

# FDI

## *Umbrella Clause*

### Essential questions:

1. Does the umbrella clause involve any contractual obligation assumed by the host state; or does it involve only obligations of administrative nature (licence agreements, contracts administratifs)?
2. Should the broad scope of umbrella clause be narrowed/limited in some manner? Does the rule of
3. Is the tribunal authorized to decide on violation of obligation covered by the umbrella clause as a preliminary question?
4. Does the umbrella clause cover only the obligation assumed by the host state; or does it cover also obligations of entities which actions are attributable to the state according to international law? In latter case, do the rules of attribution used in state wrongs liability apply?

### Sources:

**State practice:** Note of German Government to Parliament concerning 1959 BIT between Germany and Pakistani; in Alenfeld, J.: Violation of contract obligation amounts to violation of treaty.

D+S, 154: Umbrella clause as a result of controversies about the status (lex contractus) of investment agreements.

Mann, F. A.: British Treaties for the Promotion and Protection of Investments, BYBIL (1981) 241, 246;

Dolzer, R; Stevens, M. Bilateral Investment Treaties (1995) 81;

Shihata, I.: Applicable Law in International Arbitration, The World Bank in a Changing World: Selected Essays and Lectures, II (1995), 601;

Schreuer, C.: Travelling the BIT Route, 5 Journal of World Investment and Trade (2004) 231, 250; sharing the broad interpretation

Sinclair, A.: The Origins of the Umbrella Clause in International Law of Investment Protection, 20 AI (2004) 411

Yannaca-Small, K.: Interpretation of the Umbrella Clause in Investment Agreements, OECD Working Papers on International Investment, Number 2006/3

PCIJ, Serbian Loans Case, Judgment, No. 14, Series A, No. 20, 41; “[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on municipal law of some country;” later probably denied by oil concessions arbitrations.

ICJ (not known where yet); interpretation according to principle effect utile (clauses – if possible – shall be effective)

## I. RESTRICTIVE INTERPRETATION

### I. 1. Restriction to breaches through legislation and denial of dispute settlement

**SGS v Pakistan**, Decision on Jurisdiction, 6 August 2003, 42 ILM (2003) 1290; restrictive interpretation of the umbrella clause, which means that the umbrella clause would be relevant only in case the host state fails (1) to implement investment contract in its legislation or (2) to take part in agreed dispute settlement.<sup>1</sup>

Arguments used:

1. Flood of lawsuits concerning the smallest claims.
2. Blurring the sense of other protective standards.
3. Quasi-systematic interpretation. Location at the end of the BITs.

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<sup>1</sup> Dolzer & Schreuer do not enlight much how did the tribunal restricted the umbrella clause.

4. Evasion of forum selection clauses.
5. WTO jurisprudence: in dubio mitius.

Arguments not used:

1. Distinction between commercial and sovereign acts.
2. Modes of interpretation laid down in article 31 of VCLT.
3. Effect utile principle.

Commented in:

- Alexandrov, S. A.: Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract ..., 5 Journal of World Investment and Trade (2004) 555, 569
- Wälde, T.: The Umbrella Clause in Investment Arbitration – A Comment on Original Intentions and Recent Cases, 6 Journal of World Investment and Trade (2004) 183, 225

## **I. 2. Restrictions to *acta iure imperii***

**El Paso v Argentina**, Decision on Jurisdiction, 27 April 2006, paras 77 et seq.; supported the first and second argument used in *SGS v Pakistan*; distinction between *acta iure commercii* and *acta iure imperii* – state as a merchant and state as a sovereign.

**Pan American v Argentina**, Decision on Preliminary Objections, 27 July 2006, paras 108 et seq.; nearly identical to *El Paso v Argentina* (two out of three arbitrators are the same).

**Salini v Jordan**, Decision on Jurisdiction, 29 November 2004, 44 ILM (2005) 569, para 125; addresses, whether obligation to maintain a legal framework constitutes an umbrella clause [Article 2(4) of BIT between Italy and Jordan]; answers negatively; supports distinction between commercial and sovereign acts recognized in *El Paso* and *Pan American*.

**Texaco v Libya**, 53 ILR (1979) 389, para 72 (René-Jean Dupuy); distinction between commercial and sovereign acts based on French concept of *contracts administratifs*.

**ARAMCO v Saudi Arabia**, 27 ILR (1963) 117, 164; repeated the opinion of *Texaco v Libya*.

**Siemens v Argentina**, Award, 6 February 2007, para 206; rejected distinction between different types of investment contracts; no basis in wording “any obligations” and in the definition of investment.

## **I. 3. Restriction to significant governmental interference**

**CMS v Argentina**, Award, 12 May 2005, 44 ILM (2005) 1205; affirmed distinction between commercial and sovereign acts of the host state; purely commercial aspects are not covered by the umbrella clause, significant interference of government or public agencies is required.

Conceptual approach corresponds with

- *Joy Mining v Egypt*, Award, 6 August 2004, 19 ICSID Review-FILJ (2004) 486

**D + S**; references to abstract concepts has no methodological power of persuasion for it has no basis in canon/modes of interpretation according to VCLT

## **II. EXTENSIVE INTERPRETATION**

**SGS v Philippines**, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports (2005) 518; broad scope of umbrella clause recognized; content of contractual obligations remains governed by municipal law, tribunal is not empowered to decide on breach of contract not even within preliminary question (due to forum selection clause)

Criticized in:

- Schreuer, C.: *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, Law and Practice of International Courts and Tribunals (2004) 1, 11

**Noble Ventures v Romania**, Award, 12 October 2005, para 51; decided, that respondent did not violated its contractual obligations; left open, if the broad scope of umbrella clause should be narrowed or limited in some manner.

Tribunal recalled the principle that breach of contract per se does not amount to a breach of international law (§ 53).

**Eureko v Poland**, Partial Award, 19 Award 2005, 12 ICSID Reports 335; broad scope of application; violation of obligations arising from privatization scheme vis-à-vis investor.<sup>2</sup>

Reviewed in:

- Douglas, Z.: Nothing if not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex, 22 *Arbitration International* (2006) 27

### III. ATTRIBUTION

#### III. 1. Application of international law rules of attribution

**Noble Ventures v Romania**, Award, 12 October 2005, paras 82 *et seq.*; recognized an obligation assumed by state ownership fung as covered by umbrella clause in view of the grant of governmental power. Distinction between commercial and sovereign acts has no relevance, also for it is not manageable in practice.

**Eureko v Poland**, Partial Award, 19 August 2005, paras 115 – 134, 244 – 260; independent legal personality of Polish State Treasury did not preclude liability of the host state; minority opinions present.

**Nykomb v Latvia**, Award, 16 December 2003, section 4.2; without detailed discussion acknowledged a contract between the investor and a wholly owned state enterprise; watch out: ECT may give to host states special duties to observe obligations of state enterprises.

**SGS v Pakistan**, Decision on Jurisdiction, 6 August 2003, 42 ILM (2003) 1290, para 166; obligation may be assumed by the host state or its subdivisions or legal representative thereof, if their acts are attributable to the host state.

**Consorzio Groupement L.E.S.I.-DIPENTA v Algeria**, Award, 10 January 2005, para 19; a contract may be attributed to the host state where the government exercises important influence over the entity and was to some extent involved in the contract negotiations.

**SwemBalt v Latvia**, Decision, 23 October 2000, para 37; the way in which each state chooses to divide the work between its subdivisions is without relevance.

Commented in:

- Wälde, T.: Energy Charter Treaty-based Investment Arbitration: Controversial Issues, 5 *JWIT* (2004) 373, 396 – 397

**EnCana v Ecuador**, Award, 3 February 2006, paras 154 – 158; attribution relevant to the umbrella clause is consistent with attribution relevant to other treaty standards.

#### III. 2. Recognition of separate personality under domestic law

**Impregilo v Pakistan**, Decision on Jurisdiction, 22 April 2005, 12 ICSID Reports 245, para 223; the umbrella clause does not cover obligations of separate public agencies; umbrella clause was probably used on basis of MFN and therefor rejected because it involved obligations of a different host state.

Contracts may not be confused with treaties. Principle that international law rules of attribution are not operative in the case of contractual claims is well settled in:

- *Salini v Morocco* (Jurisdiction), §§ 59 – 61
- *Vivendi v Argentina* (Annulment), § 96
- *Cable Television of Nevis v St. Kitts and Nevis* (Award), §§ 2.17 – 27
- *RFCC v Morocco* (Jurisdiction), §§ 68, 69
- *RFCC v Morocco* (Award), §§ 32 – 35

**Nagel v Czech Republic**, Award, 10 September 2003, paras 162 – 163; *obiter dictum* refused applicability of the umbrella clause because the obligation was assumed by state enterprise and the host state was not involved in the

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<sup>2</sup> Necessary to know, if there was a contract, and if there was any, if it contained any dispute resolution clause.

negotiations.

**CMS v Argentina**, Decision on Annulment, 25 September 2007, para 95(c); the umbrella clause does not transform contract to a treaty obligation; the obligation is subject to its proper law, also the parties remain the same.

Accordingly:

- Crawford, J.: Treaty and Contract in Investment Arbitration, TDM, Provisional (January 2008) 19

**Azurix v Argentina**, Award, 14 July 2006; contract with province is not covered; maybe, it was decisive, that the contract was entered into by local subsidiary of the investor; it is principle of international law, that the state is liable even for acts of municipalities.

**N+P**, 460, note 76, § 9.17: different question is whether the host state may be hold responsible to interfere with contract signed between two private entities; this is an issue of other standards than that of umbrella clause; 464, domestic law (*lex contractus*) would be the substantive law on the question of compliance, but the scope of the treaty obligation would need to be determined under international law rules, including those on the attribution of the relevant undertaking to the state.

ILC Articles on State Responsibility (5; 8)

Perera, S. M.: State Responsibility: Ascertainning the Liability of States in Foreign Investment Disputes, 6 JWIT (2005) 499, 510

#### **IV. CONTRACTUAL CLAIMS, TREATY CLAIMS**

**Vivendi v Argentina**, Decision on Annulment, 3 July 2002, 41 ILM (2002) 1135, “Vivendi Annulment Committee“, paras 99 – 101; distinction between contract and treaty claims.

**Bayindir v Pakistan**, Decision on Jurisdiction, 14 November 2005, para 270; contractual matters may be addressed even in the absence of an umbrella clause.

Preceeding:

- Lalive, P.: The First World Bank Arbitration (*Holiday Inns v Morocco*) – Some Legal Problems, 51 BYIL (1980) 123
- Orrego Vicuña, F.: Contracts and Treaties in the Global Market, 8 Max Plank Yearbook of United Nations Law (2004) 341