CONTRACT CLAIMS VERSUS TREATY CLAIMS; ROLE OF UMBRELLA CLAUSES: A SEARCH FOR GREATER LEGAL CERTAINTY

A thesis submitted in partial fulfillment of the requirements for the degree of

LL.M (Corporate Law)

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2015

DEDICATION

This report is specially dedicated to my

Parents

Their love is always a source of inspiration,

Encouragement

and a hope in the darkness for me. Their

Encouragement

has given so many achievements to my life.

May ALLAH

bless me their wonderful encouragement

forever and

make me able to return at least something of it

as reward.

Approval Sheet

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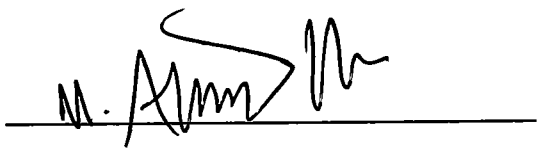

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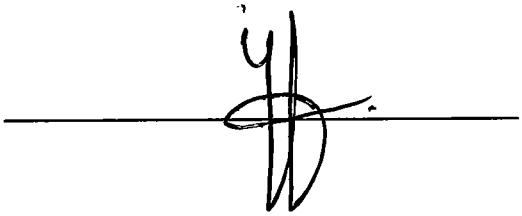

DECLARATION

I, **Wajid Aziz Qureshi,** hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

(WAJID AZIZ QURESHI)

ACKNOWLEDGEMENT

All praise to Almighty ALLAH, the most Gracious and the most Merciful, without whose will, help and blessings, I am unable to do anything and I couldn't have done such project with complete devotion and satisfaction.

I am also thankful to other people who contributed their efforts and support in the development of this thesis. Amongst these people, I would firstly like to say thanks to my Supervisor Muhammad Asif Khan, who was my main source of inspiration in writing this thesis. Mr. Mahboob Usman my friend who has contributed a lot by giving his healthy advice and suggestions in this regard. I am especially thankful to Umbreen Iqbal Ch., Civil Judge/Judicial Magistrate, Islamabad for providing the required information and helping in the completion of this thesis. I am also thankful to Major Attaullah for a great support as well as faculty members of Shariah and Law specially Noman Shahid, Program Coordinator. At last, I would like to give praise to my brothers who have continuously helped me.

Thanks to all abovementioned people and others who have contributed in it, the completion of my work their encouragement, support and aspiration. May ALLAH keep all them happy, forever, Aamin

(WAJID AZIZ QURESHI)

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LIST OF ABBREVIATIONS

BIT	**Bilateral Investment Treaties**
ICSID	**International Centre for Settlement of Investment Disputes**
AIOC	**Anglo-Iranian Oil Company**
ICJ	**International Court of Justice**
OECD	**Organization for Economic Corporation and Development**
UNCTAD	**United Nations Conference on Trade and Development**
FCN	**Friendship, Commerce and Navigation**
MFN	**Most Favored Nation**
CISS	**The Inter-American Conference on Social Security**

ABSTRACT

In order to effectively put light on the Bilateral Investment Treaties, it is preliminary required the issue is considered from four different dimensions at length, which are: (a) the historian significance as to what led the basis for the origin of the clause; (b) the academic point of views regarding the reasoning of clause; (c) the adaptation of language expressed in the clause in the different BITs; and (d) the aspect of interpretation given to the meaning of clause by the different Tribunals of the International Centre for Settlement of Investment Disputes. Apart from the above discussion, the issue in hand involves detail analyses of few elementary questions relating to the umbrella clause in order to produce some decisive and conclusive debate.

It also contains a detail study of subject matter and places ample light on the issue as to how historically the measures were taken to protect the rights of the foreign investor being affected from the unilateral acts of the host state. Hence, the successive steps were introduced to place investment related contracts to be dealt at international forums. To study and produce research oriented material, the language of the Clause has been studied thoroughly, to correctly analyze which specific contracts can be held eligible to be dealt within the context of the clause.

In this regard, different interpretations of the clause have been adopted by the Tribunal in its decisions, whereas a restrictive approach has been adopted which gives interpretation to the Clause, which clearly gives the jurisdiction in favor of the international forum only with substantive claim therein arising from the treaty claim. On the other hand, few tribunals have advocated in favor of contract claims at treaty level being internationalized contract claims. Nevertheless, there is also a third category which projects its interpretation at equal strength, meaning thereby that the remedy of contract claim is parallel both at contract and treaty level.

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Chapter 1: Introduction

1.1 Thesis Statement

Pakistani legislation pertinent to Umbrella Clause is not keeping pace with the international best practices and modern trends in Bilateral Investment Treaty [hereinafter, BIT] have need of mandatory legislation in Pakistani laws to cope with the international best practices and to compensate the investor.

1.2 Statement of the Problem

In today's world of globalized interstate trading, Bilateral Investment Treaties form the basis of the protection and promotion of foreign investment. Speaking simplistically, a Bilateral Investment Treaty is an agreement between two States Parties whereby each party agrees to promote and offer a degree of protection to the investment and investors of the other.[1]

The basic idea of umbrella clauses in BIT is to give the foreign investor more protection in terms of observation of obligations, than it would have received under the national laws of the State. This being the *raison d'etre*[2] of the clause, therefore, it is not correct to put it down merely as an ornamental provision on the ground that it elevate contractual claims to a treaty level.

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[1] The protection offered is over and above what is accorded under the national laws of the host state. Hakeem Seriki, "Umbrella Clauses And Investment Treaty Arbitration: All encompassing Or A Respite For Sovereign State and State Entities?" *J.B.L* (2007): 570-581, 572.

[2] Reason for existence

International investment was a growing possibility there was no coherent legal regime to protect the foreign investors from acts of the host State like expropriation, unfair termination of contract and so on. If such an event did take place, the investor often had no access to international dispute settlement bodies. Under the law as it existed, only States could offer diplomatic protection to its investors and instigate proceedings in the international forums – that too for violations of international law. But every violation of contractual obligation did not give rise to a violation of international law. So the foreign investor was often at the mercy of the domestic courts of the host State, which did not under all circumstances assure justice. To circumvent this difficulty, the countries began to formulate multilateral investment agreements, but these did not yield any significant success owing to the diverse needs and interests of the parties concerned. This led many European nations to negotiate their own bilateral agreements, predominantly with developing countries. Typically, there are certain terms that have become standard in a BIT, like National Treatment, Most Favored Nation, Expropriation clauses, Fair and Equitable Treatment clauses and so forth. Breach of any of these clauses will entitle the foreign investor to institute arbitral proceedings against the host State.[3] One such standard clause in BITs that has gained recent notoriety in the arena of international investment is the Observance of Undertakings clause, known more popularly as the *umbrella clause*.[4] The first mention of this clause in a BIT is in Article 7 of the Germany-Pakistan BIT in 1959, which reads: *"Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party."*

[3] Following a dispute resolution clause in the BIT allowing ICSID or a similar international arbitral forum to have jurisdiction over the issue.

Until recently a provision like this was considered by jurists as purely ornamental, at best minor of significance. The law as it stood then required for the States Parties, in case of a dispute, to offer diplomatic protection to the aggrieved investor, and thereupon instigate action in an international forum against the other State. Needless to say, this happened only in cases of serious injustice involving abusive use of sovereign power, and only in the rarest of situations. But with the coming of the ICSID Convention of 1965, which allows private investors to bring claims against the host State directly before an international forum, this clause began to be used widely as a tool to initiate international arbitration against a Host State even for contractual violations[5]. Especially following the recent spate of cases spearheaded by *SGS v. Pakistan*[6], this clause has acquired the potential of converting both contractual claims and unilateral obligations assumed by a State into treaty claims, giving rise to many heated legal discourses both extolling and decrying this wider interpretation of it.

This research aims at finding a degree of legal certainty in the application and implication of the umbrella clause. In doing so, it will look into the history and origin of the clause, the theories given by academics, the language of the clause in the different BITs, and the interpretations of the clause as given by the different Tribunals of the International Centre for Settlement of Investment Disputes [hereinafter, the ICSID Tribunals]. In the end, the research will point a way forward for a more consistent

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[4] Other nomenclatures include *mirror effect* clause, *elevator* clause, *parallel effect* clause, *sanctity of contract* clause, *respect* clause and *pacta sunt servanda.* See Katia Yannaca-Small, *Interpretation Of The Umbrella Clause In Investment Agreements,* 2006/3 OECD Working Papers On International Investment (2006): 3-29., 3.

[5] T.W. Walde, *The "Umbrella" (Or Sanctity Of Contract/Pacta Sunt Servanda) Clause In Investment Arbitration:A Comment On Original Intentions And Recent Cases,* 1(4) Transnational Dispute Management (2004)1-87., 16-17.

[6] *SGS Societe Generale de Surveillance v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003.

interpretation of the umbrella clause, keeping in mind both the necessity of upholding the effectiveness of the clause, as well as the potential difficulties in giving too wide an interpretation of it.

Three recent ICSID cases - VIVENDI, SGS v. Pakistan, and SGS v. Philippines - have exposed some of the more difficult theoretical and practical uncertainties underlying modern international investment law. Specifically, the trilogy of cases reveals inconsistent approaches by international arbitrators to delineating the relationship between the contract claims and treaty claims. The note maps the legal questions raised by the surveyed decisions and discusses the various integrationist and disintegrations methodologies arbitrators employ in order to regulate the interplay between contract and treaty claims. In addition, it tries to link the debate on the relations between contract claims and treaty claims to other debates on the relations between overlapping legal regimes taking place in the world of international investment law and in other areas of international law.

1.3. Significance of Study

The aim of this research is to search for a greater legal certainty in the interpretation of the Observance of Undertakings or umbrella clause in a Bilateral Investment Treaty. In doing so, it will look into the history and origin of the clause, the theories given by academicians, the language of the clause in the different BITs, and the interpretations of the clause as given by the different Tribunals of the International Centre for Settlement of Investment Disputes.

This paper argues that historically, the clause was introduced as a measure of safeguard to prevent the foreign investor from suffering due to unilateral acts of atrocity by the host State, by taking investment and investment related contracts to an international forum. To arrive at the exact ambit of the clause, I have analyzed the language of the clause, through its various nuances, in order to know which specific contracts can be brought within the purview of the clause. Next I have looked at the different Tribunal decisions that have interpreted the clause from different perspectives. Some of them have taken a restrictive approach, which says that the clause gives jurisdiction to an international forum only when coupled with some other substantive treaty claim. Some other Tribunals have, on the other hand, decided that the clause internationalizes contract claims by elevating them to a treaty level. There are even others who have advocated keeping the contract and treaty claims as parallel remedies. This research has only showed a way of how to interpret the scope and effect of the clause so as to cause the least amount of uncertainty in this field.

1.4 Objective of Study / Major Issues

i. What is the exact scope of an umbrella clause?

ii. Does the umbrella clause elevate contractual claims to a treaty level?

iii. Whether a BIT tribunal can exercise jurisdiction over breach-of contract claims on the ground that the umbrella clause applies to investor-State contracts; and if so,?

iv. Whether a BIT tribunal can exercise such jurisdiction when the contract contains an exclusive forum selection clause designating a different forum for the resolution of contractual disputes?

1.5. Research Methodology

It will be a critical research and rules of library research will be followed.

- International databases like JSTOR, LEXIS NEXIS and digital library of HEC will be used.
- Method of case study will be applied.
- Secondary sources for data collection
- Journals and articles

1.6. Literature Review

The Umbrella clauses play a vital role in the BITs. Over the last decade, the face of international investment law has changed radically as an ever-increasing percentage of disputes over foreign investment are being resolved through international arbitration as opposed to diplomatic intervention or domestic lawsuits. The driving force behind this change has been the proliferation of the BIT, an agreement between two countries that governs the treatment of investments made in their respective territories by individuals and corporations from the other country[7]. The BIT serves to attract foreign investment by granting broad investment rights to investors and creating flexibility in

[7] The already -substantial literature on BITs continues to expand apace with the growth of BITs. RUDOLF DOLZER & MARGARET STEVENS, BILATERAL INVESTMENT TREATIES (1995); U.N. Conference on Trade and Development ("UNCTAD"), *Bilateral Investment Treaties, 1959-1999*, Geneva, Switz., Dec. 2000, U.N. Doc UNCTAD/ITE/IIA/2; UNCTAD, *Bilateral Investment Treaties In The Mid-1990s*, Geneva, Switz., Nov. 1998, U.N. Doc. UNCTAD/ITE/IIT/7 [hereinafter *Bilateral Investment Treaties in the Mid-1990s*]; KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES:POLICY AND PRACTICE (1992).

the resolution of investment disputes. The available literature on the issue disagrees on the legal or practical significance of "legal certainty" in umbrella clause and the distinction has been widely criticized. I have not found a book directly addressing the umbrella clause but some books and articles helped me in drawing the understanding of the issue.

A book written by Redfern and M Hunter and named as, **Law and Practice of International Commercial Arbitration** provides a complete understanding of International Commercial Arbitration, the laws, rules, regulations and bilateral treaties of investment and much more. The book helped me in understanding the ICSID jurisdiction and bilateral treaties of different countries.

Principles of International Investment Law by Rudolf Dolzer and Christoph Schreuer, in this book the authors have chosen in their study and arrangement of field, neither to provide an abstract blueprint of the subject matter. The aim of the book is mainly to elucidate the meaning of central principles that govern current foreign investment law. These principles form the organizational basis of the book, but their exposition in detail centers more on the case-by-case nature of the evolving jurisprudence than on a comprehensive systematic analysis.

Digest of ICSID Awards by Richard Happ and Noah Robins. Part 1 of the book presents a summary of ICSID decisions and award from the busiest years of 2003 to 2007 and its part 2 contains a short analytical guide to the issues, considerations and conclusions and developments in this body of jurisprudence supplemented by cross references and footnotes.

The Multilateralization of International Investment Law by Stephen W. Schill provides a conceptual framework for understanding the nature and functioning of international investment law as a genuine system of law and dispute resolution and offers solution to numerous practical and theoretical problems regarding, inter alia, questions of treaty interpretation, of the use of sources in international investment law and regarding the relationship between arbitral tribunals and states.

How Far Do BITs Bite? A Comparison of SGS V. Pakistan and SGS V Philippines: Interpreting Umbrella Clauses in Bilateral Investment Treaties by Katherine Ballintine provides a comparison of both the case laws of SGS with Pakistan and Philpines.

An Umbrella Just For Two? BIT Obligations Observance Clauses And The Parties To A Contract, 24(1) Arbitration International by Nick Gallus is a very good articles that helped me in writing a comprehensive encounter on BIT obligations and pushed towards finding a legal certainty.

Umbrella Clauses And Investment Treaty Arbitration: All Encompassing Or A Respite For Sovereign States And State Entities?, by Hakeem Seriki helped me in understanding the basic concept of Umbrella Clauses and the relationship of states and arbitral tribunals as well as investment relationship between states.

Chapter 2:

Overview of Bilateral Investment Treaty

2.1 Introduction:

The aim and object of this research paper is to study and critically analyze how far the greater legal certainty has been achieved in the interpretation of Observance of undertaking or Umbrella Clauses in the Bilateral Investment Treaties. To affectively put light on the issue concerned, it is preliminary required that the issue is to be considered from four different dimensions at length, with are:

a. The historical significance as to what led the basis for the origin of the clause;

b. The academic point of views regarding the reasoning of clause;

c. The adaptation of language expressed in the clause in the different BITs; and

d. The aspect of interpretation given to the meaning of clause by different Tribunals of the ICSID.

Apart from above discussion, the issue in hand involves detail analyses of four elementary questions relating to the umbrella clause in order to produce some decisive and conclusive debate. The questions involved are:

1. What is the exact scope of an umbrella clause?

2. Does the umbrella clause elevate contractual claims to a treaty level?

3. Whether a BIT tribunal can exercise jurisdiction over breach-of contract claims on the ground that the umbrella clause applies to investor-State contracts; and if so,

4. Whether a Bit Tribunal can exercise such jurisdiction when the contract contains an exclusive forum selection clause designating a different forum for the resolution of contractual disputes.

This paper contains a detail study of subject matter and places ample light on the issue as to how historically the measures were taken to defend the rights of the foreign investor being affected from unilateral acts of the host state. Hence, the successive steps were introduced to place investment related contracts to be dealt at international forums. To study and produce research oriented material, I have gone through the language of the Clause and thoroughly studied to correctly analyze which specific contracts can be held eligible to be dealt within the context of the clause. In this regard, ample study on the different interpretations of the clause adopted by the Tribunal in its decision, whereas a restrictive approach has also been adopted which gives interpretation to the Clause, which clearly gives the jurisdiction in favor of the international forum only with substantive claim therein arising from the treaty claim. On the other hand, few tribunals have advocated in favor of contract claims at treaty level being internationalized contract claims. Nevertheless, there is also a third category which projects its interpretation at equal strength, meaning thereby the remedy of contract claim is parallel both at contract and treaty level.

In simple words, the BIT is an agreement between two states, whereby the contracting states forms a bilateral contract to protect and promote the foreign investment coming

from one another.[8] Meaning thereby, each interstate protects rights of investor and promotes the foreign investment on equal terms and conditions.

(a) Background:

After the conclusion of World War II, new era of foreign investment emerged, giving rise to the formation of "contracts between a state and a foreign investor"[9] from another country. Despite the fact that there was a great opportunity of foreign investment, there was no legal framework to give protection to a foreign investment from the breach of contract of the host country. Hence in order to avoid such exploitation and unfair termination of contracts, the foreign investor had left with no option except to approach the international disputes settlement bodies for redressel. Only the host country was able to offer safeguard to the foreign investor under its existing legislation and to give rights to initiate legal proceeding at the international forum, as a remedy against the breach of international law. Since a beach of every contractual obligation did not attract the violation of international law, the only remedy left to the foreign investor was to approach the courts of host country, which did not guarantee the protection of his rights in every circumstance. Resultantly to deal with this difficulty, the countries started to adopt multilateral investment agreements, which also proved to be ineffective to resolve the difficulties and protect the rights and interests of the parties involved. Hence, the process of negotiations began by the European Nations with the aim to adopt their own bilateral investment agreements with

[8] The protection offered is over and above what is accorded under the national laws of the host state. Hakeem Seriki, Umbrella Clauses And Investment Treaty Arbitration: All encompassing Or A Respite For Sovereign State and State Entities? *J.B.L* (2007): 570-581, 572.

the developing countries, whereas the development of such bilateral investment agreement resulted into the creation of such treaties and led the successful foundation of new era in the world.[10]

(b) Traits of umbrella clause:

Generally, some of the terms happen to be standard terms in a BIT. These included: "National Treatment, Most Favored Nation. Expropriation clauses, Fair and Equitable Treatment clauses and so on and so forth."[11] The benefit of these standard terms is that the foreign investors could initiate the arbitral proceedings against the host country.[12] One of the clauses among such standard terms, which have attained recent attention, is the Observance of Undertaking clause i.e. also called Umbrella Clause.[13] Initially in 1957, the Umbrella Clause was introduced among Pakistan and Germany in Article 7 of a BIT, which reads as follows: "Either Party shall observe any other obligation it may have entered into with regard to investment by nationals or companies of the other party."

Since for a long time and until recent times, the jurists considered the umbrella clause as nothing more than a formal clause having minimum importance. Hence, there happened to be a need of law to substantiate diplomatic protection on aggrieved foreign investor, who could initiate proceedings at international forum in case of

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[9] 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." *George Mason Law Review* 14 (2006): 137-179.

[10] August Reinisch "Umbrella Clauses, Seminar on International Investment Protection," 2006/2007. 5-6. http://forschungsnewsletter.univie.ac.at/fileadmin/user_upload/int_besiehungen/Internetpubl/weissenfels.pdf (accessed: July 05, 2015).

[11] Ibid.

[12] Following a dispute resolution clause in the BIT allowing ICSID or similar international arbitral forum to have jurisdiction over the issue.

dispute between the state parties other than cases where the sovereign powers were abused or involved in some serious injustice. Conversely with the introduction of "International Centre for Settlement of Investment Disputes" [hereinafter referred to ICSID] Convention, 1965, the private investor were allowed to redress his grievance before the International forum against the host country. Hence, the umbrella clause was started to be used as weapon for initiation of claims against the host country at International forum even for contractual violations.[14] After the decisions of recent cases especially like SGS versus Pakistan,[15] the scope of the Umbrella Clause was widely extended from contractual claims to unilateral commitments assumed by a country into its treaty claims. Hence, this wider application and interpretation of the umbrella clause by the different tribunals at international forums brought up heated debate in legal circles, which welcomed its criticism and need for a review.

The emphasis of this research paper would aim at the degree of certainty and application achieved by the use of umbrella clause, in the light of different perspectives started from its historian origin, academic theories, the use of language adopted in the different BITs and the mode of interpretation given by the different tribunals of ICSID. However to reach on conclusion, this research paper would further place some emphasis on two quires relating to the umbrella clause, which are discussed as under:

1. What is the exact scope of an umbrella clause?
2. Does the umbrella clause elevate contractual claims to a treaty level?

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[13] Katia Yannaca. "Small, Interpretation of the Umbrella Clause in Investment Agreements", 2006/3 OECD working Papers On International Investment (October, 2006):3-29, 3.

[14] T.W. Walde, "The Umbrella (Or sanctity Of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases," *Transnational Dispute Management* 4 (2002): 1-48., 16-17.

At last, the discussion would also be brought as to how the umbrella clause should be interpreted for its consistent way forward, especially in need of its effectiveness and its potential difficulties on the face of its wider interpretation adopted by different tribunal at international forum.

(c) Specific Introduction:

Since last decade, a role of Umbrella Clause has been vital in the BITs in bringing radical changes in the International Investment Law, whereas the countless disputes are being even better "resolved through international arbitration, instead of any diplomatic intervention or domestic lawsuits."[16] This change is the result of enriched use of the BIT between the two countries, to govern and safeguard the territorial investments made between the individuals and corporation from another country. Hence, the broad investment rights with more flexibility in resolving disputes for foreign investment are provided to the foreign investors. The aims and objects of the umbrella clause is 'to protect the rights of the foreign investor' in more secure terms of observation of obligations that the terms provided under the domestic law. Hence, the raison d'etre[17] of umbrella clause has more importance than Justice merely being considered as ornamental provision.

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[15] SGS Societe Generale de Surveillance v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003. {SGS V. Pakistan case}.
[16] Ibid.
[17] Reason for existence

2.2. A Brief Historical View of Investment Laws and Bilateral Investment Treaty:

Subsequent to the end of World War-II, the global economy started moving towards normalization and so the foreign capital emerged more freely. Hence, the foreign investment acquired rapid importance.[18] The atmosphere began to change in favour of the foreign investment but the same had no effect on the foreign investors. Generally in the absence of any legal framework to protect "their interests, the foreign investors went to rely on the international investment law which had "an ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and contested general principle of law".[19] Due to inconsistent provision of laws found in International Investment law, the inadequate result were prominent in dealing with issues; such as, there was no counterproductive mechanism to effectively cope with the modern practice of foreign investments and hence, the foreign investment were left at the mercy of host countries, if their interests were seized or their contractual obligation were repudiated.[20] Hence, no privileges and responsibilities relating to the foreign investors and the host countries were articulated with clarity, where in the existence of such vague and limited principles, the International investment laws were interpreted with varying meanings, which sparked server disagreements between the industrialized countries and newly arisen developing countries from decolonization. Hence, a stance adopted by the industrialized countries was that the developing countries were liable to protect the rights and requirements of the foreign investors under the International Investment law and the same were bound to compensate the

[18] 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," *George Mason Law Review* 14 (2006): 137.
[19] Ibid.
[20] Ibid.

investors for causing injuries to such interest at their hands. This view was rejected by the developing countries for the reasons that such stance demonstrated the supremacy of the developed countries over developing ones and also implicated an approach to control the sovereignty and to restrict the economic growth of developing countries within their parameters.[21]

In view of the rapid expansion of economic activities, there was realization and desire on the part of both sides that there existed a need to provide some conclusive legal cover to the growth of international investment. This was evident from the early steps taken in the form of proposals; such as, in multilateral treaties, including "1948 Havana Charter and the 1949 International Chamber of Commerce International Code of Fair Treatment of Foreign Investment."[22] Despite the subsequent efforts were made to achieve multilateral treaties, these early proposal did not succeed in safeguarding the unilateral interests of the wide ranging countries on such unified terms necessarily required for their reconciliation.[23] When no multilateral treaties were achieved, the individual efforts were made by the European countries to negotiate with "developing countries on a one-to-one basis"[24] by way of foreign investment treaties. Hence, their efforts achieved success in reaching bilateral agreements, which escorted the beginning of every first bilateral treaties or BITs. Moreover, this led the European Countries to expand economic growth by entering into BITs even with individual developing countries outside Europe. Finally after almost eleven years in 1970, Germany and Pakistan formed the first BIT, whereas total numbers reached by

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[21] Ibid., 69.
[22] Franziska Tschofen, "Multilateral Approaches to the Treatment of Foreign Investment," *ICSID Review* 7 (1992): 384-427.
[23] Ibid.
[24] Wong, "*Umbrella Clauses in Bilateral Investment Treaties*," 73.

developed and developing countries for forming BIT were eighty-three[25] during that time. Hence by the late 1980s, further expansion of BIT movement emerged on the face if its significance made by huge foreign capitals in the open markets of "Eastern and Central Europe, Asia, Africa and South America."[26] However, the figure achieved by the nations for signing BITs by the end of 1988 was just 300,[27] which was substantively increase and reached close to 2400 at the end of 2004.[28]

Despite the fact that the BIT is an agreement reached between two countries to govern the investment made by the individuals or companies from each country within the territory of each country, there are many countries which rely and create their own model of agreements while negotiating BIT terms, somewhat organized similar in content. Normally, there are substantive issues addressed by the BIT: "(1) conditions for the admission of foreign investors to the host State; (2) standards of treatment of foreign investor; (3) protection against expropriation; and (4) methods for resolving investment disputes."[29]

That the definitions contained by the BITs are identical to that of typical definitions of investments, wherein its broad aspect is often common;[30] such as, the element of the investment time. Hence, the BITs mostly give cover to the present and future

[25] UNCTAD, Bilateral Investment Treaties: 1959-1991, 3.
[26] Ibid.
[27] Athena J. Pappas, "References on Bilateral Investment Treaties," *ICSID Review* 4 (1989): 194-203, 189.
[28] World Investment Report, 24.
[29] George M. Von Mehren, Claudia T. Salomon, and Aspasia A. Paroutsas. "Navigating Through Investor-State Arbitrations-An Overview of Bilateral Investment Treaty Claims," *Dispute Resolution Journal* 39 (2004): 54-69.
[14] Ibid.
[30] Fedax N.V.v Venezuela, Decision of the Tribunal on Objections to Jurisdiction, ICISD (W. Bank) Case No. ARB/96/3 (1997).

investments,[31] whereby not only the existing investments are maintained but the future incentives are given to encourage the foreign investors.

In particular, the states are the only parties who can enter into BIT, whereas the investor accrues and enforces his rights under the dispute settlement provisions of BIT. Such provisions enable the investor to choose his forum, where the investor can file his dispute for settlement arising between him and the contracting state, which often takes him before international arbitration through ICSID. The state entering into the BIT often provides offer to the investor to approach the international arbitration, in order to arbitrate any dispute for settlement. Hence, when the investor often initiates the proceedings before the international arbitration, it amounts to the acceptance of standing offer extended to the investor for settlement of dispute.[32]

It is often considered by the investor that such incentive of standing offer extended to approach international arbitration in case of dispute settlement is the key advantage under BIT. Hence, since the existence of such provision remains at the center of umbrella clause, its interpretation has substantial effects for the investor.

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[31] Mehren, "Navigating Through Investor-State Arbitrations", 57.
[32] Jan Paulsson, "Arbitration without privity," *ICSID Review* 10 (1995): 232-257.

2.3. Beginning of Umbrella clause:

The Umbrella Clause is called as a clause being a variety of having "mirror or parallel effect or *pacta sunt servanda* (i.e. sanctity of contract clause)"[33] whereas it is found in many treaty provisions of BITs, having required both contracting state to fulfill the obligations promised in respect of investments for the investors of other contracting state. The aims and objects of the existence of umbrella clause to form conclusive environment for the foreign investor, without any further arrangements to be left at the part of the contracting state.[34] Hence, it enforces its purpose in respect of fulfilling the inter-state obligation on the face of investment agreements, which are enforced when the right to recourse the international arbitration under the umbrella clause is available to the investor in case of any breach of obligation. More importantly, the umbrella clause has rich history of stances "to allow for any breach of investment contract to be resolved"[35] through recourse of international forum.

Generally, the international investment law does not clearly tell whether a breach of contract by a contracting state amounts to "a violation of international obligation,"[36] whereas such a breach may also be considered as a breach of domestic commercial issue and the investor may have to face pressure to resolve the dispute before the municipal court of a contracting state under its applicable domestic laws, being subject

[33] Anthony C. Sinclair, "The origins of the umbrella clause in the international law of investment protection," *Arbitration International* 20 (2004): 411-434.
[34] Societe General de surveillance S.A v. Pakistan Decision of the Tribunal on Objections to jurisdiction, ICSID (W. Bank) Case No. ARB/01/13, 163 (2003).
[35] Ibid.
[36] Judith Gill, "Contractual claims and bilateral investment treaties," *Journal of International Arbitration* 21 (2004): 397-412.

to the unilateral various by the state.[37] Henceforth, the umbrella clause was initially introduced. In particular, the origin of the umbrella clause has also been discovered by the scholars in a draft agreement between Anglo-Iranian Oil Company's (AIOC) claims on nationalization of Iranian oil program in 1956.

In 1951 after the long concessionary oil contract with Iran, the AIOC's interest was effectively seized, following the change in government bringing up the enactment of "Iranian Oil Nationalization law," whereby the Iran Oil fell the control of the Government.[38] Hence, this pursued the AIOC to adopt different legal options for redressal, which included unsuccessful attempts arising out of the defective provision of concession agreement to settle claims[39] and abortive proceedings before the International Court of Justice (ICJ).[40] Finally, the interest of foreign investment could not be procured until the American sponsored coup got back in power in Iran being officials friendly to investment and getting resolved the investment dispute attached to foreign interests.[41]

Resultantly, the AIOC was sent a proposal by Elihu Lauterpacht, whereby AIOC was advised for settlement on two instruments: (a) Consortium Agreement to be made between Iran and the Consortium companies inclusive of AIOC and hence, the agreement would continue to protect some Iranian oil facilities, (b) an Umbrella Treaty to be concluded between Iran and the United Kingdom, and hence it "would incorporate the Consortium Agreement and would oblige the terms by way of

[37] Sinclair, "The origins of the umbrella clause in the international law of investment protection," 412-13.
[38] Ibid., 415-16."
[39] Ibid.
[40] Ibid., 414.
[41] Elihu Lauterpacht, "International Law and Private Foreign Investment," *Indiana Journal of Global Legal Studies* 4 (1996): 259-276.

guarantee provided by Iran thereof."[42] In view of the earlier failure of the concession agreement, the proposed agreement was designed in such a way "that any contract between Iran and United Kingdom would be incorporated or referred to in a treaty between Iran and the United Kingdom in such a way that a breach of the contract or settlement shall be *ipso facto* deemed to be a breach of the treaty".[43]

The incorporation of Umbrella Clause was to ensure that governing law to any dispute settlement would not be solely Iranian law (or anyhow it would not be subject to its unilateral variance), whereas instead of the Iranian Courts, the International Court of Justice could be approached to seek any remedy for breach of settlement.[44] Hence after its emergence, the Umbrella Treaty was never materialized as the issue of settlement adopted a different direction.[45] Until few years to 1959, the umbrella clause arose and turned out to be in a more concrete arrangement in the Abs-Shawcross Draft Convention of Investment Abroad ("Abs-Shawcross Draft"), which was created by the private effort of European lawyers to protect the foreign investments in disputes that threatened the AIOC. Hence, its Article II mentioned: "Each party shall at all times ensure the observance of any undertakings which it may have given in relation to investment made by nationals of any other party."

Interestingly not being applicable to just one particular agreement instead to all investment commitments undertaking by the contracting state with the investor from another state, this umbrella clause revolved its earlier flaws by evolving to happen like

[42] Sinclair, "The origins of the umbrella clause in the international law of investment protection," 415.
[43] Ibid.
[44] Ibid., 415-16.
[45] Ibid., 415.

more closely to the umbrella clause of advance time in BITs. However in order to achieve the observance of any undertakings, the Umbrella Clause was held to simply cover "all contractual investments, obligations including between the contracting state and a foreign private investor," as envisage by the Abs-Showcross Draft.[46] Generally, an undertaking has broader meaning "than a contract and thus, the same incorporates obligations from a contract."[47] The same conclusion is also reached by commentators like fotourous that the article II is "meant to cover the cases of contractual commitments of states to alien," and schwarzenberger also noted that it "covers undertakings by contracting parties both to subjects and objects of international law."

To achieve the purpose, the Umbrella Clause should be interpreted with certain consistency, whereas the article-II is described by the drafter of Draft Convention as it "affirms, and attributes specific content to, the universally accepted principle *pacta sunt servanda*,"[48] and clearly observed that it "applies not only to agreements directly concluded between States, but also to those between a State and foreigners...."[49] Hence, Article II is considered by its author as a remedy under the International Law against any breach of contract against the investor i.e. the "purpose of that clause [was] to dispel whatever doubts may possibly exist as to whether a unilateral violation of a concession contract is an international wrong".[50]

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[46] Arghyrios A. Fatouros, "An International Code to Protect Private Investment-Proposals and Perspectives," *University of Toronto Law Journal* (1961): 77-102.
[47] Georg Schwarzenberger, "The Abs-Shawcross Draft Convention: On Investments Abroad: A Critical Commentary," *Journal of Public Law* 9 (1960): 147-162.
[48] Hermann Abs, and Hartley Shawcross, "The proposed convention to protect private foreign investment: a round table: comment on the draft convention by its authors," *Journal of Public Law* 9 (1960): 115-132.
[49] Ibid.
[50] Ignaz Seidl-Hohenveldern, "The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table," *Journal of Public Law* 10 (1961): 100-123.

Remarkably, Certain Draft Conventions on "Organization for Economic Corporation and Development (OECD), including 1967 Draft Convention on Protection of Foreign Policy (1967)"[51] got inspiration from the Abs-Showcross Draft. Hence, an umbrella clause is included under Article two of the OECD Draft, which provide; "Each party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other party."[52]

Article 2 of OECD Draft is explained in official commentary as "as application of the general principle of *pacta sunt servanda*" to "agreements between States and foreign nationals."[53] Moreover, it clarifies that "[an] undertaking may be embodied in a contract or in a concession,"[54] but that "any right originating under such an undertaking gives rise to an international right."[55] Hence, article two is meant to protect the interests of the investor under the contractual obligations arising from the treaty obligations i.e. under the International Law. Article 2 is elaborated by Lauterpacht as to "put [investor-State contracts] on a special plane in that breach of them becomes immediately a breach of convention."[56] Similarly, Porsper Weil stated that the existence of umbrella treaty between the contracting state and the country of foreign investor eliminates difficulty for smooth performance of contract into an international obligation of the contracting State for the benefit of foreign investor of other contracting country. Thus, the enactment of umbrella clause ensures "the inviolability of the contract, even if it is

[51] OECD, Draft Convention on the Protection of Foreign Property, *International Legal Materials* 117 (1968). {hereinafter referred to OECD Convention}
[52] Ibid., 124.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Lauterpacht, "International Law and Private Foreign Investment," 265.

legal under the national law of the contracting state, given rise to the international liability of the latter vis-à-vis the state of the other contracting party."[57]

Consequently, the applicability of umbrella clause in dispute resolution would enable the foreign investor to seek remedy from international forum against the breach of international law arising from interstate contracts.[58] In this regard, it is also noted by the International and Comparative Law Section of the American Bar Association that "the OECD Draft would provide for giving effect in an international forum to acquired rights arising from State contracts, and in this way would ensure the application of an international standard where under international law that standard should be applied."[59]

After its ultimate failure in producing a draft, the OECD finally recommended to its member states in its 150th meeting in 1967 that a model draft of may be adopted in their BITs, which would affirm the applicability of a general investment law for foreign investment.[60] By this time, the umbrella clauses, were already found in many BITs, which was quite evident from very first Germany-Pakistan BIT in 1957,[61] whereas its article 7 incorporated specifically stated: "Either party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other party."[62] This was observed by a German analyst as an umbrella clause "relates particularly to investment contracts between the investor and

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[57] Stanimir A Alexandrov, "Breaches of Contract and Breaches of Treaty," *The Journal of World Investment & Trade* 5 (2004): vii-577, 566-7

[58] Sinclair, "The origins of the umbrella clause in the international law of investment protection," 430.

[59] Common On International Trade & Investment., American Bar Association , The Protection of Private Property Invested Abroad 96 (1963).

[60] OECD Convention.

[61] Treaty for the Promotion and Protection of Investment, F.R.G.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23, 28-29 (1963).

[62] Ibid., 28.

the host country" and "transforms responsibility incurred towards a private investor under a contract into international responsibility incurred towards a private investor under a contract into international responsibility."[63] He further analyzed it as "the protection of such contracts is now a standard clause in bilateral investment agreements."[64]

Finally in 1991 as laying down basis from the Germany-Pakistan 1959 BIT, the German Model BIT was restructured by incorporating substantially the similar wording of umbrella clause in its article 8(2): "Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party."[65]

Similarly, the umbrella clause was also designed in the U.S Model BIT of 1983, having kept in mind the OECD Draft,[66] with the following wording: "each party shall observe any obligation it may have entered into with regard to investors or nationals or companies of the other party."[67] Moreover, the U.S Model BIT subsequently drafted in 1948 and 1987 also incorporated the similar wording of umbrella clauses.[68] Such incorporation of umbrella clauses are again analyzed by observers as it "raises to a treaty issue any attempt by a BIT partner to invalidate a contract by changes in

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[63] Joachim Karl, "The promotion and protection of German foreign investment abroad," *ICSID Review* 11 (1996): 1-36., 23.
[64] Ibid.
[65] 1991 German Model Treaty on the Encouragement and Reciprocal Protection of Investments *ICSID Review* 11 (1996): 221-232., 226.
[66] Gudgeon, K. Scott. "United States Bilateral Investment Treaties: Comments On Their Origin, Purposes, And General Treatment Standards." *International Tax & Business Law* 4 (1986): 105-129., 111.
[67] 1983 U.S. Model BIT art. II (4), Jan. 21, 1984.
[68] 1984 U.S Model BIT art. II (2), Feb. 24, 1984.

domestic law or otherwise ... [such that] a breach of contract constitutes a breach of treaty."[69]

The BITs got the influence from OECD Draft and the same has been seen in major developed countries, including France[70] and United Kingdom.[71] That's why the umbrella clause turned out to be commonly found in BITs now.[72] In the light of above views, it is suggested that the BITs has generally been in wide ranging surveys particularly in relation to umbrella clauses, which enable the dispute resolution procedures given under the BIT against the violations caused by the breaches of inter-State contracts for foreign investments. For instance, a study carried out by the "United Nations Centre on Transnational Corporations" (UNCTC) highlighted that umbrella clause "makes the respect of [investor State] contracts... an obligation under the treaty. Thus, a breach of such a contract by the host State would engage its responsibility under the [BIT] and (unless direct dispute settlement procedures come into play) entitle the home State to exercise diplomatic protection of the investor"[73]. Furthermore during the mid-1990s, a related observation given by the United Nations Conference on Trade and Development (UNCTAD) vide its survey was explained "as a result of [an umbrella clause in a BIT], violations of commitments regarding investment by the host country would be redressible through a BIT."[74]

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[69] Ibid.
[70] Sinclair, "The origins of the umbrella clause in the international law of investment protection," 433.
[71] Eileen Denza, and Shelagh Brooks, "Investment protection treaties: United Kingdom experience," *International and Comparative Law Quarterly* 36 (1987): 908-923., 910.
[72] Karl, "The promotion and protection of German foreign investment abroad,"25.
[73] UNCTAD, *Bilateral Investment Treaties* 39 (1988).
[74] Bilateral Investment Treaties in the mid-1990s.

Undoubtedly, the term investment "obligations" include contractual obligations within its "ordinary meaning". Moreover, the ICSID cases which previously dealt pre-contractual claims clearly illustrated that a contract could be said to have been concluded unless the investment is made.[78] Since the application of umbrella clauses is restricted to only obligations pertaining to investment, the term contractual obligations would be meaningless if the umbrella clauses are eliminated from the its scope.[79] Hence to elaborate the interpretation adopted in SGS vs. Pakistan by the Tribunal, Article 9 of the Switzerland-Pakistan BIT incorporates the umbrella clause dealing with obligations between an investor and a contracting state, which are necessarily comprehended under a contract between the parties; otherwise, the meaning of umbrella clause significantly would be eroded in any other circumstances.[80]

Having rejected the interpretation of the umbrella clause adopted by SGS on the basis that it extracts the other superfluous substantive standards than provided in the treaty, whereas a mere breach of contract can also enable to invoke the provision of BIT, the Tribunal in SGS vs. Pakistan retained its focus on its face. This interpretation is also inaccurate on the grounds that such standards incorporated by the substantive provisions of BIT are not characteristically referred in contracts; such as fair and equitable treatments, status of MFN, non-discrimination and protection from expropriation.[81] More so, the decision of Tribunal in SGS vs. Pakistan did not address

[78] Mihaly Int'l Corp. v. Sri Lanka, Award, ICSID (W. Bank) Case No. ARB/00/2, 48, 51 (2002).
[79] SGS. v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004)
[80] SGS v. Pakistan. Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/01/13 (2003).
[81] Schreuer, Christoph. "Travelling the BIT route: of waiting periods, umbrella clauses and forks in the road." *The Journal of World Investment & Trade* 5 (2004): 231-256., 253.

as what possible consequences would be if the umbrella clause does not apply to contractual obligations.[82] Hence, the umbrella clause itself incorporated superfluous content, while it criticized about other provisions being made superfluous.

Supposedly before the observations made on the effects of umbrella clause that the meaning of "obligations" or "commitments" was based on uncertainty or ambiguity, its interpretation adopted in SGS vs. Philippines produced more comprehensive support in its history, which particularly demonstrated its restricted application to investor-state contracts to overcome the presumption that the international obligation would not arise in case of a breach of contract.[83] Moreover in the light of the decisions of SGS cases, FedEx. Venezuela[84] also reached on this conclusion that a breach of contractual obligation at the hands of a state amounted to a violation of BIT,[85] whereas if that's a case then Venezuela did not respect certain promissory notices issued, wherein a recovery under the Netherlands Venezuela BIT was sought.[86] In line with Article 3 of the BIT, each state is required under an umbrella clause to "observe any obligation it may have entered into with regard to the treatment of investments of nationals of the other contracting party", whereas the scope of investor state arbitration to disputes arising from obligations under the BIT, was limited under article 9(1) and (3) of the BIT.[87] Hence according to the determination of the Tribunal, Venezuela failed to meet its obligations under the promissory notices by failing to directly address the

[82] SGS v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004)
[83] Ibid.
[84] Fedax N.V. v. Venezuela, Award, ICSID (W. Bank) Case No. ARB/96/3 (1998), reprinted in37 I.L.M. 1391 (1998).
[85] Ibid., 29.
[86] Ibid., 26.
[87] Venezuela ICSID (W.Bank) Case No.ARB/96/3/30.

umbrella clause, which amounted to a violation of BIT in the following words:

> "...Venezuela is under the obligation to honor precisely the terms and conditions governing such investment, laid down mainly in [the umbrella clause of the BIT], as well as to honor the specific payments established in the promissory notes issued, and the Tribunal so finds in the terms of Article 9(3) of the [BIT].[88]

At conclusion, the umbrella clause is said to have been interpreted to cover all breaches of investor state contracts arising from investment, unlike its decision in SGS vs. Pakistan, being consistent with its historian unqualified language and earlier observations. Being based on two-fold inquiry and after the first-one answered, the umbrella clauses are now to been considered in more challenging but less explored question i.e. the effects on the applicability of umbrella clauses in the light of exclusive forum selection clause in the contract.[89]

2.5. Jurisdiction under an Exclusive Forum Selection Clause in the Contract and Its Effects on Umbrella Clause:

The question relating the exercise of jurisdiction was determined by the Tribunal in the decision of SGS vs. Philippines as the umbrella clause enables the Tribunal to exercise jurisdiction in contractual disputes, whereas in the presence of exclusive forum selection clause found in the contract, it would be inappropriate to do so but the same would also leave the investor to nowhere, just like in the case of SGS vs. Pakistan. This approach of the Tribunal adopted in SGS vs. Philippines case is in fact

[88] Venezuela, ICSID (W. Bank) Case No. ARB/96/3/29.
[89] Alexandrov, "Breaches of Contract and Breaches of Treaty," 572.

strong enough to turn up the umbrella clause as nullity in practical sense and to play a creative role for other practical difficulties. Moreover, it is also considered as the same has been misguided in theory to govern the relationship between the investor-state parties in case of breaches of contract and treaty under an umbrella clause, whereas the correct principles has not been adopted in the contractual interpretation by the Tribunal, which failed to resolve the conflict between the umbrella clauses and forum selection clauses in contracts. Hence, the applicability of umbrella clauses could be allowed in view of the better application adopted in the interpretation of contractual forum selection clauses.

In view of the special selection contractual clause, the approach of the Tribunal in practice leads to two-fold issues: (a) a superfluous umbrella clause and (b) problems relating to staying the proceedings:

(a) A Superfluous Umbrella Clause:

Since it is evident from the history that as a matter of recourse for disputes to be resolved in a neutral forum for being matters concerning to international law, the umbrella clause was particularly articulated to deal with disputes under investor-state contracts. Surprisingly in order to determine whether contractual obligations are covered under the umbrella clause, the Tribunal in SGS vs. Philippines referred that the umbrella clause "addresses... [and provides] assurances to foreign investors with regard to the performance of obligations assumed... with regard to specific investments- in effect, to help secure the rule of law in relation to investment

protection".[90] Hence, it can be deduced from this fact that the investors at least rejoice a key significant benefit under the BIT to resolve their investment disputes in line with the BITs dispute settlement provisions.[91]

Apart from its previous understanding, the Tribunal determined that even in the presence of special selection clause under a contract, the umbrella clause does not have any overriding effect. Hence, the interpretation adopted by the Tribunal clearly meant that the umbrella clause will operate into two situations: (a) when a forum designated by the special selection clause is the same as that of the BIT; and (b) when there is no selection clause in the contract. Even though, the first situation makes the umbrella clause redundant, whereas the second situation rarely happens because mainly the investment contracts incorporate a clause relating to the resolution of disputes.[92]

Indeed, such interpretation does not practically make the umbrella clause ineffective; rather somewhat it has determined the issue in respect of its admissibility, instead of jurisdiction. Hence, such determination adopted by the Philippines' Courts in relation to "the scope or extent of the respondent's obligation" under the contract, is not clear as to whether the tribunal has still left anything to resolve such an arrangement. This has been criticized by one commentator as the decision "results in the BIT tribunal having

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[90] SGS v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004)
[91] Ibid.
[92] Hannah L. Buxbaum, "Forum Selection in International Contract Litigation: The Role of Judicial Discretion." *International Law & Dispute Resolution* 12 (2004): 185-210., 189.

jurisdiction over an empty shell and deprive [es] the BIT dispute resolution provision of any meaning."[93]

Hence, the fact that the Tribunal criticized the interpretation of umbrella clause adopted in SGS vs. Pakistan is itself subject to its own criticism as it "failed to give any clear meaning to the 'umbrella clause."[94] According to the Tribunal, the umbrella clause "if it has any effect at all"- nevertheless to say some point – "confers jurisdiction on an international tribunal, and needs to do so with adequate certainty."[95]

(b) Problems relating to Stay of Proceedings:

The Tribunal's approach regarding the stay of proceedings also exposes other obstinate difficulties, which includes a problem concerning ambiguity as under what circumstances the stay would vanish, whereas such answer has not been addressed by the tribunal. On the other hand, it is presumed that the Tribunal would not lift its stay so that the judgments given by the state courts could be reconsidered on its merits in situations when there happens to be a fraud or a miscarriage of justice. Now, a question arises where a line is to be withdrawn in cases; such as, if a justice is denied by the Philippines court when an arbitrary amount is awarded without explaining or substantiating in its judgment, or if a justice is denied when the award was refused in the judgment? Even if such a line is presumably drawn, the question remains for the Tribunal to recognize only extra-contractual situations in which lifting of

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[93] SGS v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004), 174-75.

[94] Emmanuel Gaillard, "Investment Treaty Arbitration and Jurisdiction Over Contract Claims–the SGS Cases Considered." International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, *Bilateral Treaties and Customary International Law* (2005): 325-346., 334.

[95] SGS v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004)

the stay could be justified which "means that [the] Tribunal is restricting, in practice, its jurisdiction to BIT claims only, after affirming in theory, that Article VIII and X (2) of the BIT confer on the Tribunal jurisdiction over also purely contractual claims."[96] Conversely in other words, it is considered as an exercise based on without consistency.

As keeping the contract to govern the particular issue within the scope of SGS's obligation and simultaneously retaining jurisdiction over the dispute arising from the BIT, the Tribunal seems to have considered the dispute having several components that may be distributed and respectively resolved. Indeed even if such components are kept aside instead of being defined by the difficulties, the approach adopted by the Tribunal is problematic for distorting both the contractual forum selection clause and the relevant BIT provision. Particularly, both the CISS Agreement and the BIT, being the settlement provisions, deal with settlement recourse of the relevant "dispute" as a whole, whereas the earlier prefers "[a]ll actions concerning disputes in connection with the [CISS Agreement]"[97] to be dealt by the Philippines courts, and latter enables the investor to deal all "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party."[98] No provision anticipates or authorizes the determination of different components of the dispute in different scenarios.

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[96] Ibid.
[97] Article 12 of "The Inter-American Conference on Social Security Agreement. {hereinafter referred to CISS agreement}.
[98] Article VIII of the BIT.

(c) The Approach of Tribunal in Practice in respect of the Relationship Between a Breach of Contract and a Treaty Violation under Umbrella Clause:

To tackle practical obstacles, the approach adopted by the Tribunal regarding its staying proceedings is academically misunderstood. Hence, the mistaken decisions are due the result of misunderstanding regarding the nature of a BIT violation under umbrella clause, and its effect to the breach of contract. If the function of the contract or a BIT is particularly characterized as different components of the dispute, the approach adopted by the Tribunal in SGS v. Philippines is not applied properly in the Vivendi annulment decision.[99] According to Vivendi, the breach of either contract or treaty involves different standards and hence, it is the Tribunal which has to determine on the face of a dispute whether "the fundamental basis of the claim is related to the contract or the treaty."[100] In case of breach of contract, the dispute is controlled by any exclusive forum selection clause, whereas in case of breach of treaty, the dispute settlement provisions enriched in the BIT would govern the dispute and the jurisdiction falls within the ambit of BIT tribunal.[101]

Importantly instead of incorporating an umbrella clause, Vivendi incorporated an exclusive forum selection clause in the contract, which gave exclusive jurisdiction to the courts of the host State in case of any dispute. Now, the question was what if the "nature" of claim involved both the contractual and treaty violations and it became "impossible" for the tribunal to distinguish one another then the tribunal could dismiss

[99] Compañia de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic, Decision on Annulment, ICSID (W. Bank) Case No. ARB/97/3 (2002). {hereinafter referred to CAA v. Argentine}
[100] SGS v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004)
[101] CAA v. Argentine

such claims. As per the tribunal's point of view, the court of host country is required to go with the contract's forum selection clause.[102] As per the observations given by the ad-hoc Committee for Vivendi, that by "actually fail[ing] to decide whether or not the conduct in question amounted to a breach of the BIT[103]", the Tribunal wrongly places its obligation for reaching that initial determination, whereas the tribunal's obligation remained there and did not release due to the presence of forum selection clause in the contract. Hence, the exercising jurisdiction under the contract is one thing and considering the terms of a contract to determine whether a distinct standard of international law as reflected under the provision of BIT has been violated or breached.[104]

In order to deal with the difficulty of dismissal of the investor's claims, a test was formulated by the Committee to distinguish between breaches of contract and treaty provisions in order to determine whether a breach had the basis connecting to the claim's fundamental or essential of a contract or a treaty so that the same had to be dealt accordingly.[105]

The determination of question relating to whether a claim related to a contract or a treaty is not relevant in respect of claims based on the umbrella clause because all contractual breaches are recognized and characterized by the umbrella clause as BIT violations. However, both the breaches of contract or treaty are considered differently by the Vivendi test which distinguishes BIT provision based on "a distinct standard"

[102] Ibid.
[103] Ibid., 111.
[104] Ibid., 105.
[105] SGS v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004), 153.

which provided in contracts, hence the effects of an umbrella clause are not comprehended because the BIT violation amounts to a breach of the contract.

Importantly, though terms of the contract govern the claims based on the umbrella clause, this does not change the nature of BIT claims into the contractual claims. However, even if the Vivendi test lets the BIT Tribunal to exercise the jurisdiction on the grounds that the claims having "fundamental basis" is based on a treaty apart from any exclusive forum selection clause in the contract,[106] the Vivendi test must convincingly require the same for BIT claims as elaborated in the umbrella clause. Considerably, in Vivendi the ad-hoc committee observed that "[a] state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty."[107]

2.6. The Interpretation of Contract under Applicable Principles:

To resolve the conflict between the BIT and the contract over the tribunal's decision to stay the proceedings, the tribunal's interpretation as well its application is suspected for applying the particular principles of contract law and for reaching on mistaken conclusion. The tribunal's denial to accept the BIT provisions having overriding effects by forum selection clauses in contractual claims is based on the reasoning that inclusion of forum selection clause is a specific provision, which take precedence over the general provision of the umbrella clause in a negotiated contract.[108] Precisely, such interpretation is not considered as implausible by the tribunal for the reason that

[106] Salini Construttori SpA v. Morocco, Decision on Jurisdiction, ICSID (W. Bank) Case No. ARB/00/4 (2001), reprinted in 42 *I.L.M.* 609, 614 (2003).
[107] CAA v. Argentine
[108] SGS v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004)

otherwise, no foreign investor would possibly accept any agreement having an exclusive jurisdiction clause in his contract because "they will always have the hidden capacity to bring contractual claims to BIT arbitration."[109]

However, such explanation is wrong because it is quite easy for a state to incorporate such BIT provision, which limits the effect of umbrella clauses or which incorporates BIT settlement provision in the contracts containing a forum selection clause.[110] On the other hand, a State can particularly exclude the effect of any such contract from the scope of the BIT provision in respect of investment contracts existing at the time of the BIT. Likewise, a State can enter into a contract to exclude the effects of investment contracts concluded after the BIT has been concluded. Such possibility also clarifies the reason behind why it cannot be presumed that BIT provisions simply possess overriding effect over the forum selection clause in general, since the Tribunal maintains that a "government [has agreed] to the adjudication for the future of an indefinite range of cases in a number of different forums with different rules."[111]

Whereas, the proper analysis is to determine that the burden should lay on the state or the investor in case of potential conflict amongst the BIT and the contract. In particular, it is only a state which remains a party to both agreements executed between the state and investor. Moreover in case of any dispute, it is only a state which is held liable for such conflict, whereas any resulting ambiguity is required to be read against the state and favorably to the investor. Therefore in SGS vs. Philippines, it was only Philippines which was party to both the BIT and the CISS Agreement (as SGS became

[109] Ibid., 134.
[110] Ibid.
[111] Ibid., 153.

party latter) and hence, the dispute between the BIT provisions and Article 12 of the CISS Agreement was deemed to have been settled against the Philippines.

Though the Principle that "a party to a contract cannot claim on that contract without itself complying with it"[112] was relied by the tribunal, the effect of umbrella clause was ignored, making it a violation of the BIT to breach the contract. The fact that the terms of the contract are incorporated by the umbrella clause to specify a BIT violation does not modify the particular treaty character of the resulting BIT violation.

Moreover in SGS vs. Philippines, SGS being a party asserted its claim on the basis of BIT. Since it was recognized by the tribunal itself that "it is for the claimant to formulate its case. Provided the facts as alleged by the claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more of the provisions of the BIT, the Tribunal has jurisdiction to determine the claim."[113]

Conclusively, the emphasis is more set on the BIT instead of the contract. Assumingly, the Philippines could argue that it was authorized to receive the benefit of the BIT (for say: to encourage its continued investment) regardless of being bound by its obligations. Considering the fact that the problem persists relating to a BIT violation and hardly to contractual breach, it is the state that "should not be able to approbate and reprobate in respect of the same agreement."[114] As a result, the BIT provision should entitle the SGS (investor) to pursue its claims arising from breaches of contract before the Tribunal.

[112] Ibid., 154.
[113] Ibid., 157.
[114] Ibid., 155.

2.7. Is the Concession Contract Covered by Umbrella Clause?

A number of recent decisions have found that all contract are covered by umbrella clause language, for example, following Eureko. B.V. v Poland, partial Award, Ad Hoc Arbitration, where the tribunal interpreted the Netherland-Poland BIT's umbrella clause, which states 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 Eureko tribunal expressly concurred with the SGS v. Philippines tribunal's holding that the umbrella clause "means what it says"

Other decisions have reached similar results. For example, in Siemens A.G. v. Argentina,[115] Award, involving the Germany-Argentina BIT, the tribunal held that the umbrella clause "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." The tribunal went on to state that it "does not subscribe to the view...that investment agreements should be distinguished from concession agreements of an administrative nature, ...[because] the term "investment'... linked as it is to 'any obligations,' would cover any binging commitment entered into by Argentina in respect of such investment."[116]

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[115] Siemens A.G. v. Argentina, Award, ICSID Case No. ARB/02/8

[116] This is also discussed in other cases as well., e.g. LG & E Energy Corp. V Argentina, Decision on Liability, ICSID Case No. ARB/02/01, para. 170 (3 October 2006) (noting that any umbrella clause "creates a requirement for the host State to meet its obligations towards foreign investors, including those that derive from a contract"); Sempra Energy Int'l v. Argentina, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/16, para. 101 (11 May 2005) ("the specific guarantee of a general 'umbrella clause '...involve[es] the obligation to observe contractual commitments concerning the investment"); cf. Noble Energy, Inc. v. Ecuador, Decision on Jurisdiction, ICSID Case No. ARB/05/12, paras. 156-157 (5 March 2008) (citing obligations established in investment agreement as potentially "falling within the scope of an umbrella clause"); Enron Corp v. Argentina, Award, ICSID Case No. ARB/01/3, paras. 273-74 (22 May 2007) (observing that "[u]nder its ordinary meaning the phase 'any obligation' refers to obligations regardless of their nature," but noting that"' "[o]bligation's covered by the 'umbrella clause' are nevertheless limited by their object; 'with regard to investment" Noble Ventures, Inc. v. Romania, Award, ICSID Case No. ARB/01/11, para. 61 (12 October 2005) (holding that the text of the U.S-Romania BIT's umbrella clause indicates that"' "the parties had as their

Ultimately, the tribunals held that "an umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims."[117] Further, the tribunals drew a distinction between contracts with the "State as a merchant" and the "State as a sovereign." [118]

The energy concession agreement between Company A and State Beta could well be covered even under the more limited interpretations suggested by El Paso and Pan American, based on the notion that a public concession is not any ordinary commercial contract, but involves a granting of rights by the government acting in a sovereign, rather than a purely proprietary, capacity. Nevertheless, the ongoing differences in approach among arbitral tribunals create some measure of uncertainty as to how these clauses will be interpreted.

In CMS Gas Transmission Co. v. Argentina,[119] the tribunal stated that "not all contract breaches result in breaches of the Treaty. The standard of protection of the Treaty will be engaged only when there is a specific breach of treaty rights and obligations or a violation of contract rights protected under the treaty. Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor."[120]

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aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT," but reserving question whether "the expression 'any obligation' despite its apparent breadth, must be understood to be subject to some limitation in the light of the nature and object of the BIT").

[117] *Ibid., para. 110.*

[118] *Ibid., para. 108.*

[119] CMS Gas Transmission Co. v. Argentina, Award, ICSID Case No. ARB/01/8 (25 April 2005).

[120] Ibid., para. 299.

(It should be noted that the portion of the CMS Award dealing with the umbrella clause was subsequently annulled on the basis that Award failed to state reasons why CMS could invoke contractual and other obligations owed by Argentina not to CMS but rather to TGN, of which CMS was a minority shareholder. [121]

Another important issue is whether the investor must itself be a party to the contract in question in order to have standing to invoke the umbrella clause. This is particularly important because many foreign investors do business through locally incorporated subsidiaries or affiliates. The umbrella clause states that: "Each Party shall observe any obligation it may have entered into with regard to investment." It does not specify to whom the contractual obligation must be owed. That is, the plain language of the clause does not appear to be limited to contractual obligations owed by the Party to the foreign investor (i.e., to Company A); rather, the plain language suggests that it also covers contractual obligations owed to investments of the investor (i.e., in this case, to Company A's wholly-owned subsidiary). On this interpretation, Company A could bring an umbrella clause claim against State Beta for breach of the concession agreement between the State and the locally-incorporated subsidiary.[122]

The existence of alternative procedures for pursuing contract claim may also create hurdles to submitting a contract dispute to treaty arbitration. Tribunals have considered case where State have resisted treaty arbitration of contract claims on the ground that the contract in dispute contains it own dispute resolution clause requiring, for example,

[121] See CMS Gas Transmission Co. v. Argentina, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8 (Annulment Proceeding), paras. 89-99 (25 September 2007).

[122] Enron Corp. v. Argentina, Decision on Jurisdiction (Ancillary Claim), ICSID Case No. ARB/01/3, paras. 77-83", 155

arbitration under particular rules or procedures. The majority of these tribunals have held that the existence of a contract remedy does not affect the jurisdiction of a BIT tribunal, making BIT arbitration available even where the contract" contains its own dispute resolution requirements. In addition, they have held there is no need to exhaust alternative contract remedies before bringing a BIT arbitration.

CHAPTER 3:

Kinds of Umbrella Clause: A New Concept or Old file In New Cover?

3.1. The Anglo-Iranian Oil Company Dispute:

The historical background of this concept was that it was created under necessity. The contracts and policies of the Anglo-Iranian Oil Company (a Persian oil company) were of the nature of long time. But by the changing of the government in the state, the new government amended the all oil policies that all contracts of the oil companies will be entertained and governed only by the government and the government will be all in all in oil contracts. The concession agreement of AIOC was failed to and could not be fulfilled due to the changing of the government. Jurisdiction of International Court of Justice was also refused by itself on the basis that Iran accepted the compulsory jurisdiction of the court under Optional Clause which includes the violations of the treaty but excludes the breach of agreements and all claims relating to breach of agreements under customary international law. Finally when the government of Iran was agreed to settle the dispute, it was an advice to the AOIC to settle the dispute in a treaty. It was also governed by international law. In simple, any contract between AIOC and the government of Iran was to be settled in a treaty between Iran and UK. So the violation of the contract will be the violation of treaty automatically. Breach of contract becomes the violation of treaty under international law. The advantage of this

contract under treaty was that the agreement will not be affected by the changing of the government and obligations would be fulfilled because these obligations were imposed under the international law and these could not be affected by change of government in the state. Secondly, the contract can be challenged as the violation of the treaty and consequently it became the compulsory jurisdiction of the International Court of Justice.

3.2. The Abs-Shawcross Draft:

In 1959 the German Society started efforts to advance to secure the Foreign Investments. For this, a draft of "international convention for the protection of Mutual Property Rights in Foreign States was published by Chairman Deutsche Bank, Dr. Herman Abs."[123] This step was taken in result of failure of FCN (Friendship, Commerce and Navigation) treaty to ensure the protection of Foreign Investors. The main purpose of this draft was to ensure the protection of private property rights of the foreigners who have dual nationality and have business in more than one state.[124] The significance of article IV(4) of the draft was that if individual private agreements awarded a greater protection to foreign investors than to locals then such promises are to be respected and preferred.[125] This article did not give any positive obligation to the host country to the protection and promotion of private personal investment and also did not protect the rights of coming investors. In 1958, Lord Shawcross also submitted his own draft for the protection of private foreign investors and promoting the outflow of capital to economies where it was most

[123] Hermann Josef Abs, *Proposals for Improving the Protection of Private Foreign Investments.* Institute International d'Études Bancaires, Secrétariat Général, 1958., 33.
[124] Ibid., 24-25.
[125] Ibid., 30.

needed. He suggested the matters should be decided under the rules of international law.[126] He advocated the application of *Pecta Sunta Servanda*, for the performance of specific agreements between states especially with the alien States.[127] He stated that the result of the wars give birth to the developing nations to make business treaties in order to improve their economical conditions. But the investors, who were already waiting for business treaties, were unwilling to invest their money in the affected areas by wars because they thought that their investment in those areas were not secure.

In this situation, the importance of public international law recognized and a setup of universally accepted rules and conditions introduced in order to protect the rights and interests of the foreign investors. First benefit of this was that the developing countries would come into business treaties and make themselves strong economically. Secondly, it would encourage the foreign investors to protect their rights and interests.[128] United Nations Treaty Series published that foreign public investment is in the nature of a treaty even it has lack of all the characteristics of a treaty and has right to enjoy the full protection under International law. There is a problem in this field of foreign private investment. And problem is that these kind of agreements are governed by the terms and conditions of the contacting parties mutually agreed and settled by both. If the parties settled that the agreement would be canceled after the fixed time, there is no reason of fixing of specific time and

[126] Shawcross, Hartley Shawcross Baron. *The Problems of Foreign Investment in International Law*. Publisher not identified, 1962., 341.342.
[127] Ibid., 420.
[128] Ibid., 341-342.

to override the terms and conditions of treaty.[129] Dr Shawcross states that the very fact of concluding a contract is an exercise of sovereignty, distinguishable only in degree, not kind, from the conclusion of a treaty.[130] Hypothetical question is, whether the principle of *pacta sunt servanda* will apply to these kinds of quasi-treaties or not. Mr. Shawcross says in this support that by giving the reference of Losinger case assertion by Switzerland that "the principle of *pacta sunt servanda* applies not only to the agreements directly concluded between States but also to those between a State and foreigners."[131] He also give reason of this that the property of an alian comes into existence due to contract finalized by the State so the responsibility of its protection imposed upon state. Shawcross also describes situations that where it would be possible for the State to cancel the contract or a fundamental change in the circumstances of contract going to the root of the contract, or to frustration of a contract, as provided by the local laws of the state. But a State can take decisions that in which circumstances and when it will allow foreign investments. In certain departments and institutions like atomic energy, most of the States do not allow foreign investors. The argument, rather, is that once a State allows investors in a particular field and extends some undertaking in that respect, it should not be allowed to cancel the contract unilaterally. In this situation, the aggrieved party should have any reasonable remedy under international law. Shawcross stated that the umbrella clause is within the already established international law of treaties, and claimed that no new legal concept was coming into existence as did others when the OECD Draft was discussed.[132] A meeting was held between Abs and Shawcross and in 1959 they

[129] Ibid., 351.
[130] Ibid.
[131] PCIJ Series C, No. 78, (1936), 32.
[132] Ibid., 339.

issued their joint draft Convention on foreign Investments. The Draft provided for *ad hoc* arbitration and compulsory jurisdiction of the International Court of Justice. Furthermore, the umbrella clause also found its way into Article II, which states that "each party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by the nationals of any other Party."[133] Term used was 'any undertaking' and as such covered both contractual as well as unilateral undertakings and obligations.[134] This Draft for the first time incorporated an umbrella clause in clear and unambiguous terms.

3.3. Existing Concept or a New Formulation of Law?

Mr. Shawcross maintained that the provision was a mere restatement of the *pacta sunt servanda* clause that was already a well-established part of public international law. But the others did not agree with his opinion.[135] Schwarzenberger has noted that this article transforms the obligations towards the objects of international law into obligations under international law. But some other researchers have difference in their opinion.[136] Mr. Schwarzenberger noted that this piece of writing transforms the duties towards the purposes of international law into obligations and duties under international law. Activities related to the investment given by one state party to private nationals of the other state party shall be monitored and watched by obligations of the each state party towards each other. Generally, the contracting state is given the first chance to remedy of the charged violation of international law in

[133] Ibid., 422.
[134] Georg Schwarzenberger, "ABs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary," *Journal of Public Law* 9 (1960): 147-171., 154.
[135] Sinclair, "The origins of the umbrella clause in the international law of investment protection," 423.
[136] Ibid.

its local courts under the obligations of Customary International Law. If the foreign national has been denied from justice or it is obvious that he will not receive justice in the local courts of the host State, the home government of the foreign investor can take action and can role the matter into an apprehension under the international law under the specific circumstances. But, against Schwarzenberger, the wording of Article II is such that it is not necessary for the foreign national to look for remedy in the local courts of the host State. In simple words, we can say that any violation of obligations would become a breach of the treaty. This is an extensive violation of law, and out of true to the stability too far in the interest and benefit of the investor.[137] Finally the draft concluded that the states should fulfill their obligations in good faith hence the Article III cover ban against misconducts opposing to the obligations.

3.4 The OECD Draft Convention of 1967:

The draft of Abs-Shawcross was presented before the "Organization for European Economic Co-operation" and in 1967 its successor "Organization for Economic Co-operation and growth" recommended the sketch "Convention on the protection of foreign property". Article 2 of the summary enclosed an observation of actions clause, which says: "Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party."

The term 'property' is used here in a wider sense, and therefore it clears the meaning of *investments* in the previous Abs-Shawcross sketch, just as property rights protected by an obligations can include money claims and specific performance claims under a contract treaty. It has been checked by at least one

[137] Georg Schwarzenberger. *Foreign investments and international law* (British: Praeger, 1969), 116-117.

researcher,[138] that the piece of writing is almost an *ad verbatim* copy of the Abs-Shawcross Draft Article II. This was opposing, as the dispute resolution system in the OECD sketch necessary the collapse of domestic remedies before looking for restoration in an international environment, while Article 2 (as the earlier Abs-Shawcross Draft) laid down no such requirements. Schwarzenberger has also noted that the supreme nature of state accountability is compulsory via this Article is too cruel a measure forced upon the state, and that there must be "reasonable defences for non-performance by other state."[139] Which are available to the State Party linked to those provided under Article 6. However, where the contracting state party has given any responsibility concerning non-interference with the contract, it will create the right of estoppel in opposition to any one-sided interference in the future. Explanation furthermore restrictions the scope of the Article by saying that the obligations in question must concern to the property concerned and that the matter should not be minor. Some philosophers[140] are of the opinion that neither the Abs-Shawcross Draft nor the OECD Draft brought about the birth of new legal grounds. Freshness in the entire work out was only the submission of universally accepted public international law rules to contracts between state parties and alien foreigners. According to Shawcross, this was a legally satisfactory extrapolation. In the next chapter I shall effort to discover the importance of the textual wordings of the different kinds of umbrella clauses that are at this time in approach in a variety of BITs, and how they have been involved in the understanding of the clause as a whole.

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[138] Ibid., 160.
[139] Ibid., 161.
[140] Sinclair, "The origins of the umbrella clause in the international law of investment protection," 430.

3.5. Jurisdiction of International Arbitral Tribunals concerning Treaty Claims and the Role of the Umbrella Clause:

I. State Contracts and Confined Forum Selection Clauses:

In present time the trend of dealing of business practice it is very common that the investor and the host state enter into an agreement under treaty in which they fix the specific terms and conditions, especially which are affective in the host state. In lawful construction the investor manages that how to achieve from the host state lawful commitments or guarantees that go further than those enclosed in existing BITs. These kinds of agreements are usually called as "state contracts". According to them the body the supposed "concession contracts", state contracts that award the investor concession and relief for example the right to operate water sewage in a specific area for a specific period of time.

It often occurs that through the discussions between host state and investor the previous one insists to introduce the contract into a dispute resolution clause referring any clash arising from the contract to its local courts or to arbitration under its local law. This occurs for example during the discussions between SGS Société Générale de Surveillance S.A. (SGS) and Pakistan, where the SGS proposed UNCITRAL adjudication and Pakistan forced on local arbitration. In view of the fact that this was measured a "deal-breaker" for Pakistan, SGS approved.[141]

[141] SGS v. Pakistan, par. 158.

II. Contract Claims vs. Treaty Claims: Mapping Conflicts :

Of course such environment choice clauses in state contracts give respondents in international investment arbitration some reason for objections to jurisdiction. The ICSID Tribunal in *Vivendi I,* let suppose "had to make treaty with the argument that the only claims presented by Claimants relate to rights and obligations of the parties under Concession Contract and that, accordingly, Article 16.4 of the Concession Contract requires that Claimants present those claims only to the controversial governmental tribunals of Tucumán".[142] With the intention to respond to this argument tribunals generally "hold that contract claims as claims based on suspected violations of the agreement under treaties on the one hand and treaty claims as claims based on suspected violations of the BIT on the other hand must be illustrated and that the effect of the dispute settlement clause in the contract on the jurisdiction of tribunal needs to be considered separately"[143] for moreover kinds of claims. In simple language the tribunal has two questions to answer if it male this difference. The first is that "whether the dispute resolution clause entertains its jurisdiction over contract claims,"[144] and the second is that "whether it entertains its jurisdiction over treaty claims."[145] Whereas the Tribunal in *Vivendi I* had problems in establishing contract from treaty claims and spoke of "the impossibility [...] of separating potential breaches of contract claims from BIT violations."[146] Many tribunals that were afterward confronted with parallel arguments "clearly drew the distinction between

[142] Vivendi I, par. 41.
[143] Ibid.
[144] Ibid.
[145] Ibid.
[146] Ibid., par. 81

contract and treaty claims."[147] And today this distinction is "now well recognized in investment treaty arbitration."[148]

III. Irrelevance of Dispute Settlement Clauses in State Contracts for Tribunals' Jurisdiction Over Treaty Claims:

Whereas the decisions of tribunal in cited cases contradicted in as far as their jurisdiction over contract breaches were disturbed and the tribunal uniformly got "jurisdiction over treaty claims in spite of the existence of forum selection clauses in the state contract."[149] Gaillard stated that the power in result of these cases is that "the investor has a right to seek the global accountability of the host State on the basis of the relevant investment treaty in spite of the forum selection clause contained in the investment agreement."[150]

IV. Jurisdiction Over Contract Claims and the Umbrella Clause – Prevailing Approach:

No real power or authority arises from tribunals by contrast, decisions with respect to their jurisdiction over contract breaches. So no clear line of way of thinking has found and the arguments used, have caused large uncertainty concerning the role of the umbrella clause. Now we will look on the situations under which tribunals have received the jurisdiction above contract claims. Mr. *Schreuer* notes in an interview that "there are several situations in which the tribunal can deal also with claims arising

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[147] SGS v. Pakistan, par. 161.
[148] Gaillard, SGS Cases, 328.
[149] SGS v. Pakistan, par. 190 (a).
[150] Gaillard, SGS Cases, 328.

from a suspected violation of contract."[151] In the following report he describes three different situations in which a tribunal is competent to hear contract claims. Situations are given below.

First Situation: First situation is given where the breach of contract "amounts to a breach of International Law."[152] *Schreuer* stated that this is however the case where a breach of contract violates the principles assured by the applicable BIT and also "every breach of contract by the state will be considered violation of international law."[153] So if the violation of the contract violates the rule of reasonable and unfair management, the prevention of difficult to deal with "discriminatory trial or the prohibition of measures having effect equivalent to nationalization."[154] For example the international courts and tribunals have held frequently that " measures by a state affecting rights under a contract may amount to an expropriation."[155]

Second Situation: According to Scheuer the second situation is that in which "an international tribunal is competent for contract claims."[156] Actually BITs contain "very broad dispute settlement clauses referring to ICSID arbitration"[157] between one of the Contracting Parties and an investor of the other Contracting Party. This condition does not seem to prohibit disputes that arise from suspected violations of a contract from his wording as long as they are related to an investment. Though the "tribunals have not always accepted this option and infrequently declined jurisdiction over

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[151] Schreuer, Vivendi I Case, 295.
[152] Ibid.
[153] Ibid.
[154] Ibid., 296.
[155] Ibid.
[156] Ibid.
[157] Art. 8 (1) of the French-Argentina BIT.

contract claims under these circumstances."[158]

Third Situation: *Schreuer* explains, "an international tribunal is capable to hear contract claims of the state parties accept to watch any obligations they may have entered into with respect to investments."[159] The violations of the contract become treaty violations under this provision. Many of scholars share their view that "just as some international arbitral tribunals have shared it."[160] But the other tribunals are of the opinion that the umbrella clause cannot have this effect at all and raising a number of arguments that will be discussed in detail further below. Mr. *Schreuer* also raised "a good point in stating that despite the clear clarity of these clauses, they have led to considerable confusion and to conflicting "decisions by tribunals."[161]

Following remarks will perhaps not avoid conflicting decisions by tribunals in the future. But they will help in future to "resolve some of the confusion that has arisen with respect to umbrella clauses, jurisdiction over contract claims and the effect of dispute settlement clauses in state contracts."[162]

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[158] Schreuer, Vivendi I Case, 296-299.
[159] Ibid., 299.
[160] SGS v. Philippines, par. 128.
[161] Ibid.
[162] Ibid.

V. Jurisdiction Over Contract Claims and the Umbrella Clause - Contemporary Approach:

Situation 1: Jurisdiction Over Contract Claims:

We have already discussed in the above arguments that sometimes it is said that "if the breach of the contract amounts to a breach of international law tribunals can exercise jurisdiction over contract claims as discussed in the above" first situation. As this seems to be clear at first scene and a "closer look should make clear that, in actual fact, this is not the case. Mexico had contractually guaranteed the investor to keep current the existing licenses necessary for the operation of a landfill in Mexico"[163] in *TECMED v. Mexico.* However Mexico "did not renew the licenses, forcing the investor to stop its activities in the field of hazardous waste. The Tribunal held that the fact of denying renewal of permits constituted an indirect illegal expropriation and thus a violation of the relevant BIT."[164] There is no doubt that "the non-renewal of the licenses was not only in violation of the BIT, but also in violation of the contract"[165] in this case. Hence the TECMED could have raised a distinct claim before the ICSID Tribunal, namely a contract claim alleging that the contract has been violated in addition to the treaty claim alleging that the contract has been violated. In simple words we can say that the same set of facts "gave at the same time rise to a BIT claim and to a contract claim namely the non-renewal of the

[163] Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States Case No. ARB (AF)/00/2
[164] Ibid., par. 95.
[165] Ibid.

license."[166] However the claimant "based his claim on the suspected violation of the BIT entirely. It does not mean that he could not all together have based it on the other legally binding instrument the treaty contract."[167]

In *Noble Ventures* the Tribunal stressed this in a same way that, it may be further added that in as much as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State. But that responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other, a situation that further reflects the respective autonomy of the two legal systems each one with regard to the other.[168]

A question arises here that why do we mention here all this? It just "follows from this understanding that the Tribunal in *TECMED v. Mexico* would not have found Mexico's acts being in violation of substantial."[169]

BIT provisions in the alternative way TECMED could still have highlighted the issue that these treaties and agreements were in violation of the international law. After that it became necessary to introduce that tribunal has power to exercise jurisdiction over contract and treaty claims. While TECMED did not highlighted the contract claims

[166] Ibid.
[167] Ibid.
[168] Ventures, Noble. Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005, at para. 5
[169] Ibid.

because the Tribunal did not have to deal with this problem. It should be pointed out from this example that when it is cleared that tribunals are competent to entertain contract claims because if a contract violation amounts to a violation of a BIT it will not be true. Tribunal does not really entertain jurisdiction over the claims raised by contracts and treaties. Here is also another different question of whether or not a tribunal is competent to hear contractual claim or not. Thus it will be wrong to say that an international tribunal has jurisdiction over treaty claims when the same acts and omissions disobey both the contract and the treaty for example the non-renewal of permits. Simply, the facts raised a contract claim and it means even less that the tribunal has upheld jurisdiction over this type of claims that an investor could have raised a contract claim based on the same set of facts as the treaty claim does not mean that the investor actually has. In Nobel Ventures, the Tribunal also stressed on this that:

> It may be further added that, inasmuch as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State. But that responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other, a situation that further reflects the respective autonomy of the two legal systems the local and international, each one with regard to the other.[170]

[170] Ibid.

3.6. Jurisdiction Over Contract Claims Thanks to an Umbrella Clause?

Sometimes "Umbrella clause is said to have the effect of elevating contract claims to the level of treaty claims"[171] or of "transforming contract claims into treaty claims"[172] Besides the continuation of the umbrella clause is generally seen as one of a number of conditions "that can make an international tribunal competent to hear contract claims"[173] as pointed out in situation three. Following research will show "that neither of these views is covered by the wording of the umbrella clause and that the umbrella clause can have no more means have these powers."[174] It will also be noted that it is not necessary at all to understand the umbrella clause as an "elevator clause" in order to give it its full effect. Art. 3 (4) of the Belize-Netherlands BIT narrated that "each contracting party shall observe any obligation it may have entered into with regard to investments of nationals of the other contracting party."[175] If we suppose that the term "shall" is very important and that to "observe" an "obligation" means not to violate them. We also suppose that the expression "any duty entered into with regard to investments" carries duties under treaties which relate to investments. Highlighting these suggestions what this provision does [176]at it creates for either contracting party any legal obligation under the BIT to tolerate its obligations under state contracts. So, if a contracting party breaches provisions of such a treaty it will amount to violation not only the contract itself but also the BIT or, more accurately, the umbrella clause. If we

[171] SGS v. Pakistan, par. 156
[172] Ibid., 160.
[173] Ibid.
[174] Ibid.
[175] BIT available at: http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_belize.pdf. (accessed: January 25, 2015).
[176] Ibid.

compare we will note that the umbrella clause's wording does by no means indicate that it "elevates" the treaty claim to a contractual claim. This explanation give birth to the wrong form that contract claim and treaty claim become one and that the original contractual claim would withdraw. This is wrong that the umbrella clause give birth to a relation between two kinds of claims. This creates a very close relation among breach of a contract and also "breach of the BIT since any violation of the contract is by virtue of the umbrella clause and also the violation of the treaty." Meaning of a contractual claim is that "umbrella clause simply made for the investor a second legal provision, a BIT provision that can be based upon different claim on, a treaty or umbrella clause claim."[177] If the plaintiff claims that the umbrella clause makes the agreement claim out of a contractual claim then "the Tribunal should frankly reject this view and it should hold that the umbrella clause does not raise, change or rotate contract claims into treaty claims."[178] No doubt that the umbrella clause should be seen as a separate rules as to the others such standards apply which were highlighted above in *Ad* situation 1: jurisdiction over contract claims. According to this view where a contract is dishonored the investor has right to raise different claims: a contract claim and a BIT claim.

Part 1. Jurisdiction Over Contract Claims:

When we pass through the situations 1 and 3 we can raise a question that can an international tribunal ever be competent to hear contract claims or not? There are two main opinions in answer. Many of tribunals and also scholars are of the opinion "that under the circumstances described as situation 2 above namely if the BIT contains a

[177] Ibid.
[178] Ibid.

broad dispute settlement clause referring to any disputes relating to investments or just disputes regarding investments and consequently the tribunal can entertain jurisdiction over contract claims."[179] But other tribunals have conflicted themselves to this view. But the issue is not completed here and will be focus to additional consideration. *Salini v. Morocco,* Art. 8 of the applicable BIT presented an option of three dispute settlement for all disputes or differences which includes disputes related to the quantity of expropriation nationalization and similar procedures among "a contracting party and an investor of the other contracting party concerning an investment."[180] Tribunal found the terms of Art. 8 "very general" and held that the "reference to expropriation and nationalization measures cannot be interpreted to exclude a claim based in contract from the value of the application of this article."[181] It is very clearly narrated that the "article 8 compels the state to respect the jurisdiction offer in relation to violations of the bilateral treaty and any breach of an agreement that binds the state"[182] in a straight line. In the case *SGS v. Philippines* the tribunal had to interpret article VIII of the Swiss-Philippine BIT which resulted that disputes could be referred to international arbitration with respect to investment. While answering the question whether the restricted argument adjustment clause in the state contract could expel its jurisdiction over contract claims it stated that, "it is not plausible to suggest that 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."[183]

[179] Ibid.
[180] Ibid.
[181] Salini v. Morocco, par. 59
[182] Ibid., par. 61.
[183] SGS v. Philippines, par. 134.

The tribunal, in Article 09 held in another case named *SGS v. Pakistan* concerning "the dispute settlement clause in the BIT referred to ICSID arbitration disputes with respect to investments between a contracting party and an investor of the second contracting party"[184] that it is recognized by us that all the disputes which arise from the complaints registered on charged violation the BIT that all the disputes which arises from the complaints which are based on charged violation of the BIT and those disputes which arises from the violation of the PSI, all these can be defined as the disputes which relates to the investments and this phrase is used in the Art 09 of BIT. Though, the phrase does not have any concern with the legal basis subject matter and cause of action of the claims. In simple, we can say that no compulsory obligation arises that both kinds of claims are not covered from Art 09 by both the contracting parties.[185] So the tribunal decided that it had no jurisdiction related to the complaints presented by SGS and also which are based on supposed breaches of PSI agreements which also do not represent any breaches of the substantive principles of the BIT.[186]

There is also an important defense regarding it, is that a difference can be added between the provisions of dispute resolution of BIT which are used in broad sense as compared to the other international arbitrations which are only for the disputes for the national companies of the state parties which other party relates to the obligations of the former under this treaty.[187]

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[184] Ibid.
[185] SGS v. Pakistan, par.161.
[186] Ibid., par. 162.
[187] Art. 8(1) of the BIT between Angola and the United Kingdom.

Treaty clearly confines the jurisdiction of arbitral tribunals here of disputes in order to the duties under the BIT and also excludes the jurisdiction over complaints based on an agreement. This defense can give very strong impression and reasonable use by the Ad hoc Committee in *Vivendi II.* But "on the other hand it may appear strange to interpret a treaty as creating a jurisdictional basis for the BIT tribunal" in those cases where it is not apply to rule on a charged violation of that agreement as narrated by Gaillard.[188] It is difficult to answer to the question that if someone accepts the view that the umbrella clause does not make a tribunal competent to hear contractual complaints but it makes a regular BIT standard then it will become immaterial that whether a tribunal can entertain jurisdiction over contractual claims or not. It is for this reason that complaint is then a treaty claim and treaty claims usually falls under an international arbitral tribunal's jurisdiction according to the umbrella clause.

Part 2. Arguments Pro and Opposed to Umbrella Clauses Effect – Does it have any effect at all or not?

If we accept that the umbrella clause is an independent BIT typical, we come to know that it does not set at zero the point of view that respondents and tribunals have raised in support of their limited explanation of this provision. No doubt that the question what's left of whether the truth "that the BIT contains an execution of undertakings, the section creates a condition in which any breach by a state of an obligation relating to the assets will be the violation of the umbrella clause and thus of the BIT."[189] The respondent has stated in every case that it does not have this effect involving an umbrella clause. It is necessary to discuss before we analyze the

[188] Gaillard, SGS Cases, p. 336.
[189] Ibid.

defense used in the personal proceedings that the statement which is used under the umbrella clause can direct to the wrong obligations that "violations of the contract" are "transformed" into "treaty violations", meaning that the violation of the contract ceases to exist. Violations of the contract become treaty violations. Yet if we give full powers to the umbrella clause in the BIT then there will be the violation of the contract and the plaintiff has right to raise a contract claim based on the breach of contract at any time.[190] As a result the phrases like "due to the umbrella clause, violations of contract become treaty violations" should be handled with care and could be replaced by the less ambiguous expression that, "by virtue of the *pacta sunt servanda* clause, violations of contract quantity to breach of the BIT."[191] At the bottom of and opposite "arguments that will now be analyzed should therefore be seen as dealing with the concluding and not with the previous statement."[192]

I. Rules on the Interpretation of Treaties and the Interpretation of the Umbrella Clause:

In SGS v. Pakistan, the tribunal had to understand in the umbrella clause in SGS v. Pakistan that either the "contracting party shall always undertaking the performance of the commitments it has entered into the investments of the investors of the other opposite contracting party."[193] Firstly, the tribunal highlighted the rules of interpretation that it will be applicable under the meaning of this provision. The provision is given below.

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[190] Whether the tribunal accepts jurisdiction over the contract claim is, of course, a different matter.
[191] Ibid.
[192] Ibid.
[193] Art. 11 of the Swiss-Pakistan BIT; SGS v. Pakistan, par. 163.

We begin, as we usually do, by exploring the words in fact used in Article 11 of the "BIT ascribing to them their ordinary meaning in their context and in the light of the object and purpose of Article 11 of the Swiss-Pakistan Treaty and of that Treaty as a whole."[194] Court sustained with the examination of the following wording of provision that firstly, textually, Article 11 falls significantly short of saying what the claimant investment it means. The "commitments" the performance of which a contracting party is to "constantly guarantee" are not limited to contractual agreements. The agreements referred to may be surrounded in for example the local legislative or administration or other unilateral events of a contracting party. The idiom "constantly to guarantee the observance" of some statutory, administrative or contractual agreement simply does not to our mind, automatically "signal the creation and acceptance of a new international law duty on the part of the contracting party, where clearly there was none before."[195] As the issue of textually therefore, the scope of Article 11 of the BIT, while consisting in its totally of only one verdict, appears at risk of almost indefinite expansion. The text itself of Article 11 does not claims to state that the breaches of contract charged by an investor in relation to a contract it has concluded with a state are automatically "elevated" to the level of breaches of international treaty law. Thus, it appears to us that while the plaintiff is required to spell out the penalty or inference it would draw from Article 11, the Article itself does not set forth those circumstances.[196] From this discussion, first of all it must be mentioned that the tribunal fails to relate at least one of the interpretative rules it outlines at the very beginning. It analyze the "ordinary meaning" of Art 11 that it do not take into consideration the "context, object and purpose

[194] SGS v. Pakistan, par. 164.
[195] Ibid., par. 166.

of the Treaty". Tribunal raises a dispute that is difficult to understand. While confessing that "the scope of Article 11 appears liable of almost indefinite expansion", because it holds that this provision "falls considerably short of saying that what the plaintiff investment asserts it means." Does the fact that a provision may have a scope "susceptible of almost indefinite expansion" imply that it cannot mean that what the plaintiff charges? To the contrary, as *Schreuer* noted that the fact that the reference to "commitments" in Article 11 of the Pakistan-Switzerland BIT is not limited to contractual patties is no reason to exclude contracts from its meaning".[197] Any view of article would deprive the Art, 11 and its effect utile regarding the investment of plaintiff other than those which are sustained by SGS. The tribunal bring into being that it was not convinced "that rejecting SGS's reading of article 11 would automatically reduce that article to pure exhortation, that is, to a non-normative statement."[198] This gives birth to two different possible meanings to the umbrella clause which are given below;

First is that the "confirmation in a treaty which includes that a contracting party is bound under and pursuant to a contract, or a law or other local law issuance could, signal an implied affirmative agreement to enforce implementing rules and regulations"[199] which might be essential or suitable to give effect to a contractual or constitutional responsibility in favor of investors of the other contracting party that would otherwise be a dead letter. And the second is that the violation of certain provisions of a State contract with an investor of another state may amount to the

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[196] Ibid.
[197] Christoph Schreuer, "Travelling the BIT route," *The Journal of World Investment* 5 (2004): 231-256., 253.
[198] SGS v. Pakistan, par. 172.
[199] Ibid.

violation of a treaty provision for example article 11 of the BIT signing a contracting party continuously to certify the observance of contracts with investors of another contracting party in exceptional cases. Further more if a contracting party was to take action that essentially impede the capability of an plaintiff to put on trial its complaints before an international arbitration tribunal or was to reject "to go to such arbitration at all and leave the affected party only the option of going before the local tribunals of the contracting party that the contracting party may be regarded as having failed within the meaning of article 11 of the Swiss-Pakistan BIT."[200] Again the Tribunal in *SGS v. Philippines* accurately noted "that the tribunal has failed to give any clear meaning to the umbrella clause"[201] referring to this part of SGS v. Pakistan judgment.

Resultantly we come to know that his explanation and interpretation of umbrella clause is not clear and has many doubts and it gives birth to a number of questions for example what is an implied affirmative commitment to enact implementing rules and regulations? Will the host state be in breach of the umbrella clause if it is failed to take governmental dealings which are encouraging to the assets? And if it is so then what kind of actions would be satisfactory for a state to abide by its responsibility under this provision? Is it a matter-of-fact to see a breach of the umbrella clause if the host state fails to enforce the rules and regulations without any reason with its unwilling behavior, any material damage to the investor? Furthermore, the tribunal's second approach that "under what exceptional circumstances the tribunal does not distinguish these exceptional circumstances but it would leave this matter to future tribunals to determine themselves whether or not the circumstances are exceptional

[200] Ibid.
[201] SGS v. Philippines, par. 125.

or not."[202] It will amount to an extreme legal issue and will create doubt that every time such a clause is at issue. The doubt will be in this meaning that that the two interpretations given by the tribunal settlement the umbrella clause much in that case if any *effet utile*. Secondly the simple meaning of the words on its own gives direction towards a much broader effect.

A tribunal of them came to a highly distinct result when it interpreting the performance of obligations that the "clause was the one constituted in *Eureko v. Poland*. Here, the tribunal analyzed Art. 3.5 of the Dutch-Polish BIT which states that each contracting party shall observe any obligations it may have entered into with regard to investments of investors of the other contracting party."[203] The tribunal highlighted that this provision is "a rule of public international law which needed to be interpreted in accordance with the Vienna Convention."[204]

Article 31, paragraph 1, of the Vienna Convention stated "that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[205]

The ordinary meaning of a provision is "that a state shall observe any obligation it may have entered into with regard to certain foreign investments is not obscure." The phrase, "shall observe" is imperative and categorical. "Any" obligations is capacious and it means that not only obligations of a certain type, but any means "all obligations entered into contract with regard to investments of investors of the other contracting

[202] Ibid.
[203] Eureko v. Poland, par. 244.
[204] Vienna Convention on the Law of Treaties, 1969.
[205] Eureko v. Poland, par. 247.

party."[206] Background of article 3.5 is that a treaty whose object and purpose is the encouragement and mutual safeguard of investment is a treaty which contains specific provisions deliberated to bring about that end of which article 3.5 is one. It is well established rule "that treaties and their clauses are to be interpreted so as to make them effective rather than ineffective."[207] So the Government of Poland has entered into obligations vis-à-vis Eureko with regard to the latter's investment, and to the extent that the "Tribunal has found that the Respondent has acted in breach of those obligations and finally it falls under the violation of Article 3.5 of the Treaty."[208]

All the points discussed above conclude the result that violations of a contract at the same time will be the violation of article. 3.5. in the BIT.

II. The Umbrella Clause as a Provision "Susceptible of Almost Indefinite Expansion":

In the decision of SGS vs. Pakistan at para.166, the Tribunal advocated quite clearly in favor of a narrow interpretation because of the SGS's approach for the umbrella clause would turn the provision "susceptible of almost indefinite expansion."[209]

Obviously, this cannot be turned as legal argument and a narrow interpretation cannot be justified merely for the reason that a provision in BIT has far-reaching effects. Indeed, this stance is quite correct because even the States know very

[206] Ibid., par. 246.
[207] Ibid., par. 248.
[208] Ibid., par. 244.
[209] SGS v. Pakistan, par. 166; El Paso v. Argentina, par. 72.

well and agree upon the fact that there exist potential effects of the BIT provisions. This is quite apparent from one prominent example showing this was indeed a fact.

In view of the decision in SGS vs. Pakistan, a letter referred to ICSID by the Swiss Government emphasized that it was "alarmed about the very narrow interpretation given to the meaning of [the umbrella clause] by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions."[210]

In reality, this is applicable to every state and all BT provisions. The states are deemed to draft the clauses differently in BIT, where the state and party have furnished investors a lower level of protection.

III. Though Exception to General Rule, the Umbrella Clause Presents No Evidence to Show What the Contracting Parties Intent For.

In the decision of SGS vs. Pakistan, the umbrella clause was explained by the Tribunal as an exception to the general rule, where refers to a violation committed by a contracting state does not itself amount to a violation of international law, unless there appears to be a clear evidence showing the intention of the contracting parties whether the clause was given such far-reaching effect as claimed by the claimant. It

[210] Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy-Secretariat General dated 1 October 2003.

was held:

> Considering the widely accepted principle with which we started, namely, 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, law, and considering further that the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, [...] we believe that clear and convincing evidence must be adduced by the Claimant [...] that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan Investment Protection Treaty in incorporating Article 11 in the BIT. We do not find such evidence in the text itself of Article 11. We have not been pointed to any other evidence of the putative common intent of the Contracting Parties by the Claimant.[211]

It is preliminarily necessary to note here that the exception to the general rule applies when due to the insertion of the umbrella clause, a violation of contract constitutes to a violation of international law. Now the difficulty is whether a restrictive interpretation should be applied to this exception of a general rule. Considerably, if this refers to an interpretation to a rule then the answer seems to be a valid one, whereas simultaneously a 'restrictive interpretation' may not be such restrictively applied which may render the exception as null and void. In other words, a restrictive interpretation should be applied in such a way that leaves the clause to be meaningfully applied.

[211] SGS v. Pakistan, par. 167.

On the other hand, there is no evidence found by the Tribunal leading to the fact that the principle of an exception to the general rule may be interpreted in a restrictive way. Moreover, such interpretation may also lead to outright conflict with the results coming out of the application of interpretative rules as mentioned above, meaning thereby such rules are widely accepted ones as a result of customary and treaty law.

Being the outcome of ordinary meaning given to the words used by the parties, these rules are formulated and set at naught. That is why, it remains completely impractical to the contracting parties to a treaty to attach "clear" evidence" which shows in clear terms as to what they meant to say while stipulating exceptions from a general rule in respect of its having far-reaching consequences. Hence not prior to the signature of Kellogg-Briand Pact[212] in 1928, the established rule of international law was that the legitimate way of policy was only possible by way of use of force. In case, if the argument somehow was raised over the legally binding effects of the treaty, it was the parties who had to show "clear evidence" as what indeed intended by them was the renouncement of the use of force in international relations.

IV. Other Substantial BIT Standards Would Be Rendered Superfluous

The general contention regarding the interpretation of the umbrella clause is that due a wider interpretation of the umbrella clause, all other current standards of treatment are rendered as "substantially superfluous".[213] According to the Tribunal in SGS vs. Pakistan:

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[212] "Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy", signed in Paris, 27 August 1928.
[213] SGS v. Pakistan, par. 168

> There would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract, or of municipal statute or regulation, by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party.[214]

For Schreuer, this decision was "not clear why the acceptance of the umbrella clause as covering breaches of contract would have made the BIT's substantive provisions superfluous. The BIT's substantive provisions deal with non-discrimination, fair and equitable treatment, national treatment, MFN treatment, free transfer of payments and protection from expropriation."[215] These issues are not normally covered in contracts. Therefore, extending "the BIT's protection to investment contracts would not make the substance of a BIT superfluous."[216]

In El Paso vs. Argentina, the Tribunal advocated that a narrow interpretation should be preferred in view of its decision taken in SGS vs. Pakistan and it observed in a very description manner as:

> the interpretation given in *SGS v. Philippines* [...] renders the whole Treaty completely useless: indeed, if this interpretation were to be followed – the violation of *any legal obligation* of a State, and not only of any contractual obligation with respect to investment, is a violation of the BIT, whatever the source of the obligation and whatever the seriousness of the breach – it

[214] Ibid.
[215] *Schreuer*, Travelling the BIT Route, 152.
[216] Ibid.

would be sufficient to include a so-called "umbrella clause" and a dispute settlement mechanism, and no other articles setting standards for the protection of foreign investments in any BIT. If any violation of any legal obligation of a State is *ipso facto* a violation of the treaty, then that violation needs not amount to a violation of the high standards of the treaty of "fair and equitable treatment" or "full protection and security."[217]

Such inconsistent observations were not still considered whether a wider interpretation the *pacta sunt servanda* clause would result all the treaty standards as superfluous. If the yes is positive than would it mean that the umbrella clause must be interpreted narrowly? or would it suggest that as an established rule under the international law that the treaties are required to be interpreted in such a manner that its literal meaning given to one of many treaty provisions leads to entirely fulfil the function of other treaty provisions, so that the umbrella clause must be narrowly interpreted in order to render a substantial scope of application to other provisions?

In case of first submission as to whether the umbrella clause should be interpreted with narrow version, it is obvious that the treaty provisions of observance of commitments cover the scope of obligations and are heavily dependent each other. Hence, the effects of interpretation of umbrella clause may render large parts of a BIT obsolete, if it is narrowly interpreted. This issue is to be discussed in more detail in Part 3, whereas it is worth-mentioning here that basically, there is no uniformity in the drafting of umbrella clauses and hence due to their different designs, the different

[217] El Paso v. Argentina, par. 76.

conclusions are expected. Secondly, whether the obligations are covered under the umbrella clause has now begun to develop the case law on this point. Although the phrase "obligations entered into with respect to investments" are mostly referred to "specific commitments" by the tribunals and hence, the effect of the umbrella clause is only considered as specific then a general one for violation of specific commitments, the tribunals' decisions are vary to a different decisions in dealing with the scopes of obligations to be "specific". Whereas in SGS vs. Philippines, it was observed by the tribunal that the "specific" includes "collateral guarantees, warranties or latters of comfort"[218]and in LG&E vs. Argentina, this was considered by the Tribunal to be applicable "even to provisions of a host state's Gas Law."[219] However, it is not accepted so far by any Tribunal "that the umbrella clauses also cover obligations under municipal law."[220] This broad view could result in circumstances that many "protective BIT standards could be deprived of at least some of their significance."[221] Having referred in Part-3, it remains uncertain as if the word "commitments" can also come under the provisions in a state's municipal law and if the umbrella clause covers the state's municipal law too.

Let consider for agreement point of view that the scope of application, including "obligations" under the state law are covered by the umbrella clause within its broadest possible application; this would even not make other whole of treatment standards superfluous. However, there are also BIT standards, which "are neither covered by

[218] SGS v. Philippines, par. 117.
[219] LG&E v. Argentina, par. 174.
[220] SGS v. Pakistan; El Paso v. Argentina; Pan American v. Argentina.
[221] SGS v. Pakistan.

state contracts nor by municipal law."[222] Resultantly, such cannot be covered by the umbrella clause either, wherein the obligations under contracts and municipal law are covered. Other than that, it can also be thinkable that there can also be areas covered by standards of treatment under which the state too owns obligations under a contract or under its municipal law and hence also under the umbrella clause i.e. basically for "the standard of full protection and security and the standard of fair and equitable treatment."[223]

The current BIT standard may also be considered as of "national treatment". In other words, such standard requires the host state that the investors may at least be treated as its own nationals. Generally, such treatment of legal commitment is neither granted to foreigner investors by a state contract nor by a host state's municipal law. Hence, there is no obligation under which the umbrella clause can become operative by any means. An umbrella clause cannot be thus termed as to replace the "national treatment". This proposition also applies to the MFN (Most Favored Nation) clause; in fact here the foreigners are more frequently provided equal treatment under the domestic laws. Hence in the last case, it is yet admitted that the obligations are covered by the umbrella clause under the state's municipal law because different treatment provided to the foreigners on the basis of nationality would constitute to breach of the MFN clause as well as that of umbrella clause.

In order to deal with the standard of "full protection and security", a hypothetical example is considered as follows: the new rockets are tested by the ministry of

[222] Ibid.
[223] Ibid.

defence of the host country. During a rock test, a factory of foreign investor has been destroyed which hit the foreign investment. On the face of case, it amounts to a violation of the BIT standard of "full protection and security". Simultaneously under the law of the host country, it appears to be a hardly a case of BIT violation, which may "give rise to the obligation of the host state to pay compensation for the damage caused. Such an obligation arises under municipal law and given cover under the umbrella clause,"[224] leading to a result that if compensation is not paid under the municipal law, this would amount to a violation of this provision at the same time.

In such circumstances, the BIT provision of "full protection and security" would give boost up the umbrella clause as a second legal basis for a BIT claim. However, what if such incident occurs in a host state where no strong civil law system is found in force? In case where the damages cannot duly be claimed as compensations under the municipal law, the operation of the umbrella clause provides no effect and hence, the essence of "full protection and security" clause act as protective measure for the investor. Summarily, this situation may significantly give rise to the fact that "even the broadest interpretation of the umbrella clause not make other BIT provisions"[225] superfluous.

To conclude, it is indeed correct to say that in several cases, it is acts of and omissions of a state giving rise to the "violation of a protective BIT standard, which also constitute a breach of the *pacta sunt servanda* clause."[226] However, such behaviors which amount to violations of substantive BIT other than the umbrella

[224] El Paso v. Argentina.
[225] Ibid.
[226] Ibid.

clause are not prohibited under the laws and contracts. Hence, violation of the every set of facts "based on one the most current BIT standards could not necessarily constitute at the same time a breach of the umbrella clause."[227] It is the circumstances of the case which is to be taken into account to determine "whether both an ordinary BIT standard and the clause or only one or even none of them is/are violated."[228] Hence, both the common protective standards and the umbrella clause are justified to be included in a BIT, without the need of interpreting the umbrella clause in a narrow way whatsoever.

After coming to the conclusion of first of two questions asked at the outset of this sub-chapter as negative, the answer to the second questions turns out to be somewhat obsolete. However to reach on entirety, a second question is further elaborated in view of the rules of treaty interpretation. Considering the established rule as mentioned supra that the interpretation given to the treaty provision is to be in such manner which renders them effective instead of making them ineffective, it is perhaps correct to say that if the literal interpretation to one treaty provisions renders the other treaty provisions superfluous then the former must be narrowly interpreted to give cover to the latter some *effet utile*. Without any content, it cannot be deemed that the parties to the treaty simply have established legal rules. However as mentioned, not necessarily the umbrella clause is to be interpreted in an excessively narrow way, which may render other BIT provision effective. In El Paso vs. Argentina, the Tribunal convinced that if the umbrella clause is interpreted broadly, this would make other BIT provision into empty phrases, such as, the scope of the application of the umbrella

[227] Ibid.
[228] Ibid.

clause would be limited/restrained to obligations mentioned in state contracts, except "obligations" under municipal law. As already mentioned[229] supra, this would result in a very broad field of application for other BIT standards, whereas on the other hand, what this would have done is to deprive the disputed provision even of the key of its scope of application: contractual obligations. It still remains uncertain to determine as to whether such "interpretation of the umbrella clause is in line with the rule of *effet utile*."

V. The Existence of an Exclusive Dispute Settlement Clause in a State Contract:

In respect of the narrow interpretation of the umbrella clause, the Tribunal in SGS vs. Pakistan urged while challenging a BIT having contained an umbrella clause and a state contract existing between SGS and Pakistan which incorporated a dispute settlement under the Arbitration Act of Pakistan: "Any dispute [...] relating to this Agreement [...] shall be settled by arbitration in accordance with the Arbitration Act of the Territory as presently in force".[230] It was argued by the Tribunal for a reason why a restrictive interpretation required to be given to the umbrella clause was based on SGS's contention that "the PSI Agreement procedure must give way to the ICSID procedure contemplated in the BIT [...] because the contract claims are transformed into BIT claims by the operation of Article 11 of the BIT".[231] Following the claimant's contention, the Tribunal held that "[a] [...] consequence [of a broad interpretation of the umbrella clause] would be that an investor may, at will, nullify any freely

[229] Ibid.
[230] SGS v. Pakistan, par. 15.
[231] Ibid., 160.

negotiated dispute settlement clause in a State contract."[232] Hence, it was considered the reason why the umbrella clause was given very narrow and somewhat uncertain meaning.

The above analyses given by both the claimant and the Tribunal were derived from the assumption that the umbrella clause if broadly interpreted would render its effect of elevating the contract claims to the level of treaty claims. In such circumstances, it is up-to the ICSID Tribunal and not for arbitrator under the Pre-Shipment Inspection Agreement, to assess whether or not the contract claim was well-incorporated. Hence, the incorporation of the dispute settlement clause by the contract would turn to be an empty expression. According to one of the arbitrators, namely Rajski in Eureko vs. Poland raised his concerns while adding a dissenting opinion in the following words: "This way, jurisdiction clauses agreed by the parties submitting all contractual disputes between the parties to an international arbitration tribunal or a state court may be easily frustrated by a foreign contracting party".[233]

Emphasis is required over a view that the contract claims are transformed by the umbrella clause into treaty claims because such is not covered by the wording of clause and the same leads to confusion. Such misleading results into one possible circumstance that after its "transformation", the contractual claim would "disappear" and be taken over by the treaty claim. In such a case, the existence of dispute settlement clause in a contract happens to be no more effective. Considerably, if the umbrella clause is accepted as an independent BIT standard, the answer to this pretended absurdity is fairly easy.

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[232] Ibid., 168.
[233] Eureko v. Poland: Professor Jerzy Rajski's Dissenting Opinion, par. 11.

Where the umbrella clause is absent, a contractual claim would be dealt under contract exclusively for any breach of a contract. Where the umbrella clause is incorporated by a BIT, a breach of the contract results to a violation of the umbrella clause, and thus giving rise to a BIT claim without cancelling a contract claim. This means that a breach of contract constitutes, when an observance of commitments clause is contained, every time a breach of two separate claims: a contract claim coming out of a breach of contract and a BIT claim coming out of a breach of umbrella clause.

Significant to note here, the existence of such legal circumstance leads to no exception. On the other hand, it is quite known that each single act constitutes to several claims arising out of different legal basis. In incumbent case, the issue relates to a breach of contractual obligation based different legal grounds leading to contractual ones on one side and the umbrella clause on other side.

If it is accepted that a breach of contract results into two separate claims, the above mentioned difficulty remains no more since the ICSID arbitrator can exercise jurisdiction over the BIT claim, whereas the contract arbitrator would be restricted from exercising jurisdiction over the contract claim, due to the result of at least not broad interpretation of the umbrella clause. It is pertinent to note here whether the ICSID Tribunal can also exercise jurisdiction over the contact claim. This difficulty relates to a different proposition and at least not related to the umbrella clause.

It may also be objected that if the ICSID Tribunal is accepted to have jurisdiction over the umbrella clause claims, this is lead to unsatisfactory situation, such as, to

determine whether or not there is a breach of umbrella clause, the Tribunal has to consider there happened a breach of umbrella clause because only a breach of the contract constitutes a violation of the umbrella clause and this will be done by applying the domestic law of the host country. If it is concluded by the Tribunal that the contractual obligations has not been fulfilled by the host state, the Tribunal will look for a breach of the contract and hence, a breach of the umbrella clause as well. At the same time under the dispute settlement clause, proceedings can be initiated by the claimant in the chosen forum in the contract and a contract claim can be raised. During such proceedings, it might be possible that judge/arbitrator finds no violation of contraction obligations and hence dismiss the claim. Resultantly, two conflicting awards would come out of the same question whether or not there was a violation of the contract.

Being certain that undesirable results from conflicting dispute settlement, it still appeals no way out to over giving interpretation to a BIT clause in inconsistent way to avoid conflicting awards and decisions. On the other hand, it seems that the difficulty can persist from several situations and perhaps be settled on multilateral, if not on a broad, basis.

VI. Location of the Umbrella Clause in the Bilateral Investment Treaty

A frequent reference has been made by the Tribunal time and again in respect of the location of the umbrella clause in BIT, which has acquired quite significance. As in SGS vs. Pakistan, the location of the "umbrella clause was not among protective standards of treatment" instead it was kept amongst dispute settlement and final

provisions. As it was held by the Tribunal:

> Given the above structure and sequence of the rest of the Treaty, we consider that, had Switzerland and Pakistan intended Article 11 to embody a substantive "first order" standard obligation, they would logically have placed Article 11 among the substantive "first order" obligations set out in Articles 3 to 7. The separation of Article 11 from those obligations by the subrogation article and the two dispute settlement provisions (Articles 9 and 10), indicates to our mind that Article 11 was *not* meant to project a substantive obligation like those set out in Articles 3 to 7 [...].[234]

In SGS vs. Philippines, the location of the umbrella clause in the BIT was observed by the Tribunal with the following comments:

> [T]he Tribunal in SGS v. Pakistan found support for its conclusion in the fact that Article 11 is located at the end of the BIT, after the basic jurisdictional clauses, whereas if it had been intended to impose substantive international obligations it would more naturally have appeared earlier. This factor is entitled to some weight, and it is the case that where it appears (as it does in only a minority of BITs) the "umbrella" clause is usually located earlier in the text. But the Tribunal does not regard the location of the provision as decisive, having regard to the other considerations recited above. In particular, it is difficult to accept that the same language in other Philippines BITs is legally operative, but that it is legally inoperative in the Swiss-Philippines BIT merely because of its location.[235]

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[234] SGS v. Pakistan, par. 170.
[235] SGS v. Philippines, par. 124.

The decision of SGS vs. Pakistan was also referred by *Schreuer* without following notes: "[t]he argument based on the location of the clause in the BIT is a legitimate supporting argument in the Treaty's interpretation." However, it "cannot be extended to other BITs containing similar clauses" in which they "are frequently grouped together with the standards of treatment guaranteed by these treaties."[236]

The issue by briefly discussed by the Tribunal in Eureko vs. Poland as:

> "Insofar as the placement of the umbrella clause in the BIT – among the substantive obligations or with the final clauses – is of any significance (*in this Tribunal's view, little*), it should be noted that Article 3.5 of the BIT between Netherlands and Poland places its umbrella clause amidst the rendering of the Parties' substantive obligations".[237] [Emphasis added]

To conclude these statements, having location to the umbrella clause in the BIT can be raised as one the legal arguments, whereas such argument should not be given much significance and should not considered as decisive under any circumstances.

Part-3 Different Wordings – Different Scopes? How the Effects of Umbrella Clause can go Far-Flung?

As previously discussed in Part-2 which was related to the international responsibility of the host's state under the umbrella clause in view of the violation of obligations in respect of investments, there remains a question yet to be resolved that what kind of

[236] Schreuer, Travelling the BIT Route, 253.
[237] Eureko v. Poland, par. 259.

obligations are exactly covered under this provision. Since the umbrella clauses do not have any uniform wording, some clauses talk about "any obligation" and others refer to "specific commitments". However in some cases, the term "investments" is concerned to these obligations in general and in other clauses, the term "specific investments" is used. Whether the use of different terminologies or terms has any practical effects and what are such effects as such?

I. Scope of Obligations Covered by Umbrella Clauses:

That it is earlier discussed that the umbrella clauses has been articulated into different terms, there is no uniform results acquired in the decisions and analyses. The "different observance of commitments clauses is used to incorporate different kinds of obligations to have different scope of application,"[238] in view of the fact that how broad the clause has been articulated. Hence to start with a narrow drafted umbrella clause, it will also consider a broad drafted umbrella clause for analyses and further consideration.

According to Dr. F.A. Mann, an observance of commitments clause provides "that every party shall observe any obligation arising from a particular commitment it may have entered into with regard to a specific investment".[239] It was explained by him as "a provision of particular importance in that it protects the investor against any interference with his contractual rights".[240]Moreover, it was further elaborated by him that this clause applies when

[238] Ibid.
[239] Frederick A. Mann, "British Treaties for the Promotion and Protection of Investments," *British Yearbook of International Law* 52 (1982): 241-254., 245.
[240] Ibid., 246.

the State has entered into a particular commitment which imposes obligations. Such obligations may arise *from contract* with the State or *from* the terms of the *licence* granted by it." He concluded that "[thus if the *law of the land* provides that the State is liable for the torts of its servants this is not an 'obligation arising from a *particular commitment*' the State may have entered into.[241] [Emphases added]

It was obvious distinction made by Mann among "*general commitments*" (not being applicable exclusively to specific investment: such as, obligations arising out of the State's Law of Tort) and "*particular commitments*" (being applicable to specific investment only: such as, obligations arising from contracts or licences). Moreover, the latter are considered to be covered by the umbrella clause. This view is held to be in consistence with the wording of the clause. Hence, the umbrella clause does not cover either general commitments relating to investments in general or general commitments relating to specific investments.

The Tribunal held in SGS vs. Philippines that it is proved under umbrella clause that "[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."[242] [Emphasis added]. Being already wider a little bit, this clause is not restricted to "particular commitments" and hence, "any obligation" is also covered:

[It will often be the case that a host State assumes *obligations with regard to*

[241] Ibid.
[242] SGS v. Philippines, par. 115.

specific investments at the time of entry, including investments entered into on the basis of *contracts* with separate entities. Whether *collateral guarantees, warranties* or *letters of comfort* given by a host State to induce the entry of foreign investments are binding or not, i.e. whether they constitute genuine obligations or mere advertisements, will be a matter for determination under the applicable law, normally the law of the host State. But if *commitments* made by the State *towards specific investments* do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X(2).[243] [Emphases added]

It is significant to mention here that the terms "specific" or "particular obligations" did not itself denote anything, it was the tribunal which derived such terms from "with regard to specific investment" that "general obligations" is held not to be covered under.

In *Noble Ventures*, a broad provision of Article II 2(C) of the US-Romainan BIT was interpreted by the Tribunal in respect of words "any obligation [a party] may have entered into with regard to investments".[244] It was held that

> [It is difficult not to regard this as a clear reference to investment contracts. In fact, one may ask what other obligations can the parties have had in mind as having been "entered into" by a host State with regard to an investment. The

[243] Ibid., par. 121.
[244] Noble Ventures, par. 51.

> employment of the notion "entered into" indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Art. II (2)(c) would be very much an empty base unless understood as referring to contracts.[245]

Interestingly, it needs to be highlighted that the wording of the umbrella clause did not clearly restricts its scope of application to "specific commitments", but it was interpreted by the Tribunal by deriving its notion from "entered into" that only "specific commitments", which results into the same result as discussed earlier.

Doubts have been mentioned by the Tribunal

> as to whether [...] Art. II(2)(c) of the BIT perfectly assimilates to [the] breach of the BIT any breach by the host State of any contractual obligation as determined by its municipal law or whether the expression "any obligation", despite its apparent breadth, must be understood to be subject to some limitation in the light of the nature and objects of the BIT.[246]

Hence, the Tribunal ousted some specific obligations from the umbrella clause's scope.

The first case was LG&E vs. Argentina, wherein it was accepted by the Tribunal that the umbrella clauses cover obligations which arise out of the host state's municipal law. The tariff scheme was regulated and fixed under the Gas law of Argentina LG&E

[245] Ibid.
[246] Ibid., par. 61.

investment, which provided certain guarantees relating to the calculation of the tariff in dollars before conversion to pesos with a price index and no price controls without indemnification. However due to economic crisis, Gas Law was amended vide Regulation by Argentina and hence, the guarantees were withheld. Under article II (2)(c) of the relevant BIT, a broader term was used which provided that "[e]ach party shall observe any obligation it may have entered into with regard to investments."[247]

It was held by the Tribunal that "such [a] clause [...] creates a requirement for the host State to meet its obligations towards foreign investors, including those that derive from a contract."[248] It assumed that the umbrella clause covered only specific obligation and it referred to the Gas Law and the Regulation "that these provisions were not legal obligations of a general nature. On the contrary, they were very specific in relation to LG&E's investment in Argentina, so that their abrogation [was] a violation of the umbrella clause."[249]

In respect of the umbrella clause, a role adopted by the tribunal was much similar to that of so-called "stabilization clauses", which are often found in a state contracts with certain stipulation that the investor's investment will not be affected in case of adverse changes adopted by the host state in its legislation. Hence, there seems a slight difference among the situation drawn by tribunal from the umbrella clauses and from a stabilization clause. The latter is not violated if the law is amended because state sovereignty is not limited by the stabilization clause. In case of only adverse changes

[247] LG&E v. Argentina, par. 169.
[248] Ibid., par. 170.
[249] LG&E v. Argentina, par.174.

affecting the investment, it is held to be violated. In LG& E vs. Argentina, the Tribunal held that the umbrella clause is violated by mere "abrogation" of the law through a regulation.

It is uncertain whether such view is consistent with the wording of the umbrella clause. Whether such provisions amount to wrongful violations obligations or whether the state has such obligations towards the invested under such law? As per the decision of the Tribunal, there existed a duty not to amend the law, though not expressly state anywhere neither incorporated within a contract nor by the law itself. It further remains uncertain whether even law if not applied would also constitute a breach of the umbrella clause because there exists no condition laid down by the law expressly which requires obligation to be applied over the investor. Conversely, a situation might be different where an obligation is stipulated by the law to apply or restriction over its amendment in respect of the investor. In such situations, whether abrogation or non-appliance of the laws or regulations could said to amount a breach of the legal or contractual provision and hence of the umbrella clause. Hence, the term "obligation entered into with regard to investments" appears to be quite difficult in a law without incorporating such explicit obligations.

Again referring back to the wording of umbrella clause, it is noted that the position in LG&E vs. Argentina regarding umbrella clause was acquired in very general terms but its scope of application concerning "specific obligations" has been limited by the tribunal having excluded its "legal obligations of a general nature". A general analyses gathered from these cases is that only a breach of specific obligations would trigger the breach of umbrella clause irrespective how generally it could be termed i.e. when

investment in question is particular. Surprisingly to note here, the umbrella clauses despite having different words are somehow least inclined to be interpreted similarly by the tribunals. Not being strict, this leads the tribunals to differently interpret "different wordings and develop different bodies of case law"[250] in view of every different umbrella clause type.

II. Obligations and its Scope of Violations Covered:

When the observance of commitments provisions does not an obligation with its scope, there exists no violation of such obligation being triggered under the state's international responsibility under such clause. Conversely, does it mean that if a "commitment is covered by itself, will it mean any violation of such amount to a breach of the umbrella clause?" The term "shall observe" seems to provide no much wider interpretations. On its face, "any violation of the covered obligations would constitute a breach of the umbrella clause," whereas it yet requires to be decided by the case. However in view of some scholars, the questions remains as to what kind of violations amount to a breach of umbrella clause's protection.

According to Mann, there are no limitations on the violations covered by the umbrella clause. For him, the effect of the umbrella clause it render wrongful "any interference with [the investor's] contractual rights, whether it results from a mere breach of contract or a legislative or administrative act [...]". The effect of the violation could be of, for instance: "[t]he variation of the terms of a contract or licence by legislative measures, the termination of the contract or the failure to perform any of its terms, for

[250] Ibid.

instance, by non-payment, the dissolution of the local company with which the investor may have contracted and the transfer of its assets [...]."[251]

In Eureko vs. Poland, R. Dolzer and M. Stevens were quoted by the tribunal as saying: "[this] provision [...] protects the investor's contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts...".[252]

Still it has not been argued that the umbrella clause only covers specific kinds of violations and it is quite possible that such argument may be raised in near future. In such a situation, it would be necessarily required to make to distinction between the two separate qualities of what type of obligations, the observance of undertaking clause cover. Conversely, it would also require to be answered what kind of violations of such obligations, it would fall in.

[251] Ibid., par. 174.
[252] Ibid.

Chapter 4:

Significance of Wording: The Interpretation of Language Used in Umbrella Clause

4.1 Primary Concept of the Clause:

The investors[253] or the investment[254] can be protected under the observance of undertaking clauses with the titles, such as Observance of Commitments,[255] *Trato Mas Favorable*,[256] Promotion and Protection of Investment,[257] Undertakings Given to Investors,[258] Special Commitments,[259] Applicable Laws[260] and such like others. Thus, the incorporation of such clauses offers more security in terms of observation of obligations to the investor, which the national laws of the State might not offer. Being the *raison d'etre* of the clause, this cannot be considered as merely as an ornamental provision. Undoubtedly, it is the drafting of the clause which provides the key to interpret the clauses "as properly creating a treaty obligation between Party States and the clauses purely endorsing their international law obligations."[261] For instance, the BIT reached between the Italy and Jordan reads as follows: "Each Contracting Party

[253] Article 2(4) of the "Greece-Serbia and Montenegro BIT of 1997", which reads as "Each Contracting Party shall, in its territory, respect in good faith all obligations concerning a particular investor of the other contracting party undertaken within its legal framework."
[254] Article 4(1) of the "Finland-Estonia BIT of 1992" which reads as "Each Contracting Party shall observe any obligation it may have entered into with regard to investments".
[255] Article 11 of the "Switzerland-Kazakhstan BIT of 1994".
[256] Article 10 of the "Bolivia-Peru BIT of 1993".
[257] Article 2(2) of "The UK Model BIT".
[258] Article 10 of the "Australia-Poland BIT of 1991".
[259] Article 10 of the "France-Mexico BIT of 1998".
[260] Article 11 of the "India-Mauritius BIT of 1998".
[261] El Paso v. Argentina.

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

However, no obligation arises from the inclusion of such clause, which binds either party to act in protecting the investors from the other State or observe any undertakings arising out of the investments, whereas it hardly extends least protection of legal treatment to aliens/investors and incorporates a good faith clause, which is not different from the already existing international law obligations being observed by the States relating to foreign investments. On the other hands, the Tribunal interpreted some cases where it is difficult to reconcile the wording with the text. The example can be taken from the Switzerland-Pakistan BIT, which gives directives to either party to "constantly guarantee the observance of the commitments."

According to the Oxford English Dictionary, the noun 'Guarantee' means 'a formal assurance that certain conditions will be fulfilled', and the verb means 'provide a guarantee for something; promise with certainty'.[262] Hence, the phrase "constantly guarantee the observance of the commitments" attaches its ordinary meaning to place serious obligations on the State to regard its commitments its investor. However, the interpretation given by the Tribunal is much narrow in prospect and denies its effectiveness, which has been guaranteed to the Switzerland-Philippines BIY of 1997.[263] Apparently, such clauses are not only mandatory but rather ambiguous, which

[262] Compact Oxford English Dictionary of Current English, 3rd ed., s.v. "guarantee".

[263] Article X (2) of the BIT reads: "Each Contracting Party shall observe any obligations it has assumed with regard to specific investments in its territory by investors of the other contracting party". This has been held to be a proper umbrella clause, possibly due to the mandatory "shall observe" clause provided in it.

[263] A more in-depth analysis of the SGS v. Pakistan case along with the textual interpretation of the umbrella clause contained in that BIT is found in the following chapter.

leads the subjective interpretation to a great extent and it often goes against them. The State is under positive obligation to fulfill its commitments, if the clause contains words "shall observe", otherwise the non-fulfillment of such obligations under a clause amounts to a violation of the treaty. However in case of more softly drafted clause which requires the State to only whether the commitments are being maintained, the slight unfair treatment will not bring into the protective measures taken by the clause. Hence, a proper observance of undertaking has also to be through this cursory acknowledgment of duties owed to investors.

4.2. Ambiguity in Language: A Fatal Flaw:

Having deduced from earlier argument, it is further elaborated with the example of Australia-Poland BIT of 1991. Article 10 of which reads: "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."[264]

In respect of invoking this clause, there seems to be no dispute but its deficiency can easily be seen. The phrase "subject of its law" is uncertain and ambiguous for failing to define whether it referred to law existing at the time of signing of the treaty or law existing at the time of breach. Generally, the governments bring change in the law during the intervening times, which means that laws of the states become fundamentally different what was perceived at the time of existing State Obligations. The obligations enriched under the international law are only sacred in any

[264] Article 10 of Australia-Poland BIT of 1991.

circumstances, hence, such clause cannot be termed as a proper umbrella clause rather it is reappearance of the international obligation of the State. Moreover, the phrase "do all in its power to ensure" is also vague and uncertain, leading to adverse interpretations.

In addition, few more variations in respect of this clause are further elaborated below.

4.3. The Written Undertakings:

Article 11 of the Austria-Chile BIT 1996 reads: "A Contracting Party shall, subject to its law, adhere to any written undertakings given by a competent authority to a national of the other Contracting Party with regard to an investment in accordance with its law and the provisions of this Agreement."[265]

There is no doubt that each State generally gives its undertaking in writing. Hence, the inclusion of this clause may not retain such great importance, whereas it still occupies strength for attaining significance in a case pertaining to future verbal agreements between the investor and the State.

What is important for the effectiveness of the umbrella clause is to be drafted in clear and precise manner. Careful consideration must be given in dealing with whether such clause would protect the undertakings in general or particularly in respect to investments as well. Moreover, it also has to deal with whether such clause includes only contractual undertakings or unilateral too, and whether the terms such as "shall observe" or "shall respect" has been incorporated into the clause clearly imposing duty on the State to protect the investments.

[265] Article 11 of the Austria-Chile BIT 1996.

4.4. The Applicability of the Clause:

The application of the observance of undertaking clause can be extended to undertakings "entered into by the State"[266] or assumed by the State.[267] Initially, it appeared that only contractual obligations would be covered under the phrase "obligations entered into by the State" in relation to contractual obligations "assumed by the State" through legislative or administrative or any other unilateral measures taken by it. Practically, the unilateral undertakings do not have unanimous legal opinion at all. As per Schwarzenberger,[268] unilateral undertakings are binding like consensual ones, whereas Fatouros states that the contractual commitments are only governed under the clause by States to aliens.[269] According to Mann, the clause will be only applicable to specific commitments made in terms of specific investments or more precisely to contractual obligations or obligations under a licence, irrespective of whether the clause might be broadly drafted.[270] In above both cases, unilateral undertakings are effectively overruled because the bilateral negotiations take place between the State and the investor. In SGS vs. Pakistan, this analogy was supported and held that unilateral undertakings are covered under the phrase "commitments entered into".

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[266] Article 2 of the "UK Model BIT" which reads "Each Contracting party shall observe any obligation it may have *entered into* with regard to investments of nationals or companies of the other Contracting Party". [*Emphasis added*]

[267] Article 8(2) of the "German Model BIT 1991" which reads as "Each 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". [*Emphasis added*].

[268] Schwarzenberger, "The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary," 154.

[269] Arghyrios A. Fatouros, "An International Code to Protect Private Investment-Proposals and Perspectives," *University of Toronto Law Journal* 14 (1961): 77-102., 88.

[270] Mann, "British Treaties for the Promotion and Protection of Investments," 245.

Unilateral undertakings are expressly excluded under a BIT, which can be evident from examples like given in the Austria-Chile BIT of 1997. Article 2(4) reads: "Each Contracting Party shall observe any contractual obligation it may have entered into towards an investor of the other Contracting Party with regard to investments approved by it in its territory."

Having incorporated the legal maxim of expression *unius est exclusio alterius*, the contractual undertaking takes spontaneously takes precedence over the unilateral undertakings by excluding its applicability over bilateral/contractual undertakings.

Another controversy involves is that if a clause incorporates the words "any obligation", do they imply to contractual obligations only or other obligations are covered too under its interpretation? In Noble Ventures,[271] the Tribunal held that the interpretation of "any obligations" only cover investment contracts. When all obligations are undertaken by the parties in respect of specific investment in a BIT, they only refer to the contractual obligations keeping in mind the investment contract only. However, the decision of SGS vs. Pakistan was clarified by the Swiss Authorities that the BIT took place with their intentions to the following effects: "...they are intended to cover commitments that a host State has entered into with regard specific investments of an investor...which played a significant role in the investor's decision to invest or to substantially change an existing investment..."[272]

[271] Noble Ventures Inc. v. Romania
[272] Katia Yannaca-Small, "Interpretation of the Umbrella Clause in Investment Agreements," OECD Working Papers on International Investment 2006/3, 16.

However in reality, not only specific commitments rather all commitments coming out of the investment contract whether verbal or written, express or implied, are held to be covered and applicable under a BIT because such commitments have played very key role towards the investment. It often happens during the negotiations that for diplomatic or other concerns, the contract fails or omits to contain terms which remain significant in discussion and turns out to be backbone for the contract to exist. If the analysis of the Switzerland is considered and held significant, such promises having tacit undertakings and insinuations come into play under the scope of the clause and their violation shall amount to the violation of Treaty. Hence, no decision endorses such a view and generally, a result is much narrower rather pragmatic one which hardly exceeds the scope of the contract. However, the adverse point of view is not arbitrary and surely not impossible.

The third thing is that it is ambiguous whether the clause has binding effects in respect of the obligation over the State not to change its law adversely affecting the specific investment till the period of the contract. The obligations of the State towards the specific investor are only covered under the Umbrella clause, whereas the law can only be abrogated or amended obligations in respect of investment under its express provisions but it does not have any obligation *stricto sensu*. Resultantly in the absence of express provision included in the BIT or investment clause, it remains uncertain to read it with the clause.[273]

At last, it is still doubtful whether only violation relating to obligations or specific ones in nature are covered under the clause. On face of a silent case law, it is not easily

[273] LG&E v. Argentina.

possible to determine how this factor shall be interpreted by the Tribunal. Some attempts can be made by evaluating the general wordings of the clause. Hence, the typical clause reads "Each Contracting Party shall observe any obligations" and the meaning of such phrase is exactly the same as any violation of the obligations entered into particularly for specific investment contracts amounts to a violation of the clause. This view was supported by the Tribunal at least in one decision.[274] Hence, the breach of contract or a licence through a legislative or administrative act shall be considered as violation of obligations and hence a violation of the treaty.

4.5. The words effects:

Several conclusions have been drawn by the courts while determining the effects of the clause based on its wordings. Some adjudicated in favor of effective approach and others for the restrictive approach based on the interpretation of wordings. The former requires the effective utility of the clause to be considered. It gives wordings a valid interpretation, which makes the clause useful and helpful in protecting the substantive rights of the parties. In my analyses, such observation is weak argument in relation to the Austinan approach of positive law, which considers morality or custom apart from the legal rules. Hence, the clause aims for it to be placed in international context, out of the domestic jurisdiction of the host state, irrespective of its consequences and results. According to Schwarzenberger, the effect of the clause is "to transform obligations towards objects of international law, which as such are beyond the pale of international law, into obligations under international law. For this purpose, it does not matter whether public contracts are treated as falling under any

[274] Eureko v. Pola.

particular system of municipal law, under legal rules abstracted from a number of such legal systems, or are allocated to a separate legal system of quasi-international law. Whichever of these solutions is preferred, it is clear that such relations are not per se governed by international law".[275] However, the views of the Schwarzenberger support the application of the rules of public international law, which previously come under the domain of private international law. Unless the contractual claims are elevated by the umbrella clause to the treaty level, this cannot be possibly done. Hence, an effective interpretation of the clause is voted by Schwarzenberger and the same has been adopted by the Tribunal in decisions in Noble Ventures and to certain extent in SGS vs. Philippines.

The opponents have objected over this interpretation, rather supported restrictive approach. Under my analyses, such interpretation is envisaged within the diameter of Dworkin's school of thought. Having considered the effect of a liberal interpretation of the words on the State and the investor, these jurists consider that such effect of a liberal interpretation would allow the conversion of contractual claims into treaty claims which would undermine the sovereignty of the states. The test of effectiveness applied on the interpretation by these jurists is that such liberal interpretation of words would lead other provisions ineffective.

On the other hand, another school of thought is that it is the language of the clause, which enables a foreign investor a right to bring contractual claims before international forum but fails to replace the original contract claim with a treaty claim. However, the proper law of contract is applied for interpretation of the contract

[275] Schwarzenberger, "ABS-Shawcross Draft 2Convention on Investments Abroad", 154-155.

claims before an international forum. Hence under the international law, the law expressly provided in the contract would be the proper law of contract or in the absence of such express provision, the proper law of contract would be the one having the closet and most real connection with the transaction.[276] Another possibility to answer this view is that the application of proper law of contract might defeat the whole purpose of inserting the umbrella clause if the terms of the contract are overruled by applying the proper law of contract.[277]

The ICSID Tribunals have already given due consideration to these different views in several cases beginning from SGS vs. Pakistan. Now onwards in the next chapter, a critical appraisal of such cases has been given, dealing with the umbrella clause in detail or discussing some significant and established parameters concerning the interpretation of umbrella clause.

[276] As per Lord Denning in *In re United Railways of Havana & Regla Warehouses Ltd* [1961] A.C. 1007, 1068.
[277] The claim may be in relation to certain acts that were lawful under the prior law of the host State but became unlawful by virtue of certain legal amendments. Supposing the law of the host State is the proper law of contract, under the new laws the claims will not be given effect to. This is exactly the kind of situation that the legislators wanted to protect the investors from, while drafting the clause. For details see Chapter 1.

Chapter 5:

Recent ICSID Decisions on Competing Contract and Treaty Claims

5.1. The Vivendi Case:

A relationship between treaty and contractual claims has been examined generally by the ICSID tribunal in its decision in SGS vs. Pakistan with following observations: "As a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders."[278]

However, ad hoc Committee in Vivendi had already "discussed and documented in extenso" regarding this proposition, which the Tribunal comprehensively quoted from that decision on the relationship between the contract and treaty as follows:

"In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by

[278] SGS v. Pakistan, para. 147.

international law; in the case of the Concession Contract, by the proper law of the contract.

.....

Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.....

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.

On the other hand, where the fundamental basis of the claim is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in the contract between the claimant and the respondent State—cannot operate as a part of the application of the treaty standard. At most it might be relevant—as municipal law will often be relevant—in assessing whether it has been a breach of the treaty".[279]

5.2. Societé Générale De Surveillance S.A. VS. Islamic Republic of Pakistan

In SGS vs. Pakistan, it was considered whether the Tribunal could exercise jurisdiction over the Claimant's contract claims in view of the dispute resolution clause of the BIT

[279] SGS v. Pakistan, paras. 96, 97, 98 and 101, respectively.

under article 9)[280] and PSI agreement clause 11[281] between the parties in the following words:

> We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations to the PSI Agreement, can both be described as 'disputes with respect to investments', the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the factual subject matter of the disputes, does not relate to the legal basis of the claims, or the cause of action asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9 ... [Thus, we do not see anything in Article 9, or in any other provisions of the BIT that can be read as vesting the tribunal with jurisdiction over claims resting *ex hypothesis* exclusively on contract.....We believe that Article 11.1 of the PSI Agreement is a valid forum selection clause so far as it concerns the claimant's contract claims which do not also amount to BIT claims, and it is the clause that this tribunal should respect.[282]

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[280] Switzerland–Pakistan BIT.

[281] The arbitration clause in Clause 11 of the PSI Agreement reads as follows: "11.1 Arbitration. Any dispute, controversy or claim arising out of, or relating to this Agreement or breach, termination or invalidity thereof, shall as far as it is possible, be settled amicably. Failing such amicable settlement, any such dispute shall be settled by arbitration in accordance with the Arbitration Act of the Territory as presently in force. The place where arbitration shall be is Islamabad, Pakistan and the language to be used in the arbitration proceedings shall be the English language."

[282] SGS v. Pakistan, para. 161. The Tribunal noted: "We are not suggesting that the parties cannot, by special agreement, lodge in this Tribunal jurisdiction to pass upon and decide claims sounding solely in the contract. Obviously the parties can, but we do not believe that they have done so in this case. And should the parties opt to do that, our jurisdiction over such contract claims will rest on the special agreement, not on the BIT."

In view of the above analyses, it was decided by the Tribunal that it lacked jurisdiction to try contractual claims of SGS.

5.3. Joy Mining Machinery Limited vs. The Arab Republic of Egypt:

Joy Mining[283] claimed that the tribunal had the jurisdiction on the basis of an observance of undertaking clause as well as DRC in the BIT. On the grounds that no "investment" fell within the meaning of the relevant BIT, the Tribunal reached on the following conclusion:

> Even if for the sake of argument there was an investment in this case, the absence of the Treaty-based claim, and the evidence that, on the contrary all claims are contractual, justifies the finding that the tribunal lacks jurisdiction. Neither has it been credibly alleged that there was Egyptian State interference with the Company's contract rights.[284]

Considering another argument of the claimant that the forum selection clause, if upheld, would not restrict the ICSID tribunal from exercising its jurisdiction, the Tribunal also heard the adverse argument of the respondents that in the presence of forum selection clause, the jurisdiction of the Tribunal is not amenable based on the views of the "decision in SGS vs. Pakistan (which upheld a forum selection clause concerning contract claims which even did not equate them to treaty claims) and the

[283] Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11
[284] Ibid., para. 82.

Vivendi decision (which decided the forum selection clause concerning contract claims to be applied)."[285]

It was also observed by the tribunal:

> It is necessary also to conclude that in the absence of any ICSID jurisdiction only the forum selection clause stands. There is no question here of either exclusive ICSID jurisdiction or of concurrent jurisdiction; even less so is there room here to adopt the solution of *SGS v. Philippines*, directing the parties to local courts first and suspending ICSID jurisdiction until that first step is completed.[286]

It was further analyzed:

> "90. The situation in this case is precisely that which the *Vivendi Annulment* Committee envisaged when holding 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.'
>
> 91. The rationale for this conclusion on contract-based claims and the validity of forum selection clauses is entirely logical, as it is the conclusion in the converse situation, that is, as in *Vivendi*, that the claim is treaty based:

[285] *Vivendi* Annulment Committee.
[286] Joy Mining v.Egypt, para. 89.

'... Where "the fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of the exclusive jurisdiction clause in a contract between the Claimant and Respondent state or one of its subdivisions cannot operate as a bar to the application of the Treaty standard".[287]

It was also noted:

"... the Respondent gave in the hearing the assurance and formal commitment that resort by the Company to UNCITRAL arbitration would be honored and the final award on the merits of the dispute would be the basis governing the release of the bank guarantees."[288]

It was also observed by the tribunal that it is the international legal obligation rested upon the respondent to "facilitate the enforcement of any award issued in the UNCITRAL case" where the intervention of the State is essential.

A request was made for cancellation of the Award on 22 December 2004 to ICSIB regarding the paragraphs wherein the assurances and formal commitment were observed by the Tribunal on behalf of the respondent through it counsel.

[287] Ibid., paras. 90 and 91.
[288] Ibid., para. 95.

5.4. SGS Societé Générale De Surveillance S.A. V. Republic of The Philippines

In SGS vs. Philippines, the question of jurisdiction was considered by the Tribunal in respect of the contractual dispute arising out of an investment under article VIII (2) of the BIT "irrespective of any breach of the substantive provisions of the BIT."[289]

Under Article VIII of the BIT, it was provided for the settlement of "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party". In case of dispute not settled by consultation between the parties, the investor was provided option to approach "either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration", whereas in case international arbitration, the investor was entitled to go before ICSID or UNCITRAL arbitration. It was held by the Tribunal that:

> *Prima facie*, Article VIII is an entirely general provision, allowing for submission of all investment disputes by the investor against the host State. The term 'disputes with respect to investments'...is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be 'a dispute with respect to investments'; so too would a dispute arising from an investment contract such as the CISS Agreement.[290]

[289] SGS v. Philippines, para. 129.
[290] Ibid., para. 131.

The other considerations which were expressed by the Tribunal while concluding the above views are as follows:

i. Under Article VIII(2), the law of the host state would be applied by the each of the forums under its competence;

ii. There should be express provisions mentioned in BIT, if the parties to the BIT want to restrict the claims arising from breaches of BIT between the investor and state to arbitration;

iii. The choice given for forum selection for resolution of investment disputes requires to be in proportion to the "purpose of the BIT to promote and protect foreign investments"; and

iv. The contractual disputes are naturally covered under the term "disputes with respect to investments" arising out of a relationship between investments and contracts, being recognized in accordance with the case law concerning the pre-contractual claims.[291]

The Tribunal observed that as per principle, it is upto the investor to bring the claim before the "ICSID arbitration under Article VIII(2) of the BIT, leaving behind the exclusive jurisdiction clause mentioned in the investment agreement."[292] Different view adopted by the Tribunal in SGS vs. Pakistan was considered by the Tribunal to rest its

[291] Ibid., para. 132.
[292] Article 11 of the Austria-Chile BIT 1996

conclusion, whereas it did not give weightage to narrow reading of the equivalent clause in the Switzerland-Pakistan BIT under Article 9 (wherein a term "disputes with respect to investments" was also mentioned) on the grounds that the scope of relevant provision could not be restricted under the legal classification of the claim.

Having considered its observations made in SGS vs. Pakistan that specific and exclusive provisions, clearly expressed, have precedence over the general provisions by overriding effect in respect of the dispute settlement agreements, the Tribunal did not approve a suggestion that "general language in BIT's dealing with all investment disputes should be limited because in some investment contract the parties stipulate exclusively for different dispute settlement arrangements".[293]

5.5. BIVAC VS Paraguay

The question of whether a breach of a contractual obligation may be elevated to an investment treaty violation has resulted in widely divergent views. The BIVAC v. Paraguay decision favours the more generous interpretation of umbrella clauses adopted in SGS v. Philippines and the recent SGS v. Paraguay award but departs from the narrow reading taken in SGS v. Pakistan. The tribunal's award on the merits is currently pending.

BIVAC is a Dutch-incorporated company headquartered in France. The dispute arose from a contract entered into among the parties for the facility of technical services for pre-shipment examination of imports into Paraguay. These services included the issuing certificates of inspection, appraising the reasonableness of prices charged by sellers, the physical identification of goods before shipment, estimating custom values,

[293] SGS v. Philippines, para. 134.

training Paraguayan personnel and assisting in the establishment of a database. The Ministry of Finance was obliged to pay fees for technical services which were calculated as a percentage of the Free on Board value of the goods that were to be paid on a monthly basis. The contract was to run for a term of three years that could be extended periodically.

BIVAC brought the arbitration claiming that of the 35 invoices issued over the three-year period, 19 of those invoices amounting to US$22 million remained unpaid. BIVAC alleged that the various government bodies confirmed the validity of the contract and BIVAC's compliance with its obligations. Notwithstanding these affirmations, BIVAC claimed that no payments were made. BIVAC filed a Request for Arbitration on 16 February 2007 under the *Paraguay-Netherlands BIT* (the "Treaty") seeking US$36 million plus interest for a violation of the BIT's protection against deprivation of investment, unfair and inequitable treatment and unreasonable measures, and failing to observe obligations entered into with respect to the investment.

On March 2, 2007, the ICSID Secretariat asked BIVAC to clarify two issues: (1) how the contract qualified as an investment under Article 25 of the ICSID Convention and (2) what was the interplay between the dispute settlement clause in the contract and the dispute settlement provisions in the BIT. BIVAC responded on March 15th stating the BIT contained the relevant definition of "investment" and its claim to money for the services constituted a title to money and a right granted under public law. Second, BIVAC contended that the contractual arbitration clause did not preclude jurisdiction under the Treaty regardless of whether the claim raised issues of interpretation and application under the contract. The Centre subsequently registered the Request for Arbitration on April 11, 2007.

Paraguay raised six objections to the tribunal's jurisdiction:

(i) Paraguay never explicitly consented to arbitration before ICSID and the mere fact of ratification did not constitute such agreement.

(ii) The arrangement between BIVAC and Paraguay was in the nature of an administrative contract and was not covered by the BIT. Given the purely contractual relationship and the absence of a capital contribution, it did not qualify as an investment in common language or under Paraguayan law.

(iii) The contract contained an exclusive dispute settlement mechanism establishing the jurisdiction of courts in Asunción and making Paraguayan law applicable.

(iv) BIVAC did not make an investment in the territory of Paraguay as required by the BIT.

(v) The Paraguayan Constitution and laws providing for public order prohibit the State from derogating national jurisdiction in favour of international arbitration where issues relating to State property arise.

(vi) The dispute is not of a legal nature as required by Article 25(1) of the ICSID Convention because the contract is of a public, administrative nature and is governed by *ius cogens* law and considerations of public policy. The tribunal decided to treat Paraguay's jurisdictional objections as a preliminary matter under Article 41(2) of the ICSID Convention and suspended the proceedings on the merits.

After the hearing on jurisdiction, Paraguay raised objections to BIVAC's standing contending that the real party in interest was a French company. BIVAC objected to the introduction of a new objection but the tribunal decided to join the matter to the merits.

The tribunal first considered Paraguay's assertion that it had not consented to ICSID jurisdiction since neither the President nor a representative with full powers had committed the State. BIVAC argued that the State had consented to arbitrate disputes through the BIT. The tribunal agreed with BIVAC's argument holding that Paraguay's consent contained in Article 9(2) of the BIT was unqualified with respect to compliance with constitutional or domestic legal requirements.

Paraguay's second objection that the contract was not an investment because it was purely a right to receive payment for services performed abroad and it was not a concession or rights granted under public law, similarly failed to persuade the tribunal. The tribunal evaluated the services provided by BIVAC (e.g. issuing certificates of inspection) and concluded that they performed functions "commonly reserved to the public authority of the State" and "contributed to the raising of public revenues through import duties." Therefore it concluded that BIVAC's rights were "granted under public law" within the meaning of the BIT.

With respect to Paraguay's argument that BIVAC did not make an investment within its territory, the tribunal found a sufficient territorial nexus based on BIVAC's local presence, BIVAC's training of Paraguayans and the establishment of a local database in Paraguay. Further, the tribunal considered that the activities performed by BIVAC whether in Paraguay or abroad were inseparable.

By contrast, the tribunal refused to express any view as to whether "a persistent failure to make payments on an outstanding debt, no matter how unreasonable or unwarranted, could *of itself* ever amount to a violation of the obligation to provide fair and equitable treatment in circumstances in which a contractually agreed remedy remains available." The tribunal therefore found that there was an arguable claim

relating to fair and equitable treatment. However, to establish a successful claim, BIVAC would have to establish that the acts of Paraguay show an "activity beyond that of an ordinary contracting party." It further rejected Paraguay's contention that the local courts should hear this claim. In this respect, the tribunal distinguished between treaty claims and contract claims despite the overlap of the underlying factual issues.

Finally, Paraguay argued that the dispute settlement procedures in the contract were applicable and that a mere failure to pay under a contract did not convert a domestic dispute into an international claim under the BIT. In considering this argument, the tribunal distinguished between the jurisdiction and admissibility of the Claimant's contractual claims.

With respect to the issue of jurisdiction, the tribunal recognized that there was "no *jurisprudence constante* on the effect of umbrella clauses." The tribunal found that the broadly worded provision in the BIT established an international obligation for the parties to observe contractual obligations with respect to investors. In reaching this conclusion, the tribunal gave weight to the placement of the umbrella clause in the Treaty which was located in the same provision that imposed an obligation to provide fair and equitable treatment and before the expropriation clause. The tribunal also considered it significant that Paraguay had not offered an explanation of the purpose and effect of the umbrella clause. It therefore determined that Article 3(4) gave "the tribunal jurisdiction over a claim that arises from or is produced directly in relation to the Contract." This, the tribunal concluded, meant that Article 3(4) not only imported obligations under the contract into the BIT, but it also imported into the BIT all the obligations owed by Paraguay to BIVAC under the contract (including the forum selection clause).

As to the admissibility of the claim, the tribunal held that the claims were inadmissible because the contract included an exclusive alternative forum clause. The tribunal was persuaded by the fact that the contract post-dated the BIT and that the language of the forum selection clause was broadly worded. The tribunal also pointed to the need to respect the parties' autonomy as reflected in the contract. Hence, it found that the proper forum for the resolution of contractual claims raised under Article 3(4) of the BIT were the local Paraguayan courts.

The tribunal declined jurisdiction over the company's expropriation claim but upheld its jurisdiction with respect to the allegations of unfair and inequitable treatment. Although the tribunal found that BIVAC's claims under the umbrella clause were inadmissible, it reserved for the merits the question whether the consequence of this decision should be that the claim must be dismissed or the exercise of jurisdiction must be stayed.

5.6. Bosh International and B&P v. Ukraine - ICSID CASE NO. ARB/05/14

It relates to allegation by the Claimants, Bosh and B&P, that they made an investment in Kiev, the capital city of Ukraine, which consisted of a contract which B&P entered into on 29 January 2003 with the Taras Shevchenko National University of Kiev ('the University') to undertake a two-stage renovation and redevelopment of a property at the address 3 Chervonozorianyi Avenue. This project was to result in the creation of 'a facility comprising a hotel, a research training centre with conference and meeting rooms, dining facility, a garden and sporting facility' which would be designed 'to accommodate academic symposia, seminars and conferences' (herein after referred to as 'the Project', 'the Science-Hotel Complex'). The Claimants (Bosh) further allege that, through conduct of the CRO, the Ukrainian courts, the Ministry of

Justice and the University-all of whose acts and omissions are attributable to Ukraine. It is added that the contract between B&P and the University was terminated. B&P was subsequently evicted from the Science-Hotel Complex. The Claimants submit that the Respondent has, through the conduct of these entities, breached its obligations under the BIT, and that this has caused the Claimants to suffer loss.

The Tribunal determines as follows:

1. Each of the Claimant' claims is within the jurisdiction of the Tribunal, and the Claimants' claim under Article II(3)(c) is admissible.
2. The conduct of Ukrainian Courts, the CRO and the Ministry of Justice is attributable to Ukraine, but the conduct of the University that is the subject of the proceedings in not attributable to Ukraine.
3. With regard to the Claimants' claims:
    a. the Respondent has not breached its obligations under Article II(3)(a) or Article III of the BIT by the conduct of the CRO.
    b. the Respondent has not breached Article II(3)(c) of the BIT through the conduct of the University.
    c. the Respondent has not breached Article II(3)(c) of the BIT through the conduct of the University as regards the 2003 Contract.
    d. the Respondent has not breached Article II(3)(a) of the Bit through the conduct of the Ukrainian court and the conduct of the Ministry of Justice.
4. On the issue of costs, the Claimants are ordered to pay to the Respondent the amount of USD 150,000.

5.7 Pakistani Current Pending Cases-Future Research

The Pakistan has some current cases relating to umbrella clauses. The detail of which is given as follows:-

I. **Ali Allawi Versus Government of the Islamic Republic of Pakistan**-PCA No. AA451

BIT between the Government of the United Kingdom of Great Britain and Northern Islands and the Government of the Islamic Republic of Pakistan for the Promotion and Protection of Investment, dated November 30, 1994. Mr. Ali Allawi a UK National and being an investor and shareholder of the Progas Pakistan Limited, a subsidiary of the Progas Companies served a notice of Arbitration of pursuance of Article 8 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Islands and the Government of the Islamic Republic of Pakistan for the Promotion and Protection of Investment dated November 30, 1994.

It is important to point out that three Mauritius based Companies, namely Progas Energy Ltd, Progas Holdings Ltd and Sheffield Engineering Company Ltd. These companies collective incorporated as subsidiary collectively incorporated a subsidiary company i.e. Progas Pakistan Limited and started Business in Pakistan by establishing LPG Terminal at Port Qasim, Karachi. The company was to import Liquefied Petroleum Gas from Qatar and to distribute it inside the country. The Progas Company claim that they were authorized by Government of Pakistan to fix their own prices but later, GOP and OGRA started to intervene to manipulate LPG prices since 2004. They brought the situation into the notice of GoP and OGRA for may times but no redressel measures were taken. Due to such policy of the GOP and OGRA, the

Business of the Progas Companies ruined and they had to stop their activates due substantial loses. On the basis of this dispute while invoking Section 8 of the Bilateral Investment Treaty Mr. Ali Allawi has initiated arbitration proceedings against the Government of Pakistan.

In the captioned matter the deadline for filing the defence statement on behalf of the GoP was 15th November, 2013 and the same has been filed, accordingly. The case is ripe up for final hearing and pending for decision.

II. Karkey Karandeniz Electrik Uretim Vs. The Islamic Republic of Pakistan, ICSID Case No. ARB/13/01

The background of the matter is that the Hon'ble Supreme Court of Pakistan in the Human Rights Case No. 7734-G/2009 had struck down all the Rental Power Service Contract and had directed the NAB to recover losses occasioned by the contracts.

The Karkey, a Turkish company on the termination of the Contract by the August Court has initiated Arbitration Proceedings before the ICSID Tribunal on the basis of the Bilateral Investment Treaty between the Islamic Republic of Pakistan and Government of Turkey was signed in the year 1995. The case pending for adjudication.

III. Agility for Public Warehousing Company, K.S.C Vs. The Islamic Republic of Pakistan, ICSID Case No. ARB/11/08

An Agreement was signed between Central Board of Revenue (now Federal Board of Revenue) and M/s Public Warehousing Company (PWC) Kuwait, for supply, configuration and implementation of software for automation of Customs Operation for collection of income Tax etc. The Agreement for pilot project was signed on June,

2013, with implementation time of 7 months. As per terms of the Agreement the Software was required to be operative at KICT on January, 2005.

A dispute rose between the parties in respect of service i.e. Agility Micro clear Software which was demanded by the F.B.R. and was effused by the Claimant Company on the ground that the same was not included in the Agreement between the parties.

The Claimant While invoking the Bilateral investment Treaty between the Government of the Islamic Republic of Pakistan and the State of Kuwait in the Year 1983 has initiated Arbitration proceedings before ICSID.

M/s Agility (Previously Public Ware Housing Company (PWC) filed a claim in the ICSID, International Court of Settlement of Investment Disputes, Washington, USA. The Counter Memorial has been filed on behalf of the Islamic Republic of Pakistan. Now the case is pending for final decision.

IV. M/s Progas Energy Limited and two others Versus Government of the Islamic Republic of Pakistan, PCA No. 108/2012

Investment, Promotion and Protection Agreement (IPPA) was signed between the Government of the Republic of Mauritius and the Government of the Islamic Republic of Pakistan on 03.04.1997.

Pursuant to the IPPA three Mauritius based Companies, namely, Progas Energy Ltd, Progas Holding Ltd., and Sheffield Engineering Company Ltd have been collective incorporated as subsidiary company i.e. Progas Pakistan Limited and started Business in Pakistan by establishing LPG Terminal at Port Qasim, Karachi. The company was to import Liquefied Petroleum Gas from Qatar and to distribute it inside the country. The Progas Company claim that they were authorized by Government of Pakistan to

fix their own prices but later, GOP and OGRA started to intervene to manipulate LPG prices since 2004. They brought the situation into the notice of GoP and OGRA for may times but no redressel measures were taken. Due to such policy of the GOP and OGRA, the Business of the Progas Companies ruined and they had to stop their activates due substantial loses.

On the basis of this dispute while invoking Investment, Promotion and Protection Agreement (IPPA0 the Progas Group of the Companies has initiated arbitration proceedings against the Government of Pakistan.

It is important to point out that on an application on behalf of Pakistan the Tribunal has been pleased to consolidate the instant matter along with other connecting case i.e. PCA No. AA451-Ali Allawi (UK) Versus Government of the Islamic Republic of Pakistan. Now the matter is pending for adjudication.

V. Broadsheet LLC versus Federation of Pakistan & National Accountability Bureau (NAB).

On June 6, 2000, an agreement between Broadsheet LLC duly incorporated Company under the Laws of Isle of Man and NAB was singed in order to diagnose, locate and trace the ill-gotten money and to bring it back to Pakistan. In terms of the Agreement 20% of the proceeds recovered by the NAB was to be paid by the Company. Similarly another agreement between Government of Pakistan and International Assets Recovery (IAR) was also signed on 15.07.2000.

21st July, 2001, the NAB received a letter from the Broadsheet LLC to pay US $ 25 Million plus US $ 5 Million as a goodwill gesture. NAB vide letter dated 28.10.2003 attempted to terminate recovery agreement. On 20.05.2008 after the negotiation the

settlement agreement was signed between the NAB and Broadsheet LLC through Mr. Jerry James and an amount of US $ 1.5 Million was paid. Similarly, a settlement agreement between NAB and IAR through Dr. William F Pepper was signed and an amount of US $ 2.2 Million was paid to him. Broadsheet LLC was wound up in accordance with Manx Law by the order dated 02.04.2007 of the High Court. However, vide order dated Man solely pursue the arbitration claim under the Asset Recovery Agreement dated 20.06.2000. Pursuant to the said order the Broadsheet LLC has initiated arbitration proceedings against the NAB under the Rules of the Chartered Institute of London.

5.8. Developing Position from Legal Aspects:

After having critical study of above case law, the umbrella clause appears to have acquired inconsistent position from legal point of view. Initially in SGS vs. Pakistan, the tribunal was well aware of very wide scale of the clause, leading to uncertain situation which may potentially cause inconvenience to the States and their sovereignty. Though the Philippines Tribunal adopted more liberal approach, it did not dissociate contract claims from treaty ones. Afterwards, the clause was further pushed towards more challenging boundaries of more possible limits by the decisions of Eureko and Nobel Ventures, in view of its history an evolution. However later, Al Paso's approach was more prone towards restrictive interpretation, which reverted back its position to initial stance. Now, the situation would further clear in the upcoming case law that which way the position will tilt. However in view of the present legal controversy on the matter surrounding this clause, my suggestions are also elaborated in the next chapter of "conclusion" to prescribe a potential way forward in this regard for this research.

Chapter 6:

Conclusion and Recommendations

In view of the last chapter wherein the umbrella clause has been analyzed on the comparative account of several perspectives adopted by the Tribunal in its decisions, this chapter now provides a conclusive "conclusion" of the entire research paper, keeping in view my own interpretation of the clause. Hence, two questions earlier posed at the beginning of this thesis are also required to be answered.

1. The first question was what is the exact scope of an umbrella clause? To answer this in the light of my research analysis, the following considerations are given for supportive argument.

Firstly, my views don't support the argument in favor of any generalization on the effects of an umbrella clause. Hence, no standard umbrella clause exists at all. In Chapter 2, the umbrella clauses have been named differently under different BITs and their interpretations widely fluctuate. The umbrella clause can be drafted with certain ambiguity in order to avoid any obligation being created on the side of the State at all, or the umbrella clause can be proper mandating normative provision to create a specific obligation concerning the investments. Simultaneously, unilateral legislative or administrative obligations assumed by the state can fall under the domain of such clause. Hence, its application can be just limited to written undertakings, or to orals ones. The key point is that it's the wording of the umbrella clause, which entirely matters for how it to be construed or taken on a cases to case grounds.

To make an argument for the sake of discussion, the most common lines of form of the clause reads "Each Party shall observe any obligation it may have entered into with regard to investments". I believe that the interpretation in respect of the scope and ambit of the provision should be subject to a plain reading of the text. According to Eureko and Noble Ventures decisions, "articles 31 and 32 of the Vienna Convention on the Law of Treaties" also support such plain interoperation. However where absurd results arise through a plain interpretation, only then the intention of the contracting parties and other relevant documents should be considered for interpretation. Hence, the phrase "any obligation" on its plain meaning includes any obligation whether be contractual or unilateral, if it comes out of an investment contract and deals with that investment. The argument that a plain interpretation would widen up the scope of the clause to unreasonable extents doesn't meet any merits. Preliminary, there exits inherent limitation within the term "obligation" in respect of an investment-related obligation. Resultantly, only violations specifically affecting the investment (which creates the subject-matter of the contract) should fall within the scope of the clause. In view of these limitations, the ICSID Tribunal should deal with any claims against the violation of a State obligation.

This view is also supported, keeping in of history and evolution of the clause. As described in Chapter, the history of the world economy revealed that the capital flew from the developed into the so-called developing States. However due to lack of any coherent body of legislation to protect the interest of the foreign investor, nobody was agreed to invest into these states. In view of the general anomie found in States, the

investor was deprived from rights in specific stances like the change of government or other situations. This resulted in the voice raised by Elihu Lauterpacht (and later Abs and showcross) for the insertion of a clause in treaties so that the investors would be given effective immunity from whimsical violation of obligations on the part of the host states through means of grabbing their investment contracts under domestic legislation and of providing them an international recourse. Due to the nature of every investment contact having international element involved, any breach provided international remedy without much difficult. This can view in the light of the umbrella clause, which was always introduced to provide jurisdiction to an international forum against the violation of contractual obligations in respect of investment, in the meaning given by a plain reading of its words.

Moreover in my opinion, there would no fear of floodgate of cases arising out of the wider interpretation of the clause. Preliminary, from the face of initiating legal proceedings at international forum with the high cost suggests that the claims involve handsome investment of the investors; otherwise investors don't generally approach the ICSID for each little claim merely arising out of the incidental to the investment contract. Next is that, such interpretation also requires the State to ensure undertakings specially assumed in respect to the investment to be fully observed. When the investment is made within its territory on the undertakings extended by the State to its investor, there arises no option for the state to withdraw such undertakings/facilities and deprive the investor within its property, irrespective of seeking remedy from the international forum. The measures taken by the state are

significant in relation to determining factor, which will lay down foundations for foreign investment to be made in that respect in future again.

Contrary, the argument is that if the investor is allowed forum shopping to choose between the contractual forum and ICSID, this will effectively override the contractual forum selection clause and eventually the State would suffer at the cost of undue favor extended to the investor. However, this view has been rejected by Jarrod Wong in his article, which reads: it is the state which has been party to both the contract and the treaty, so the forum selection clauses can be upheld over the treaty clauses by the state or otherwise, the state can easily make an exception under the BIT, specifically stating that the application of the umbrella clause would be restricted when there exits "an exclusive forum selection clause in an investment contract," irrespective of if the investment contract is signed before or after the existence of BIT.

Where no such exception exits, the interpretation should go against the State in case of dispute over the issue of jurisdiction to be determined under a BIT or a contract. Hence, a State should not be allowed to place an umbrella clause in a BIT just to attract investors (providing remedy through an international recourse), and to present the contractual forum selection clause so that the investors could be barred from approaching the international forum.

2. The above analyses extents me this opportunity to answer my second question, which was presented at the start of this paper i.e. whether the "effect of the umbrella clause is to elevate contractual claims to a treaty level."

If the answer is positive, then the contractual forum selection claims will be overridden by the treaty claims. However, if both are considered apart then two parallel jurisdictions co-exist together.

My analysis is that if two parallel forums co-exist together, this will lead to confusion and uncertain results. Since both contractual and treaty claims under the umbrella clause are not different claims to each other and give rise to the same claim, their remedy can be sought at two different forums. Hence, if two different forums are allowed to be proceeded for a claim, different results may arrive. For example, if the decision given by the domestic forum conflicts with the decision given by ICSID, this would pose uncertainty in respect of decisions and no decision could prevail over one and other. Let assumes another situation that under the contract, international arbitral forum is chosen for dispute settlement but a parallel proceedings are initiated by the investor before the ICSID. In such case, the decision of which international forum will prevail remains a question. Another possibility is that the investor might get relief from both the forums i.e. the contractual and international one.

In my opinion, a legal certainty can be achieved in this issue, if the proper effect is given to the umbrella clause by giving the option to the investor to pursue contract claims before an international forum, similarly like treaty claims. This will produce productive results as pointed out above because only claims relating to investment will fall within the ambit of umbrella clause. In case of such contract claims, the investor will enjoy having a choice either to pursue a contract claim under the contractually selected forum (having the proper law of contract as its applicable law) or to approach

before the ICSID by considering it as a treaty claim. A contract claim coming before the ICSID would cease to exist and it will be decided in view of the treaty standards and international law.

Thus, the actual difficulty regarding the effectiveness of the umbrella clause is neither to create two parallel jurisdictions for avoidance of same claims nor to elevate contract to treaty level. The criticisms of having parallel jurisdictions are already discussed supra, whereas if the contract claims are automatically elevated to treaty level under the umbrella clause, this will deprive the investor from the right of pursing the claim before the contractual forum for being entirely seized by the international law. Hence, a more balanced approach appears that the investor should be given a choice to pursue his claims either before in a contractual or an international forum. The history of the clause also supports this view, which aimed to provide protection to the foreign investors an international remedy before a neutral forum, even though there exits contractual forum too.

It is still unpredictable to judge the internationally-accepted future relating to the scope and effect of the umbrella clause. Due to the absence of binding precedence in the ICSID, the existing point of law has produced more vagueness and confusion in relation to its failure to reach on correct interpretation of the clause. As discussed above, the tribunal has refused to exercise jurisdiction over the claim in four out of ten decisions one was refused while interpreting the umbrella clause, whilst one was even after establishing its jurisdiction. Even though the claims admitted by the court always accompanied by other BIT violations, the question remains how the Tribunal would

deal with cases purely coming out of the violation of umbrella clauses. The aims and objects of this research were to provide analyses of how to interpret the scope and effect of the umbrella clause by minimizing its uncertainty as much as possible in this field of law.

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