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## Umbrella clauses: uncertain contract protection under IIAS<sup>1</sup>

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*Cláusulas paraguas: protección incierta bajo los acuerdos internacionales de inversión*  
*Cláusulas guarda-chuva: proteção incerta no âmbito dos acordos internacionais de investimento*

*Umbrella clauses were designed to allow disputes over breach of contracts to be settled by an arbitration tribunal. However as the jurisprudence on the matter has evolved, investors cannot be certain on whether their claim based on such clauses will stand. Certainty of the application of law is essential on investment law; therefore it is indispensable that a jurisprudentia constante is reached so that investors can be sure whether they will be able to rely on them or not. Alternatively, if uniformity of interpretation is not reached, States should decide whether such clauses should be included or removed from BITs.*

*Las cláusulas paraguas fueron concebidas para permitir que las disputas sobre incumplimientos contractuales pudieran ser resueltas por un tribunal de arbitraje. No obstante, a medida que la jurisprudencia sobre este asunto ha evolucionado, los inversores no pueden estar seguros de que las demandas sustentadas sobre ese presupuesto prosperarán. La seguridad jurídica es esencial para el Derecho de inversiones, por ello resulta indispensable que se alcance una jurisprudencia constante, a los efectos de que los inversores tengan seguridad de si podrán sujetarse a ellas o no. Alternativamente, si la homogeneidad de interpretación no se alcanza, los Estados tendrán que decidir si dichas cláusulas deberán incluirse en los TBI o, por el contrario, ser eliminadas.*

*As cláusulas guarda-chuva foram projetadas para permitir que as disputas sobre violações contratuais poderiam ser resolvidas por um tribunal de arbitragem. No entanto, como a jurisprudência sobre esta questão evoluiu, os investidores não podem ter segurança de que uma demanda sobre aquele orçamento vai prosperar. A segurança jurídica é essencial para o Direito de investimento, por isso é essencial que uma jurisprudência constante seja atingida, no sentido de que os investidores tenham segurança se poderão se manter com aquela base o não. Alternativamente, se a homogeneidade de interpretação não é alcançada, os Estados terão de decidir se essas cláusulas devem ser incluídas em os BITs ou, pelo contrário, ser eliminadas.*

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## 1. Foreword

Since the 1960s, and especially in the 1980s, International Investment Law has been largely defined by the rise of bilateral investment treaties (BITs) and the 1990s saw the rise multilateral investment agreements –which hereinafter shall be conjointly referred to as international investment agreements or IIAs<sup>-2</sup>.

This particular kind of international treaty offers a protective framework for investors entering a foreign State, hence encouraging foreign investment. IIAs have come to replace the traditional treaties of peace, friendship, commerce and navigation, which only provided for State-to-State dispute resolution. Under the traditional system, before the rise of the BITs, investors seeking to settle a dispute regarding their investments had to either, rely on the judicial system of the host state (often suspect of being biased and failing to meet investors' expectations, especially in developing countries), or put forward their complaints upon its home state and rely on her diplomatic services (which provided a slow and inefficient route to any kind of satisfaction).

BITs, first, and Multilateral Investment Treaties, later, made substantive progress, by allowing investors to bypass both routes and seek settlement directly upon an international arbitration tribunal, without having to rely on the services of its home State. This is known as an Investor-State Dispute Settlement system.

The value of these treaties can be of especial importance for developing nations, where judicial systems often fail to measure up to investor expectations, at the same time, investors from more developed countries can benefit from placing their disputes regarding their investment in the international arena, where an arbitration tribunal is more likely to make an unbiased decision when judging State actions that spark a dispute with investors.

Precisely through this idea of protecting foreign assets on countries that are suspected to have questionable standards in judicial protections, many IIAs are tailored to cover and provide a settlement mechanism not only to disputes related to "obligations under this agreement" (this is disputes that relate to direct investment), but also other forms of obligations, through what has come to be known as "*umbrella clauses*". This has led to an increasing number of investment treaty arbitrations involving not only the treaties themselves but also **investor-state contracts**. Umbrella clauses have, therefore, taken one step further on ISDS systems by allowing now to jump directly into international arbitration disputes that have traditionally been submitted to the host State's administrative or civil law and to its national courts.

The object of this article is to expose the problems of interpretation and certainty of application of umbrella clauses and in order to do so, we must:

1. First of all, comprehend how they came to be, their historical origin, which shall throw light into their purpose.
2. Secondly, we must perform a thorough analysis of the wording of these kind of clauses and of the interpretation that they have been given by the arbitration tribunals with regards to their scope and effect

This study intends to question the usefulness of umbrella clauses, due to the aura of confusion that surrounds their real purpose, scope and effect, in such a manner that they fail to meet

**KEYWORDS**  
**Investment arbitration, umbrella clause, investment contracts, BITs, international law.**

**PALABRAS CLAVE**  
 Arbitraje de inversiones, cláusula paraguas, contratos de inversión, TBI, derecho internacional.

**PALAVRAS-CHAVE**  
 Arbitragem de investimento, cláusula guarda-chuva, contratos de investimento, TBIs, direito internacional.

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the minimum standard of certainty that is required of any legal system. They have therefore become a questionable instrument within the Investor-State Dispute Settlement system. Treaty negotiators must question whether such clauses are actually beneficial and should assume that they should be rethought of as an instrument for investor protection within the international investment legal system.

## 2. History of the umbrella clause

According to Sinclair (2004)<sup>3</sup> the origins of this clause can be traced to 1953-1954, when Sir Elihu Lauterpracht provided advice to the UK regarding the settlement of the Iranian-British dispute, after Iran nationalised the Anglo-Iranian Oil Company. After such proposal it can be found on different multilateral investment treaty drafts dated between 1956 and 1959<sup>4</sup>.

Such clause was introduced for the first time in the *Treaty between the Federal Republic of Germany and Pakistan for the promotion and protection of investments*, signed in Bonn, on 25 November 1959, in particular, article 7 ends with the following statement: ***“Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party.”*** This statement can be taken as the umbrella clause prototype, as shall be discussed below.

Since this clause was introduced for the first time in the Germany-Pakistan BIT, the EOCED estimates that out of the 2500 BITs currently in existence, around 1000 hold this kind of clauses (that is 40%). However, neither the doctrine nor the resolutions of the arbitral tribunals have come to agree on the actual implications of this kind of clauses inserted on the BITs; while, on the other side, the treaty practice with regards to this kind of clause is not uniform either, as we find an enormous variation in wording, scope of protection and relevance of the clause within the treaty<sup>5</sup>.

We can theoretically divide the different types of umbrella clauses into three groups, and the interpretation practice into two other groups, making umbrella clauses one of the most confusing elements in international investment law.

## 3. Types of umbrella clauses

Even though there is a massive variety in the drafting of umbrella clauses, -even within one State's treaty practice it can be difficult to find uniformity-, for systematic purposes, umbrella clauses can be divided into three trends, looking at the scope that they try to cover, from the narrowest to the widest.

It must be noted that there is debate among the scholars as to whether group 1 and 3 constitute actual umbrella clauses; most notably Sinclair considers them “similar provisions” (Bjorklund et al. 2009, p.

281-284)<sup>6</sup> but not umbrella clauses properly speaking. For the purposes of this article, these clauses shall be included within the concept of umbrella clause, as so have done different arbitration tribunals in different cases as it shall be discussed below.

### *A. Group 1: Restrictive umbrella clauses*

The “*restrictive umbrella clause*” group refers to umbrella clauses that are so narrowly drafted that is clear that they try to exclusively include investment contracts, often by remitting to the terms of the contract itself. Their purpose is to reduce the scope of the umbrella clause as much as possible, up to the point that we might question whether they actually constitute an umbrella clause.

Examples of clauses pertaining to this group can be found –among many others- on the 2005 Iceland-Mexico BIT<sup>7</sup>, where article 8 reads as follows:

*“Article 8*

*Application of other Rules*

*Each Contracting Party shall observe any other **obligation it may have assumed in writing**, with regard to investments in its territory by investors of the other Contracting Party. However, disputes arising from such obligations shall be **settled only under the terms of the contracts underlying the obligations.**”*  
(emphasis added).

The expression “*in writing*” clearly refers to contracts. Unilateral written compromises, which could arguably also be included under the phrasing of the first sentence, are clearly excluded by solely referring to “*the terms of the contracts underlying the obligations*” on the second sentence. On the other side, remittance to the respective contract to the settlement of any dispute arising from the contract excludes the direct effect that characterises an umbrella clause.

A second example of these restrictive clauses, where there is remittance to the terms of the investment agreement, can be found on the 2001 BIT between India and Kuwait (and on very similar terms, the Spain-India 1997 BIT), where, pursuant to article 4<sup>8</sup>:

*“[...] 4. Each Contracting State shall observe any obligation or undertaking it may have entered into with regard to investments in its territory by investors of the other Contracting State **with disputes arising from such obligations being only redressed under the terms of the contracts underlying the obligations.**”*  
(emphasis added)

This kind of clauses would only permit the mirror effect of umbrella clauses in cases where the investment agreement provided that that effect is to take place. Hence, they render this clause useless, since jurisdiction of an arbitration tribunal would not actually be the BIT, but the contract itself, as the tribunal put it in *Lanco*<sup>9</sup> submission to jurisdiction is based on consent.

### *B. Group 2: the umbrella clause prototype*

This second group has been labelled as the “umbrella clause prototype” for two reasons, firstly because it is the closest to the original wording of the umbrella clauses (see the 1959 Germany-Pakistan umbrella

clause quoted above), and secondly since it is also the most common wording found on the IIA's that include umbrella clauses. An example of this the 2004 Switzerland-Dominican Republic BIT establishes on its article 12(2) the following mandate:

*"Each Contracting Party shall observe **any obligation it has assumed with regard to investments** in its territory by investors of the other Contracting Party."* (emphasis added)

The way this clause has been drafted, -with a similar wording to that of the 1959 Germany-Pakistan BIT transcribed above (p. 3)- is purposely ample. And precisely because of its ample wording this kind of umbrella clause is the one that poses the biggest problems of interpretation as shall be discussed below.

The Japan - Colombia 2011 BIT, on its article 4, has opted for more elaborate draft, drifting away from the original wording to become somewhat more restrictive but with similar effects; therein it is stated:

*"[...] 3. Each Contracting Party shall **observe any obligation deriving from a written agreement** concluded between its central government or agencies thereof and an investor of the other Contracting Party with regard to specific investments by the investor, which the investor could have relied on at the time of establishment, acquisition or expansion of such investments."* (emphasis added)<sup>10</sup>

This clause specifies some of the terms, we can observe as a trend that there is a drift away from the wide wording of the traditional drafting; in order to clearly exclude certain cases, and to clarify the terms of protection. This trend can be generally observed in the most recent Japanese treaty practice.

### *C. Group 3: the extremely widely drafted umbrella clauses*

Finally, the third group has been labelled the "*extremely widely drafted umbrella clauses*", precisely because the wording has been chosen to actually not compromise at all. They can be taken as a declaration of intents, but no further; they imply a compromise to respect contractual investment, but under no circumstances can they be taken as allowing the "umbrella effect" of circumventing national courts to submit a dispute to an investment arbitration tribunal. A paradigmatic example (since it has been actually applied by an arbitration tribunal, and its terms widely discussed), pursuant to article 2 of the 1996 BIT between Italy and Jordan:

*"Promotion and Protection of Investments*

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

It is clear that there is no commitment to allow disputes to be settled by an arbitration tribunal, but just a declaration of the intention to maintain a guaranteeing legal framework. The only doubt that could arise as to whether this clause implies an "umbrella effect" could be based on the last sentence, whereby it is declared that such commitment includes "*compliance, in good faith of all undertakings assumed with regards to each specific investor*". However relying on this last phrase alone in order to submit a contractual dispute to an arbitration tribunal seems very farfetched, unless the specific contract expressly provides such a system for dispute resolution. This was precisely the interpretation given by the Tribunal in *Salini*

*Construttori S.p.A. and Italstrade v. Hashemite Kingdom of Jordan*, where it was stated that there was no intention to create international liability for breach of such commitments.<sup>11</sup>

Clauses of this kind are scattered in a variety of BITs, as an example, we can cite the Japan-Uruguay 2015, where article 6, under the title “other obligations” reads as follows (emphasis added):

*Each Contracting Party, subject to its laws, shall do all in its power to ensure that a written agreement with regard to a specific investment, between a national authority of that Contracting Party and an investor of the other Contracting Party or its investment that is an enterprise in the Area of the former Contracting Party, is respected, provided that the written agreement is with respect to:*

- (a) natural resources that a national authority controls;*
- (b) supply of services to the public on behalf of the former Contracting Party; or*
- (c) infrastructure projects, that are not for the exclusive or predominant use and benefit of the government.*

Again we find another example of how the Japanese treaty practice is moving towards more elaborate clauses with more narrowly defined terms. However, the mixed scope of this clause may still lead to problems of application: on one side, a commitment to *do all in its power to ensure that a written commitment is respected* subject to the national law of the host state cannot imply a commitment to settle disputes regarding investment contract to international tribunals; on the other, the specification of the scope may hint that conflicts over these subject-matters may be settled by an arbitration tribunal when the Host State has not respected the terms of the agreement.

#### 4. The interpretation divide

As it has been aforementioned, apart from the wide variety in which umbrella clauses are drafted, we find a great divide in the interpretation given to them by the arbitration tribunal. Even if, as said above, the umbrella clause can be traced back to the 1950s, it was not until 2003 that a Tribunal tackled its interpretation, with the case *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*<sup>12</sup>. In 2004, another Tribunal had to decide over the application of the umbrella clause to the dispute that arose between SGS and Philippines<sup>13</sup>, and even if also it did not admit jurisdiction based on the umbrella clause, in doing so, it directly contradicted the previous decision *SGS v. Pakistan*. This diversion in jurisprudence that arose from the contradictory interpretations given in the SGS cases has been maintained throughout the decisions that followed, in such a manner that we can assert that two contradictory schools of thought have been formed (J. B. Potts 2011). In particular, the following points of divide can be observed on the two lines of thought that arose from the two SGS cases:

1. Fears over an infinite expansion of claims on the tribunals, i.e., whether all breaches of the contract are also breaches of the Treaty.
2. Validity of forum selection clauses established in investment contracts, i.e., whether a forum selection clause can override the umbrella clause or not.
3. The effectiveness that can have the umbrella clause regarding the intent of the Parties when



negotiating the Treaty, i.e., did the parties intend that disputes over the contract in question was to be submitted to arbitration or not.

### *A. Restrictive interpretation: SGS v. Pakistan*

The *school of restrictive interpretation* was born, as said above when the Tribunal had to consider the application of article 11 of the Switzerland-Pakistan BIT to the SGS v. Pakistan conflict. Such article provides that:

*"Each contracting party shall constantly guarantee the observance of the commitments it has entered into with respect to the investment of the other contracting party"*

First of all, it must be said that following the opinion of Sinclair (and also of the Tribunal) the clause can hardly be considered an umbrella clause, as *"an undertaking to constantly guarantee the observance of commitments" arguably entails something different from a directive "to observe" or "to respect" commitments entered into with foreign investors"* (Bjorklund et al. 2009, p. 283). Regardless of this observation, the Tribunal tackled the application of article 11 as if it was a proper umbrella clause. Moreover, the principle that *"A treaty interpreter must of course seek to give effect to the object and purpose projected by that Article and by the BIT as a whole"*<sup>14</sup> was firmly held.

Nevertheless, the Tribunal rejected giving effect to the clause, exposing four lines of argument (which were later followed in SGS v. Philippines), namely:

1. A textual analysis required restricting the scope of Article 11 of the BIT. As the Tribunal put it: the clause, *"while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion."*<sup>15</sup> A broad interpretation *"would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments to an investor of the other Contracting Party"*<sup>16</sup> A similar argument was expressed in *El Paso v. Argentina*<sup>17</sup>, where it was also added, reinforcing the textual argument that neither the term 'contract' nor 'contractual obligation' was contained in the clause<sup>18</sup>.
2. Secondly, the Tribunal asserted the principle of general international law that a violation of a contract cannot be automatically elevated to a breach of the BIT<sup>19</sup>. The intent of the parties could not reasonably be to submit any breach of a contractual agreement to the international jurisdiction. *"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."*<sup>20</sup> In a similar restrictive framework, *El Paso v. Argentina* and *Pan American Energy v. Argentina* argued a distinction between acts of sovereignty and commercial acts, arguing that BIT protection would only cover acts of a commercial nature.
3. Thirdly, the Tribunal held that the arbitration selection clause should be given effect. The Tribunal worried that, if the umbrella clause was given effect in the manner defended by the claimant, forum selection clauses would only flow in one direction, in favour of the investor, for *"that investor could always defeat the State's invocation of the contractually specified forum, and render any mutually agreed procedure of dispute settlement, other than BIT-specified ICSID arbitration, a dead-letter, at the investor's choice."*<sup>21</sup>
4. Finally, systematic approach required an analysis of the placement of the umbrella clause



within the overall framework of the BIT is uncertain. The Tribunal in was of the opinion that the placement of the clause near the end of the treaty, before the final clauses, and away from the substantive obligations assumed by the parties, was indicative of an intention of the Contracting Parties not to provide a substantive obligation.<sup>22</sup>

### *B. Expansive interpretation: SGS v. Philippines*

Even though on the *SGS v. Philippines* case the tribunal did not reach a decision on merits either, the rejection of the claim was not on grounds of jurisdiction, but on grounds of inadmissibility: the breach of contract in question did not amount to a violation of international law based<sup>23</sup>, the Tribunal considered that they were upon a “mere refusal to pay a debt” which not amount to an expropriation of property, hence it opined that the claim was “premature” and that the claimant should “await the determination of the amount payable in accordance with the contractually-agreed process”<sup>24</sup>

Nevertheless, the Tribunal took the opportunity to analyse the reasoning of the *SGS v. Pakistan* decision, and after a thorough scrutiny<sup>25</sup>, it strongly dissented from its reasoning labelling it of being ‘unconvincing’.

First of all the tribunal contested the idea of indefinite expansion of the umbrella clause, arguing that for the mirror effect to take place, the State must have assumed a legal obligation with regards to a specific investment, and could not be applied to general obligations assumed pursuant to the law or other kind legal instrument<sup>26</sup>. Essentially, over the textual analysis the Tribunal came to the conclusion that the clause “means what it says”<sup>27</sup>, even if contradicted by the *SGS v. Pakistan* ruling. *Eureko v. Poland* coincided with this idea: the Tribunal should give effect to the intention of the parties when introducing a clause of this kind in the BIT<sup>28</sup>.

Secondly, with regards of the general principle that a state violation of an investment contract cannot consist by itself a violation of international law, the tribunal in *SGS v. Philippines* pointed out that this general principle of international law cannot be taken as an absolute matter, and that it should rather be a matter of interpretation<sup>29</sup>. In this sense it comes to say that a Tribunal should consider individually whether a particular violation of a contract amounts to a violation of the relevant BIT. This argument was later held by the Tribunal on *CMS v. Argentina*<sup>30</sup>, where it was argued that breaches of treaty rights or of essential terms of the contract could set off the application of the umbrella clause, in particular “significant interference by the government”<sup>31</sup>

Thirdly, in relation to the possible overriding effect of the umbrella clause over jurisdiction selection clauses in investment contracts, the tribunal makes a detailed excursus<sup>32</sup>. The tribunal questioned whether BITs constituted an apt instrument to override contractually agreed forum selection clauses (whether to local courts or to national or international arbitration). The tribunal responded negatively to such an idea on two grounds. On one side, under the principle that a general provision does not abrogate a specific one; on the other, under the supporting and supplementing functions of BITs, they constitute framework treaties not intended to replace specific arrangements made between investor and the host State.<sup>33</sup> The tribunal conceded that BITs cannot automatically render ineffective a contractual forum choice, however, it concluded that it is a matter of the merits of the breach<sup>34</sup>, the investor should only be allowed to pursue its claim on an international tribunal on cases of *force majeure* preventing the claimant from complying with the contract. It can be added that it could very well be argued the claimant could pursue its action on the arbitration tribunal in cases where the breach of contract amounts to a breach

of the BIT itself, with or without an umbrella clause, and with or without an exclusive jurisdiction clause. If the breach of contract implies a violation of a substantive clause (such as a violation of fair and equitable treatment or when there was an expropriation without compensation), the tribunal should have jurisdiction based on the dispute settlement provisions of the relevant international agreement.

Finally, regarding to the systematic approach, the *SGS v. Philippines* Tribunal opined that while the placement of the clause may be entitled to some weight; it could not consider this factor as decisive. In this respect, the Tribunal stated "*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*".<sup>35</sup>

## 5. Conclusions

As we have seen, it is unclear for an investor whether relying on an umbrella clause can be a beneficial option in order to pursue a claim with regards to its contractual investment.

Chaisse and Bellak (2015) affirm that "[i]n essence, an umbrella clause extends the scope of the application of a BIT, and **it offers more protection to the investor**." (emphasis added). However, such a statement is at least debatable; if the investor cannot be sure whether the umbrella clause will or will not be given effect by the tribunal, hence surrounding its claim by a halo of uncertainty contrary to its interests, it can hardly qualify as an extra protection. Not in vain, once the dispute is sparked, an investor may spend a considerable amount of resources seeking compensation from a tribunal that may or may not apply to the case the umbrella clause depending on whether such tribunal follows a restrictive or an expansive interpretation regarding jurisdiction and admissibility of the claim. It is true that this uncertainty may be attributed to some extent to diversity in the text of different clauses, however, much of it is based on the divergent points of view of different arbitrators (Shenkman and File 2008).

Furthermore, it is also unclear whether the investor can rely on treaty-based protections if there is an exclusive jurisdiction clause in the relevant contract that excludes international arbitration. Whether such a clause would be ineffective in the light of the umbrella clause, under the argument that international law is above municipal law and cannot be overridden by the contract, or, on the other hand, whether the option for a specific jurisdiction should exclude international investment arbitration, giving weight to the parties' contractual intention, if far from being resolved<sup>36</sup>. Still, it must be borne in mind that not every breach of contract will imply a breach of the BIT; hence, not all breaches of contract can be subject to arbitration, regardless of the existence of an exclusive jurisdiction clause in the investment contract.

Moreover, the importance given to the umbrella clause within the Treaty could be fundamental in order to determine whether the investor can or cannot present his claim upon the arbitration tribunal. However, as seen above, decisions of the different cases also give different weight to the importance of this systematic approach.

Therefore, on the investors' side umbrella clauses, as they have been drafted up to date, fail to meet the minimum standard of certainty that they so eagerly seek and must develop their investment among the

uncertainty of whether, given a breach of contract by the host State, their investment is secured. This is especially important in capital-intensive investment<sup>37</sup> like the energy, infrastructure or heavy industry (González de Cossío 2013).

Investors must be both wary and prudent, when seeking arbitral redress upon a State violation of an investment contract. The literal text of the clause might give a hint of how the successful claim can be. However, as seen, there is no guarantee that the tribunal will even pronounce itself on grounds of merit. Actually, at the time of writing, there has not been a single decision that has gone beyond the admissibility phase when analysing umbrella clauses.

Nevertheless, it is not only the investors that suffer the consequences of the incertitude of the application of umbrella clauses; States too suffer its vagueness. Its supposed stabilising role prevents abrupt innovations in the legislative and economical systems; hence it may play a negative role refraining host states from tackling sectorial reforms when they might imply a breach of contract against necessary social and economical reforms that sometimes are very much needed, especially in developing countries. The *LG&E* case in Argentina<sup>38</sup> is paradigmatic, but more developed countries might too be affected, as it has happened in Spain with the renewable energy sector.

Accordingly, it is questionable whether umbrella clauses within IIAs actually provide a proper system for contract dispute prevention and settlement.

Thus, in this state of affairs, States must question, when negotiating IIAs, whether a provision of this kind is of any use to either to States (who want to favour investment in their land, hence need certainty), or to investors (who seek certainty to all aspects of their investment, dispute resolution included). Precisely, we can actually observe a trend towards its elimination in countries such as Norway, India, US, or many South American countries as well as in multilateral agreements such as NAFTA or ASEAN, being the Energy Charter Treaty the most notable exception (Pereira de Souza Fleury 2015).

Before us, as these lines are being written, one of the most comprehensive and important international investment treaties, the Transatlantic Trade and Investment Partnership, is being negotiated between the European Union and the United States. TTIP constitutes a free trade agreement meant to go beyond traditional FTAs and shape the future drafting of similar trade agreements. An Investor-State Dispute Settlement system is to be included. Therefore EU and US should use this opportunity to rectify the negative effects of traditional umbrella clauses, in a similar manner to what Japan has been doing when drafting its BITs.

The European Union's proposal for Investment Protection and Resolution of Investment Disputes (tabled for discussion with the United States and made public on 12 November 2015)<sup>39</sup>, foresees on its Chapter II, Section 2, and article (number 7) dedicated to the "Observance of written commitments" wherein it is prescribed that:

*"Where a Party either itself or through any entity mentioned in Article X [Definition of "measures adopted or maintained by a Party"] has entered into any contractual written commitment with investors of the other Party or with their covered investments, that Party shall not, either itself or through any such entity breach the said commitment through the exercise of governmental authority."*

It is true that language of this article is more precise than the traditional umbrella clause, however it may still spark differences in its interpretation, scope and effect. As with the recent trends of the Japanese

treaty practice referred to above, more explicit terms and different manners to approach the wording, limitations and problems of interpretation and application seem to be inevitable.

A different approach can be observed in the latest US 2012 model BIT which excludes umbrella clauses altogether. In stead it is included a mechanism for settlement of contract-related disputes (provided by article 24)<sup>40</sup>, whereby an investor may submit a claim to arbitration when the respondent has breached an investment agreement and the claimant has incurred in loss or damage arising thereof, provided that the subject matter of the claim and the claimed damages directly relate to the covered investment in reliance on the relevant investment agreement. It is highly likely that the system provided by the 2012 model will be the counteroffer of the American negotiators of TTIP.

In any case, both options –EU's proposal or the US 2012 model BIT- imply a step forward in the search for clarity and certainty of application from the traditionally drafted umbrella clause, and such a step should benefit both States and investors, notwithstanding new problems arising thereof. Future negotiators of IIAs should consider whether alternatives as those proposed above constitute a valid alternative, or whether they should exercise governmental influence in shaping interpretation towards a uniform understanding of how umbrella clauses should be applied.

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## Notas

<sup>1</sup> This article is dedicated to Professors Antonio Pastor Palomar and Javier Guillén Caramés, who I thank for their insight

<sup>2</sup> For a complete history of the rise of the ILAs in international investment law, see 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" on *George Mason Law Review* [vol. 14:1, 2006], p. 139-142

<sup>3</sup> For a complete history of how the umbrella clause came to be, see: A.C. Sinclair: "The Origins of the Umbrella Clause in the International Law of Investment Protection", *Arbitration International* 2004, Vol. 20, No 4, pp.411-434.

<sup>4</sup> Article 4 of the 1956-59 *Abs Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries* and article II of the 1959 *Abs -Shawcross Draft Convention on Foreign Investment*.

<sup>5</sup> The Netherlands Model BIT places the clause on article 3 within an article detailing the substantive protections provided under the Treaty. Such structure has also been followed on most treaties concluded by United Kingdom, New Zealand, Japan, Sweden and the US. By contrast, the Swiss Model BIT places the umbrella clause in a provision entitled "other commitments" and separates it from the substantive provisions by two dispute resolution clauses and a subrogation clause. The Swiss Model BIT format is also found in the Finnish and Greek Model BITs and BITs concluded by Mexico.

<sup>6</sup> Anthony C. Sinclair, "The Umbrella Clause Debate" on *International Investment Law Current Issues (III) Remedies in International Investment Law. Emerging Jurisprudence of International Investment Law* / ed. by Andrea K. Bjorklund, Ian A. Laird and Sergey Ripinsky. *British Institute of International and Comparative Law* 2009, Pages 281-284

<sup>7</sup>This is the most common wording of the umbrella clause on the Mexico BIT Practice, as reflected on article 8 of the 2005 Iceland–Mexico BIT, art. 19(2) of the 2000 Hellenic Republic–Mexico BIT, art. 18(2) of the 1999 Portugal–Mexico BIT, art. 10(2) of the 1998 France–Mexico BIT, art. 9 of the 1998 Belgium–Luxemburg Economic Union–Mexico BIT, art. 8(2) of the 1998 Germany–Mexico BIT, art. 9 of the 1998 Austria–Mexico BIT, art. 3(4) of the 1998 Netherlands–Mexico BIT and art. 2(3) of the 2000 Denmark–Mexico BIT. The exception is article 10 of the 1995 Switzerland–Mexico BIT, which includes a standard Group 2 umbrella clause.

<sup>8</sup>The exceptional terms of this clause is probably due to India's particular reticence to include umbrella clauses on the BIT she signs, with the only exceptions being, apart from Kuwait and Spain, Denmark Austria, United Kingdom and Switzerland, all of them with a scope to exceptional situations when redress cannot be found on national courts or when the contract specifically provides for a submission to arbitration clause.

<sup>9</sup>*Lanco International Inc. v. The Argentine Republic ICSID CASE No. ARB/97/6* (Cremades, President, Aguilar Alvarez and Olavo Baptista, arbitrators), paras. 42 to 44

<sup>10</sup>Similar clauses can be found on most of the BITs signed by Germany, Denmark or Finland, countries that have been characterised to be especially favourable to include umbrella clauses on their Bilateral Investment Treaties. Also on the Spain–Venezuela (1995) and the Spain–Costa Rica (1997) BITs.

Switzerland is particularly favourable of the inclusion of umbrella clauses in its BIT, nevertheless we find some notable exceptions within the Swiss treaty practice; namely, article 10. (2) of the 2006 Switzerland–Colombia BIT reads: “Each Party shall observe any obligation deriving from a written agreement concluded between its central government or agencies thereof and an investor of the other Party with regard to a specific investment, which the investor could rely on in good faith when establishing, acquiring or expanding the investment.” It is to be noted that the clause limits its scope to “written agreements concluded by the central government or its agencies” and that such written agreements are only those in which “the investor could rely on in good faith”.

<sup>11</sup>*Salini Costruttori S.p.A. and Italstrade v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on jurisdiction dated 9 November 2004 (Guillaume, President; Cremades and Sinclair, Arbitrators), paras. 126–127

<sup>12</sup>*Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, Dated 6 August 2003, (Feliciano, President, Thomas and Feurès Arbitrators).

<sup>13</sup>*Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, Dated 6 August 2003, (El-Kosheri, President, Crawford and Crivellaro Arbitrators).

<sup>14</sup>*SGS v. Pakistan*, para 165

<sup>15</sup>*Ibid.*, para. 166

<sup>16</sup>*Ibid.*, para. 168

<sup>17</sup>*El Paso Energy International Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, decision on jurisdiction, para. 23

<sup>18</sup>*Ibid.*, para. 74

<sup>19</sup>*SGS v. Pakistan*, para. 167

<sup>20</sup>*Ibid.*, para 168

<sup>21</sup>*Ibid*

<sup>22</sup>*Ibid.*, para. 169

<sup>23</sup>Article X(2) of the Switzerland–Philippines BIT stipulates that “Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.” It can be therefore included in the “proper umbrella clauses” of group 2.

<sup>24</sup>*SGS v. Philippines*, paras. 161 and 163

<sup>25</sup>See *Ibid.*, paras. 120 to 128

<sup>26</sup>*Ibid.*, para 121

<sup>27</sup>*Ibid.*, para 119

<sup>28</sup>*Eureko B.V. v. Republic of Poland, Ad hoc arbitration, Partial Award, paras. 256 to 258*

<sup>29</sup>*SGS v. Philippines, para. 122*

<sup>30</sup>*CMS Gas Transmission Company v The Republic of Argentina ISCID Case No. ARB/01/8 Award (Orrego Vicuña, President, Lalonde and Rezek, Arbitrators).*

<sup>31</sup>*Ibid.*, para. 299

<sup>32</sup>See *SGS v. Philippines, paras. 136 to 155*

<sup>33</sup>*Ibid.*, para 141

<sup>34</sup>*Ibid.*, para 154

<sup>35</sup>*Ibid.*, para. 124

<sup>36</sup>Even if based on different merits, we find arguments for and against on different decisions. In favour of the effectiveness of the choice of forum we find both SGS decisions on jurisdiction; against, we can cite *Lanco v. Argentina* or *BIVAC v. Paraguay*.

<sup>37</sup>This issue is discussed in depth by González de Cossío, Francisco on “¿Cuándo pacta es servanda: Las cláusulas paraguas en el arbitraje de inversión” Instituto de Investigaciones Jurídicas, UNAM

<sup>38</sup>*LG&E Energy Corp., LG&E Capital Corp. And LG&E International Corp v. Argentine Republic ICSID Case N° ARB/02/1, decision on liability (Dr. Tatiana B. de Maekelt, President; Judge Francisco Rezek and Professor Albert Jan van den Berg, Arbitrators)*

<sup>39</sup>[http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf)

<sup>40</sup><http://www.state.gov/documents/organization/188371.pdf>