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UMBRELLA CLAUSES IN THE ICSID ARBITRATION

ICSID TAHKİMİNDE ŞEMSİYE KLOZLAR

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Abstract

Umbrella clauses are commonly used in international investment arbitration. They are stipulated in the international investment treaties, especially in the Bilateral Investment Treaties (BITs). Since BIT is concluded between sovereign states and it has not a direct relationship with investment contract which concluded between an investor and state where the investment is made. The frequent use of umbrella clauses raises various legal problems. This article aims to discuss different approaches taken towards such clauses, namely restrictive and broad interpretation approaches, while concluding that a more flexible and workable solution may be available in order to deal with problems regarding umbrella clauses.

Öz

Şemsiye klozlar (umbrella clauses) uluslararası yatırım tahkiminde sıklıkla kullanılan standart hükümlerdir. Bu hükümler genellikle uluslararası yatırım sözleşmelerinde yer almakta, özellikle de iki taraflı yatırım antlaşmalarında (Bilateral Investment Treaties) sıklıkla kullanılmaktadır. İki taraflı yatırım anlaşması; iki devlet arasında yapıldığından dolayı, yatırımcı ile yatırım yapılan devlet arasında akdedilen yatırım anlaşması ile doğrudan bir ilgisi de olmamaktadır. Buna rağmen uygulamada şemsiye klozlarının sıklıkla kullanılması ve yatırımcının yatırım sözleşmesi ihlalinde devlete karşı çoğu zaman doğrudan ikili yatırım anlaşmasında yer alan bu özellikli hükümlere dayanması beraberinde birçok hukuki problemi de getirmektedir. Bu makalenin amacı, ICSID kararları ışığında şemsiye klozlarının yorumlanmasında artık yerleşmiş olan sınırlı ve geniş yorum metotları analiz ederken, aynı zamanda bu sorunun çözümü için daha kullanışlı ve uygulanabilir bir çözüm aramaktır.

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Introduction

Umbrella clauses are used very frequently in international investment arbitration and generally stipulated in many bilateral investment treaties ("BIT"). In general, an umbrella clause is a provision permitting arbitration of claims for breach by the host state "of *any obligation* owed to the investor"[1]. International arbitration practitioners are familiar with the umbrella clauses however; legal issues arisen from umbrella clauses have not reached a uniform solution so far. Some arbitral tribunals interpret the umbrella clauses broadly, while others tend to apply a more restrictive approach.

This article aims to discuss two main approaches, namely *broad* interpretation and *restrictive* interpretation, adopted by various arbitral tribunals to deal with umbrella clause claims brought in international investment disputes, especially under the ICSID[2] arbitration.

The first section of the article tries to give readers a general idea about the BITs and the definition of umbrella clauses by heavily emphasizing the importance of such clauses in international investment arbitration. This section also gives a brief historical background with regard to emergence of umbrella clauses and analyzes the rationale behind this emergence while giving some actual wording of such clauses from pending or concluded ICSID cases.

The second section constitutes a crucial part of this article because it elaborates both the broad approach and restrictive approaches by analyzing ICSID cases involving umbrella clauses. Referring to *SGS v. Pakistan*, which is generally referred to in order to support

[1] Gary B. BORN, *International Arbitration: Law and Practice*, 2nd edition, Kluwer Law International, 2015 ("Law and Practice"), p. 401; Rau´l Pereira de Souza FLEURY, *Recent Developments - Umbrella clauses: a trend towards its elimination*, Arbitration International, p. 679–691, Advance Access Publication, 2015, p.679-680.

[2] The International Centre for the Settlement of Investment Disputes ("ICSID") is a specialized arbitration institution, headquartered in Washington, D.C. United States, which was established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"). ICSID was established at the initiative of the International Bank for Reconstruction and Development ("IBRD" or aka "World Bank").
The ICSID Convention entered into force at October 14, 1966 and gained wide acceptance from many countries all around the world. As of April 11, 2014; 159 States have signed the ICSID Convention and 150 of the signatory States have deposited their required instruments of ratification. For a detailed and updated list of state parties, see https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English (accessed at 9/4/2014).
ICSID Additional Facility Rules have been used for the claims that *do not* fall within the ICSID's scope. For more elaborations on this topic see İlhan, YILMAZ, *Uluslararası Yatırım Uyuşmazlıklarının Tahkim Yoluyla Çözümü ve ICSID*, Beta 2004, p. 31-34; Born (Law and Practice), p. 401-410.

restrictive approach, this section analyzes the rationale and argument for adoption of such an approach by the tribunal. Similarly under the analysis of the *SGS v. Philippines* case, which is usually referred to as the cornerstone for the adoption of the broad approach, this article aims to elaborate the rationale and argument for adoption of the broad approach by the tribunal. Although these two investment arbitration cases are very significant for each approach, this article suggests that to see how an arbitral tribunal deals with the umbrella clauses in more *recent cases* is extremely crucial to see whether there is a uniform adoption of one approach, or a reconciliation of two approaches. This paper concludes that, as it is clear from the recent cases discussed below, arbitral tribunals have not adopted one of these approaches as a uniform rule and it seems that there have not been and will not be reconciliation between the two approaches.

In the third section both approaches are elaborated by focusing on pros and cons of each approach in the light of basic principles of international arbitration. This section emphasizes that the interpretation of umbrella clauses is a contractual interpretation by a neutral arbitral tribunal. Tribunal must decide on the question of whether it has jurisdiction due to an umbrella clause which is stipulated in a BIT that is a separate international treaty from the main investment contract from which an investment dispute arises. This section argues that the adoption of only one approach would be inconsistent with the basic nature of international arbitration, which is supposed to be flexible. This article suggests giving a broad discretion to an arbitral tribunal to decide whether it has jurisdiction over a claim in a *case by case* basis.

In conclusion, the article suggests that the struggle to adopt one of these approaches or to reconcile them is meaningless since it undermines trust in the judgment of a neutral tribunal. Contrary to the broad discretion of an arbitral tribunal in international arbitration, such adoption forces arbitrators to apply a uniform approach despite the fact that each case may be different. Therefore, this article asserts that the interpretation of umbrella clauses should be left to a neutral arbitral tribunal in each case, and such tribunal shall decide whether it has jurisdiction over contractual claims under BIT due to an umbrella clause. If it does, then by taking all relevant facts of the case the tribunal will decide on an investment dispute by taking umbrella clauses into account.

I. Umbrella Clauses in Investment Arbitration

1. Bilateral Investment Treaties ("BITs")

Since most BITs have umbrella clauses, it is crucial to understand the basic aspects of a BIT. BITs, also known as investment protection agreements, became popular during the 1980s and were used as a means of "encouraging capital investments," especially in developing countries[3]. In order to attract foreign investments, BITs may permit claimants to avoid all local judicial systems and submit certain disputes to international arbitration through the ICSID to solve investment dispute. ICSID arbitration mechanism is frequently used and attracts many investors to countries that accept this mechanism, because enforcement of ICSID awards is much easier compared to other foreign arbitral awards. Article 54 of the ICSID Convention states that "each contracting state shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State". As clearly understood from this provision, there is no need to go through enforcement procedures additionally if the award is an ICSID award.

A recent study shows that over 200 important cases have been concluded under the ICSID arbitration and there are approximately 2600 BIT concluded worldwide[4]. A BIT can be defined as an international agreement between two countries that governs "the treatment of investments made in their respective territories by individuals and corporations from the other country"[5]. BITs usually provide broad investment rights to investors and also create flexibility with regard to resolution of investment disputes. Significant protections for investments made by foreign investors may vary from one host state to another. However in general, guarantees against expropriations and guarantee of fair and equitable treatment are provided by most host states[6]. Some BITs go further and also include a *national treatment clause*, basically requiring foreign investors to be provided with substantially the same legal protections as investors from the host country. In BITs, usually in order to assure that its national investors will be broadly protected

[3] Gary B. BORN, *International Arbitration: Cases and Materials*, Wolters Kluwer – Law & Business, 2011, p.40. (*Cases and Materials)*

[4] Jonathan B. POTTS, *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization*, Virginia Journal of International Law 51.4 (2011): 1005-1045. Academic Search Complete, Web. 2 Sept. 2014, p. 1006.

[5] 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*, 2006, p. 135 – 177. George. Mason L. Rev. [Vol. 14:1], p.135.

[6] BORN, p.40; FLEURY, p. 680.

against the host state's actions that may cause breach of an investment contract made with the investor, state parties to the BIT incline to stipulate an umbrella clause.

2. Definition of Umbrella Clauses

An umbrella clause can be defined as a provision usually found in a BIT that imposes a requirement on each Contracting State to observe *all investment obligations* entered into with investors from the other Contracting State[7]. Umbrella clauses in investment treaties usually guarantee the observation of all obligations assumed by the host State in favor of investors willing to invest in that country. In other words, an umbrella clause can be considered as an enforcement mechanism for host state promises[8].

Umbrella clauses sometimes are also known as "observance of undertakings", "sanctity of contract", "pacta sunt servanda", or "mirror effect clauses," and found in slightly less than half of the bilateral investment treaties worldwide[9]. An umbrella clause is a catch-all provision that *arguably* enables investors to bring a pure investment contract claim under the breach of a BIT. This is very crucial because an investment contract is separate from a BIT. A BIT is an agreement which is made between two sovereign states, whereas an investment contract is made between an investor and a sovereign state.

3. Emergence of Umbrella Clauses

Umbrella clauses were first seen in the Anglo-Iranian Oil Company ("AIOC") dispute in the early 1950s[10]. The context that gave rise to the emergence of umbrella clauses was that investors were often forced to resolve any disputes that arose from their contracts with the host

[7] WONG, p.136; Işıl EGEMEN DEMİR, *Uluslararası Tahkim Hukukunda Şemsiye Klozlar*, Yayımlanmamış Yüksek Lisans tezi, İstanbul 2007, p. 18; Sedat ÇAL, *Uluslararası Yatırım Tahkimi ve Kamu Hukuku İlişkisi,* Seçkin 2009,p. 314.

[8] Stephan W. SCHILL, Enabling *Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 Minn. J. Int'l L.1 (2009), p. 35.

[9] Jean-Christophe HONLET / Guillaume BORG, *The Decision of the ICSID Ad Hoc Committee in CMS v. Argentina Regarding the Conditions of Application of an Umbrella Clause: SGS v. Philippines Revisited*, The Law and Practice of International Courts and Tribunals 7 (2008) 1–32, p.3; EGEMEN DEMİR, p.18-19.

[10] HONLET/BORG, p.3; Also,
"The umbrella clause was already present in the first BIT between Germany and Pakistan (1959). However, it wasn't until 2003 that the clause was given attention…" (FLEURY, p. 680.)

state in the state's national courts and laws, which were "vulnerable to unilateral variation by the state" and detrimental to the interests of investors[11].

The 1954 draft settlement agreement between AIOC and Iran due to conflicts arisen from Iran's oil nationalization program at that time resulted in the first appearance of umbrella clauses[12]. In 1951, AIOC's interests under an oil concessionary contract with Iran were heavily damaged when a change in national government resulted in the enactment of the Iranian Oil Nationalization Law, which basically placed all oil operations in Iran in the government's hands[13].

Thereafter, AIOC attempted to secure an agreement and get compensation due to this nationalization program. These attempts, including proceedings before the International Court of Justice ("ICJ"), failed but a settlement was proposed in accordance with advice provided by Elihu Lauterpacht, a worldwide renowned British scholar, to AIOC. According to this proposed settlement, a consortium of oil companies including AIOC would continue to operate certain Iranian oil facilities. Additionally, an "umbrella treaty" between Iran and the United Kingdom incorporating the Consortium Agreement and containing "*a guarantee by Iran to fulfill the terms thereof"* would be concluded[14]. In order to protect the interests of the investors more clearly, the proposed settlement was deliberately structured in a way that any contract between Iran and AIOC 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*."[15]

Amounting breach of contractual obligation to breach of an investment treaty between two countries is a basic characteristic of an umbrella clause. One should also note that the basic aim of an umbrella clause is to prevent the dispute from falling within the jurisdiction of national courts of the host state, in order to avoid varying and arbitrary national proceedings. The Consortium Agreement should be regarded as first to include an umbrella clause because it ensured that the settlement would not be subject to Iranian law. It also provided an "interstate

[11] WONG , p.143; Anthon Y C. SINCLAIR, "The Origins of the Umbrella Clause in the International Law of Investment Protection", Arbitration International, Vol. 20, No. 4, LCIA 2004, p. 411-434, p. 414-418.

[12] WONG , p.143-144; ÇAL, p.315-316; EGEMEN DEMİR, p.19; SINCLAIR, p. 414-418.

[13] WONG , p.142-143; SINCLAIR, p. 414-418.

[14]WONG , p.144; SINCLAIR, p. 414-418.

[15] WONG , p.144; POTTS, p.1010; SINCLAIR, p. 414-418.

remedy allowing for any breach of the settlement to be resolved by the ICJ" instead of the Iranian courts.

Despite the fact that the 1954 umbrella treaty never materialized[16], taking its wording and goals into account is very crucial since it marks the very first attempt to stipulate and implement an umbrella clause against a sovereign state in international arbitration.

4. Wording of Umbrella Clauses

After AIOC dispute, the Abs-Shawcross Draft Convention on Investments Abroad (Abs-Shawcross Draft)[17] developed a new formulation of umbrella clauses. Article II of this draft required each state party to "*at all times* ensure the observance of *any undertakings which it may have given in relation to investments* made by nationals of any other Party." The use of the phrase "any undertakings" was immediately interpreted as any contractual undertakings between states and foreign investors[18].

In their basic formulation, the umbrella clauses impose an obligation on the host government to observe all obligations they undertake with respect to investments from the foreign state[19]. In order to impose obligations on the host state very broadly, the clauses usually attempt to use some crucial words to become a catch-all provision. "Any undertakings", "all obligations", "any obligation" or "any other obligation assumed" are just some of the most common expressions in a typical umbrella clause.

For example article II (2) (c) of the 1991 United States-Argentina BIT has a typical wording: "[e]ach Party shall observe *any obligation* it may have entered into *with regard to investments*."[20]

Article II (3) (c) of the BIT between Ukraine and the USA provides the umbrella clause as follows:

> "Each Party shall observe *any obligation* it may have entered into with regard to investments[21]."

[16] WONG , p.144; ÇAL, p.316; SINCLAIR, p. 414-418.
[17] WONG, p.144. The text of the Abs-Shawcross Draft is reprinted in The Proposed Convention to Protect Private Foreign Investment: *A Round Table, 9 J. PUB. L. 115, 116-18 (1960)* [hereinafter Abs-Shawcross Draft].
[18] POTTS, p. 1010; see different versions of wording at ÇAL, p. 321-323.
[19] SINCLAIR, p. 415; POTTS. at 1006-1007.
[20] POTTS, p. 1010.
[21] ICSID Case No ARB/08/11: Bosh International, Inc and B &P Ltd Foreign Investments Enterprise (Claimants) vs. Ukraine (Respondent), dated October 25, 2012.

The 1959 Germany-Pakistan BIT's article 8(2) stipulated an umbrella clause with "substantially similar language"[22]:

> "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."

Turkey also has had more than 90 BITs with other countries and some of these BITs stipulate umbrella clauses[23]. For example, Netherlands - Turkey BIT (1986) article 3(2) provides an umbrella clause as follows:

> "…Each Contracting Party shall *observe any obligation* it may have entered into *with regard to investments*."

USA - Turkey BIT (1990) article 2(3) provides an umbrella clause in almost same words:

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

The wording of umbrella clauses may change a little bit from one BIT to another, but the main aim to catch all disputes through such clauses and to subject them to the jurisdiction of tribunals remains the same in all umbrella clauses.

5. Importance of Umbrella Clauses

Investors often rely on an umbrella clause as a catch-all provision to pursue claims when a host state's actions do not otherwise breach the BIT, but amount to pure breach of underlying investment contract. The proposed AIOC settlement provided an umbrella clause for a specific contract, namely an oil concessionary contract. However, in modern BITs an umbrella clause usually applies not just to one particular agreement but to "all investment commitments" undertaken by each state party with investors from any other state party[24]. Once stipulated, the umbrella clause aims to equate breach of basic contract claims with breach of the umbrella

[22] WONG , p.148.

[23] See other BITs concluded between Turkey and other countries, stipulating umbrella clauses, at EGEMEN DEMİR, p.28-30; see all BITs that Turkey has become party at http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/214#iiaInnerMenu (15.02.2017).

[24] WONG , 145; ÇAL, p.323; FLEURY, p. 680-683; J. CHAISSE/ C. BELLAK, *Navigating the Expanding Universe of International Treaties on Foreign Investment Creation and Use of a Critical Index*, Journal of International Economic Law, 2015, Vol. 18, No. 1, pp. 79–105:
"… In essence, an umbrella clause *extends* the scope of the application of a BIT, and it offers more protection to the investor."

clause[25]. Since the umbrella clause is stipulated in a BIT and BIT covers "all investment commitments", breach of a contractual obligation may amount to breach of such a BIT as well. Therefore, the host state arguably may be held liable through application of breach of the umbrella clause by an arbitral tribunal.

If an umbrella clause is found applicable to a contractual claim arisen from an investment contract by an arbitral tribunal, then this international arbitration tribunal constituted under the BIT will thereby have jurisdiction over *breach of investment contract* claims, since a breach of the investment contract is also a breach of the umbrella clause stipulated in the BIT. If an arbitral tribunal adopts this interpretation as a general rule then it is correctly argued that the investor can now seek to "redress any breach of an investment contract between himself and a host contracting state" through international arbitration under the BIT, based on the wording of an umbrella clause[26]. The umbrella clauses are considered new and the reason is that, normally a mere violation of an investment contract cannot trigger treaty protection under customary international law. However, umbrella clauses aim to "circumvent this traditional notion through a supposedly explicit statement that breaches of contract will be considered breaches of the treaty as well"[27].

By negotiating and stipulating umbrella clauses, states may create a crucial exception to the rule of the autonomy of their national legal systems and allow a pure violation of an investment contract to be elevated to a violation of international law. Some even argue that as a consequence of such an application, the obligations assumed with an investment contract in domestic law of the host country would be "internationalized."[28]

II. Scope and Validity of the Umbrella Clauses: Restrictive Interpretation v Broad Interpretation

1. General

By looking at the cases below, it is possible to argue that in general arbitral tribunals have had two general approaches: *Broad interpretation* of umbrella clauses and *strict interpretation* of umbrella clauses. Under the strict approach, usually tribunals claim that they do not have jurisdiction over pure *contract* claims on the grounds that umbrella clauses in the BITs do not

[25] BORN, Law and Practice, p.401-402; FLEURY, p. 680-683.
[26] WONG, p. 137; FLEURY, p. 680-683.
[27] POTTS, p. 1006; FLEURY, p. 680-683
[28] WONG, p.137.

extend to such claims. On the other hand, tribunals applying broad approach claim that they in fact have jurisdiction over such pure *contract* claims due to the stipulation of umbrella clause in the BITs, when another forum is not explicitly agreed upon separately by parties to cover investment disputes.

As a general example to show these two different approaches, this article analyzes two essential cases in international investment arbitration: In the *SGS v. Pakistan*[29] case, the tribunal determined that a BIT tribunal does not have jurisdiction over mere contractual claims on the grounds that umbrella clauses do not extend to such claims. Whereas in *SGS v. Philippines*[30], the arbitral tribunal though deciding to the contrary that a BIT tribunal in fact has such jurisdiction, went on to determine that it should not exercise this jurisdiction "where the contract contains an exclusive forum selection clause designating a different forum for resolving disputes arising under the contract"[31].

2. Analysis of ICSID Cases Involving an Umbrella Clause

a. *SGS v. Pakistan.* The dispute in SGS v. Pakistan emerged from a Pre-Shipment Inspection ("PSI") agreement entered into between the Swiss company SGS and the Republic of Pakistan whereby SGS was to provide PSI services with respect to goods exported from certain countries to Pakistan. When parties disputed the adequacy of each other's performance, Pakistan primarily terminated the agreement. The resulting dispute between the parties concerned the validity and consequences of the termination.

In September 2000, Pakistan initiated arbitration in Pakistan on the basis of the controversial arbitration clause[32] stipulated in the PSI Agreement. Conversely, SGS sought the resolution of its disputes with Pakistan *under the BIT* between the Swiss Confederation and the Islamic Republic of Pakistan by rejecting arbitration in Pakistan. Pakistan sought an injunction from the Pakistani courts to restrain SGS from pursuing the ICSID arbitration; however the ICSID tribunal recommended that Pakistan not take any step to initiate a complaint until a final decision on the ICSID Tribunal's jurisdiction is made. The ICSID Tribunal determined that the

[29] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13).
[30] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6.
[31] WONG , p.137; FLEURY, p. 680.
[32] "… refer [a]ny dispute, controversy or claim arising out of, or relating to the Agreement or breach, termination or invalidity thereof, to arbitration in accordance with the Arbitration Act of the Territory (of Pakistan)". CASE No. ARB/01/13
(http://www.italaw.com/sites/default/files/case-documents/ita0779.pdf, 2.2.2017).

disputes between the parties emerged from *a relationship defined initially by contract*, whereas it was constituted on the basis of the BIT.

The Tribunal defined the central issue as being whether it had jurisdiction "to determine SGS's claims which are grounded on alleged violations by Pakistan of certain provisions of the BIT ("the Claimant's BIT claims"), or its claims grounded on alleged breaches of certain provisions of the PSI Agreement ("the Claimant's contract claims"), or on both types of claims."[33] The tribunal rightly emphasized that *BIT claims* and *contract claims* appear reasonably "distinct" in principle.

The *restrictive approach* was applied by the arbitral tribunal in SGS v. Pakistan, which decided that a broad dispute resolution clause in a BIT is not sufficient basis for a BIT tribunal to have jurisdiction over purely contractual claims.[34] Although parties (investors) usually try to stipulate catch-all phrases in order to escalate contractual claims directly to BIT claims, in SGS v. Pakistan case, the arbitral tribunal did not seem to be persuaded by such a broad catch-all provision, namely the wording of "all disputes with respect to investments". In other words, the SGS v. Pakistan tribunal does not view the phrase of "all disputes with respect to investments" contained in Article 9 of the BIT as a provision that provides a legitimate basis for its jurisdiction over *purely contractual* claims. It seems clear from the award that the tribunal made a distinction between claims arisen from BIT and from the investment contract[35]. In other words, the tribunal asserts that an umbrella clause in BIT does not elevate a contractual breach to breach of the BIT made by and between two sovereign states.

I think such a restrictive approach can be criticized on the ground that it condones the fact that an umbrella clause is a *consensual* provision stipulated in the BITs by the states. Since some treaties expressly restrict the BIT tribunal's jurisdiction over only treaty violations. This is why investors naturally *desire* their countries to stipulate a broader language of protection clause into a BIT while the countries negotiate with the host state, in order to guarantee their future investments against arbitrary actions of the host government. However; if there is not such an explicit consensus forbidding contractual claims under the BIT concluded between

[33] 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 Edited by Todd Weiler, 325-346, p.328.

[34] CASE No. ARB/01/13, Paragraph 162:
"…We conclude that the Tribunal has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT…"
(http://www.italaw.com/sites/default/files/case-documents/ita0779.pdf, 2.2.2017).

[35] For more details regarding the reasoning of the arbitral tribunal see EGEMEN DEMİR, p. 46-47.

states and there is an umbrella clause, it is possible to argue that states give their consents to be liable for *all investment disputes* including those arisen from the *investment contract* as well. The intention behind such a catch-all clause, at least for an investor, is to protect himself against a sovereign state under a BIT in cases of both breach of an investment contract and breach of a BIT.

Restrictive approach in the SGS v. Pakistan case has some justifications as well. It is rightly argued that it may seem odd "to interpret a treaty as creating a jurisdictional basis for the BIT tribunal in cases where it is not called upon to rule on an alleged violation of that treaty"[36]. This article agrees that the jurisdiction of an arbitral tribunal, in most cases, is over the claims arisen from the BIT itself. However, since there is a consensual umbrella provision stipulated in a BIT that is intended to circumvent investment disputes to the same jurisdiction by the states, it is possible to argue that it is after all about the interpretation of the arbitral tribunal dealing with the case. In SGS v. Pakistan, the arbitral tribunal seemed to ignore the consensual character of an umbrella provision and concentrate more on the jurisdiction matter itself. By applying the strict approach, the tribunal decided that it lacked jurisdiction over pure contractual claims despite the existence of an umbrella clause. In other words, the tribunal rejected to elevate the alleged breach of contract by the State to an alleged breach of the Switzerland-Pakistan BIT[37]. This approach shall be analyzed in more details below.

b. *SGS v. Philippines.* Contrary to the restrictive approach applied by the tribunal in SGS v Pakistan (May 23, 2004), just a few years later the arbitral tribunal in *SGS v Philippines* (April 11, 2008) came to the opposite conclusion based on similar facts and a similar umbrella clause in the Switzerland-Philippines BIT. Although the exclusive jurisdiction clause[38] in the underlying contract between the investor and the host state raised another question of exclusive jurisdiction[39], the tribunal's *broad* analysis regarding umbrella clauses has been remarkable.

The ICSID arbitral tribunal, respecting the selected forum by the parties, argued that the *selected tribunal* determines if and to what extent the agreement was breached. The tribunal

[36] GAILLARD, p.336.
[37] HONLET/BORG, p.5.
[38] Paragraph 137:
As noted already, Article 12 of the CISS Agreement provides that: "All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila."
http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C6/DC657_En.pdf (3.2.2017).
[39] Paragraph 155:
"…To summarize, in the Tribunal's view its jurisdiction is defined by reference to the BIT and the ICSID Convention. But the Tribunal should not exercise its jurisdiction over a contractual claim *when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively*. SGS should not be able to

also argued that it may exercise its jurisdiction in order to decide if such a breach, if established by the selected forum, amounts to a breach of the BIT. In other words, the ICSID tribunal would have jurisdiction to determine whether there is a breach of the underlying contract, and also whether such an established contractual breach amounts to a breach of the BIT.

The Switzerland-Philippines BIT, similar to the Switzerland-Pakistan BIT, stipulated the phrase of "disputes with respect to investments" between an investor and the host state. One can easily see from such wording that an umbrella clause is established in the BIT, mainly in order to elevate the contractual claims to BIT claims. Respecting a contractual dispute resolution mechanism by the parties, the *SGS v. Philippines* tribunal argued that such general wording of the BIT dispute settlement provision "warranted a purely contractual claim to be submitted to a tribunal constituted on the basis of the BIT".[40] This reasoning seems to make sense because according to the Tribunal; by stipulating such a *broad* definition, the host state does not only accept the liability for the breach of BIT but it also accepts the liability for any contractual breach regarding the investment. The tribunal agrees that umbrella clause of the BIT has the effect of elevating a simple breach of *contract* claim to a treaty claim under international law. Therefore, a contractual argument between two entities becomes a legal issue between two sovereign states as part of international law.

c. Recent Cases. In recent cases, it is possible to argue that there is still a division with regard to tribunals' approaches to evaluation of umbrella clauses. There are tribunals that favor the application of restrictive approach, while some favor applying the broad interpretation established in the *SGS v Philippines*.

The *El Paso v. Argentina*[41] case decided on 25 October 2011 was remarkable because the tribunal concluded that the umbrella clauses as stipulated in the United States–Argentina BIT could not *by itself* transform *any* contract claim into a treaty claim[42]. The main concern of the

approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim. The Philippine courts are available to hear SGS's contract claim. Until the question of the scope or extent of the Respondent's obligation to pay is clarified… a decision by this Tribunal on SGS's claim to payment would be premature…"
http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C6/DC657_En.pdf (3.2.2017).

[40] GAILLARD, p.333-334.

[41] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15
Paragraph 526; the so-called umbrella clause contained in Article II(2)(c) provides as follows:
"Each Party shall observe any obligation it may have entered into with regard to investments."
http://www.italaw.com/sites/default/files/case-documents/ita0270.pdf (10.2.2017)

[42] Paragraph 531: "In its Decision on Jurisdiction, the Tribunal rejected the argument that the so-called umbrella clause included in Article II(2)(c) could elevate any contract claim to the level of a treaty claim: "In other words, the Tribunal, endorsing the interpretation first given to the so-called 'umbrella clause' in the Decision SGS v.

tribunal was that the opposing evaluation would transform *all* state commitments, no matter how minor, into treaty claims[43]. Nevertheless, the tribunal considered the reasoning in SGS v. Pakistan, where the tribunal had explained that while it was possible to draft a treaty elevating contractual claims, there was no clear and persuasive evidence that it had been the intention of the drafting parties. The tribunal sought *clear* intentions of host countries and without clear indications of such intent, the tribunal refused to apply the umbrella clause *broadly*. If there is such an explicit and clear provision in the BIT, then due to such umbrella clause an *investment agreement claim can be viewed also as a treaty claim*[44]**.**

For *SGS v the Republic of Paraguay*,[45] decided on February 10, 2012, the ICSID arbitral tribunal found that the Republic of Paraguay's breach of contractual obligations with SGS was actionable and fell within the scope of the tribunal's jurisdiction, under the umbrella clause stipulated in the BIT between Switzerland and Paraguay. Interestingly despite the counter argument by the defendant[46] the ICSID tribunal, unlike SGS v Philippines, decided on its jurisdiction over the contractual claims in spite of parties' intentions requiring conflicts to be resolved in the courts of Paraguay. It is possible to argue that the ICSID tribunal analyzed "umbrella clause" broader than SGS v Philippines since it argued that it has jurisdiction by notwithstanding the selected contractual dispute forum by the parties[47].

Pakistan, confirms what it mentioned above, namely, that it has jurisdiction over treaty claims and cannot entertain purely contractual claims, which do not amount to a violation of the standards of protection of the BIT…" http://www.italaw.com/sites/default/files/case-documents/ita0270.pdf (10.2.2017)

[43] POTTS, 1016-1017.

[44] Paragraph 531: "…It adds that, in view of Article VII(1) of the US-Argentina BIT, a violation of an investment agreement entered into by the State as a sovereign and an American national or company is deemed to be also a violation of the Treaty and can thus give rise to a treaty claim." Paragraph 532: "…This means that a contract claim is not transformed into a treaty claim by the umbrella clause, while an "investment agreement" claim can be viewed as a treaty claim by virtue of a combination of Articles VII (1) and II (2) (c): "moreover, Article II, read in conjunction with Article VII (1), also considers as treaty claims the breaches of an investment agreement between Argentina and a national or company of the United States. In other words, although in general a contract claim is not a treaty claim, the violation of an investment agreement can be considered a treaty claim as it is an obligation entered into with regard to investments under Article VII (1)…" http://www.italaw.com/sites/default/files/case-documents/ita0270.pdf (10.2.2017)

[45] SGS *Société Générale de Surveillance* S.A. *v. The Republic of Paraguay*, ICSID Case No. ARB/07/29.

[46] Paragraph 126: "Respondent has objected, in many variations and forms, to this Tribunal's exercise of jurisdiction over this dispute because Article 9 of the Contract states that "[a]ny conflict, controversy or claim deriving from or in connection with this Agreement, breach, termination or invalidity, shall be submitted to the Courts of the City of Asunción under the Law of Paraguay" In Respondent's view, Claimant's claims are, at their core, claims for breach of the Contract, over which Article 9 of the Contract vests exclusive jurisdiction in the domestic courts of Paraguay." http://www.italaw.com/sites/default/files/case-documents/italaw1526.pdf (10.2.2017)

[47] Paragraph 129: "Claimant has not asked this Tribunal to decide claims by SGS under the Contract for breach of that Contract. We note in passing that the Treaty's dispute resolution provisions are arguably broad enough that Claimant would have been entitled to do so: Article 9 provides for the resolution of "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party," and, as discussed in Section IV.A above, Article 9(2) contains Paraguay's consent to international arbitration of such a dispute. There is no qualification or limitation in this language on the types of "disputes with respect to investments" that a Swiss

There are many cases regarding the conflicts arisen from the interpretation of umbrella clauses. Some of those cases resulted in positive conclusions that the tribunal has jurisdiction to hear the breach of umbrella clauses, whereas others were concluded that the tribunal does not have jurisdiction over the umbrella clause cases[48].

III. Analysis of *Restrictive* and *Broad* Interpretations

1. General

By looking at tribunals' approaches towards umbrella clauses in various cases in the light of recent cases, it is possible to see two main interpretations applied: *restrictive* interpretation and *broad* interpretation. Arbitration tribunals applying restrictive approach usually refer to the *SGS v Pakistan* case, while proponents of the broad interpretation mostly refer to the *SGS v Philippines* case discussed above.

It seems like there has not been and will not be reconciliation between these two different approaches of arbitral tribunals as recent cases discussed above have indicated. This article is of the opinion that there should be a balance between the intentions of the host state and the investing state. Both approaches have advantages and disadvantages and imposition of one approach as a rule will contradict with the flexible nature of international arbitration. The following section of this article will focus on advantages and disadvantages of both approaches and aim to provide a more balanced approach that is *subject to change,* regarding the interpretation of umbrella clauses by arbitral tribunals, on a *case by case* basis.

investor may bring against the Republic of Paraguay. The ordinary meaning of Article 9 would appear to give this Tribunal jurisdiction to hear claims for violation of Claimant's rights under the Contract—surely a dispute "with respect to" Claimant's investment—should Claimant have chosen to bring them before us. But Claimant has not done so." http://www.italaw.com/sites/default/files/case-documents/italaw1526.pdf (10.2.2017)

[48] For more cases and analysis, see EGEMEN DEMİR p. 42-45. Since elaboration of *all* relevant cases will go beyond the scope and purpose of this article, we only refer to a few more important cases. *Some* important cases are as following:
Eureko B.V. v. Republic of Poland (Ad Hoc); Occidental Petroleum Corporation and Occidental Exploration and Production Company *v.* The Republic of Ecuador, ICSID Case No. (ARB/06/11); Daimler Financial Services AG v. Argentine Republic, ICSID Case No. (ARB/05/1).

2. Analysis of *Restrictive* and *Broad* Interpretations

a. Problems with Adopting either of the Approaches. If tribunals accept the broad interpretation as a general rule, then such adoption will misinterpret the intention of the host state which obviously does not wish *all kinds* of contractual claims including minor investment disagreements to be elevated to BIT claims. On the other hand, if tribunals agree on the restrictive approach as a general rule then such a conclusion will misinterpret the intention of the investing state (or its national investor), who obviously wants to elevate all contractual claims to BIT claims in order to secure investors' interests against the host state as much as possible. More crucially, if tribunals try to adopt one of these approaches as a general rule or to combine them into a new approach applicable to all cases involving umbrella clauses, then they will contradict some basic principles of international arbitration such as flexibility, broad discretion of arbitral forum, the competence-competence rule.

b. Analysis of the Restrictive Approach. One of the justifications behind defending strict interpretation of umbrella clauses is the argument that foreign investment capital usually flows from a developed country to a developing country and most BITs stipulating umbrella clause are concluded between developed countries and developing countries. Based on this reasoning, it is argued that developing countries have sought "to interpret *restrictively* any BIT provision that accords rights to the investor and imposes obligations on the host State, whereas developed countries will read the same provision *expansively*"[49]. To protect developing countries, it is suggested that a strict approach is more reasonable. In the light of recent cases, this article suggests that such reasoning is no longer valid in support of the application of strict interpretation.

First of all, the fact that foreign investment capital usually flows from a developed country to a developing country has been changing lately. Most developed countries endeavor to attract foreign investment even from developing countries, and developing countries also have desired to attract more investment from both developed and developing countries[50]. It is also argued that the argument of unequal bargaining power would invalidate not just the umbrella clause but all BIT provisions[51]. I think that it is also crucial and more realistic to accept that there is not equal bargaining power between especially developed countries and developing countries. It is normal that parties do not have equal bargaining power or status especially in a commercial

[49] WONG, p.138.
[50] BORN, p.457-458.
[51] WONG, p.139.

or investment transaction. Therefore this fact by itself is not enough to conclude that an umbrella clause is not valid at all. Such an argument condones the importance of party autonomy both in international law of treaties and international arbitration. Despite the gap between their bargaining powers, two parties may freely choose to engage in certain contracts.

Having emphasized that, on the other hand, an umbrella clause should not be used as a *tactic* by a developed country, the fact that the developing countries desire to be more an attractive environment for foreign investment does not necessarily mean that they favor broad interpretation completely and automatically. However, in my opinion in case of a dispute including bargaining power difference, appointment of a *neutral* tribunal must be considered an important step in order to evaluate the inequality regarding bargaining power at the BIT stage. In other words, an arbitral tribunal may take such a huge and inequitable gap between states' bargaining power to decide whether the umbrella clause is to catch all state undertakings regarding investment in a developing country or not. For example, if a US Company makes an investment in Nigeria and the BIT between the US and Nigeria stipulates many provisions including an umbrella clause, which are *strictly* and *completely* in favor of the US, still the interpretation of such provisions will be in the hands of a neutral tribunal. Therefore, just because an umbrella clause is stipulated in a BIT due to unequal bargaining power between state parties does not necessarily mean that a restrictive approach should be applied by the tribunal.

As long as both parties have an equal say in appointment of the *neutral* arbitrators under ICSID arbitration, and are given equal opportunity to prove their claims, the tribunal in light of common intentions of the parties will interpret umbrella clauses on a case-by-case basis. It is true that to infer state parties' intentions the tribunals have examined the structure of the BIT as guidance[52]. For example, in *SGS v Pakistan* where strict interpretation was adopted, the tribunal heavily emphasized the fact that the umbrella clause was stipulated at the end of the document, and not among the "first order obligations" at the beginning[53]. This inference supports my conclusion that instead of imposing a generally applicable standard to the interpretation of umbrella clauses, it should be left to the arbitral tribunal which ultimately to decide whether an umbrella clause covers contractual claims by taking into account various aspects of the dispute, such as common intent, way of drafting the umbrella clause, BIT

[52] POTTS, p. 1034; FLEURY, p. 681-682.
[53] SGS v. Pakistan, paragraph 170.

structure, BIT negotiation stage etc. For each case, the arbitral tribunal should decide on its jurisdiction and then decide whether the host state actually assumed all investment obligations by agreeing to the stipulation of an umbrella clause in the BIT.

The reasoning relied on by the arbitral tribunal in *El Paso v. Argentina* was that adoption of a broad interpretation would transform all state commitments, no matter how minor, into treaty claims[54]. Although I agree with this concern, I am of the opinion that this reasoning is misleading in a sense that it relies on the danger of restrictive approach as a general rule. I agree that the adoption of restrictive approach as a uniform standard applicable to all umbrella clause claims will automatically elevate all state undertakings regarding investments into BIT claims. However, that does not necessarily mean that based on such concerns arbitral tribunals should automatically reject broad interpretation or adopt restrictive approach as a general rule. Once a tribunal decides on its jurisdiction to hear an umbrella clause claim affirmatively, it is up to this neutral arbitral tribunal to decide whether a certain state undertaking can be elevated to a treaty claim irrespective of how big or minor the state undertaking is.

c. Analysis of the Broad Approach

One of the main justifications behind adopting the broad interpretation may be that since both the host state and the investing state *agree* on the stipulation of such an umbrella clause, from the standpoint of contract law the arbitral tribunal should have jurisdiction to elevate contractual claims to investment claims directly due to the umbrella clause. I think that such contractual interpretation is very elegant since a BIT (between host state- investing state) is a separate agreement from the investment contract (between host state or authorized host state entities and investor) itself. In contracts law, one should note that *relativity of contract* is a general principle and any interpretation otherwise will provide an exception. In order to demonstrate the elegancy of this contractual issue, suppose the following scenario: A US Company invests in Turkey by participating in a joint venture agreement with the Turkey Ministry of Energy and Natural Resources. A dispute arises from this joint venture agreement due to cancellation of a project 3 years after the project started. The US Company claims that such breach of the joint venture agreement is also a breach of the BIT by Turkey, by relying on

[54] POTTS, p. 1016-1017; FLEURY, p. 684.

the umbrella clause stipulated in the US – Turkey BIT[55]. These two separate agreements are illustrated in the following diagram:

US Company (Investor) Joint Venture Agreement → Ministry, TURKEY (Host State)

US Bilateral Investment Treaty (1990) TURKEY →

This diagram schematically depicts that the BIT and the joint venture agreement or the investment contract are two separate agreements. A BIT is an international agreement signed between two sovereign states, whereas a joint venture agreement is made between a sovereign state and a private entity namely investor. In both agreements, Turkey is a common party and the US tries to protect its national investors against Turkey by stipulating an umbrella clause in the BIT. Proponents of the broad interpretation approach should be aware of the fact that elevating contractual claims to the level of BIT claims in favor of an investor who *naturally* cannot be party to such an international inter-state agreement will be an exceptional analysis. Since the parties to two different agreements are different, the rights and duties of the parties vary as well. In a BIT, both states are sovereign and they are equal from the perspective of international law. Similarly if two people conclude a sale contract, they may be also considered equal. However while making investment contract it is crucial to realize that an investor is facing a sovereign state and there is no equality in this situation. This is why the investor mostly depends on the protection by his state instead of trusting the laws and discretion of the host state. Therefore I understand the investor's goal of getting broader protection from BIT through an umbrella clause but it cannot be condoned that the investor is not party to the BIT directly. In my opinion, the investor may look like a *beneficiary* because the state concludes the BIT with host state to protect investors. As in insurance law, if someone is beneficiary in the contract that does not make him directly to party to the insurance contract. This is why, while analyzing the issue, the tribunal needs to concentrate on that these are two separate agreements with different parties, rights and obligations.

However, my criticism in this article of broad interpretation does not necessarily mean that the broad approach is not applicable at all, and that restrictive approach should be universally applied. First, just because an ICSID tribunal decides that it has jurisdiction over a pure contractual claim arisen from an investment under a separate umbrella clause stipulated in a BIT, does not necessarily mean that the arbitral tribunal will decide that the host state violated

[55] http://www.state.gov/documents/organization/43615.pdf (Signed December 3, 1985; Entered into Force May 18, 1990) (accessed 10/23/2014).

its duties under the BIT. In B*osh International, Inc and B &P Ltd Foreign Investments Enterprise vs. Ukraine*, despite the clear claims of claimants regarding the umbrella clause in the relevant BIT, the arbitral tribunal did not find the conduct of Kiev University regarding the investment dispute *attributable* to the Ukraine[56]. In other words, even if the tribunal found that it had jurisdiction to decide on such a pure contractual claim by applying broad interpretation, the host state still would not be held liable since there was an obstacle barring the claimants from recovery under the BIT ("a non-attributable nature of conduct"). There can be other obstacles as well because an umbrella clause does not cover every contractual obligation between foreign investor and host State. Since the ICSID tribunal deals with "investment" issues, the contract entered into by the host State has to qualify as an "investment in the sense of the applicable investment treaty[57]".

I am of the opinion that an arbitral tribunal may have jurisdiction over a contractual claim by a just and equitable interpretation of the common intent of the parties, as long as it is constituted of neutral arbitrators and the parties have equal say in such constitution and defending their claims. On the other side of the coin, based on the same interpretation methodology, the arbitral tribunal may decide on its lack of jurisdiction by applying restrictive interpretation in a particular case as well.

3. Seeking a more Flexible Approach

I believe that a flexible approach, instead of a *uniform* and universal broad or restrictive approach, is more suitable for the nature of arbitration proceedings in general. Today's investment arbitration practice as discussed above has also shown that it is not possible to reach a universally valid and single approach to solve issues arisen from umbrella clauses[58]. Therefore technically, any approach will be challenged at the Tribunal's hands because the Tribunal flexibly will decide how to interpret umbrella clause or even, whether to take such clause into account in the first place.

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[56] See more details at http://www.italaw.com/sites/default/files/case-documents/italaw1118.pdf (13.2.2017). This case is crucial for this paper because the tribunal makes a distinction between contracts. *Bosh* invests in Ukraine, but the investment should be between an investor and a sovereign state from the International Investment Arbitration's perspective. If that is not the case, the investor is not entitled to rely on an *umbrella clause* because the investor *does not have an investment contract with the state in the first place*. The Kiev University is "a separate and autonomous juridical entity" which is not *organ* of the state. The tribunal must be careful while deciding on the umbrella clause claims.

[57] SCHILL, p.86.

[58] FLEURY, p.691: "There is not a uniform standard to consistently and reasonably rely upon and so, there is a shocking fluctuation of decision-making between extremes that are based in the application of the umbrella clause to almost identical facts and circumstances."

One of the most striking features of arbitration is *flexibility*. By the flexible approach, I do not mean that all tribunals should follow one single approach. On the contrary, each tribunal should be able to evaluate each case flexibly and on a case-by-case basis. However one can rightly argue that *predictability* and *certainty* are also common expectations; therefore, a *universal* method of interpreting umbrella clauses should be maintained. I disagree, because adoption of such an approach will fundamentally alter the nature of arbitration proceedings. Suppose that broad interpretation is adopted as a general rule and any contractual claim arisen from an investment shall be solved under a BIT automatically due to an umbrella clause. This adoption definitely contradicts with the notion of the competence-competence rule, which clearly states that the tribunal itself decides whether it has jurisdiction over a certain claim or not.

Hoping that the arbitral tribunal will have jurisdiction over a contractual claim is understandable but *imposing* such authority upon all arbitral tribunals contradicts with the competence-competence rule. Similarly, the adoption of the restrictive approach stating that the tribunal does not have jurisdiction over contractual claims, since the umbrella clause does not elevate such claims to BIT claims, also contradicts with the competence-competence rule. Parties to the dispute can raise any claims and evidence they desire, but it is up to the arbitral tribunal to decide whether it has jurisdiction to hear such claims or if the evidence submitted is admissible.

Conclusion

In this article I suggest that a neutral arbitral tribunal has the duty to come up with a just result regarding contractual interpretation of an umbrella clause. Although it is hard to determine, if it can be concluded from the facts of a case that both the host state and the investing state by stipulation of an umbrella clause agree that such clause will cover contractual claims arisen between the host state and the national (investor) of the investing country, then such a violation may be subject to broad interpretation of umbrella clause. Such contractual interpretation is very elegant since the BIT (between host state- investing state) is separate from the investment contract (between host state or authorized host state entities and investor) itself. One should note that this is an issue of whether a general provision in a totally different agreement with a different party (BIT with investing state) can pull the signatory namely the host state into this agreement due to the breach of a totally different contract with a third party (investment contract with investor of investing country).

By taking subjectivity of the contracts and intention of the parties into account, *it is up to the tribunal* to decide whether it has jurisdiction over the contractual claims, and if it does, to decide whether such contractual claims can be elevated to BIT claims due to the stipulation of an umbrella clause. Therefore, I am of the opinion that imposition of one of these two approaches will not be consistent with the flexible nature of international arbitration, and the principle that arbitral tribunal shall have broad discretion to decide on whether a certain claim including an umbrella clause falls within its jurisdiction or not. Therefore, endeavors to reconcile the two approaches into one single uniform rule applicable to all investment arbitration processes or to adopt one of the approaches as a uniform rule interpreting all umbrella clauses in BITs seem unrealistic. Such endeavors ignore the most crucial aspects of international arbitration in the first place such as flexibility, broad discretion of the tribunal and the competence-competence rule. However, it seems like arbitral tribunals have been and will continue to be challenged by the ambiguity in the application of the umbrella clauses.

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