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# PRACTICAL IMPLICATIONS FROM AN EXPANSIVE INTERPRETATION OF UMBRELLA CLAUSES IN INTERNATIONAL INVESTMENT LAW

*Katherine Jonckheere* \*

## ABSTRACT

*The right way to interpret so-called 'umbrella clauses' has been debated for over a decade. Interpreted restrictively, these clauses merely reinforce the substantive commitments and protections listed in the remainder of the investment treaties in which they are found. An expansive interpretation on the other hand gives these clauses the effect of elevating purely contractual obligations undertaken by the state vis-à-vis specific investors to full-blown treaty obligations under international law, subject to the investment treaty's dispute settlement provisions. Although an expansive reading seems to have gained considerable ground amongst investment arbitration tribunals over the years, this article will show that the consequences of such an interpretation still differ materially in practice by looking at (i) what happens to the dispute resolution mechanism of the investment treaty when there is also an exclusive forum selection clause in the underlying contract between a state and a foreign investor, and (ii) what type of obligations can be elevated via umbrella clauses. Both states and investors are advised to take these practical implications into consideration when entering into investment agreements or treaties.*

## I. INTRODUCTION

For over a decade, investment arbitration tribunals have been divided over the best way to interpret so-called umbrella clauses.

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Found in many bilateral investment treaties (BITs), umbrella clauses typically provide that contracting states explicitly agree to meet certain obligations undertaken vis-à-vis investors from counter-party states.<sup>1</sup> While some investment arbitration tribunals maintain that an umbrella clause merely reinforces the substantive commitments listed in its respective investment treaty, such as the commitment of the host-state to treat foreign investors in a fair and equitable way, others have read such clauses more broadly to enforce obligations beyond those explicitly mentioned in the treaty.

The split between restrictive and expansive interpretations of umbrella clauses comes up in a situation where a host-state has entered into certain obligations with an investor in addition to those listed in the investment treaty—for example, by executing a production-sharing contract with a specific foreign investor. If the host-state does not subsequently fulfill its contractual obligations towards that investor, the latter arguably has a claim against the host-state for breach of contract. This contract-based claim can be distinguished from a traditional treaty-based claim, such as an alleged breach of an investment treaty's mutually guaranteed standards of protection for investors.<sup>2</sup> It is undisputed that treaty-based claims can be adjudicated under the auspices of the dispute resolution mechanism designated in the investment treaty (typically by referring them to the International Centre for Settlement of Investment Disputes (ICSID)). However, by adopting an expansive interpretation of umbrella clauses, purely contract-based claims could also be brought under the auspices of the investment treaty's dispute settlement provisions.

Over time, the debate has gradually subsided in favor of an expansive reading.<sup>3</sup> Rather than advancing one interpretation over the other, this article will focus on what such interpretations mean for

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<sup>1</sup> An example of an umbrella clause can be found in the BIT between the United States and Romania: "Each Party shall observe any obligation it may have entered into with regard to investments." Treaty with Romania Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Rom., art. II, ¶ 2, May 28, 1992, S. TREATY DOC. NO. 102-36 (1992) [hereinafter U.S.-Rom. BIT].

<sup>2</sup> For example, a violation of the host-state's obligation to protect the foreign investor from arbitrary or discriminatory measures or its obligation to guarantee the foreign investor equal national treatment.

<sup>3</sup> See Jude Anthony, *Umbrella Clauses Since SGS v. Pakistan and SGS v. Philippines – A Developing Consensus*, 29 ARBITRATION INTERNATIONAL 607, 607 (2013).

the debate's practical implications for its stakeholders, namely sovereigns and investors. The following section will first provide a brief overview of the main arguments invoked by tribunals and scholars for both restrictive and expansive interpretations. Section III will then discuss how investment arbitration tribunals favoring expansive interpretations have decided cases involving claims brought under umbrella clauses, focusing on two issues that are still controversial amongst them. First, what is the relationship between an exclusive forum selection clause in a contract between a host-state and an investor and the dispute settlement provision in the applicable investment treaty? Second, which types of obligations are elevated to the level of an investment treaty breach? Would a unilateral promise of a host-state to share with a foreign investor a certain cost related to the investment qualify as an "obligation" that can be elevated to an obligation under the relevant investment treaty, or would contractual obligations be required? Section IV will conclude by discussing the practical implications of differing expansive interpretations of umbrella clauses and thereby offer recommendations for both investors and states.

## II. DEBATE ON THE INTERPRETATION OF UMBRELLA CLAUSES

As the ICSID tribunal in *BIVAC B.V. v. Paraguay* aptly explained, "there is no *jurisprudence constante* on the effect of umbrella clauses[;] . . . the subject is one on which legal opinion is divided."<sup>4</sup> The debate began a good ten years ago when two tribunals—deciding shortly after one another—reached vastly different outcomes when dealing with an umbrella clause in *SGS v. Pakistan*<sup>5</sup> and *SGS v. Philippines*.<sup>6</sup> Both cases addressed the question of whether the host-state's commitments referenced in the respective

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<sup>4</sup> Bureau Veritas, Inspection, Valuation, Assessment & Control, *BIVAC B.V. v. Republic of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 141 (May 29, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0103.pdf>.

<sup>5</sup> *Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶¶ 172–73 (Aug. 6, 2003), 8 ICSID Rep. 406 (2005).

<sup>6</sup> *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 128 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

investment treaties' umbrella clause also included "obligations arising under otherwise independent investment contracts between the investor and the host State."<sup>7</sup> If the answer was "yes" (utilizing an expansive umbrella clause interpretation as adopted in *SGS v. Philippines*), breach of the host state's contractual commitments would amount to a breach of the BIT and the matter would be subject to ICSID jurisdiction.<sup>8</sup> In the alternative (utilizing a restrictive interpretation as adopted in *SGS v. Pakistan*), the local forum would adjudicate the investor's contractual claim.<sup>9</sup>

#### A. RESTRICTIVE INTERPRETATION

In *SGS v. Pakistan*, the claimant argued for an expansive interpretation of the umbrella clause contained in Article 11 of the Switzerland-Pakistan BIT, which reads: "[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."<sup>10</sup> The arbitration tribunal rejected the argument that Article 11 "elevated" SGS's contractual claims to treaty claims, subject to ICSID jurisdiction.<sup>11</sup>

Still the leading case, *SGS v. Pakistan* summarizes some of the key arguments in favor of a narrow interpretation of umbrella clauses. The first is a "floodgate" argument, pointing to the far-reaching consequences an expansive interpretation would create. Namely, an expansive view would make umbrella clauses "susceptible of almost indefinite expansion" and "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, we believe that clear and convincing evidence must be adduced."<sup>12</sup> The tribunal concluded that no evidence of such

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<sup>7</sup> Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135, 136–37 (2006).

<sup>8</sup> See *SGS v. Phil.*, Objections to Jurisdiction, ¶¶ 129–31; *SGS v. Pak.*, Objections to Jurisdiction, ¶ 168.

<sup>9</sup> See *SGS v. Phil.*, Objections to Jurisdiction, ¶ 155.

<sup>10</sup> *SGS v. Pak.*, Objections to Jurisdiction, ¶ 97.

<sup>11</sup> See *id.* ¶¶ 54, 172–73.

<sup>12</sup> *Id.* ¶¶ 166–67; see also Matthew Wendlandt, *SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes*, 43 TEX. INT'L L.J. 523, 541 (2008).

intent could be found in the text of the umbrella clause.<sup>13</sup> The *SGS v. Pakistan* tribunal also set forth what would become a more “widely accepted principle . . . that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law.”<sup>14</sup>

Three years later, the arbitration tribunal in *El Paso v. Argentina* followed the *SGS v. Pakistan* tribunal’s view that contractual claims could only be transformed to treaty claims if this had been stated “clearly and unambiguously.”<sup>15</sup>

The tribunals in both *SGS v. Pakistan* and a case that followed shortly after, *Joy Mining v. Egypt*, applied the *Vivendi* “essential basis” test—distinguishing investment treaty breaches and contractual breaches by “the fundamental basis of the claim”—in rejecting jurisdiction over contract-based claims.<sup>16</sup> This test explains that where a claim’s fundamental basis is a BIT, international law is applicable; on the other hand, when its fundamental basis is a contract, the law applicable to the contract will govern.<sup>17</sup>

#### B. EXPANSIVE INTERPRETATION

Shortly after the *SGS v. Pakistan* tribunal reached its decision, the tribunal in *SGS v. Philippines*, another landmark decision, reached the opposite conclusion and accepted jurisdiction

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<sup>13</sup> *SGS v. Pak.*, Objections to Jurisdiction, ¶ 167.

<sup>14</sup> *Id.*; see also Michael Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY J. INT’L L. 142, 152, 161 (2010).

<sup>15</sup> *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 74 (Apr. 27, 2006), 21 ICSID Rev. 488 (2006).

<sup>16</sup> *Id.*, ¶ 63; *Joy Mining Mach., Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 75 (Aug. 6, 2004), 13 ICSID Rep. 123 (2008); *SGS v. Pak.*, Objections to Jurisdiction, ¶ 148 (quoting *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, Case No. ARB/97/3, Annulment, ¶ 101 (July 3, 2002), 8 ICSID Rep. 490 (2005)).

<sup>17</sup> *Vivendi Universal v. Argentine Republic*, Annulment, ¶ 96. In *Vivendi*, the panel agreed that the “proper law of the contract” for the Concession Contract was the law of Tucumán Province, not international law rules of arbitration, because Tucumán “possesses separate legal personality under its own law and is responsible for the performance of its own contracts.” *Id.*

over contractual claims on the basis that the umbrella clause “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.”<sup>18</sup> An expansive interpretation of umbrella clauses requires that breaches of obligations the host-state has undertaken with respect to foreign investors are elevated to breaches of the umbrella clause included in the investment treaty. Therefore, a simple breach of a commercial contract between a host-state and an investor could be transformed into a breach of a treaty. Article 10 of the Switzerland-Philippines BIT stipulates the following umbrella clause: “[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.”<sup>19</sup> Admittedly, the language of the umbrella clause in *SGS v. Philippines* seems weaker than this of the clause in *SGS v. Pakistan*, which does not mention “specific” investments “in [the host-state’s] territory.” The *SGS v. Philippines* tribunal even makes a reference to the “vaguer terms” of the umbrella clause contained in the Swiss-Pakistan BIT.<sup>20</sup> However, the slight textual differences between umbrella clauses do not satisfactorily explain the basis for the split in international investment law.

Tribunals advancing an expansive construction of umbrella clauses have typically relied on Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, which provides that a treaty must be interpreted (i) in accordance with the ordinary meaning of its terms in their context and (ii) in light of its objective and purpose.<sup>21</sup> First, they have pointed out the plain language of umbrella clauses,<sup>22</sup> such as the mandatory character of “shall

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<sup>18</sup> *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 128 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

<sup>19</sup> *Id.* ¶ 115.

<sup>20</sup> *Id.* ¶ 119.

<sup>21</sup> *See Eureka B.V. v. Republic of Pol.*, Partial Award, ¶ 247 (Aug. 19, 2005), 12 ICSID Rep. 335 (2007) (quoting Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331); *Enron Corp. v. Argentine Republic*, ICSID Case ARB/01/3, Award, ¶ 273 (May 22, 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf>.

<sup>22</sup> *Société Générale Surveillance S.A. v. Republic of Para.*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 168 (Feb. 12, 2010), <http://www.italaw.com/sites/default/files/case-documents/italaw1526.pdf>.

observe” and the broad phrasing of “any obligation,”<sup>23</sup> which would arguably include not only obligations specified in the investment treaty but also purely contractual obligations under national law.<sup>24</sup>

Second, and related to this interpretation, is the argument under international law that a provision in an international treaty must be “interpreted as meaningful rather than meaningless,” and to be rendered “effective rather than ineffective.”<sup>25</sup> Proponents of an expansive interpretation seem to agree that a restrictive interpretation would render umbrella clauses redundant.<sup>26</sup> The tribunal in *SGS v. Philippines* criticized the *SGS v. Pakistan* decision in this respect by stating that the latter “failed to give any clear meaning to the umbrella clause.”<sup>27</sup> In *SGS v. Paraguay*, the umbrella clause was similarly interpreted to provide jurisdiction over contract-based claims in order “to give purpose and effect to that provision.”<sup>28</sup> This is also how the ad hoc arbitration tribunal in *Eureko B.V. v. Poland* reached the conclusion that an umbrella clause “must be interpreted to mean something in itself,” namely, to include the obligations undertaken by the host-state with respect to the investments made by foreign investors in accordance with the BIT.<sup>29</sup> The ICSID arbitration tribunal in *SGS v. Paraguay* similarly held that an umbrella clause means 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.”<sup>30</sup> The tribunal in

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<sup>23</sup> See, e.g., Bureau Veritas, Inspection, Valuation, Assessment & Control, *BIVAC B.V. v. Republic of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 141 (May 29, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0103.pdf> (stating that “[t]he words any obligation are all encompassing.”); *SGS v. Phil.*, Objections to Jurisdiction, ¶ 115 (citing the language “shall”).

<sup>24</sup> *SGS v. Phil.*, Objections to Jurisdiction, ¶ 115; *BIVAC B.V. v. Para.*, Objections to Jurisdiction, ¶ 141.

<sup>25</sup> *Eureko B.V. v. Republic of Pol.*, Partial Award, ¶ 248.

<sup>26</sup> Stephen W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT’L L. 1, 39–40 (2009).

<sup>27</sup> *SGS v. Phil.*, Objections to Jurisdiction, ¶ 125 (internal quotations omitted).

<sup>28</sup> *Société Générale Surveillance S.A. v. Republic of Para.*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 176 (Feb. 12, 2010), <http://www.italaw.com/sites/default/files/case-documents/italaw1526.pdf>.

<sup>29</sup> *Id.* ¶ 249.

<sup>30</sup> *Id.* ¶ 168.

*BIVAC B.V. v. Rep. of Paraguay* agreed that “the umbrella clause has to be interpreted in such a way as to give it some meaning and practical effect.”<sup>31</sup>

Third, investment arbitration tribunals adopting an expansive interpretation have turned to the objective and purpose of the investment treaties in which umbrella clauses are found.<sup>32</sup> According to the tribunal in *Eureko B.V. v. Poland*, “the encouragement and reciprocal protection of investment” must be read into the umbrella clause.<sup>33</sup> Therefore, when in doubt, the umbrella clause ought to be interpreted in favor of encouraging investment.<sup>34</sup> Allowing for resolution of all disputes arising from the same investment by a single forum (i.e., the forum designated in the investment treaty) would make foreign investment more attractive for investors who might not wish to refer their disputes to the host-state’s national courts for fear of bias or an underdeveloped judicial system.<sup>35</sup>

Finally, proponents of an expansive interpretation have traced back the historical origins of umbrella clauses to the 1950s and 1960s.<sup>36</sup> The 1967 OECD Draft Convention on the Protection of Foreign Property was the first treaty to include an umbrella clause, titled “Observance of Undertakings.”<sup>37</sup> The commentary to the Draft

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<sup>31</sup> Bureau Veritas, Inspection, Valuation, Assessment & Control, *BIVAC B.V. v. Republic of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 141 (May 29, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0103.pdf>.

<sup>32</sup> See *supra* text accompanying notes 21–28.

<sup>33</sup> *Eureko B.V. v. Republic of Pol.*, Partial Award, ¶ 248 (Aug. 19, 2005), 12 ICSID Rep. 335 (2007).

<sup>34</sup> *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005) (citing Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., pmbl., Nov. 14, 1991, 31 I.L.M. 124).

<sup>35</sup> *Id.* ¶ 132.

<sup>36</sup> For further discussion, see *Eureko B.V. v. Republic of Pol.*, Partial Award, ¶ 251; Jonathan B. Potts, *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance and Internationalization*, 51 VA. J. INT’L L. 1005, 1008 (2011); Schill, *supra* note 26, at 36, 55, 56; Wong, *supra* note 7, at 149.

<sup>37</sup> Organisation for Economic Co-operation and Development [OECD], *Draft Convention on the Protection of Foreign Property*, at 13, No. 15,637 (1962), available at <http://www.oecd.org/investment/>

Convention explains that “any right originating under such an undertaking gives rise to an international right.”<sup>38</sup> The tribunal in *Eureko B.V. v. Poland* emphasizes how scholars in the 1970s and 1980s have further interpreted the umbrella clause to transform contractual obligations into international ones.<sup>39</sup>

### III. THE EXPANSIVE INTERPRETATION OF UMBRELLA CLAUSES IN PRACTICE

Although host-states (who have an interest in avoiding international law breaches) and foreign investors (who have an interest in seeing their claims adjudicated in international forums) are likely to continue to disagree on one interpretation, the arguments for a broad definition seem to have gained traction with arbitration tribunals as is demonstrated by the substantial number of cases decided this way. Instead of fueling the debate, section III will focus on what an expansive interpretation of umbrella clauses means in practical terms and will consider two questions that are controversial within the ranks of supporters of a broad interpretation. The first question relates to what happens when there is an umbrella clause in the investment treaty, thereby elevating contractual claims to treaty claims, and an exclusive forum selection clause in the contract. Does the dispute resolution mechanism in the investment treaty override the forum selection clause in this scenario? The second question asks which types of “obligations” can be brought into the treaty realm. Would they need to be contractual or could they have a wider scope and include, for example, unilateral promises or statements made by the host-state?

#### A. EFFECT OF EXCLUSIVE FORUM SELECTION CLAUSES

In *SGS v. Pakistan*, the tribunal expressed concern that elevating any contractual breach to a treaty breach would “negate routine forum selection clauses in thousands of state-investor

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internationalinvestmentagreements/39286571.pdf. The umbrella clause provided that “[e]ach Party shall at all times ensure the observance of undertakings given by it in relation to the property of nationals of another Party.” *Id.*

<sup>38</sup> *Id.* at 14–15.

<sup>39</sup> *Eureko B.V. v. Republic of Pol.*, Partial Award, ¶ 251 (internal quotations omitted).

contracts.”<sup>40</sup> For this reason, a forum selection clause in a contract between host-state and foreign investor had to take precedence over BIT jurisdiction. However, expansive interpretations of umbrella clauses have varied with respect to their effect on such forum selection clauses. This section distinguishes three scenarios that arise once an investment arbitration tribunal has accepted jurisdiction over a contractual claim on the basis of the applicable investment treaty’s umbrella clause. First, the contract between the host-state and investor does not contain a forum selection clause; consequently, there is nothing standing in the way of the tribunal deciding on the merits of any contractual claim. Second, there is an exclusive forum selection clause and the tribunal gives the selected forum precedence over BIT dispute resolution, meaning that it does not decide the merits of the case. Finally, there is an exclusive forum selection clause but the tribunal gives precedence to BIT dispute resolution and therefore decides itself the merits of the case.

The different approaches that tribunals supporting a broad interpretation have taken to decipher umbrella clauses are not just theoretical; there have been tangible consequences. For example, in *BIVAC B.V. v. Paraguay*, the tribunal accepted jurisdiction over a contractual claim but then declared this claim “inadmissible” because of the exclusive forum selection clause in the contract, deflecting a decision on the merits of the case to the local courts indicated in the forum selection clause.<sup>41</sup> Contrarily, in *SGS v. Paraguay*, a case stemming from a similar set of facts, the tribunal ignored the exclusive forum selection clause to decide for itself the merits of the case.<sup>42</sup> It is interesting to contrast the vastly different results of *BIVAC B.V. v. Paraguay* and *SGS v. Paraguay* with the outcomes of the respective poster cases for the restrictive and expansive interpretations of umbrella clauses, *SGS v. Pakistan* and *SGS v. Philippines*. Both cases also had an exclusive forum selection clause in the underlying contract between the host-state and the foreign

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<sup>40</sup> *Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶ 56 (Aug. 6, 2003), 8 ICSID Rep. 406 (2005).

<sup>41</sup> Bureau Veritas, Inspection, Valuation, Assessment & Control, *BIVAC B.V. v. Republic of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 142 (May 29, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0103.pdf>.

<sup>42</sup> *Société Générale Surveillance S.A. v. Republic of Para.*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 185 (Feb. 12, 2010), <http://www.italaw.com/sites/default/files/case-documents/italaw1526.pdf>.

investor.<sup>43</sup> Although often perceived to be drastically different,<sup>44</sup> the outcomes of these two cases were nonetheless largely the same—the local courts of the host-state could decide the merits of the investor’s contractual claims<sup>45</sup>—thereby illustrating how the interpretational divide runs deeper than a simply restrictive versus expansive approach.

#### 1. TRIBUNAL GIVES PRECEDENCE TO THE FORUM SELECTION CLAUSE

As it turns out, a number of proponents of an expansive interpretation would render an umbrella clause ineffective in the presence of an exclusive forum selection clause, including the arbitrators in *SGS v. Philippines*. In the latter case, by accepting jurisdiction over the foreign investor’s contractual claim on the basis that the umbrella clause in the Swiss-Philippines BIT rose to a treaty claim, the tribunal paved the way for adopting an expansive interpretation in case law, while at the same time declaring the contractual claim inadmissible because of the forum selection clause in the underlying agreement between investor and host-state.<sup>46</sup>

As one author astutely observed, “this is to take away with one hand what was given with the other, leaving investors no less empty-handed than they were under *SGS v. Pakistan*.”<sup>47</sup> Another commentator tries to defeat this criticism by pointing out that ICSID tribunals should have the freedom to decide the merits of contractual claims if they wish, and simply did not think it appropriate in *SGS v. Philippines*.<sup>48</sup> A third argues that an exclusive forum selection clause should override the BIT dispute resolution mechanism because foreign investors should be able to “negotiate more lucrative

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<sup>43</sup> See Yuval Shany, Notes and Comments, *Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT’L L. 835, 839–42 (2005).

<sup>44</sup> *Id.*

<sup>45</sup> See *SGS v. Pak.*, Objections to Jurisdiction, ¶ 145–46; *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 162 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

<sup>46</sup> See Shany, *supra* note 43, at 842–43.

<sup>47</sup> Wong, *supra* note 7, at 165–66.

<sup>48</sup> Wendlandt, *supra* note 12, at 552–54.

contracts” with the host-state by forfeiting dispute resolution as determined in the treaty.<sup>49</sup>

In *BIVAC v. Paraguay*, a case concerning unpaid invoices arising from a contract between a Dutch company and the Paraguayan Ministry of Finance, the tribunal accepted jurisdiction over the Dutch company’s contractual claim.<sup>50</sup> However, and similar to *SGS v. Philippines*, it did not decide the merits of the case because of the exclusive forum selection clause in the contract where the parties had chosen the Tribunals of the City of Asunción.<sup>51</sup> Although the tribunal declared it had jurisdiction over the contractual claim, it considered that claim to be inadmissible, stating that a broad reading of the umbrella clause indicated that the entire contract is imported into the BIT, including the exclusive forum selection clause.<sup>52</sup> The tribunal then addressed whether the proceedings should be stayed—as was done in *SGS v. Philippines*—or the contractual claim dismissed, which would be the normal practice for an inadmissible claim.<sup>53</sup> The tribunal finally decided that a stay of proceedings was the most appropriate way to deal with the issue of admissibility.<sup>54</sup> However, the decision seemed to imply that the contractual claim might still become admissible if the forum selected in the contract fails to meet “expectations with regard to the sound administration of justice.”<sup>55</sup> In conclusion, the tribunal appeared to have assumed a supervisory role, as had been argued for by the claimant.<sup>56</sup>

Another ICSID tribunal came to the same conclusion in *Bosh International, Inc. v. Ukraine*.<sup>57</sup> There, the tribunal did not need to decide what happens after an umbrella clause is breached because the contractual breaches alleged by the claimant were not

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<sup>49</sup> Potts, *supra* note 36, at 1042.

<sup>50</sup> Bureau Veritas, Inspection, Valuation, Assessment & Control, *BIVAC B.V. v. Republic of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 142 (May 29, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0103.pdf>.

<sup>51</sup> *Id.* ¶ 145.

<sup>52</sup> *Id.* ¶ 159.

<sup>53</sup> *Id.* ¶ 161.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* ¶ 290.

<sup>56</sup> *See id.* ¶ 288.

<sup>57</sup> *Bosh Int’l, Inc. v. Ukraine*, ICSID Case No. ARB/08/11, Award, ¶ 254 (Oct. 25, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1118.pdf>.

attributable to the host state.<sup>58</sup> However, “for the sake of completeness,” the tribunal added that the contractual claim would not be allowed because there was an exclusive forum selection clause in the contract.<sup>59</sup>

## 2. TRIBUNAL GIVES PRECEDENCE TO INVESTMENT TREATY DISPUTE RESOLUTION

Having ignored the exclusive forum selection clause in the underlying contract in favor of BIT dispute resolution, the investment arbitration tribunals in *Eureko B.V. v. Poland*, *LG&E Energy Corp. v. Argentine Republic*, and *SGS v. Paraguay* on the other hand found themselves in a position to decide the merits of the contractual claims brought before them.<sup>60</sup>

In *Eureko v. Poland*, the ad hoc arbitration tribunal decided that the allegations of contractual breach were admissible despite the contract’s exclusive forum selection clause, reasoning that the umbrella clause in the Dutch-Polish BIT had the effect of elevating the contractual breach to a treaty breach.<sup>61</sup> Applying Polish law, the tribunal found a breach of the contract, which automatically constituted a breach of the treaty’s umbrella clause.<sup>62</sup>

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<sup>58</sup> *Id.* ¶ 178.

<sup>59</sup> *Id.* ¶ 250. “The present Tribunal agrees, and concludes that where a contractual claim is asserted under an umbrella clause, the claimant in question must comply with any dispute settlement provision included in that contract.” *Id.* ¶ 252.

<sup>60</sup> *Eureko B.V. v. Republic of Pol.*, Partial Award, ¶¶ 190–91 (Aug. 19, 2005), 12 ICSID Rep. 335 (2007); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 132–39 (Oct. 3, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0460.pdf>; *Société Générale Surveillance S.A. v. Republic of Para.*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 185 (Feb. 12, 2010), <http://www.italaw.com/sites/default/files/case-documents/italaw1526.pdf>.

<sup>61</sup> *Eureko B.V. v. Republic of Pol.*, Partial Award, ¶ 250. Article 3.5 of the Dutch-Polish BIT provides: “Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.” *Id.* ¶ 77.

<sup>62</sup> *See id.* ¶ 260. Interestingly, the decision is accompanied by a strong dissent, which asserts that the Tribunal’s findings are wholly incompatible with Polish law. *See Eureko B.V. v. Republic of Poland*, Dissenting Opinion, ¶ 11.

In *SGS v. Paraguay*, the forum selection clause asserted that “[a]ny conflict, controversy or claim deriving from or in connection with this Agreement, breach, termination or invalidity, shall be submitted to the Courts of the City of Asunción under the Law of Paraguay.”<sup>63</sup> Although arising from facts similar to those in *BIVAC v. Paraguay*,<sup>64</sup> *SGS v. Paraguay* had very different practical implications. Instead of giving precedence to the forum selection clause, the tribunal stated that directing SGS’s contractual claims to the Paraguayan courts would place it “at risk of failing to carry out its mandate under the Treaty and the ICSID Convention.”<sup>65</sup> The tribunal also stressed that it would need “strong cause” not to exercise jurisdiction.<sup>66</sup> In reaching its conclusion, the tribunal relied in part on the Vivendi Annulment decision, which asserted that a “[t]ribunal, faced with such a claim and having validly held that it had jurisdiction, [is] obliged to consider and to decide it.”<sup>67</sup> Although the Vivendi Annulment Committee was referring to traditional treaty claims,<sup>68</sup> the tribunal in *SGS v. Paraguay* had no reservations in applying their reasoning, because it considered the contractual breaches to amount to breaches of the treaty’s umbrella clause.<sup>69</sup> Thus, contractual claims brought under an umbrella clause are, in the tribunal’s view, treaty claims.<sup>70</sup> Unless it can be shown

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<sup>63</sup> *SGS v. Para.*, Decision on Jurisdiction, ¶ 126.

<sup>64</sup> Both cases involved foreign companies that had contracted with the Paraguayan Ministry of Finance to perform certification and pre-shipment inspection services for cargoes but were not paid after mutual termination of their respective contracts. See Bureau Veritas, Inspection, Valuation, Assessment & Control, *BIVAC B.V. v. Republic of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 160 (May 29, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0103.pdf>.

<sup>65</sup> *Id.* ¶ 172.

<sup>66</sup> *Id.* ¶ 175.

<sup>67</sup> *Id.* ¶ 171.

<sup>68</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, Case No. ARB/97/3, Annulment, ¶ 11 (July 3, 2002), 8 ICSID Rep. 490 (2005); *SGS v. Para.*, Decision on Jurisdiction, ¶ 142.

<sup>69</sup> “Even if the alleged breach of the treaty obligation depends upon a showing that a contract or other qualifying commitment has been breached, the source of the obligation cited by the claimant, and hence the source of the claim, remains the treaty itself.” *SGS v. Para.*, Decision on Jurisdiction, ¶ 142.

<sup>70</sup> *Id.*

that the parties clearly intended to exclude BIT jurisdiction, the tribunal will decide the merits of the case.<sup>71</sup>

Finally, in *LG&E Energy Corp. v. Argentine Republic*, the tribunal again made its decision based on the merits of the contractual claim. The arbitrators began their analysis by stating that umbrella clauses award “extra protection” to a state’s obligations towards foreign investors, without addressing whether or not the contractual forum selection clause should be applied.<sup>72</sup> It then went straight to the merits of the investor’s claim, deciding that Argentina had breached the obligations it had undertaken with respect to the claimant by repealing the statutory scheme it had constructed to attract foreign investors for its gas distribution sector.<sup>73</sup>

The aforementioned cases show that when a host-state enters into contractual obligations with a foreign investor, inserting an exclusive forum selection clause in the contract does not necessarily guarantee that the courts designated in such a clause will adjudicate potential disputes arising from the contract.<sup>74</sup> The dispute resolution mechanism agreed to in the BIT may very well supersede the exclusive forum selection clause in the contract.<sup>75</sup> Because it is generally in a state’s interest to have its own local courts deal with these contractual disputes, the host-state should be aware of this risk.

### B. SCOPE OF OBLIGATIONS AFFECTED

A second contentious point amongst supporters of a broad interpretation concerns the scope of umbrella clauses. In other words, which types of obligations can be brought under the umbrella clause? There appears to be a consensus that contractual obligations relating to investments would qualify.<sup>76</sup> As early as 2006, the tribunal in

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<sup>71</sup> *Id.* ¶¶ 179–80.

<sup>72</sup> *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 170 (Oct. 3, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0460.pdf>.

<sup>73</sup> *Id.* ¶¶ 171–174.

<sup>74</sup> See *SGS v. Para.*, Decision on Jurisdiction, ¶¶ 138–39.

<sup>75</sup> For further arguments in support of this interpretation, see Wong, *supra* note 7, at 136–37.

<sup>76</sup> *Bosh Int’l, Inc. v. Ukraine*, ICSID Case No. ARB/08/11, Award, ¶¶ 231, 248 (Oct. 25, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1118.pdf>; see also Bureau Veritas, Inspection, Valuation, Assessment & Control, *BIVAC B.V. v. Republic of Para.*, ICSID Case No.

*LG&E Energy Corp. v. Argentine Republic* pointed out that multiple tribunals—referring *inter alia* to the tribunal in *SGS v. Philippines*—“have concluded that the breach of a contractual obligation in a contract between the State and an investor gives rise to a claim under the umbrella clause.”<sup>77</sup> Also illustrative is the more recent ICSID case of *Bosh International, Inc. v. Ukraine*, where the tribunal followed the decision on jurisdiction in *BIVAC B.V. v. Paraguay*’s as to include contractual obligations in the types covered by umbrella clauses.<sup>78</sup>

Several authors would moreover go beyond purely contractual arrangements to include other types of commitments, such as unilateral promises or legislation implemented to induce foreign investment.<sup>79</sup> Others believe there should be a clearer delineation, as illustrated by one scholar’s criticism of the *LG&E Energy Corp. v. Argentine Republic* decision to include regulatory measures entered into by the host-state under the umbrella clause’s definition of obligations: “[i]t would be a startling proposition in any system of contract law that the regulatory system is a part of the contract, unless[,] of course, they were mandatory provisions that required their incorporation into contracts.”<sup>80</sup>

Investment arbitration tribunals have generally tried to strike a balance. For example, in determining the proper scope of the words “any obligation” in the Swiss-Philippines BIT umbrella clause, the tribunal in *SGS v. Philippines* emphasized that the legal obligation “must have been assumed vis-à-vis the specific investment—not as a matter of the application of some legal

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ARB/07/9, *Objections to Jurisdiction*, ¶ 142 (May 29, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0103.pdf>.

<sup>77</sup> *LG&E Energy Corp. v. Argentine Republic*, *Decision on Liability*, ¶ 171.

<sup>78</sup> *Bosh v. Ukraine*, *Award*, ¶ 252.

<sup>79</sup> Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 *DENV. J. INT’L L. & POL’Y* 483, 510 (2011); Schill, *supra* note 26, at 84–85, 89; Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host-State “Commitments” and the Myth of Stability in International Law*, 24 *AM. REV. INT’L ARB.* 361, 377 (2013).

<sup>80</sup> *El Paso Energy Int’l Co. v. Republic of Arg.*, ICSID Case No. ARB/03/15, *Legal Opinion of M. Sornarajah*, ¶ 96 (Mar. 5, 2007), <https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlawita0970.pdf>.

obligation of a general character.”<sup>81</sup> The tribunal in *LG&E Energy Corp. v. Argentine Republic* seemed to support this proposition when it concluded that Argentina had implemented a statutory framework that was targeted directly at attracting foreign investors to fund the privatization of the country’s natural gas industry.<sup>82</sup> The tribunal held that a violation of these guarantees amounted to a violation of the umbrella clause, stipulating that “[e]ach party shall observe any obligation it may have entered into with regard to investments.”<sup>83</sup>

In *Sempra Energy Int’l v. Argentine Republic*,<sup>84</sup> a case where the same statutory framework was at issue, the tribunal similarly concluded that Argentina’s abrogation of its obligations undertaken through regulatory measures constituted a breach of the umbrella clause in the Argentina-U.S. BIT.<sup>85</sup> Notably, the tribunal distinguished “conduct that only a sovereign State function or power could effect” from “ordinary commercial breaches,” the latter of which would not constitute treaty breaches.<sup>86</sup> Not every contractual dispute would therefore be eligible for BIT dispute resolution; a purely contractual dispute over non-payment, for example, would arguably not be included in the umbrella clause’s scope.<sup>87</sup>

In a series of decisions concerning Argentina’s privatization of natural gas distribution, the tribunal in *Enron Corp. v. Argentine Republic* once more confirmed that both the contract between host-state and investor, as well as the legal framework that Argentina put into place to attract foreign investors, constituted “obligations” that

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<sup>81</sup> *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 121 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

<sup>82</sup> *LG&E Energy Corp. v. Argentine Republic*, Decision on Liability, ¶¶ 174–75.

<sup>83</sup> *Id.* ¶ 169.

<sup>84</sup> *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, (June 29, 2010), <http://www.italaw.com/sites/default/files/case-documents/ita0776.pdf>. The Award in this case was later annulled for reasons not related to the umbrella clause.

<sup>85</sup> *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 314 (Sep. 28, 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf>.

<sup>86</sup> *Id.* ¶ 310.

<sup>87</sup> *Id.*

had been elevated through the umbrella clause in the Argentina-U.S. BIT.<sup>88</sup>

Finally, the investor in *SGS v. Paraguay* alleged that in addition to contractual breaches, breaches of the “oral and written commitments” made by Paraguayan officials that outstanding amounts would be paid constituted breaches of the umbrella clause.<sup>89</sup> The tribunal in its preliminary decision on jurisdiction agreed with SGS that “Paraguay failed to observe commitments it allegedly made to SGS, both under the contract and under its alleged subsequent oral and written promises to make good on the claimed debt to SGS.”<sup>90</sup> In its award on the merits two years later, the tribunal nonetheless concluded that “it need not resolve these matters [of extra-contractual statements]” since their “breach would not result in any additional liability” on top of the contractual breach.<sup>91</sup>

#### IV. CONCLUSION

The expansive interpretation of umbrella clauses, which has the sweeping effect of transforming breaches of obligations a state has entered into with regard to specific investments to breaches of international law, has won significant support over the last ten years. Its adoption has nonetheless produced varied results, as has been demonstrated in this article by listing the different ways investment arbitration tribunals have dealt with exclusive forum selection clauses contained in the underlying investment contracts, and by comparing arbitrators’ diverging opinions on the scope of obligations affected. By laying out the practical implications resulting from broad interpretations of umbrella clauses, the author has tried to present a workable framework for states and investors to consider when entering into contractual or other agreements relating to foreign investments, or when negotiating investment treaties. In this respect,

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<sup>88</sup> *Enron Corp. v. Argentine Republic*, ICSID Case ARB/01/3, Award, ¶ 277 (May 22, 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf>.

<sup>89</sup> *Société Générale Surveillance S.A. v. Republic of Para.*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 167 (Feb. 12, 2010), <http://www.italaw.com/sites/default/files/case-documents/italaw1526.pdf>.

<sup>90</sup> *Id.* ¶ 171.

<sup>91</sup> *Société Générale Surveillance S.A. v. Republic of Para.*, ICSID Case No. ARB/07/29, Award, ¶ 158 (Feb. 10, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1525.pdf>.

a foreign investor should be aware that it might not have an international avenue for bringing its claims when allowing a forum selection clause into its contract with a state. Notwithstanding their broad reading of umbrella clauses, several international investment tribunals have referred such disputes to the respective contractually selected courts.<sup>92</sup> At the same time, states should take into account that an exclusive forum selection clause does not necessarily shield it from investment treaty dispute resolution.<sup>93</sup> Sovereigns are moreover advised to take note of the possibility that they may have an obligation under international law to keep their promises made to investors through unilateral statements<sup>94</sup> or regulatory measures.<sup>95</sup> By carefully considering the above parameters, both states and investors will be in a better position to deal with projects of foreign investment.

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<sup>92</sup> See generally *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, *Objections to Jurisdiction*, (Jan. 29, 2004), 8 ICSID Rep. 518 (2005); *Bureau Veritas, Inspection, Valuation, Assessment & Control, BIVAC B.V. v. Republic of Para.*, ICSID Case No. ARB/07/9, *Objections to Jurisdiction*, (May 29, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0103.pdf>; *Bosh Int'l, Inc. v. Ukraine*, ICSID Case No. ARB/08/11, *Award*, (Oct. 25, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1118.pdf>.

<sup>93</sup> See generally *Eureko B.V. v. Republic of Pol.*, *Partial Award*, (Aug. 19, 2005), 12 ICSID Rep. 335 (2007); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, *Decision on Liability*, (Oct. 3, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0460.pdf>; *Société Générale Surveillance S.A. v. Republic of Para.*, ICSID Case No. ARB/07/29, *Decision on Jurisdiction*, (Feb. 12, 2010), <http://www.italaw.com/sites/default/files/case-documents/italaw1526.pdf>.

<sup>94</sup> See generally *SGS v. Para.*, *Decision on Jurisdiction*.

<sup>95</sup> See generally *Sempre Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, *Award*, (Sep. 28, 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf>; *Enron Corp. v. Argentine Republic*, ICSID Case ARB/01/3, *Award*, (May 22, 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf>.

