textit{SGS v. Philippines} tribunal observed that its effect ‘is very far from elevating to the international level all “the municipal legislative or administrative or other unilateral measures of a Contracting Party”’.\textsuperscript{384} To acknowledge these conditions goes some way to dispelling the fears of those who would not give effect to an umbrella clause because of fears of unrestricted floods of investment treaty claims.


\textsuperscript{378} \textit{Eureko v. Poland} (n. 41) para. 256.

\textsuperscript{379} \textit{Enron v. Argentina} (n. 62) para. 274 (footnotes omitted, emphasis in original).

\textsuperscript{380} \textit{LG&E v. Argentina} (n. 58) para. 172.

\textsuperscript{381} \textit{Ibid.}, para. 175.

\textsuperscript{382} \textit{Ibid.}, para. 174 (footnote omitted).

\textsuperscript{383} \textit{SGS v. Pakistan} (n. 15) para. 166.

\textsuperscript{384} \textit{SGS v. Philippines} (n. 6) para. 121 (emphasis added), disagreeing with \textit{SGS v. Pakistan} (n. 15) para. 166.
b) The Existence of an Obligation of the Host State

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

the ‘commitments’ subject matter of Article 11 may, without imposing excessive violence on the text itself, be commitments of the State itself as a legal person, or of any office, entity or subdivision (local government units) or legal representative thereof whose acts are, under the law on state responsibility, attributable to the State itself.\(^{385}\)

Some treaties clarify this point, for instance, by identifying the agencies that may enter into an obligation in the name of the host State or the manner in which an obligation may be concluded. Article 11 of the Australia–Chile BIT, for example, covers only ‘written undertakings given by a competent authority’.\(^ {386}\) Such guidance is the exception. Sometimes the conclusion may be reached as a matter of construction. Where a treaty refers to an obligation of a ‘party’ in an umbrella clause, yet for certain purposes the treaty contains a definition of a ‘State enterprise’, it may be possible to infer that contracts concluded with State enterprises should not be equated with obligations of the State party to which the umbrella clause might apply. That was the conclusion in Bosh International v. Ukraine,\(^ {387}\) which concerned a contract concluded by the Taras Shevchenko National University of Kiev, and it was corroborated by the finding that the university’s conduct could not be attributable to Ukraine.\(^ {388}\) In the absence of clear assistance from the language of the clause, the principal disagreement is whether obligations of the host State are obligations of persons or entities for whom the State would be responsible applying international law rules of attribution, or whether the umbrella clause only covers obligations binding upon the State itself, applying the proper law applicable to the putative obligation.

There is faint support for the former approach in the cases. As already seen in the passage just quoted, it was this approach that affected the analysis of the umbrella clause in the SGS v. Pakistan case. The tribunal in Nykomb v. Latvia did not decide the point, but appeared ready to find that an obligation concluded by a State enterprise could be an obligation of the State of Latvia under the law of State responsibility.\(^ {389}\) In Eureko v. Poland, the tribunal did find that an obligation of the Polish State treasury was an obligation of Poland, applying international law rules, even though the evidence suggested that Poland was not re-

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385 Ibid.
386 E.g., Austria–Chile BIT, Article 11; also Australia–Poland BIT, Article 10; Walid Ben Hamida (n. 168) 25 et seq.
387 Bosh International v. Ukraine (n. 282) para. 245.
388 Ibid., para. 246.
389 Nykomb v. Latvia (n. 7) 37, section 4.3.3(c); and see Thomas Wälde and Kaj Hobér (n. 198).
sponsible for the obligations of the State treasury as a matter of Polish law. A majority of the tribunal rejected any reliance on Polish law to the effect that obligations of the State treasury were not obligations of the State.\textsuperscript{390} The tribunal considered that this submission ‘flies in the face of well recognized rules and principles of international law’.\textsuperscript{391} On the basis that it was ‘an international arbitral tribunal constituted under the Treaty’, the tribunal applied international law rules of attribution, specifically that the State is responsible for the conduct of State organs,\textsuperscript{392} in deciding that the obligations of the State treasury fell within the scope of the umbrella clause.\textsuperscript{393} The tribunal in \textit{Noble Ventures v. Romania} also applied rules of attribution to determine the scope of the umbrella clause, determining that obligations of the Romanian State Ownership Fund (SOF) and its successor, APAPS, were obligations Romania had entered into for the purpose of an umbrella clause claim. In doing so, the tribunal took guidance from Article 5 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (the ILC Articles).\textsuperscript{394} \textit{Toto v. Lebanon} appears to follow a similar approach. The tribunal was of a view that a certain contract would have been covered by the umbrella clause, under an approach applying the ILC Articles, despite the contract having been entered into by separate legal entities and not Lebanon itself.\textsuperscript{395}

\textit{Bosh International} is clearly in favour of applying rules of attribution to determine the subject matter scope of the umbrella clause. The tribunal ruled that the term ‘Party’ in the umbrella clause refers to any situation where the Party is acting \textit{qua} State. This means that where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility), such entities are considered to be ‘the Party’ for the purposes of Article II(3)(c).\textsuperscript{396}

The tribunal declined to find that the umbrella clause applied to a contract concluded by a State university on grounds that, applying the international law of State responsibility, ‘the conduct of the University is not attributable to Ukraine’.\textsuperscript{397}

Other tribunals reject this broader approach and hold that the objects of the umbrella clause are to be identified in accordance with their proper law, which is a distinct process from applying international law rules of attribution. In \textit{Nagel v. Czech Republic},\textsuperscript{398} the tribunal dismissed Nagel’s claim in part because whilst a

\textsuperscript{390} \textit{Eureko v. Poland} (n. 41) para. 134.
\textsuperscript{391} \textit{Ibid.}, para. 125.
\textsuperscript{392} ILC Articles, Article 4, Commentary, para. 6 in James Crawford (n. 204) 87.
\textsuperscript{393} \textit{Eureko v. Poland} (n. 41) paras. 126–128.
\textsuperscript{394} \textit{Noble Ventures v. Romania} (n. 1) paras. 85–86. On the facts, the relevant obligation was held not to have been breached, hence there was no breach of the umbrella clause: para. 158.
\textsuperscript{395} Decision on Jurisdiction, 11 September 2009, para. 190. The claim did not proceed to the merits due to the tribunal’s analysis of the impact of the jurisdiction clause in the contract.
\textsuperscript{396} \textit{Bosh International v. Ukraine} (n. 282) para. 246.
\textsuperscript{397} \textit{Ibid.}, paras. 246, 249.
State-owned enterprise was a party to a contract with the investor, the Czech Republic itself was not. The State enterprise was ‘a separate legal person whose legal undertakings did not as such engage the responsibility of [the Czech Republic]’.  

In *Impregilo v. Pakistan*, the claimant argued that the tribunal had jurisdiction in respect of certain allegations of breach of contract and an umbrella clause claim by operation of the most favoured nation provision in Article 3 of the Pakistan–Switzerland BIT. The tribunal held that ‘given that the Contracts were concluded by Impregilo with WAPDA, and not with Pakistan’ and that WAPDA was a separate legal entity distinct from the Republic of Pakistan, Impregilo’s attempts to invoke an umbrella clause claim were futile. The contracts in question were not obligations to which Pakistan was a party.  

The tribunal emphasised that there is a ‘clear distinction’ between on the one hand, responsibility of a State for the conduct of its entities that violates international law, and on the other, liability for breach of a contract concluded by a State entity for which the State may not itself be responsible. The tribunal insisted that ‘the international law rules on State responsibility and attribution apply to the former, but not the latter’. This conclusion was supported by the wording of the umbrella clause, which the tribunal said confirms that ‘the scope of application of this provision is limited to disputes between the entities or persons concerned’. The tribunals in *Azurix v. Argentina* and *EDF v. Romania* also declined to find that an umbrella clause applied in circumstances where the relevant obligation was not concluded with the State itself.  

Those in support of the former approach, involving the application of rules of attribution to determine whether the State has entered into an obligation with a foreign investor, argue that since the umbrella clause is an international obligation contained in a treaty its scope and content must be construed applying international rules. Mann preferred this analysis, arguing that the host State, for the purpose of identifying host State ‘obligations’, must ‘comprise instrumentalities, even if they are separate legal entities, as well as companies of which it is the sole shareholder’. Other commentators support this conclusion on grounds that otherwise a State would all too easily avoid its international obligations by interposing a State-controlled corporate entity between it and the foreign investor. These commentators call for coherence through the application of the same rules of attribution to the identification of protected obligations as to ques-
tions of breach. Schramke, for instance, said that ‘[a] formalistic approach which is only geared to the formal legal status of an entity under municipal law would (...) allow a state to circumvent the effects of an umbrella clause by creating or using separate entities as vehicles for that purpose’.\footnote{406 Hein-Jürgen Schramke (n. 241) 21.}

These arguments rest on the fallacy that there is some \emph{a priori} list of obligations to which the umbrella clause must apply. To the contrary, it may be presumed that a State has at least the same freedom to organise its commercial activities as private persons, and so decide that for certain activities it will create an enterprise possessing separate personality and, as an initial presumption, enjoy the normal legal consequences of that form.\footnote{407 E.g., First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 626-27 (1983); C. Czarnikow Limited v. Centrala Handlu Zagranicznego Rolimpex, [1979] A.C. 351; I Congreso del Partido, [1983] 1 A.C. 244, 258; La Générale des Carrières et des Mines v. F.G. Hemisphere Associates LLC, [2012] UKPC 27, para. 28.} It is not realistic to conclude – as the tribunals in \textit{SGS v. Pakistan}, \textit{El Paso} and \textit{Pan American} evidently did – that by agreeing to an umbrella clause a State is to be presumed to commit itself to comply with local legal obligations of separate entities.\footnote{408 Ahmed S. El-Kosheri, ‘Parallel State and Arbitral Procedures in International Arbitration’ (unpublished paper presented at the ICC Institute of World Business Law 24th Annual Meeting, Paris, 15 November 2004) at 13.} Long-standing support exists for the conclusion that the umbrella clause applies only to the obligations that States themselves choose to assume \emph{vis-à-vis} investors or their investments.\footnote{409 ABA Report (n. 132) 95–96 (emphasis added).}

Reliance on international law rules of attribution to determine the scope of a primary obligation is also misconceived. It is certainly true that to establish a host State’s responsibility \emph{for breach} of an umbrella clause, it is necessary to identify the conduct of an entity that is attributable to the State according to principles of State responsibility.\footnote{410 It is even the case that the act of a State entity concluding a contract may be attributable to its State for the purposes of assessing whether such conduct breached a primary obligation: EnCana Corporation v. Ecuador, UNCITRAL, LCIA Case No. UN3481, Award, 3 February 2006, para. 154; cf. Nick Gallus (n. 398) 167–168 seeking to rely upon EnCana as support for applying rules of attribution in determining the scope of obligations to which the umbrella clause applies, yet this confuses the role of primary and secondary rules of State responsibility.} Questions of breach of primary international law obligations invoke the secondary rules of international law concerning State responsibility for breach of obligations, of which rules of attribution form an integral part.\footnote{411 James Crawford, ‘Revising the Draft Articles on State Responsibility’ (1999) 10 EJIL 435, 436.} However, identifying the content of the primary obligation – including the obligations, commitments or undertakings entered into by the host State that the umbrella clause is intended to protect – is a different analysis. Secondary rules cannot dictate the scope of a primary obligation and do not address inherently internal law concepts concerning formation of legal obligations and identification of the parties bound by them. Although investment arbitration fre-
quently exhibits parallel features of both contractual liability and international responsibility, these remain conceptually distinct issues. A coherent understanding of the umbrella clause therefore requires that the existence of a legal obligation assumed by the host State be determined by reference to the putative proper law of that obligation, which is a distinct process from applying the secondary international law rules of State responsibility pertaining to attribution, and only then turn to questions of breach. This approach would tend to limit the population of host State obligations to which the umbrella clause may apply.

**c) The Existence of an Obligation Owed to the Claimant Investor**

A further question of scope concerns the parties who may invoke an umbrella clause. The answer to this question has the potential to have a bearing on a tribunal’s disposition as to the umbrella clause’s intended effect. At its more narrow, umbrella clauses may refer only to obligations entered into in writing or with approved investments. Such language imposes certain limits to the persons who might seek to enforce an obligation through the umbrella clause. However, most umbrella clauses are broader, referring variously to obligations entered into ‘with regard to investors’, ‘with regard to investments’, and sometimes as in the case of the Energy Charter Treaty, ‘entered into with an investor or an investment of an investor’. This wording is open to some interpretation and here arbitral practice and doctrine is again split. The wording of more common umbrella clauses, at first glance, does not seem to call for the application of traditional notions of privity of contract. Many commentators concur. Discussing the umbrella clause in the Energy Charter Treaty, the Energy Charter Secretariat’s *Readers’ Guide* asserts that:

This provision covers any contract that a host country has concluded with a subsidiary of the foreign investor in the host country, or a contract between the host country and the parent company of the subsidiary.

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412 *SGS v. Philippines* (n. 6) para. 117. For an explanation of the conditions on which a State will be found to be party to an obligation as a matter of English law, see e.g., *La Générale des Carrières et des Mines v. F.G. Hemisphere Associates LLC*, [2012] UKPC 27 and Lawrence Collins (ed), *Dicey, Morris and Collins’ The Conflict of Laws*, vol. 2 (Sweet & Maxwell, 2006) paras. 33–162.

413 See also *Impregilo v. Pakistan* (n. 225) para. 210: ‘a clear distinction exists between responsibility of a State for the conduct of an entity that violates international law (e.g. a breach of Treaty), and the responsibility of a State for the conduct of an entity that breaches a municipal law contract (i.e. Impregilo’s Contract Claims). (…) the international law rules on State responsibility and attribution apply to the former, but not the latter’; *Salini v. Jordan* (n. 2) para. 157: ‘the rules of attribution governing responsibility for the performance of contract obligations may differ from those governing responsibility for the performance of BIT obligations’; *EDF v. Romania* (n. 403) para. 318: ‘(…) the attribution to Respondent of [certain state entities’] acts and conduct does not render the State directly bound by [their contracts] for purposes of the umbrella clause’.

414 Walid Ben Hamida (n. 168) 33–37.

415 E.g., *Philippines–Switzerland BIT*, Article X(2); *Austria–Slovenia BIT*, Article 9; *ASEAN*, Article III(3).
VII. Umbrella Clause

Wälde expressed the view of umbrella clauses generally that there is ‘little if any serious disagreement that the clause was intended to cover, and should be read to cover, contracts between foreign investors (including their domestic subsidiaries) and states relating to an investment’.417

Nevertheless, a number of tribunals have declined to permit the parent company of a local subsidiary to bring a claim in its own name under the umbrella clause in respect of obligations entered into by the State with the subsidiary, even when considering a broadly worded clause.418 This was the conclusion of the tribunals in Azurix and Siemens, for instance.419 The issue was referred to an ad hoc committee in CMS v. Argentina. The committee’s starting point was that ‘obligations’ arise as between the obligor and the obligee, so identified as a matter of the applicable law.420 The performance of obligations also ‘occurs with regard to, and as between, obligor and obligee’.421 The alleged obligation arose as a matter of Argentinean law, yet the claimant was not party to the relevant agreement and not entitled to invoke and enforce obligations arising out of it and owed to its subsidiary. Nothing in the treaty, or the umbrella clause in particular, could alter this position:

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 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.422

In finding that CMS could bring a claim, the committee considered that the tribunal had failed to state its reasons and left a lacuna, which made it ‘impossible for the reader to follow the reasoning on this point’.423 The tribunal’s finding that Argentina had violated the umbrella clause was therefore annulled.424

The issue was discussed at length in Hamester v. Ghana.425 The case concerned a joint venture agreement concluded between the claimant and ‘Cocabod’, a State entity having separate legal personality under Ghanaian law. The

418 In Continental Casualty v. Argentina (n. 354), the claimant sought to introduce as a party to the proceedings its subsidiary company in order to rectify this difficulty. This request was denied on procedural grounds: para. 99. See also BG Group plc v. Argentina, UNCITRAL, Award, 24 December 2007, para. 363 finding that the claimant did not have standing in respect of a certain licence in which it alleged an indirect interest, and thus could not bring an umbrella clause claim in respect of its breach.
419 Azurix v. Argentina (n. 159) para. 384; Siemens v. Argentina, Award, 17 January 2007, para. 204.
420 CMS v. Argentina (n. 160) para. 90.
421 Ibid., para. 95(b).
422 Ibid., para. 95(c) (emphasis in original).
423 Ibid., para. 97.
424 Ibid., paras. 97–98.
425 Hamester v. Ghana, ICSID Case No. ARB/08/24, Award, 18 June 2010, para. 347.
claimant argued that breach of the agreement was a breach of the clause in the applicable treaty which provided that ‘[e]ach 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’. The tribunal was not persuaded that an umbrella clause claim against the Republic of Ghana could arise from the terms of a contract Ghana had not itself signed, on grounds of lack of privity:

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

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

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

(…)

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

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

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

Following an analysis of the text of the umbrella clause in question and a review of arbitral practice, the tribunal held that:


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

There are sound reasons to respect rules of privity of contract. First, an obligation is a legal relationship involving privity as between an obligor (debtor) and an obligee (creditor). It is the law applicable to the putative ‘obligation’ which defines the content, scope and parties to the undertaking. Secondly, the identity of one’s counterparty is a matter of party autonomy deserving of respect. A contract may have been negotiated in a particular context with specific parties in mind. Thirdly, shareholders cannot typically enforce the contracts of their companies under domestic legal systems; it is not obvious that a shareholder should be able to enforce a company’s contractual rights though a BIT. Finally, an approach that adheres to principles of privity is consistent with the conventional view that the umbrella clause would merely mirror existing obligations arising under their own proper law.

The common reasoning in these cases was that since the respective claimants could not, in their own name, enforce the obligations owed to their subsidiaries pursuant to the proper law, they could not do so by invoking an umbrella clause. Here there is a tension between the proper law approach and a plain reading of the words of the treaty since this approach seems to equate obligations ‘entered into with regard to investments’ to obligations ‘entered into with’ claimant investors. The CMS committee acknowledged this interpretative problem. However, the CMS award had not been issued on the basis that the words ‘entered into with regard to’ investments might create a right of standing on the part of parent companies to invoke obligations to which they were not strictly a party. Although its analysis is couched in more narrow terms, the CMS annulment does not rule out that this may be an appropriate construction of the clause. The tribunal in Burlington Resources v. Ecuador said that ‘no general rule’ should be extrapolated from the CMS annulment decision on this point. In its further Decision on Liability, however, the tribunal ruled that the words ‘entered into’ only reinforce the requirement of privity. According to the tribunal the phrase ‘with regard to investments’ narrows the scope of obligations to which the umbrella clause relates – the obligations must relate to investments – but does not dispense with the requirement of a pre-existing underlying obligation.

428 Ibid., para. 233.
429 David Foster (n. 109) 108.
430 Ibid., paras. 92, 94, 96.
431 Burlington Resources v. Ecuador (n. 226) para. 195, 199, joining the question of privity to the merits.
432 Burlington Resources v. Ecuador (n. 145) para. 214.
433 Ibid., para. 216. Orrego Vicuña dissented, on grounds that the majority’s analysis was inconsistent with the fact that investment treaties such as the one at issue typically extend their
conclusion has some attraction. There must be an obligation in the first place for it to then be qualified as ‘with regard to’ an investment. The phrase ‘with regard to’ is not obviously intended to create a fresh legal obligation as between claimant investor and host State where there was none to begin with. Other tribunals have permitted claims brought by claimants outside the strict bounds of privity. In both LG&E v. Argentina and EDF International v. Argentina, the respective tribunals considered that the clause in question required only an obligation entered into ‘with regard to’ the claimants’ investment, not an obligation entered into with the claimants as such. The Sempra tribunal held that the claimant could pursue an umbrella clause claim in respect of commitments contained in licences to which its subsidiaries were party on grounds that these licences were ‘the ultimate expression’ of a consolidated investment project, taken as a whole, with the claimant at its apex. There was also evidence that the particular structure, channelled through tiers of holding companies and held by Argentine subsidiaries, had been called for under the applicable law and regulations.

The decisions are clearly split on this point. The terms of the particular umbrella clause may assist in some cases. Even with the most common wording, there is strength to the argument that the words ‘with regard to’ mean what they say and are not the same as ‘with’. Given that an investment may sometimes be a local company, it is certainly arguable that a State contract with that company may be an obligation assumed with regard to an investment of an investor, and that the investor should be able to enforce it by way of the umbrella clause. The object and purpose of promoting and protecting investment might support this conclusion too, given that very often investors are required to incorporate a local company to hold valuable concessions, licences or other rights. The breadth of common dispute settlement provisions would also support the conclusion that investors may bring umbrella clause claims in respect of obligations to which they are not a direct party.

On the other hand there are sound reasons to respect rules of privity of contract. First, the identity of one’s counterparty is a matter of party autonomy deserving of respect. A contract may have been negotiated in a particular context with specific parties in mind. It would undermine party autonomy to allow non-parties to enforce such obligations through the mechanism of an umbrella clause. Secondly, shareholders cannot typically enforce the contracts of their companies under domestic legal systems; it is not obvious that a shareholder should be able to enforce a company’s contractual rights though an umbrella clause.

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

In either case, whilst the law remains unsettled in this respect, it is clear that the scope of the umbrella clause is not so open-ended as some fear. Even tribunals that have favoured giving a full effect to the umbrella clause have upheld the limits inherent in the text in respect of the existence of an underlying obligation and identification of the parties thereto. Much of the reluctance amongst certain tribunals to acknowledge the effect of the umbrella clause might evaporate with a more rigorous treatment of the legal principles that determine and delimit the class of obligations that may attract the protection of the umbrella clause.

D. Conclusions

It is possible to draw the following conclusions from the foregoing analysis of arbitral practice and doctrine. First, the fundamental question as to the effect of the umbrella clause has been largely resolved; it ‘means what it says’. There is scant merit in seeking to interpret the umbrella clause by reference to what tribunals presume the contracting parties must have intended. The umbrella clause should be interpreted like any other treaty provision in accordance with standard rules of interpretation. Tribunals that have doubted the effect of the umbrella clause have failed to supply any convincing alternative meaning for the provision.

Secondly, dissenting opinions on the effect of the umbrella clause tend to be heavily influenced by exaggerated fears as to the clause’s scope of application. It is likely that the concerns of the dissenters would be ameliorated by closer attention to the inherent limits to the clause’s scope of application, which arise by reference to its terms (‘obligation’, ‘entered into’) but also the applicable law. There is no sound reason to read any non-textual limitations into the nature of the obligations protected by the umbrella clause.

Thirdly, the existence of an obligation of the host State falling within the scope of the umbrella clause, and allegations that the host State has failed to observe an obligation, are matters to be determined primarily by reference to the proper law of the putative obligation. The umbrella clause only applies to pre-existing obligations; it does not create new ones. It is misconceived to argue that the umbrella clause invites the application of international law rules on attribution to identify the existence of an obligation of the host State.

Fourthly, international law controls the reference to the proper law and may, in exceptional cases, operate to exclude manipulative host State efforts to deny the existence of an obligation validly concluded and otherwise in force, but it does not transform the nature of the bargain. The umbrella clause should only insulate a State contract governed by the law of the host State from change in
law to the extent that a proper construction of the contract leads to the conclusion that the parties intended to exclude such changes, or to the extent that the change in law would otherwise breach international law. Only wrongful non-observance will breach the umbrella clause.

Fifthly, the majority of tribunals have required the claimant investor to be party to the State contract it seeks to protect by way of an umbrella clause claim. This conclusion is justified under the terms of some treaties, but may not fully accord with treaties that refer to obligations entered into ‘with regard to’ an investment of an investor. Here, there is a counter argument that a foreign investor ought to be able to bring an umbrella clause claim in respect of a State contract signed by a subsidiary that constitutes its investment.

Sixthly, there is nothing in the terms of a standard umbrella clause from which to conclude that a violation should only be triggered by a breach of a State contract involving the exercise of governmental power. Whilst arbitral practice is mixed, there is a well-supported view that any breach should give rise to a violation of the umbrella clause. Indeed, a bright line distinction between governmental and commercial breach on the part of a State contractual partner is not so easily drawn.

Finally, the law is unsettled as to the impact of an exclusive choice of jurisdiction clause in the underlying contract on a tribunal’s jurisdiction or competence to decide an umbrella clause claim. Tribunals have sought to explain the interaction of such a clause by reference to a test whether the fundamental basis of the claim is a breach of treaty, or breach of contract. If any treaty claim is to trigger this test, it is an umbrella clause claim, but even then there are doubts as to whether this conclusion is correct. The *SGS v. Philippines* solution of a stay of proceedings pending a reference to the chosen forum raises both theoretical and practical difficulties, potentially undermining the effect of the umbrella clause. An umbrella clause claim is by definition, a treaty claim, turning on an additional promise, expressed in a treaty, on the part of the host State to observe obligations.

What is clear is that the debate about the umbrella clause has moved on. Umbrella clause claims are no longer seen as an anathema, conceived of only in the minds of claimants’ counsel in the modern era of investor-State arbitration. In fact, the device has a long and well-documented history. Umbrella clause claims are a commonly invoked device to seek the observance of contracts and other forms of undertakings that a host State may have entered into in the context of seeking to attract inward investment.

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