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UMBRELLA CLAUSES - AN ANALYSIS OF ICSID DECISIONS AND SCHOLARLY OPINION

RESEARCH PAPER

LAWS 526 – INTERNATIONAL ECONOMIC LAW

FACULTY OF LAW

VICTORIA UNIVERSITY OF WELLINGTON

2007

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ABSTRACT

The ongoing unsuccessfulness at the multilateral level finally cleared the way for so-called Bilateral Investment Treaties (BIT). It is estimated that of the almost 2,500 BITs in force approximately 40 per cent contain an 'umbrella' clause. Put simply, by virtue of this clause the signatories mutually obligate themselves to comply with any commitment or obligation - regardless its treaty-related or commercial nature - assumed with respect to specific investments in their territory made by nationals of the other signatory. The SGS decisions of 2003 gave reason to a discourse among scholars on the character of umbrella clauses since they reached opposed results. In addition, a considerable quantity of diverging decisions has been made by other ICSID tribunals. This paper endeavours to structure and analyse the arguments given in this context. In the end, the paper finds that the ordinary meaning of umbrella clauses is in accordance with a broad interpretation. According to this wide approach an umbrella clause elevates all contract-claims onto a treaty-level.

Word length:

The text of this paper (excluding the abstract, table of contents, footnotes, questions, and bibliography) comprises 14013 words.

I INTRODUCTION

This paper addresses the approach of ICSID tribunals and scholarly opinion to the meaning and legal effect of umbrella clauses in Bilateral Investment Treaties (BITs). Thereby, the paper tries to analyse the relevant ICSID decisions and legal comments made up to now. Under part II the paper gives a short introduction to BITs, umbrella clauses and the first two ICSID decisions on this issue. Subsequently, the paper illustrates under part III the remaining decisions and legal comments pointing out the reasons which led each tribunal and scholar to its conclusion. Under part IV the paper will mark out the legal principles by which a proper interpretation of the umbrella clause is to be achieved scrutinising the highlighted arguments. In its concluding remark, the paper finds that the ongoing discussion on umbrella clauses is drawn by a reliance on canons contrary to the principles of international customary law. Finally, a proper application of the latter principles results in an interpretation of the umbrella clause as equating contractual and treaty-based claims within the framework of investor-state arbitration. The phenomenon of umbrella clauses and this analysis basically refers to the framework of ICSID. The term 'decision' in the context of this paper therefore alludes to decisions made by ICSID tribunals.

II PRELIMINARY INFORMATION

A Bilateral Investment Treaties (BITs) and Investor – State Arbitration

Developing and least developed countries are in desperate need for foreign capital. Against this background it is not surprising that there is an ongoing competition for foreign investment among them. The flow of investment from capital-exporting to capital-importing countries, however, is severely hampered by concerns of foreign investors as to the safeguarding of their investment. These concerns originate from the fact that the investment is largely at the mercy of the host State's government and unprotected against measures of expropriation or nationalisation. Just as little, investors deem the court systems of capital-importing countries as providing for legal security. Put simply, "[u]nder-development is strongly correlated with the absence of respect for contractual commitments."[1] There exists a widespread "perception [...] that a foreign investor [...] cannot be expected to have,

[1] Thomas Wälde "The Umbrella Clause in Investment Arbitration - A Comment on Original Intentions and Recent Cases" (2005) 6 The Journal of World Investment and Trade 183, 220.

confidence in the impartiality of domestic courts, in particular in countries with a recognized low quality of governance."[2] In order to overcome these concerns, capital exporting countries have made substantial efforts to negotiate a comprehensive multilateral investment agreement providing for enhanced security for foreign investments.

A review of the recent past, however, shows the collapse of the negotiations on a Multilateral Agreement on Investment (MAI)[3] made within the Organisation for Economic Co-operation and Development (OECD) in 1998 as well as the failure of similar negotiations undertaken in 2003 at the Ministerial Conference in Cancún of the World Trade Organisation (WTO).[4] Hence the substantial efforts undertaken by capital-exporting countries on a multilateral level have largely remained unsuccessful. The only ray of hope in this context arguably is the Energy Charter Treaty[5] which applies to foreign investments in the energy sector. Till this day it has been signed by fifty-one states together with the European Communities.[6] It is "so far [the] most ambitious project to set up an international investment (plus trade) regime."[7]

In view of these facts it is not surprising that capital-exporting states have shifted their endeavors away from the negotiation of multilateral treaties to alternative means deemed appropriate to provide for enhanced security for investments made by their nationals in developing countries. The continuing unsuccessfulness at the multilateral level finally cleared the way for the rise of Bilateral Investment Treaties (BITs), agreements between two countries with the sole objective to safeguard foreign investment.[8] The very first BIT was signed in 1959 between the Federal Republic of Germany and Pakistan entering into force in 1962.[9] Since then, the quantity of BITs has increased steadily reaching almost the number of "2,500 agreements at the end of 2005."[10]

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[2] Ibid, 190.
[3] The Multilateral Agreement on Investment (MAI) Draft Consolidated Text (1998) DAFFE/MAI(98)7/REV1.
[4] See for the history of multilateral investment agreements Jarrod Wong "Umbrella Clauses in Bilateral Investment Treaties : of Breaches of Contract, Treaty Violation, and the Divide between Developing and Developed Countries in Foreign Investment Disputes" (2006) 14 George Mason Law Review 135, 140.
[5] The Energy Charter Treaty (ECT) (17 December 1994) (1995) 33 I.L.M. 360.
[6] See Energy Charter www.encharter.org/index.php?id=7 (accessed 30 September 2007).
[7] Thomas Wälde "Investment Arbitration Under the Energy Charter Treaty : From Dispute Settlement to Treaty Implementation" (1996) Arbitration International 429.
[8] see UN Conference on Trade and Development "Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking" (2007) UNCTAD/ITE/IIT/2006/5, 1 www.unctad.org/en/docs/iteiia20065_en.pdf (accessed 30 September 2007).
[9] See ibid.
[10] Ibid.

Treaties providing for the protection of foreign investment, however, are not a novelty but arguably have been existent since the 18th century.[11] For example, in 1788 the United States and France agreed upon a Friendship, Commerce and Navigation Treaty which already contained provisions related to the treatment of foreign investment. [12]

Though the structure of the treaty and the wording of particular clauses may vary among the multitude of BITs, their overall goal remains the same: They are conceived to safeguard and stimulate investments made by the nationals of one signatory in the other signatory's territory.[13] In order to overcome the objections of investors to the credibility of the economic and legal system of developing states, BITs generally include clauses related to fair and equitable treatment, full protection and security, minimum standards and most-favoured-nation treatment. In addition, BITs usually provide for dispute settlement mechanisms in respect of disputes between the parties to a BIT or between a private investor and the host state. Thereby, the signatories typically refer to existing arbitration rules, e.g. the International Centre for the Settlement of Investment Disputes [ICSID] or the United Nations Commission on International Trade Law [UNCITRAL], to settle any disagreements.[14] ICSID is an institution closely-linked to the World Bank providing a framework for the conciliation and settlement of investment-related disputes.[15] From an investor's perspective, the opportunity to bypass a domestic court system and directly submitting a dispute to a neutral international forum detached from the host State's influence is unequivocally one of the key advantages provided for by a BIT.[16] It particularly takes away the investor's fears of biased or even corrupt domestic courts.

Until 1987 the disputes between investors and States resolved by ICSID tribunals were merely based on alleged violations of the individual investments between them. The first arbitration case between an investor and a State based on alleged violations of the underlying BIT was *Asian Agricultural Products Ltd v Republic of Sri Lanka.*[17] Since then the total number of treaty-based cases increased to a total amount of 255 by November 2006.[18]

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[11] see ibid, 1.
[12] See ibid, fn 1.
[13] A deeper analysis will be conducted within the course of this paper.
[14] see UNCTAD, above n 8, 100.
[15] See Worldbank www.worldbank.org/icsid/cases/cases.htm (accessed 30 September 2007).
[16] See Wong, above n 4, 142.
[17] *Asian Agricultural Products Ltd v The Republic of Sri Lanka* (1990) ICSID Case No ARB/87/3.
[18] see UN Conference on Trade and Development "Latest Developments in Investor-State Dispute Settlement" (2006) UNCTAD/WEB/ITE/IIA/2006/11, 2.

B Umbrella Clauses

1 Preliminary Remark

This paper exclusively focuses on one typical BIT clause, the so-called umbrella clause, "also referred to as 'mirror effect', 'elevator', 'parallel effect', 'sanctity of contract' and '*pacta sunt servanda*".[19] Analyses of BITs estimate that 40 per cent of the almost 2,500 currently existing BITs contain such an umbrella clause.[20]

Although the exact wording of the clause may vary from BIT to BIT its overall goal remains the same: the signatories of a treaty mutually obligate to comply with commitments assumed with respect to investments in their territory made by nationals of the other signatory. The origins of the term 'umbrella clause' have been traced back to Ignaz Seidl-Hohenveldern who wrote in an article published in 1961 that an umbrella clause brought concession contracts under the 'umbrella of protection' of an investment treaty.[21] This particular obligation may be framed in terms like "observe any obligation"[22], "constantly guarantee the observance of the commitments"[23], or "create and maintain [...] a legal framework apt to guarantee [...] compliance[.]"[24] Regardless of this simplified definition, the precise intentions behind the umbrella clause and its exact legal effects have been the subject-matter of a lively discourse among ICSID tribunals and legal commentators.

2 Differential Approach towards Bases of Claims

In order to grasp the practical relevance of the umbrella clause entirely, some preliminary remarks as to the differential approach towards the base of claims have to be made.

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[19] Katia Yannaca- Small "Improving the System of Investor-State Dispute Settlement: An Overview" (February 2006) OECD Working Papers on International Investment 2006/1, 106,107.
[20] UNCTAD, above n 8, 73.
[21] see generally Anthony C Sinclair "The Origins of the Umbrella Clause in the International Law of Investment Protection" (2004) 20 Arbitration International 411 (citing Seidl-Hohenveldern at 412, 413).
[22] German Model BIT 1991(2), Art 8(2).
[23] Accord entre la Confédération suisset la République islamique du Pakistan concernant la promotion et la protection réciproque des investissements (11 July 1995) AS 1998 2601, Art 11; (my translation: Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on promotion and mutual protection of investments).
[24] Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Rpublic on the Promotion and Protection of Investments (21 July 1996), Art 2(4).

The relevant contractual framework in case of a foreign investment comprises two essential parts. On the one hand, there is the investment contract - or municipal contract - between the private investor and the host State. On the other hand there is the BIT between the private investor's State of origin and the host State. Hence the host State's obligations towards the investor arise from two different sources: the investment contract and the treaty. In the event that an investor brings claims against a host State before an ICSID tribunal resting upon alleged violations of the latter's obligations, the tribunal adopts this differential approach as to the sources of the host State's obligations. "[A]rbitral tribunals distinguish between obligations [...] arising out of the BIT [...] and obligations arising out of the investment contract."[25]

Thereby, tribunals rely on the commonly accepted and undisputed principle in international law that the substantive Articles of a BIT "do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and *vice versa*[.]"[26] Classifying the basis of the investor's claims as contract or treaty-based, tribunals "determine [these claims] by reference to its own proper or applicable law - in the case of the BIT, by international law; in the case of the [...] [c]ontract, by the proper law of the contract [.]"[27] This differential approach as to the source of a claim and to its benchmark derives a differentiation of the state acting either as a merchant at eye level with the investor or as a sovereign endowed with governmental powers.[28] It does not mean, however, that breaches of the investment contract cannot simultaneously constitute breaches of the BIT. It rather signifies that in order for a contract violation to be constitutive of a BIT violation "a certain threshold has to be passed."[29]

Furthermore, tribunals infer from this differential approach conclusions as to their jurisdiction about claims brought before them by investors. These conclusions eventually account for the practical consequences of the differential approach. The crux of the matter is that ICSID tribunals merely exert jurisdiction over claims based on violations of the substantive standards of a BIT, e.g. fair and equitable treatment or most-favoured-nation

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[25] Bjorn Kunoy "Singing in the Rain – Developments in the Interpretation of Umbrella Clauses" (2006) 7 Journal of World Investment and Trade 275, 276.

[26] *Compañía de Aguas del Aconquija S A and Vivendi Universal v Argentine Republic*, Decision on application for annulment (2002) ICSID Case No ARB/97/3, 41 ILM 1135, para 96.

[27] Ibid.

[28] See *Joy Mining Machinery Limited v The Arabic Republic of Egypt* (2004), Award on Jurisdiction ICSID Case No ARB/03/11, para 72; *Wena Hotels Ltd. v Egypt* (2000,) Decision on Application for Annulment ICSID Case No ARB/98/4, (2002) 41 *ILM* 933, para 35.

[29] See Kunoy, above n 25, 299 *et seq*.

treatment. By contrast, as far as an investor's claims merely base upon violations of the investment contract, ICSID tribunals have proofed to be very reluctant to accept jurisdiction[30] referring these claims back to the host State's domestic courts or other forums expressly agreed upon in the investment contract. ICSID tribunals make an exception as far as the claimant asserts that the breach of the contractual obligation passes the threshold to be a breach of the treaty.[31] In this case the tribunal has to deal thoroughly with alleged violations of the investment contract.

Accordingly, the qualification of a claim as merely contractual or treaty-based directly decides on the forum by which a dispute is to be settled. Moreover, the classification of a claim as treaty-based prevents the host State from raising certain objections to the tribunal's jurisdiction. "Neither contractual forum selection clauses nor parallel proceedings in domestic courts or arbitration under such clauses can bar a treaty-based tribunal from discharging its responsibility to decide on claims for breaches of the treaty."[32]

3 *Application of the Umbrella Clause*

(a) The SGS cases

In light of investors' general reluctance to submit disputes to domestic courts of developing countries, it is not surprising that they made this issue a top priority and sought to overcome the differential treatment of contract and treaty-based claims. Thereby, investors tried to make use of the umbrella clause which until 2003 - although included in a large quantity of BITs since the 1950s – had been in a state of hibernation. The following illustrates the facts which finally led to its first practical tests.

SGS Société Générale de Surveillance (SGS) v Pakistan[33] was the first case to deal thoroughly with the practical effect of the umbrella clause. Pakistan had concluded a 'Pre-Shipment Inspection Agreement' (PSI) with SGS - a Swiss company - agreeing to pay a fixed charge in exchange for services. Article 11 of the PSI contained a dispute settlement provision

[30] See *Société Générale de Surveillance (SGS) v Islamic Republic of Pakistan* (2003) 42 ILM 1290, para 161.
[31] Vivendi, above n 26, para 111 *et seq.*
[32] Stanimir A Alexandrov "Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide of Contract Claims in SGS v. Pakistan and SGS v. Philippines" (2004) 5 The Journal of World Investment & Trade 555, 564.
[33] *SGS v Pakistan*, above n 30.

which set forth that any dispute shall be settled by arbitration before the courts of Islamabad, Pakistan. Due to certain discrepancies, Pakistan terminated the contract and refused to pay the agreed charge. Thereupon, SGS sought resolution of the dispute by ICSID under the Swiss – Pakistani BIT.[34]

SGS alleged that Pakistan *inter alia* "[had] failed to constantly guarantee the observance of the commitments it ha[d] entered into with respect to SGS's investments, in violation of Article 11 of the BIT"[35] which states that "[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party." At the heart of this allegation was SGS's approach that in addition to the substantive provisions of a BIT which are typically not breached until state conduct passes a certain threshold, the umbrella clause obliges the host state to 'constantly guarantee the observance of the commitments'[36] entered into with an investor with regard to a specific investment. The wording of this clause linguistically does not limit to treaty-obligations derived from the BIT but also encompasses mere contractual obligations arising out of the investment contract between the investor and the host state.[37] Hence the umbrella clause also obliges to comply with any contractual obligation.[38] Since the umbrella clause is a substantive provision of the treaty the compliance with contractual duties also becomes a treaty-based duty, on equal footing with other treaty-based duties like e.g. most-favoured-nation treatment[39]. According to SGS, it is "[t]he effect of an 'umbrella clause' [...] is to elevate a breach of contract claim to a treaty claim under international law."[40] Thus any violation of the contract between SGS and Pakistan simultaneously constitutes a breach of the treaty's umbrella clause making available the treaty's dispute settlement mechanism. By employing such interpretation SGS sought to overcome the differential treatment of contractual claims being enabled to override the contractual forum-choice-clause of the PSI bypassing the Courts of Islamabad and directly achieving a submission of their claim to the ICSID tribunal.

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[34] See Swiss-Pakistani BIT, above n 23.
[35] *SGS v Pakistan*, above n 30, para 34.
[36] See Ibid, para 98.
[37] See Ibid, para 99.
[38] See Ibid, para 99.
[39] See Ibid, para 99.
[40] See Ibid, para 98; *Société Générale de Surveillance (SGS) v Republic of the Philippines* (2003) ICSID Case No ARB/02/6, para 65.

The ICSID tribunal, however, explicitly rejected SGS's approach stating that "Article 11 of the BIT [did not have] the effect of entitling a Contracting Party's investor [...] to 'elevate' its claims grounded solely in a contract with another Contracting Party [...] to claims grounded on the BIT[.]"[41] The tribunal concluded that it had "no jurisdiction with respect to claims [...] based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT."[42]

Just half a year later SGS tested this rejected approach again in *SGS v Philippines*.[43] SGS alleged that the Philippines had failed to pay for services due under an investment agreement regarding the provision of import supervision services (CISS). SGS put forward that the Philippines was in breach of Article X(2) of the Swiss-Philippine BIT[44] which reads that "[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party." Surprisingly, although the underlying circumstances of the case were quite similar to those in *SGS v Pakistan* this time the tribunal expressly approved of SGS's rationale rigorously rejecting the approach of the tribunal.[45]

(b) Aftermath of the SGS cases

In the aftermath of the SGS decisions, ICSID tribunals dealt with the effect of the umbrella clause in more than a dozen cases. The overall outcome of the decisions, however, is far from being a clarification of its role. "This question has divided practitioners and legal commentators and remains unsettled in the international arbitral case law."[46] Thereby, "the umbrella clause is one, if not the most, hot topic in contemporary state-investor arbitration."[47]

Although a review of the recent publications on this issue supplies evidence for a wide variety of approaches, ICSID tribunals and legal commentators generally seem to be split into

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[41] *SGS v Pakistan*, above n 30, para 165.
[42] *Ibid*, para 162.
[43] *SGS v Philippines*, above n 40.
[44] Accord entre la Confédération suisse et la République des Philippines concernant la promotion et la protection réciproque des investissements (31 March 1997) AS 2001 438; (my translations: Agreement between the Swiss Confederation and the Republic of the Philippines on promotion and mutual protection of investments).
[45] See *SGS v Philippines*, above n 40, para 121 *et seq.*
[46] Emmanuel Gaillard "Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses" (2005) 234 New York Law Journal 68.
[47] Kunoy, above n 25, 275.

two camps either following the narrow approach taken in *SGS v Pakistan* [48] or the wide interpretation made in *SGS v Philippines*[49]. While the proportion between ICSID decisions favouring a narrow or a broad approach seems to be quite balanced, the situation among legal commentators is different. Among the latter, a considerable majority favours the wide approach.

In addition, a few intermediate views seem to have emerged between these two diametrically opposed approaches.[50] A legal commentator – although finding that umbrella clauses should not lift all contractual disputes into a treaty-level – tries to accommodate the investor's interests by a double presumption in his favour.[51] "[T]hat a contract with a government agency relating to 'investment' has a governmental character and [...] that a dispute involving a government agency seeking to escape from the obligations of a contract is not 'merely commercial' but [...] 'governmental'."[52]

It is noteworthy, that this legal issue could already have arisen in 1998 in the case *Fedax N V v Bolivarian Republic of Venezuela*[53]. In this context, Venezuela refused to honour certain promissory notes it had issued to the claimant. This clearly contractual issue could

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[48] See ICSID decisions in *SGS v Pakistan*, above n 30; *Joy Mining*, above n 28; *CMS v Republic of Argentina* (2005) ICSID Case No. ARB/01/8; *El Paso Energy International Company v. The Argentine Republic,* Decision on Jurisdiction (2006) ICSID Case No. ARB/03/15; *Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic* (2006) ICSID Case No. ARB/03/13 (*El Paso, Pan American* contain identical decisions on the umbrella clause, the decision will therefore be quoted together. The quotations refer to *El Paso*); see also Hakeem Seriki "Umbrella Clauses and Investment Treaty Arbitration: All Encompassing or Respite for Sovereign States and State Entities" (2007) Journal of Business 570; Judith Gill, Matthew Gearing and Gemma Birt "Contractual Claims and Bilateral Investment Treaties A Comparative Review of the SGS Cases" (2004) 21 Journal of International Arbitration 397.

[49] See ICSID decisions in *SGS v Philippines*, above n 40; *Eureko B V v Poland* (2005), Partial Award; *Consorzio Groupement LESI -DIPENTA v République algérienne démocratique et populaire* (2005) ICSID Case no ARB/03/08; *LG & E Energy Corp, LG & E Capital Corp, LG & E International Corp Inc v Argentine Republic* (2006) ICSID Case No ARB/02/1; *Sempra Energy International v Argentine Republic* (2005) ICSID Case No ARB/02/16; *Siemens A G v Argentine Republic* (2007), Award ICSID case No ARB/02/8; see also F A Mann "British Treaties for the Promotion and Protection of Investments" (1981) Brit Y B Int'l L 245; UN Conference on Trade and Development "Bilateral Investment Treaties in the Mid 1990s" UNCTAD/ITE/IIT/7 (1st ed United Nations, New York and Geneva, 1998); Rudolf Dolzer and Margrete Stevens Bilateral Investment Treaties (1st ed, Kluwer Law International, The Hague 1995); Jarrod Wong, above n 4; John P Gaffney and James L Loftis "The 'Effective Ordinary Meaning' of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims" (2007) 8 The Journal of World Investment & Trade 5, 15; Stanimir A Alexandrov "Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide of Contract Claims in SGS v. Pakistan and SGS v. Philippines" (2004) 5 The Journal of] World Investment & Trade 555; Christian Schreuer "Travelling the BIT Route: of Waiting Periods, Umbrella clauses and Forks in The Road" 5 (2004) J World Inv 231, 249.

[50] Thomas Wälde, above n 1; *Noble Ventures Inc v Romania*, (2005), Award ICSID Case No ARB/ 01/11 (Although the outcome of this case is similar to *SGS v Philippines* it advocates some kind of intermediate position. The details will be discussed in the course of this paper).

[51] see Thomas Wälde, above n 1, 232.

[52] Ibid.

[53] *Fedax N V v Bolivarian Republic of Venezuela* (1998), Award ICSID Case No ARB/96/, (1998) 37 ILM 1391.

have been lifted onto the treaty level by Article 3 (4) of the Dutch – Venezuelan BIT which sets forth the host State's obligation to "observe any obligation it may have entered into with regard to the treatment of investments of nationals of the other Contracting Party." However, neither the claimant nor the tribunal thoroughly analysed the function of this clause. The tribunal merely applied its plain wording stating that "Venezuela is under the obligation to honour precisely the terms and conditions governing such agreement[.]"[54] Hence it simply assumed without any justification that the respondent – pursuant to the umbrella clause – was under a treaty-obligation to comply with contractual commitments.

III UMBRELLA CLAUSES – PROS AND CONS

A Preliminary Remark

In the following the paper endeavours to elaborate on the arguments and counterarguments put forward by advocates of the narrow and the broad approach. Thereby, the paper distinguishes between decisions of ICSID tribunals and articles of legal commentators. This part confines itself to detecting the different kinds of reasoning. A thorough discussion of these arguments and an own interpretation will be conducted in part IV.

B Vienna Convention

1 ICSID tribunals - narrow approach

Much as the existing notions differ in their approach towards the effect of the umbrella clause, they at least unanimously agree on the validity of the Vienna Convention[55] as an overarching principle in the context of treaty interpretation.

This is already expressed in the case *SGS v Pakistan* where the tribunal – although not expressly using the term 'Vienna Convention' – paraphrases the wording of its Article 31.[56] It points out that one has to "ascribe[e] to [the words] their ordinary meaning in their context

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[54] Ibid, para 29.
[55] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna Convention) (23 May 1969) 1155 UNTS 331.
[56] See *SGS v Pakistan*, above n 30, para164.

and in the light of the object and purpose [...] of that Treaty as a whole."[57] Furthermore, the tribunal mentioning that "[a] treaty interpreter must [...] seek to give effect to the object and purpose projected by [a] BIT"[58] concludes that the highlighted principles are the "familiar norms of customary international law"[59] in the context of treaty-interpretation. In view of this clear statement and the fact that this proposition precedes the analysis of the umbrella clause's wordings there can be no doubt that the tribunal accepts the Vienna Convention as the benchmark for treaty-interpretation.

The interpretative approach taken by the tribunals in *El Paso, Pan American v Argentina*[60], however, remains dubious. Without any allusion to the Vienna Convention the tribunal addresses canons of interpretation either in favour of the investor or the sovereignty of states.[61] Subsequently, the tribunal asserts to take up a balanced position "taking into account both State sovereignty [...] and the necessity to protect foreign investment and its continuing flow."[62]

2 ICSID tribunals - broad approach

SGS v Philippines - although coming to a contrary conclusion - also accepts the Vienna Convention as authoritative when interpreting treaties.[63] Thereby, the tribunal's introduction to its own findings on the umbrella clause resembles the set-up of *SGS v Philippines*. The tribunal in *SGS v Philippines* initiates its analysis by firstly paraphrasing the text of Article 31 Vienna Convention alluding to the actual text, the object and purpose of the BIT, and the principle of effective interpretation.[64]

The decision in *Eureko v Poland* is even straighter when stating that "the authoritative codification of the law of treaties is the Vienna Convention"[65] and subsequently citing the wording of its Article 31. In a comparable manner the tribunal in *Noble Ventures v Romania* expressly states that "reference has to be made to Arts. 31 *et seq* of the Vienna Convention

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[57] Ibid.
[58] Ibid, 165
[59] Ibid.
[60] *El Paso, Pan American*, above n 48.
[61] See ibid, para 68 *et seq.*
[62] Ibid para 70.
[63] See *SGS v Philippines*, above n 40, para 114.
[64] See ibid.
[65] *Eureko*, above n 49, para 247

[...] which reflect[s] the customary international law concerning treaty interpretation."[66] It is noteworthy to say, that the decision *Noble Ventures v Romania* even goes beyond the references made by other tribunals to Article 31 of the Convention when explicitly referring to and citing the wording of Article 32 Vienna Convention.[67]

3 Legal commentators - narrow and broad approach

A survey of the articles published in the aftermath of the SGS decision also points to a broad consensus among legal commentators regardless of any affinity to the narrow[68], the intermediate[69] or wide approach.[70] Legal commentators unanimously agree on Vienna Convention as the benchmark for treaty-interpretation.

C Plain Wording

1 ICSID tribunals - narrow approach

Departing from the Vienna Convention as the benchmark in the context of treaty-interpretation ICSID tribunals have typically addressed the 'plain wording' of the umbrella clause at issue. In *SGS v Pakistan* the tribunal discussed the broach approach put forward by SGS. Focussing on the plain wording of Article 11 of the Swiss-Pakistani BIT it came to the conclusion that the text of the umbrella clause "falls considerably short of saying what the Claimant asserts it means."[71] The tribunal emphasised that the term 'commitments' which a party is obliged to constantly observe is "not limited to *contractual* commitments"[72] The tribunal, thereby, deemed the term 'commitments' to be much more extensive linguistically also covering "the municipal legislative or administrative or other unilateral measures of a Contracting Party."[73] In addition, the tribunal also found the term 'commitments' to extend not only to commitments of the State but also to "commitments [...] of any office, entity or subdivision [...] or legal representative whose acts are [...] attributable to the State itself."[74]

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[66] *Noble Ventures*, above n 50 ,para 50.
[67] See ibid, para 50.
[68] See Seriki, above n 48, 573, 576.
[69] See Wälde, above n 1, 214.
[70] See Wong, above n 4, 163; see Gaffney, Loftis, above n 49, 6.
[71] *SGS v Pakistan*, above n 30, para166.
[72] Ibid.
[73] Ibid.
[74] Ibid.

Put simply, the tribunal recognising that the clause "appears susceptible of almost indefinite expansion" realised that SGS's broad interpretation of the umbrella clause was covered by its wording. This, however, in the tribunal's view did not suffice to transform breaches of contract into breaches of the treaty. In order to give the umbrella clause the effect asserted by SGS it arguably required a higher degree of linguistic accuracy.

In *Salini v Jordan* the tribunal had to deal with an alleged umbrella clause whose wording differed considerably from the clauses in the SGS cases. The clause at stake - Article 2(4) of the Italian - Jordan BIT – reads that "[e]ach Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor." The tribunal expressly pointed to the individual wording of the clause stating that it "is couched in terms that are appreciably different from the provisions applied in the SGS arbitral decisions[.]"[75] The tribunal elaborating on the linguistic differences to the SGS cases stated that in the present case "each Contracting Party did not commit itself to 'observe' any 'obligation' it had previously assumed with regard to specific investments [...]. It did not even guarantee the observance of commitments it had entered into [...] as did Pakistan."[76]

2 ICSID tribunals - broad approach

The statement of the tribunal in *SGS v Pakistan* referring to the broad wording of the umbrella clause is largely undisputed among the advocates of the broad approach. This notion even bases to a wide extent upon this textual argument. The differences to the decision on *SGS v Pakistan* rather rest the conclusion drawn from this broad wording. Whereas *SGS v Pakistan* required more textual accuracy the tribunal in *SGS v Philippines* found that the clause "means what is says[.]"[77] It points out that the ordinary meaning of the terms 'any obligation', 'shall observe' and 'specific investments' linguistically cover contractual investments.[78] The tribunal goes on that an interpretation of the clause as being limited to

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[75] *Salini Construttori S p A and Italstrade S p A v The Hashemite Kingdom of Jordan* (2004) ICSID Case No ARB/02/13, para 126.
[76] Ibid.
[77] *SGS v Philippines*, above n 40, para 119; see also *Siemens v Argentina*, above n 49, para 204.
[78] See *SGS v Philippines*, above n 40, para 115.

violations of the treaty would "read into that provision words of limitation which are simply not there."[79]

In *Eureko v Poland* the tribunal dealt with the identically framed Article 3(5) of the Dutch-Polish BIT finding that the meaning of this clause was unambiguous.[80] According to the tribunal, "the phrase, 'shall observe' is imperative and categorical. 'Any' obligations [...] means not only obligations of a certain type, but [...] all [...] obligations entered into with regard to investments[.]" [81] The tribunal in *Siemens v Argentina* expressed an identical approach as to the meaning of the term 'any' when interpreting the identically framed Article 7(2) of the German-Argentine BIT. The tribunal remarked that "[t]he term "investment" [...] linked as it is to 'any obligations', would cover any binding commitment entered into by Argentina in respect of such investment."[82]

The tribunal in *Noble Ventures v Romania* – interpreting Article II(2)(c) of the US-Romanian BIT[83] - points out that the terms 'any obligation' and 'entered into with regard to investments' are "difficult not to regard [...] as a clear reference to investment contracts. The employment of the notion 'entered into' indicates that specific commitments are referred to and not general commitments[.]"[84] In view of this clear statement in favour of the broad approach, the tribunal's comments on the interpretation in *SGS v Pakistan* are remarkable. The tribunal alluding to the textual differences between the umbrella clauses in the US-Romanian BIT and the Swiss-Pakistani BIT agreed with the approach taken by the tribunal in *SGS v Pakistan* stating that the wording of the umbrella clause of the Swiss-Pakistani BIT may give reason to an interpretation as "implicitly setting an international obligation of result for each Party to be fulfilled through appropriate means at the municipal level but without necessarily elevating municipal law obligations to international ones."[85] This decision - at least its attempt to reconcile the SGS cases - has so far remained unique.

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[79] Ibid, para 118; see also *Siemens v Argentina*, above n 49, para 206.
[80] See Eureko, above n 49, para 246.
[81] Ibid.
[82] *Siemens v Argentina*, above n 49, para 206.
[83] Treaty between the Government of the United States and of America and The Government of Romania concerning the reciprocal Encouragement and Protection of Investment (28 May 1992) Senate Treaty Doc 102-36; (Article II(2)(c) of the treaty reads: Each Party shall observe any obligation it may have entered into with regard to investments.),
[84] *Noble Ventures*, above n 50, para 51.
[85] Ibid, para 58.

3 *Legal commentators- narrow and broad approach*

Legal commentators regardless of their attitude towards the function of the umbrella clause unanimously agree that the plain wording of the clauses in the Swiss-Pakistani and Swiss-Philippine BIT covers - at least from a strictly textual point of view - the wide approach.

A study of the United Nations Conference on Trade and Development (UNCTAD)[86] when addressing Article 3(1) of the Denmark-Lithuania BIT[87] finds that the "language of the provision is so broad that it could be interpreted to cover all kinds of obligations, explicit or implied, contractual or non-contractual, undertaken with respect to investment generally."[88] This notion implies the most extensive textual interpretation expanding the scope of the clause even beyond contractual commitments to all kinds of obligations. Thereby, it is in line with the identical textual interpretation of the tribunal in *SGS v Pakistan.*

Although other scholars have interpreted the umbrella clauses less extensive, they unanimously regard the broad view as covered by the clauses' wording. One scholar comments that "the natural interpretation of a broadly-worded umbrella clause referring simply to 'obligations' is that it includes contractual obligations[.]"[89] Addressing the umbrella clause in *SGS v Philippines* the advocate of an intermediate approach annotates that "the view that it covers 'any' or 'simple' or 'commercial breaches' [is] [...] compatible with the textual formulation in most *pacta sunt servanda* clauses[.]"[90] This scholar employs a similar rationale with regard to the clause in *SGS v Pakistan* arguing that "[t]here is an explicit obligation – 'guarantee' – [...] ; there is a reference to 'commitments entered into' – and that should mainly be commitments of a contractual nature [Fn omitted] – and that commitments should relate to investments by foreign investors.[91]

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[86] See UNCTAD, above n 49, 56.
[87] Agreement between the Government of Denmark and the Government of Lithuania concerning promotion and reciprocal Protection of Investment (30 March 1992) No 31059; (Article 3(1) reads: Each contracting party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.).
[88] UNCTAD, above n 49, 56.
[89] Wong, above n 4, 163.
[90] Wälde, above n 1, 209.
[91] Ibid, 214.

D Restrictive Approach

1 ICSID tribunals - narrow approach

The finding of this paper - which is that the tribunal in *SGS v Pakistan* regarded the broad interpretation as linguistically covered by the wording of the umbrella clause - raises the question as to why it finally adopted a narrow approach. The paper will give an answer to this question in the following:

The tribunal in *SGS v Pakistan* made use of a canon of interpretation known as 'restrictive interpretation' or *in dubio mitius.* This canon "applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation [.]"[92]According to the rationale given in *SGS v Pakistan,* the claimant departed with his broad interpretation from an undisputed principle of international customary law, the differential treatment of contract and treaty-claims in terms of jurisdiction.[93] Therefore, the tribunal - regardless the ordinary meaning of the clause - required more linguistic accuracy of the clause in order to overcome this principle. According to the tribunal, in such case "[t]he appropriate interpretive approach is the prudential one summed up in the literature as [...] *in dubio mitius.*"[94] It required that "clear and convincing evidence must be adduced [...] that [the transformation of contract into treaty-claims] was indeed the shared intent of the Contracting Parties [...] in incorporating Article 11 in the BIT."[95] Such evidence had - according to the tribunal - not been adduced.[96] Put simply, the tribunal put on the claimant a burden of proof for the shared intent of the parties when introducing the umbrella clause in the BIT.

The ICSID tribunals in *Pan American & El Paso v Argentina*[97] also relied on the rationale that exceptions are to be interpreted restrictively.[98] The tribunals – likewise pointing out that contractual obligations were not explicitly addressed in the umbrella clause[99] -

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[92] Lassa Oppenheim, Robert Yewdall, Jennings, Arthur Watts *Oppenheim's International Law Vol 1 Peace Part 2* (9th ed, Longman, London, 1992) 1278.
[93] See II B 2 of this paper.
[94] *SGS v Pakistan*, above n 30, para 171.
[95] *SGS v Pakistan*, above n 30, para 167.
[96] See Ibid.
[97] El Paso, Pan American, above n 48.
[98] See ibid, 77.
[99] See ibid, 74.

explicitly approved of the reasoning in *SGS v Pakistan*. The preference of the canon of restrictive interpretation, however, is at odds with another statement of the tribunal. The tribunal characterises its interpretative approach as balanced interpretation between interpretative notions favouring protection of investors or State sovereignty.[100] This appears contradictory since the principle *in dubio mitius* clearly favours the latter.

2 ICSID tribunals - broad approach

The tribunal in *Noble Ventures v Romania* arguably remains the only supporter of the broad approach who applies a canon of restrictive interpretation. Discussing the umbrella clause in Art 2 (2) (c) of the US – Romanian BIT the tribunal departs from the assumption that the clause "introduces an exception to the general separation of States obligations under municipal and [...] international law [.]"[101] In line with the decisions in *SGS v Pakistan* and *Pan American & El Paso v Argentina* the tribunal infers that the identification of the clause's effect as lifting contract claims onto the treaty level can only arise from a restrictive interpretation[.]" [102] However, although interpreting the wording of the clause at issue restrictively the tribunal finally adopts a broad approach.[103] In contrast to the decision in *Pan American & El Paso v Argentina* where an identical framed clause was interpreted restrictively, the tribunal here was satisfied by the textual accuracy of the clause. Hence although employing a canon of restrictive interpretation the tribunal found that the "general and direct formulations [tend] to an assimilation of contractual obligations to treaty ones[.]"[104]

Aside from this unique decision ICSID tribunals favouring the wide approach have expressly taken issue with the application of this principle. The tribunal in *Eureko v Poland* apparently deeming this principle as outdated emphasised that it "could be seen as a reversion to a doctrine that has been displaced by contemporary customary international law[.]"[105]

The tribunal in *SGS v Philippines* turned on the assumption made in *SGS v Pakistan* that the claimant's interpretation departed from a principle of international law, the

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[100] See ibid, 67 *et seq.*
[101] *Noble Ventures*, above n 50, para 55.
[102] See ibid, para 55.
[103] See ibid, para 60.
[104] Ibid.
[105] *Eureko*, above n 49, para 258.

differentiation between contract and treaty-claims. The tribunal pointed out that *SGS v Pakistan* relied in this assertion on the *Vivendi* case which confirmed this general distinction. Although by generally accepting this principle the tribunal alluded to a fundamental difference of the *Vivendi* case to *SGS v Pakistan*, the lack of an umbrella clause in the Franco-Argentine BIT.[106] The tribunal in *SGS v Philippines* apparently deemed this basic distinction as overcome by the umbrella clause in the Swiss-Pakistani BIT stating that the tribunal in *SGS v Pakistan* "did not need to consider whether a clause in a treaty requiring a State to observe specific domestic commitments has effect in international law."[107]

3 *Legal commentators- narrow approach*

A small number of legal commentators approve of the canon of restrictive interpretation applied in *SGS v Pakistan* and *Pan American & El Paso v Argentina*. Kunoy remarks that a restrictive interpretation is in line with the jurisprudence of the International Court of Justice (ICJ)[108] referring to the Court's finding in *Elettronica Sicula S p a, United States v Italy* that "an important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so."[109] Furthermore, Kunoy approving of the rationale in *SGS v Pakistan* that the departure from an international principle requires restrictive interpretation[110] asserts that "the interpretation has to be restrictive [Fn omitted] and in accordance with the customary rules of interpretation as reflected in Article 31 of the Vienna Convention [.]"[111] He arguably tries to reconcile the principle *in dubo mitius* with the framework of the Vienna Convention.

4 *Legal commentators- broad approach*

Legal commentators favouring a broad approach criticise the recourse to a canon of restrictive interpretation. Its application is criticised *inter alia* as policy argument employed to circumvent the plain meaning of the umbrella clause. Alexandrov points out that "policy concern [about the scope of the clause] was permitted to trump the text of the BIT"[112]

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[106] See *SGS v Pilippines*, above n 40, para 122
[107] Ibid.
[108] See Kunoy, above n 25, 283 *et seq.*
[109] International Court of Justice (ICJ) *Elettronica Sicula S p a, United States v Italy* (1989) ICJ Rep 1989, 42.
[110] See Kunoy, above n 25, 286
[111] Ibid.
[112] Alexandrov, above n 32, 570

The tribunal's substantial in SGS v Pakistan to overcome the plain wording of the clause have even been addressed in cases whose outcome did not depend on the interpretation of an umbrella clause at all. The ICSID tribunal in *Tokios Tokel˙es v Ukraine*[113] remarked that in *SGS v Pakistan* "the tribunal recognized that BIT claims and contract claims 'can both be described as 'disputes with respect to investment,' it nonetheless decided [...] to exclude contract claims from the scope of "disputes" that could be submitted to ICSID arbitration."[114]

Wälde criticises that the *SGS v Pakistan* tribunal put the burden of proof for the fact "that the text intends what it plainly means back to the claimant." [115] In his view, this infringes upon the common way to apply such a burden of proof.[116] The proper would be that "if the plain meaning is clear, the party disagreeing with the plain meaning has the burden to persuade the tribunal that the proper meaning is different from a superficially apparent meaning."[117] He also points to the practical difficulties this burden of proof poses for the claimant since "BIT negotiators [...] tend to use existing models in a 'boilerplate' fashion"[118] and do not thoroughly negotiate each clause of the BIT. "One cannot refuse to give effect to such language by requiring [...] evidence that the parties have explicitly discussed the respective clause[.]"[119]

E Effet Utile Rule and Purpose of Umbrella Clauses

1 ICSID tribunals - narrow approach

The tribunal in *SGS v Pakistan* raised concerns as to the practical effect of the BIT in case that a broad approach would be adopted remarking that "[a]ny alleged violation of [...] contracts [...] would be treated as a breach of the BIT."[120] In the tribunal's view this would render the further Articles of the BIT completely useless since "[t]here would be no real need

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[113] *Tokios Tokeles v Ukraine*, Decision on Jurisdiction (2004) ICSID Case No ARB/02/18.
[114] Ibid, fn 42 to para 52.
[115] Wälde, above n 1, 217.
[116] See Ibid, 217.
[117] Ibid.
[118] Ibid.
[119] Ibid, 218.
[120] *SGS v Pakistan*, above n 30, para 168.

to demonstrate a violation of those substantive treaty standards if a simple breach of contract [...] would suffice to constitute a treaty violation[.]"[121]

The tribunals in *El Paso & Pan American BP v Argentina* shared this concern. In their view, the equation of violations of contract and treaty obligations would make the inclusion of typical BIT provisions like fair and equitable treatment or full protection and security useless.[122] The tribunal concluded that in this case "it would be sufficient to include a so-called 'umbrella clause' and a dispute settlement mechanism[.]"[123]

Interestingly, the tribunal in *SGS v Pakistan* had to deal with an identical objection of the claimant. Thereby, SGS was not concerned about the other substantive provisions of the BIT to be rendered useless but rather the umbrella clause itself. According to SGS the narrow approach "would render Article 11 inutile, a result abhorrent to the principle of effectiveness in treaty interpretation."[124] The tribunal, however, did not share this concern putting forward that the clause could still serve as "an implied affirmative commitment to enact implementing rules and regulations necessary or appropriate to give effect to a contractual or statutory undertaking in favour of investors of another Contracting Party that would otherwise be a dead letter."[125]

2 ICSID tribunals - broad approach

The fears that the narrow approach would leave the umbrella clause without any practical effect have largely been adopted by the advocates of the wide interpretation. In a broader context, the latter depart from a different conception of the purposes of the umbrella clause and its legal function.

SGS v Philippines was the first tribunal to approach the meaning of the umbrella clause as given in *SGS v Pakistan.* It found that the latter "failed to give any clear meaning to the 'umbrella clause'."[126] An identical view expressed the tribunal in *Noble Ventures v Romania* arguing that the umbrella clause "would be very much an empty base unless

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[121] Ibid.
[122] See *El Paso, Pan American*, above n 48, para 76.
[123] Ibid.
[124] *SGS v Pakistan*, above n 30, para 172.
[125] Ibid.
[126] *SGS v Philippines*, above n 40, para 125.

understood as referring to contracts."[127] In the tribunal's view, international agreements are anyway subject to the rule of *pacta sunt servanda*. Hence for a clause confirming this principle would be no need.[128] Setting the broad and the narrow approach in contrast to each other the tribunal gave preference to the broad interpretation. The tribunal justified this decision by the principle of effectiveness according to which "a clause that is readily capable of being interpreted in [...] [a] way [to remedy contractual breaches] and which would otherwise be deprived of practical applicability is naturally to be understood as protecting investors[.]"[129]

Moreover, the *SGS v Philippines* tribunal expressly rejected the interpretation of the umbrella clause in *SGS v Pakistan* as 'implied affirmative commitment' stating that "if [the clause] has any effect at all, [it] confers jurisdiction on an international tribunal, and needs to do so with adequate certainty."[130] This rationale is in line with *Noble Ventures v Romania* case in which the tribunal found that the umbrella clause "was intended to create [...] obligations beyond those specified in other provisions of the BIT itself."[131] Likewise the tribunal in *Eureko v Poland* after relying on the principle of effectiveness[132] finds that the umbrella clause has two operative effects, to submit contracts to the jurisdiction of the tribunal and to transform breaches of contractual obligations not addressed by other BIT provisions into breaches of the umbrella clause.[133]

3 *Legal commentators- narrow approach*

The assertion that the broad approach would render the whole BIT useless has met criticism on part of the supporters of the broad interpretation. Schreuer finds this assumption incorrect the since a "BIT's substantive provisions deal with non-discrimination, fair and equitable treatment [...] and protection from expropriation." [134] Since these obligations are not normally implemented in investment contracts "extending the BIT's protection to investment contracts would not make the substance of a BIT superfluous."[135] Wälde similarly argues that

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[127] *Noble Ventures*, above n 50, para 51.
[128] See ibid.
[129] Ibid, 52.
[130] *SGS v Philippines*, above n 40, para 125.
[131] *Noble Ventures*, above n 50, para 51
[132] See *Eureko*, above n 49, para 248.
[133] See ibid, para 250.
[134] Schreuer, above n 49, 253.
[135] Ibid.

"[a] pacta sunt servanda clause [...] does not make other obligations redundant. An expropriation or discrimination can occur without a specific host-State contract being breached[.]"

Wälde elaborating on the *SGS v Pakistan* tribunal's view of the umbrella clause as 'affirmative commitment' points out that this could be interpreted as a "far-reaching reform obligation on countries."[136] Supporters of the wide approach, however, unanimously agree that the umbrella clause's meaning is "to internationali[s]e contractual breaches and, hence confer additional protection on the investor."[137] Accordingly umbrella clauses were meant to add something to the protection already enjoyed, "to achieve more than what is already the norm under customary international law."[138] It "add[s] the compliance with investment contracts, or other under takings of the host state, to the BIT's substantive standards."[139]

The supporter of an intermediate approach, however, restricts the purpose of investment treaties as "to provide external discipline for governmental conduct but not a rule for commercial [...] disputes"[.][140] Accordingly, the broad interpretation infringes upon the purpose of BITs to "impose disciplines on governmental conduct, but not on any commercial involvement of State entities[.]"[141]

F Flood of Commercial Claims

1 ICSID tribunals - narrow approach

ICSID tribunals supporting a narrow approach extensively rely on alleged negative consequences of the wide interpretation. In *SGS v Pakistan* the tribunal found that the umbrella clause linguistically covers "an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments [...] [.]"[142] It concluded that "[a]ny alleged violation of those contracts and other instruments

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[136] Wälde, above n 1, 221.
[137] Kunoy, above n 25, 276.
[138] Alexandrov, above n 32, 566.
[139] Schreuer, above n 49, 250.
[140] Wälde, above n 1, 226.
[141] Ibid.
[142] *SGS v Pakistan*, above n 30, para 168.

would be treated as a breach of the BIT."[143] In the tribunal's view, these consequences of the broad approach, were "far-reaching in scope, [...] automatic and unqualified and sweeping in their operation, [...] [and] burdensome in their potential impact upon a Contracting Party[.]"[144] In the aftermath, this apprehension was explicitly shared by the tribunals in *El Paso & Pan American v Argentina* which also feared such effect to be "far-reaching [...] [and] quite destructive of the distinction between the national legal orders and the international legal order[.]"[145]

Finally, Rasjski in *Eureko v Poland* raises identical concerns in his dissention opinion of observing that by adopting a broad approach "this [t]ribunal has created a potentially dangerous precedent capable of producing negative effects on the further development of foreign capital participation in privatization of State owned companies."[146]

2 ICSID tribunals - broad approach

ISCID tribunals in favour of the wide approach do not share the outlined concerns. In order to counter these fears, the tribunal in *SGS v Philippines* emphasised that the umbrella clause to be applicable requires the host State to assume "a legal obligation [...] vis-à-vis the specific investment - not as a matter of the application of some legal obligation of a general character."[147] The tribunal thereby opposed the extensive interpretation of the clause made in *SGS v Pakistan* as covering practically any – contractual, unilateral and administrative – obligation. The *LG&E v Argentina* tribunal follows this rationale when pointing out the necessity of a "very specific [obligation] in relation to LG&E's investment in Argentina[.]"[148]

3 Legal commentators- narrow approach

Legal commentators reiterate the arguments of ICSID tribunals related to potential negative effects asserting that "[t]he danger [..] may come if the current dam is breached and if umbrella clauses do start to override exclusive jurisdiction clauses."[149] Seriki explicitly

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[143] Ibid.
[144] Ibid, 167.
[145] *El Paso, Pan American*, above n 49, 82.
[146] *Eureko*, above n 49, Dissenting Opinion para 11.
[147] *SGS v Philippines*, above n 40, para 121.
[148] see *LG&E v Argentina*, above n 49, 171.
[149] Gill & Gearing, above n 48, 412.

states that "[t]he interpretation adopted by the SGS Philippines tribunal demonstrates the far-reaching consequences [the] broad interpretation of 'umbrella clauses' could have."[150]

4 Legal commentators- broad approach

Advocates of the broad approach largely allude to the restrictive requirement that an investor has to assume obligations with regard to specific investments. Accordingly, the umbrella clause "will provide a remedy only if there has been a breach of the host State's legal obligations towards the investor."[151] However, legal commentators do not agree unanimously that this restriction is sufficient to counter the concerns raised by supporters of the narrow approach. Sporadic voices apparently note a potential danger when observing that "[p]roblems could arise if investors were to start using the umbrella clause for trivial disputes. [...] It is to be hoped that investors will invoke umbrella clauses with the appropriate restraint."[152]

Gaffney & Loftis stress that claims would merely be re-directed "from State courts or commercial arbitration tribunals to international investment arbitration tribunals[.]"[153] Accordingly, the broad approach does not "create liability where none [...] existed[.]"[154] They suggest that a "'flood' of claims would presumably be the result of a "flood" of State activity directed at investments[.]"[155] Gaffney & Loftis seem to regard arguments related to the negative consequences as spurious arguments whereby critics effectively rely on "intent arguments [...] or public policy arguments [...] and/or interpretive "canons"."[156]

The advocate of a middle approach breaks new ground when suggesting that the tribunal in *SGS v Pakistan* could have overcome its concerns by reading into the umbrella clause an additional prerequisite.[157] He recommends that for the transformation of a contractual breach into a breach of treaty "governmental powers and prerogative [or their] abuse and the absence of a legitimating reason"[158] be required.

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[150] Seriki, above n 48, 581.
[151] Schreuer, above n 49, 255.
[152] Ibid.
[153] Gaffney, Loftis, above n 49, 21.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] See Wälde, above n 1, 215.
[158] Ibid.

G *Position of Umbrella Clause in Treaty*

1 *ICSID tribunals - narrow approach*

The tribunal in *SGS v Pakistan* in order to underpin its narrow approach also referred to the position of the umbrella clause within the Treaty. In the tribunal's view "[t]he separation of Article 11 from [other substantive provisions] indicates [...] that [it] was not meant to project a substantive obligation like those set out in Articles 3 to 7[.]"[159]

2 *ICSID tribunals - broad approach*

In *Noble Ventures v Romania* the tribunal supported its broad interpretation of the observing that it "forms part of the Article which provides for the major substantial obligations undertaken by the parties."[160]

The *SGS v Philippines* tribunal found that the position of the umbrella clause "is entitled to some weight."[161] However, the tribunal did "not regard the location of the provision as decisive[.]"[162] The tribunal particularly did not 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."[163] This approach is shared by the tribunal in *Eureko v Poland* according to which the position of an umbrella clause was of little importance.[164] However, the tribunal observed that in the case at issue, the umbrella clause was placed among the substantive obligations.[165]

3 *Legal commentators- narrow and broad approach*

Legal commentators in favour of the broad approach agree on the fact that an "argument based on the location [...] is a legitimate support argument[.]"[166] However, it has to be borne in mind that this argument is not applicable outside the Swiss-Pakistani BIT since

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[159] *SGS v Pakistan*, above n 30, para 170.
[160] *Noble Ventures*, above n 50, para 51.
[161] *SGS v Philippines*, above n 40, para 124.
[162] Ibid.
[163] Ibid.
[164] See *Eureko*, above n 49, para 259
[165] See Schreuer, above n 49, 259.
[166] Ibid.

"[u]mbrella clauses are frequently grouped together with the standards of treatment guaranteed by these treaties."[167] Another commentator points out that the reliance on the position "is read to much into the enumeration order of substantive obligations in BITs."[168] In view of the ordinary drafting process of treaties which largely bases on the utilisation of model clauses it cannot be assumed that the drafter really have thought thoroughly about the position of the clause.[169]

According to Wälde, the position of the umbrella clause in the Swiss-Pakistani BIT after the dispute settlement mechanism and the fact that it has an own title could also give rise to a converse interpretation as "overarching principle."[170]

H Overriding of Forum Choice Clauses

1 ICSID tribunals - narrow approach

The tribunal in *SGS v Pakistan* within its rationale stressed another alleged negative consequence of the broad approach. In its view an investor would be enabled to "nullify any freely negotiated dispute settlement clause in a State contract[.]"[171] The tribunal arguably deemed this to be an alteration of the contractual balance in favour of the investor since "the State party to the contract would be effectively precluded from proceeding to the arbitral forum specified in the contract unless the investor was minded to agree."[172]

2 ICSID tribunals - broad approach

The *SGS v Philippines* tribunal apparently shared this concern. Although in its view the umbrella clause elevated the contract claims onto the treaty-level, the tribunal decided to give preference to the forum-choice clause in the investment contract between investor and State, the PSI Agreement. [173] Consequently, the tribunal assumed jurisdiction over the contract claims but deemed them as not admissible and stayed the proceedings.[174] It justified

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[167] Ibid, 253.
[168] See Wälde, above n 1, 222.
[169] see ibid.
[170] Ibid, 222.
[171] *SGS v Pakistan*, above n 30, para 168.
[172] Ibid.
[173] See *SGS v Philippines*, above n 40, para 141.
[174] See ibid, para 175.

its decision by pointing to "the *maxim generalia specialibus non derogant*. [...] It is not to be presumed that [...] a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties."[175] Moreover, the tribunal regarded a BIT to be "a framework treaty, intended [...] to support and supplement, not to override or replace, the actually negotiated investment arrangements[.]"[176] In the end, Furthermore, it argued that "a party should [not] be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum."[177]

3 *Legal commentators- narrow and broad approach*

The decision in *SGS v Philippines* to declare SGS's contract claims inadmissible has met considerable criticism. One scholar observes that the tribunal picked up the overcome principle of exhaustion of local remedies stating that "in effect it re-introduced this limitative principle, at least for the situation where the *pacta sunt servanda clause* [...] meets an exclusive jurisdiction clause under domestic law."[178] In addition, the notion of the tribunal is at odds with the meaning of the umbrella clause and the investor-state arbitration provisions "to provide the investor – irrespective of whether or not it was able to negotiate arbitration recourse with the government itself – with an international recourse out of the hands and control of a biased government."[179]

Another scholar puts forward that the decision in *SGS v Philippines* leaves the umbrella clause without any function except in cases "where the contract's forum selection clause designates the same forum as the BIT; and [...] where the contract does not contain a forum selection clause."[180]

Finally, a scholar accuses the *SGS v Philippines* tribunal of misinterpreting the precise effect of the umbrella clause. "[W]hile claims premised on the umbrella clause are defined by reference to the terms of contract, this act of incorporating the contract does not alter the fact that the claims ultimately are BIT claims whose 'nature' is wholly that of treaty claims."[181] There is an established principle in international customary law that contractual forum-choice

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[175] Ibid, para 141.
[176] Ibid.
[177] Ibid, 154.
[178] Wälde, above n 1, 229.
[179] Ibid, 231.
[180] *SGS v Philippines*, above n 40, para 166 *et seq.*
[181] Wong, above n 4, 170.

clauses cannot prevent an international arbitral tribunal from deciding on treaty-based claims. Consequently, if the tribunal has deemed the elevated contract claims as real BIT claims it would have disregarded the contractual forum-choice clause since deciding on the contract claims.[182]

I Historical Sources and Shared Intent

1 ICSID tribunals - broad approach

The tribunal in *Eureko v Poland* enumerates a number of historical sources[183] which shares its wide approach to the umbrella clause. A survey of these sources reveals that the history of the umbrella clause goes back to the middle of the 20th century. The tribunal *inter alia* refers to the inclusion of an umbrella clause in the Abs-Shawcross Draft Convention of Investments Abroad[184] of 1959.

The tribunal particularly alludes to a comment by Prosper Weil on the umbrella clause in Article 2 of the Draft Convention on the Protection of Foreign Property of the Organization for Economic Cooperation and Development of 1967[185] where he observed that "an 'umbrella treaty' [...] turns the obligation to perform the contract into an international obligation of the contracting State vis-a-vis the State of the other contracting party."[186] Furthermore, the tribunal relies on a statement of Mann who observed that the umbrella clauses was "a provision of particular importance in that it protects the investor against any interference with his contractual rights[.][187] The tribunal also quotes Dolzer, Stevens who find that umbrella clauses "seek to ensure that each Party to the treaty will respect specific undertakings towards nationals of the other party. [...] [I]t protects the investor's contractual rights against any

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[182] See ibid.
[183] see *Eureko*, above n 49, para 251.
[184] Abs-Shawcross Draft "The Proposed Convention to Protect Private Foreign Investment: A Round Table" (1960) 9 J Pub L 115 *et seq.*
[185] Organisation for Economic Co-operation and Development (OECD) Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention (1967) C(67)102; (the umbrella clause in Article 2 reads: Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.).
[186] Prosper Weil "Problemes relatifs aux contrats passes entre un Etat et un particulier" (1969) 128 Recueil des Cours 95, 130 ; (the translation of the French text is taken from Wong, above n 4, 147).
[187] F A Mann "British Treaties for the Promotion and the Protection of Investments" (1981) 52 British Year Book of International Law 241, 246.

interference which might be caused by either a simple breach of contract or by administrative or legislative acts[.]"[188]

The tribunal in *Eureko v Poland* does not infer the correctness of its wide approach directly from these sources. However, there can be no doubt that it at least implicitly tries to substantiate its own view by a reference to these historic comments on umbrella clauses.

2 *ICSID tribunals - broad approach*

Scholars arguing for a broad interpretation of the umbrella clause rely more explicitly on the mentioned sources. In this context, authors have argued that the "the sum of its history [...] points unambiguously to [the] conclusion [that] [t]he umbrella clause applies to obligations arising under investor-State contracts so as to allow for their breach to be resolved as BIT violations"[189] and an "historical examination of the origins [...] shows in the clearest manner that the intention of [the] State [...] is to permit a breach of contract to be effectively characterised as the breach of an international treaty obligation."[190] Another author states that "[a]mple authorities support the view that the intent of States [...] was [...] to elevate the State's contractual breaches to the level of treaty violations."[191]

The vast reference to historical sources, however, also meets with criticism. One author argues that the umbrella clause was elaborated in middle of the 20th century within the context of concession agreements "which were then seen as [...] subject to primarily administrative law[.]"[192] The implementation of the umbrella clause "was based on the assumption that States – not individual investors – would enforce [claims] before [...] arbitral institutions [.]"[193] The then prevailing general unwillingness of governments to enforce claims of private investors implied some kind of 'screening function' by which merely commercial claims lacking allegations of abuse of governmental power were filtered out.[194] With the rise

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[188] Dolzer & Stevens, above n 49, 81 *et seq*.
[189] Wong, above n 4, 149.
[190] Emmanuel Gaillard "Investment Treaty Arbitration and Jurisdiction over Contract Claims - The SGS Cases Considered" in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (1st ed, Tod Weiler, London, 2005) 325.
[191] Alexandrow, above n 32, 567.
[192] Wälde, above n 1, 192.
[193] Ibid.
[194] See ibid, 192.

of direct investor-state arbitration in the late 1980s[195] this filter ceased to exist. Until then an elevation of any contract claim onto the treaty level was just a theoretical possibility which, however, became reality because of direct investor-State arbitration and the broad wording of umbrella clauses.[196] Notwithstanding, it was not the initial intent of drafters to elevate every commercial claim onto the treaty level. The author - addressing the often-quoted comments of Mann and Dolzer, Stevens – holds that these facts were not fully "thought trough [...] by the few commentators who thought the clause applied also to 'mere contract breaches'[.]"[197]

IV DISCUSSION OF ARGUMENTS

A Structure of Own Analysis / Vienna Convention

1 Preliminary remark

In light of the diverging approaches as to meaning and effect of the umbrella clause the question arises whether and how this conflict can be resolved. The answer thereto is simple. The meaning of the clause has to be ascertained by an interpretation of the clause itself and the treaty. "The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty."[198] This finding admittedly is not unique. Advocates of the narrow as well as the wide approach have interpreted the umbrella clause exhaustively. The different approaches after all arise from different results of these interpretations. The fact that these results are hardly reconcilable – or rather mutually exclusive - gives reason to the assumption that some of the interpretations are erroneous. This is surpsising given that all approaches agree on the same overarching principle in the interpretation of international treaties, the Vienna Convention, which sets forth a detailed interpretation set-up. One cannot help think that this set-up has not been applied properly.

Although the Vienna Convention is not the only source of interpretative canons in the context of treaty-interpretation, this paper does not challenge its authortiative character. The principles embodied in the Vienna Convention on the Law of Treaties are commonly being

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[195] See ibid, 194.
[196] See ibid, 195.
[197] Ibid, 226.
[198] *European Communities – Customs Classification of Computer Equipment* (5 June 1998) WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para 93 (Appelate Body, WTO).

accepted as reflecting current customary international law,[199] even in cases in which states have not signed or ratified it.[200] This applies to both Articles 31 and 32.[201]

The fact that practically every ICSID tribunal or legal commentator dealing with umbrella clauses consults the Vienna Convention supplies further evidence for the correctness of this statement. In view of this overall acceptance of the Vienna Convention and the diverse results of its application this paper starts with some general remarks as to its dogmatic structure. Having defined the particular elements of Articles 31 and 32 of the Vienna Convention, the paper seeks to clarify the umbrella clauses by fastidiously applying these principles. Thereby, the paper endeavours to develop a rationale strictly in accordance with the dogmatic framework of the Convention.

2 *Article 31 - ordinary meaning and context*

The tribunal in *Aguas del Tunari SA v Republic of Bolivia* exemplary summarises Article 31 Vienna Convention which is the general rule of interpretation."

> Interpretation [...] is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose [.] [...] [Thereby,] the Vienna Convention does not privilege any one of these three aspects of the interpretation method.[202]

The term 'context' is exhaustively defined in Article 31 (2) and (3) Vienna Convention. According to 31 (2) the text of the Treaty, including preamble and annexes, has to be interpreted in the light of any agreement or instrument related to the Treaty made either by all parties or at least one party accepted by the others in connexion with the conclusion of the Treaty. Pursuant to Article 31 (3) subsequent agreements regarding the interpretation or application of the treaty and subsequent practice in the application establishing an agreement of the parties regarding its interpretation may be taken into account together with the context. "As a practical matter [...] there are likely to be few circumstances in which a tribunal will

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[199] Oppenheim, above n 92, 1271.
[200] *Aguas del Tunari SA v Republic of Bolivia* (2005) ICSID Case No ARB/02/3, para 88; *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (28 November 2002) WT/DS213/AB/R para 61, 62 (Appellate Body, WTO).
[201] *Japan — Alcoholic Beverages II (1 September 1996)* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para 104 (Appelate Body, WTO).
[202] *Aguas del Tunari*, above n 200, para 91.

need to (or ought to) look for the relevant contextual information outside the treaty or instruments exchanged in connection with that treaty."[203]

When ascertaining the ordinary wording of an umbrella clause one has to bear in mind that clauses can be framed differently.[204] Therefore, one has to focus on the individual wording of the clause at issue. "Hence, whether an 'umbrella clause' is construed as elevating 'contractual claims' to the level of treaty obligations will ultimately depend on the exact wording of the clause in question."[205] The tribunal in *SGS v Philippines* emphasised this proposition when suggesting that the "umbrella clause" in the Swiss-Pakistan BIT was formulated in different and rather vaguer terms than Article X(2) of the Swiss-Philippines BIT.[206]

In the following the ordinary wording of the umbrella clauses discussed in the SGS cases will be ascertained. Since the umbrella clauses dealt with in the other ICSID decisions do not show any noticeable difference[207] the obtained results directly apply to the umbrella clauses discussed therein. The wording of the umbrella clause in Article 2(4) of the Italian - Jordan BIT[208], however, differs considerably from the clauses of the SGS cases. Its ordinary meaning and the approach of the tribunal *Salini v Jordan* will be addressed separately.

Both clauses[209] begin with the mandatory term 'shall'. Hence from a textual point of view they appear to set forth binding provisions. This impression is underpinned by the fact that other substantive articles of the BITs which undoubtedly constitute binding provisions employ the same term.[210] Article 4 of the Swiss-Pakistani and Swiss-Philippine BIT e.g. introduces the other substantive provisions with the term 'shall'. It appears reasonable to award identically framed provisions within the same treaty a consistent signification. Accordingly, the term shall, of the umbrella clauses in the Swiss-Pakistani and Swiss-Philippine BIT, point to the existence of a binding obligation.

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[203] Gaffney, Loftis, above n 49, 8 (arguing similarly with regard to the context).
[204] See Seriki, above n 48, 580; see also *Joy Mining, above n 28,* para 72.
[205] See Seriki, above n 48, 580.
[206] *SGS v Philippines*, above n 40, para 119.
[207] The majority of umbrella clauses is framed like the corresponding clauses in the US-Romanian and Swiss-Philippine BITs: "Each Party shall observe any obligation it may have entered into with regard to investments."
[208] See Italian-Jordan BIT, above n 24, Art 2(4).
[209] See wording of the umbrella clauses under II B 3 (a).
[210] See *SGS v Philippines*, above n 40, para 115.

The term 'any obligation' of Article X(2) of the Swiss-Philippine BIT implies no linguistic restriction to a certain type of obligation. It rather applies to 'any' obligations regardless of its contractual or treaty-related nature. An identical statement is to be made about the term "commitments" contained in Article 11 of the Swiss - Pakistani BIT. Although not employing the word 'any' the latter does not imply any restriction to a certain kind of obligation either. The term 'commitments' linguistically covers both contractual and treaty-obligations. If the drafters had indeed intended a limitation to certain obligations, this could have been expressed easily.[211] Such a limitation to "treaty-based" claims would have eliminated any doubts as to the scope of the provision. The ordinary meaning of both clauses, however, does not give rise to such an assumption. The ordinary meaning of the terms 'any obligation' and 'commitments' linguistically covers both obligations derived from the investment contract and from the treaty.[212] Moreover, these expressions are linked to the terms "observe" and "constantly guarantee the observance" which sets forth a continuous duty of compliance with contractual and treaty-based obligations. As the tribunal in *SGS v Philippines* puts it, limiting the scope of the clauses to obligations under treaty-provisions would be "read[ing] into that provision words of limitation which are simply not there."[213]

A limitation of the scope of obligations covered by an umbrella clause finally arises from the terms 'entered into with respect to the investments of the investors' or 'assumed with regard to specific investments'. The expressions 'entered into' and 'assumed' gives reasons to the assumption that for the State to be bound it must perform an activity. This activity has to be directed towards a certain, specified investment. An activity related to a specific investment normally is the conclusion of an investment contract with an investor – just these relate to specific investments. By contrast, BITs do not relate to particular investments but rather provide for an underlying framework. The limitation in shape of 'entered into' or 'assumed' has apparently been ignored by the tribunal in *SGS v Pakistan* which expressed its concern that the ordinary meaning of the clause not only covered contractual and treaty-based obligations but also unilateral and administrative duties.

Consequently, the ordinary meaning of both umbrella clauses supports the broad approach. Although they are framed in a different way the textual differences are marginal not justifying a differential treatment. This paper explicitly disapproves of the decision in *Noble*

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[211] See ibid, para 118.
[212] see Wong, above n 4, 163; see UNCTAD, above n 49, 56;
[213] *SGS v Philippines*, above n 40, para 118.

Ventures v Romania insofar as the tribunal concludes that the ordinary meaning of the umbrella clause in the Swiss-Pakistani BIT justifies the narrow approach of the tribunal in *SGS v Pakistan*.[214]

The required focus on the individual wording of the umbrella clause at issue justified the tribunal's narrow approach in *Salini v Jordan*.[215] According to Article 2(4) of the Italian - Jordan BIT the signatories obliged to "create and maintain a legal framework apt to guarantee the [...] compliance [...] of all undertakings assumed with regard to each specific investor." This duty is a rather general obligation and does not compel to comply with any obligation or commitment entered into with investors.[216] The obligation to maintain a framework apt to guarantee compliance linguistically relates to the establishment of institutions dealing with compliance like a specialised court system. The provision in Article 2(4) of the Italian - Jordan BIT lacks the textual accuracy to lift any contractual obligation onto a treaty-level.[217]

3 *Article 31 – objective and purpose*

An interpretation in light of the treaty's object and purpose at first glance seems to be a gateway for speculations about the parties' intents when negotiating the treaty. This assumption, however, is erroneous since "[t]he object and purpose of the parties to [the] treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph."[218] The "object and purpose must be ascertained [...] from the text itself of [the] Article [...] and the rest of the BIT."[219] The wording of the treaty is not to be brought in line with far-fetched assumptions on the parties' intent. To the contrary, "[t]he parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them."[220]

This strong reliance on the written text has to be seen against the background, that the Vienna Convention in its Article 31 shifts the emphasis of interpretation towards a strict

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[214] See *Noble Ventures*, above n 50, para 58.
[215] See Italian-Jordan BIT, above n 24, Art 2(4).
[216] See *Salini*, above n 75, 126.
[217] See also Gaffney, Loftis, above n 49, 13.
[218] *ADF Group Inc v United States of America* (2003) ICSID Case No ARB(AF)/00/1, para 147.
[219] *SGS v Pakistan*, above n 30, 165.
[220] see International Law Commission (ILC) Draft Articles on the Law of Treaties with Commentaries (1966) ILC Yearbook Vol II, 221.

textual approach [221] at the expense of other - rather teleological or subjective - canons not expressly laid down. The Vienna Convention represents a move away from the canons of interpretation previously common in treaty interpretation [.]"[222] "[T]he starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[223]

Accordingly, any speculation about the object and purpose of a treaty which is based upon documents outside the exhaustive enumeration in Article 31 (2) and (3) "falls foul of customary international law as reflected in the Vienna Convention, in so far as treaty interpretation is concerned."[224]

The overall goal of a BIT is largely undisputed. It aims at the promotion of foreign investment. [225] This view is underpinned by a simple reading of the preamble introducing the BITs in the SGSs cases which alludes to "an endeavour to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other." In this context, the term 'create' gives reason to the assumption that additional incentives beyond the status before signing the treaty were intended. Hence "BITs exist presumably because the State party wished to change some part of the status *quo ante* to promote new, desirable behaviour[.]" [226]

Bearing this in mind, it is coherent to interpret the ordinary wording of umbrella clauses in a manner that they offer an incentive for investors.[227] The incentive thereby is the opportunity for an investor to submit any kind of dispute to an unbiased international tribunal bypassing the domestic courts of the host state. By contrast, "merely affirming its pre-existing [international] obligations would provide little incentive to an investor." [228] Hence an interpretation of the clause's ordinary meaning in light of the object and purpose of the BIT leads to a comprehension of the umbrella clause as an incentive-driven provision. An

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[221] See Oppenheim, above n 92, 1271.
[222] *Aguas del Tunari*, above n 200, para 91.
[223] ILC, above n 218, 220.
[224] Gaffney, Loftis, above n 49, 20.
[225] See Wong, above n 4, 163; see also *Eureko v Poland*, above n 49, 248.
[226] Gaffney, Loftis, above n 49, 19.
[227] See ibid, 12.
[228] Ibid 12.

incentive in shape of enhanced judicial protection, however, is just offered when interpreting the clause broadly as equating contractual and treaty-based claims.[229]

This rationale, however, is criticised by some commentators arguing in favour of a narrower view of the object and purpose of BITs. Although the intention to support foreign investment is not disputed, the elevation of contract claims onto the treaty level is deemed as going to far. Accordingly, the comprehensive judicial protection for investors by international arbitral tribunals goes beyond the degree of protection envisaged by the drafters of these clauses. Supporters of this notion derive this conclusion from a different approach to a BIT's object and purpose as "impos[ing] disciplines on governmental conduct, but not on any commercial involvement of State entities[.]"[230] The tribunal in *El Paso & Pan American v Argentine* applies a similar reasoning pointing out that internationally secured remedies are limited to State contracts while in a commercial contract there is no need for such mechanism.[231]

This limited approach to a BIT's sense, however, is not supported by a reading of the preamble and the other provisions of the treaty. The advocates of this approach draw their conclusions from far-fetched speculations about the shared intent of the parties. The paper has already shown that the object and purpose has to be ascertained primarily from the text of the treaty itself. Hence a reading of BITs as merely providing only protection governmental conduct exceeds the limits set forth by the textual approach of the Vienna Convention.

Wälde largely bases his intermediate view – in particular the differentiation from the broad approach - on this limited notion as to the protection envisaged by BITs.[232] This rationale has to be countered with the same argument: it is beyond the limits the Convention sets forth for the ascertainment of a treaty's object and purpose. In addition, the intermediate approach although advocated as "provid[ing] non-dogmatic flexibility for tribunals to appreciate [...] the degree to which [...] government conduct [...] indicates abuse – or not – of governmental powers"[233] rather provides for legal uncertainty. The lack of a doctrine of precedent in the ambit of ICSID and the constant change of the tribunals' compositions has already led to totally opposed decisions on the meaning of identically framed umbrella clauses.

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[229] See *SGS v Philippines*, above n 40, 116.
[230] Wälde, above n 1, 226; Seriki, above n 48, 581.
[231] See *El Paso, Pan American*, above n 48, para 77
[232] See Wälde, above n 1, 196.
[233] Ibid, 236.

One can therefore assume that ICSID tribunals will also come to different results when determining whether a state conduct involves abuse of governmental powers or not. Moreover, excluding commercial conduct from the clause's scope would provide incentives for governments to develop new methods to interfere with investment contracts. Governments could try to avoid the jurisdiction of an international arbitral tribunal by disguising their interference as merely commercial. A constant delay of payment based on alleged bad performance of the investor could have the same demoralising effect as direct expropriation or nationalisation.

The argument of the *SGS v Pakistan* tribunal related to the position of the clause within the Swiss-Pakistani BIT is basically acceptable since it derives from the text of the treaty itself. [234] However, this argument is not strong enough to override the ordinary meaning of the clause. In addition, the conclusion that the position outside the substantive provisions weakens the clause's binding character is not imperative. Wälde correctly points out an alternative interpretation of this fact as awarding particular importance.[235] Accordingly, the compulsory character of the umbrella clause in *SGS v Pakistan* is not diminished by the fact that it is not placed together with other substantive obligations. By contrast, the reference in decisions arguing for the broad approach to its position among the substantive provisions[236] merely underpins the results already obtained from the interpretation of the plain wording. In these cases the position of the clause appears to be a legitimate supportive argument.

4 Article 31 - effet utile

In addition to the illustrated elements of Article 31 the *effet utile* rule, the principle that "the parties are assumed to intend the provisions of a treaty to have a certain effect and not to be meaningless: the maxim *ut res magis valeat quam pereat*"[237] is considered to be embodied in the general rule of interpretation.[238] "[T]he apparent goal of "in their context" is to ensure that the entire agreement of the parties, comprising the treaty and subsequent agreements about the treaty, is made effective."[239]

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[234] see *SGS v Pakistan* , above n 30, para 169.
[235] See Wälde, above n 1, 222 *et seq.*
[236] *Noble Ventures*, above n 50, para 51
[237] Oppenheim, above n 92, 1280.
[238] see ILC, above n 218, 219; see also Gaffney, Loftis, above n 49, 17 (arguing in favour of its effective ordinary meaning approach).
[239] Gaffney, Loftis, above n 49, 20.

The broad approach awards the umbrella clause a unique function within the framework of a BIT. It transforms breaches of the contracts between investors and host States into breaches of the treaty. It has been shown that this would be in line with the ordinary meaning and the context and purpose of a BIT. Advocates of the narrow approach, however, criticise this as rendering the whole treaty useless.

This assumption is erroneous. If a BIT – as stated in *El Paso & Pan American BP v Argentina* merely contained an umbrella clause and a dispute resolution clause - only the breaches of obligations entered into by the host State with an investor regarding a specific investment would be submitted to treaty arbitration. The other substantive provisions - like MFN, repatriation of funds etc - are normally not covered in investment contracts.[240] Hence without these typical provisions in a BIT, breaches of these obligations would be without remedy.[241] The reference of legal commentators to the fact that breaches of treaty obligations can occur without simultaneous being a breach of a contract is correct.[242] An expropriation can be in accordance with the domestic law of a host state whereas under a BIT provision the corresponding domestic law as a whole might be deemed discriminatory. Consequently, the broad approach does not render the other substantive treaty provisions useless.

The question as to the practical effect awarded to the umbrella clause by the narrow approach is more difficult to answer. What can an umbrella clause effectuate if not elevating contract breaches onto the treaty level? Advocates of the narrow approach largely have factored out this issue in their comments. Merely the tribunal in *SGS v Pakistan* attempted to award the clause a practical effect as "implied affirmative commitment to enact implementing rules and regulations necessary or appropriate to give effect to a contractual or statutory undertaking in favour of investors of another Contracting Party that would otherwise be a dead letter."[243]

The term 'affirmative commitment' already raises serious doubts as to the practical effect of this definition. An 'affirmative commitment' does not create new obligations but confirms already existing commitments. A simple reading of this definition suggests that it does not give the umbrella clause any additional valour beyond the already existing

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[240] See Schreuer, above n 49, 253
[241] See Ibid.
[242] See Ibid.
[243] *SGS v Pakistan, above n 30,* para 172

commitments. Wälde correctly states that it is not clear what this definition means.[244] He also points out the potential far-reaching consequences this definition might have: Would an investor "be able to sue a government because its national law [...] does not protect contractual commitments sufficiently?"[245]

Such a reading, however, would indeed be a far-reaching intrusion into the sovereignty of the host state.[246] It would also be a contradiction the general tendency in *SGS v Pakistan* to preserve the sovereignty of host states by applying the principle *in dubio mitius*.

Consequently, only the broad approach awards a clear and practical effect to the umbrella clause. This effect does not render the other substantive provisions of the BIT useless. By contrast, the function as suggested by *SGS v Pakistan* lacks of a clear meaning and infringes upon the *effet utile* rule.

5 Article 32 – supplementary means

"The application of the basic rule of interpretation laid down in Article 31 of the Vienna Convention will usually establish a clear and reasonable meaning."[247] However, according to Article 32 Vienna Convention supplementary means of interpretation, including preparatory work and the circumstances of its conclusion may be consulted in order to confirm the meaning resulting from the application of article 31. This, however, does not change the fact that Article 31 Vienna Convention is the central provision, the general rule.

In order to determine the meaning of a clause, supplementary means of interpretation may only be stressed in case that the general rule leaves the meaning of the text ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Just in this case, canons of interpretation that have not found their way into the general rule of Article 31 Vienna Convention can supportively be consulted as "supplementary means."

This paper, however, has shown that the ordinary meaning of the umbrella clauses in the SGS cases remains neither obscure nor ambiguous. A simple reading of the clauses in

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[244] see Wälde, above n 1, 221
[245] Ibid.
[246] See Ibid.
[247] Oppenheim, above n 92, 1275.

their context and in light of the object and purpose of the treaty rather justifies their comprehension as elevating all contract claims onto the treaty level. Accordingly, recourse to supplementary means of interpretation, the preparatory work of the treaties and the circumstances of its conclusion is not necessary in order to determine their meaning.

6 Arguments beyond the scope of the Vienna Convention

(a) Preliminary remark

This paper has shown that in order to determine the meaning of the umbrella clauses a recourse to the means of Article 32 Vienna Convention is not necessary. This proposition, however, has been disregarded by a considerable quantity of ICSID tribunals and scholar. The paper therefore discusses in the following particular arguments totally incompatible with the structure of Articles 31 and 32 Vienna Convention.

(b) Historical sources / shared intent

The paper has shown under III H that advocates of the broad approach extensively rely on works of legal commentators published between 1950 and 1980. Regardless of the final correctness of the final outcome the reliance on these sources is clearly beyond the scope of the Vienna Convention.

Treaty-interpretation in accordance with the Convention follows a strict set-up. Thereby, any documents - aside from the treaty at issue - which can supportively be consulted are exclusively enumerated in Articles 31 (2) and (3). A closer look at the acceptable documents shows that these have to be "related to the Treaty." "The elements of interpretation [...] all relate to the agreement between the parties at the time when or after it received authentic expression in the text. *Ex hypothesi* this is not the case with preparatory work[.]"[248] "The context is limited to ancillary agreements or instruments accepted and agreed to by all parties."[249]

Advocates of the wide approach rely on the publications of legal commentators made long before the signing of the Treaty at issue. Therefore, these sources are clearly beyond the

[248] ILC, above n 218, 220.
[249] Gaffney, Loftis, above n 49, 20.

scope of documents which – according to Article 31 Vienna Convention – have to be considered as the context. If at all these publications could be consulted as preparatory work within the scope of Article 32. However, they do not constitute "preparatory work" of the concrete BIT whose umbrella clause is to be interpreted. They rather are statements about the general intent of States when negotiation umbrella clauses or comments related to clauses in other BITS. What's more, these comments have not been made by the official representatives of the signatories but by legal commentators outside the state machinery.

The same argument applies to the speculations of the supporters of the narrow approach about the "shard intent" of the parties not embodied in the materials allowed by the Vienna Convention. "The evidence of 'shared intent' on which most critics rely - the historical reticence of States to be the subject of direct claims in arbitration - has no place in this prescribed analytical framework."[250] These assumptions largely not even base upon documents but upon unfounded speculations about the intentions of states in general. Seriki points out that "it is doubtful [...] [that] [states] intended that umbrella clauses could be used as a basis for bringing contractual claims against the state by the foreign investor."[251] It remains ambiguous where this conclusion comes from. In addition, it gives reason to the suspicion that the ordinary wording of the umbrella clauses is wilfully disregarded and adapted to political views."[252] Apparently, [m]uch of this argument [...] is the product of purported canons of interpretation or drawn from ideological, rather than legal, sources."[253]

(c) Consequences

The same rationale can be applied as far as supporters of the narrow approach point to possible negative consequences of the broad interpretation. The framework of the Vienna Convention does not provide for the consideration of consequences within the interpretation of a treaty. This is coherent in view of its textual approach to presume the parties to have the intention which appears from the plain wording of the use terms. Relying on the alleged negative consequences advocates of the narrow approach turn this principle on the head by adapting the ordinary wording to their personal views of adequate drafting.

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[250] Ibid.
[251] Seriki, above n 48, 567.
[252] Alexandrov, above n 32, 570.
[253] Gaffney, Loftis, above n 49, 19.

Furthermore, it is not acceptable to override the authentic text merely because of careless drafting not considering potential effects certain clauses might have. In the end, it is questionable if the floodgate-concerns are persuasive at all. Gaffney & Loftis correctly point out that the umbrella clause does not create new liability but merely redirects it from domestic courts to international arbitral tribunals. Their further statement as to the "insignificant number of treaty claims under observance of obligations clauses" in view of "the astonishing level of direct investment and a web of over 2,000 BITs"[254] is convincing in view of the limited amount of ICSID decisions which substantially have dealt with umbrella clauses.[255]

(c) Restrictive approach / *in dubio mitius*

Some considerations have to be made with respect to the interpretative canon *in dubio mitius* relied on by the tribunals in *SGS v Pakistan, Noble Ventures v Romania and Pan American & El Paso v Argentina.*[256] These tribunals - together with a number of legal commentators[257] - make use of a principle which "applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation [.]"[258] In these decisions, the tribunals expressly accepted the mandatory character of the Vienna Convention. However, since they found that the umbrella clause introduced an exception to international customary law they shifted to a restrictive canon of interpretation. The effort to combine these principles is exemplified by the statement of a legal commentator who argues that interpretation has to be both restrictive and in accordance with Article 31 of the Vienna Convention. [259]

It has already been pointed out that the differential treatment of contract and treaty claims is a settled principle in international customary law. This is not questioned by this paper. However, "this conceptual distinction is not a peremptory norm[.]"[260] Accordingly, the

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[254] Gaffney, Loftis, above n 49, 21.
[255] Ibid.
[256] see the decisions under III D.
[257] see the legal comments under III D.
[258] Oppenheim, above n 92, 1278.
[259] see Kunoy, above n 25, 286.
[260] Ibid, 299.

umbrella clause is perfectly reconcilable with this principle; the umbrella clause even requires its existence. It is the very sense of the umbrella clause to overcome this distinction.[261]

Advocates of the narrow approach, however, have drawn the conclusion that a break with this principle requires a restrictive interpretation. This is based on the erroneous assumption that the Vienna Convention and the canon of restrictive interpretation are combinable. *In dubio mitius* is not part of Article 31 of the Vienna Convention which sets forth the general rule when interpreting treaties. This principle is rather recognized in international law as a "supplementary means of interpretation"[262] within the scope of Article 32. This Article may be stressed when the interpretation according to Article 31 remains obscure or ambiguous. It is not on an equal footing with the primary rules in Article 31. Consequently, considering Article 31 Vienna Convention and the canon of restrictive interpretation as simultaneously applicable infringes upon the hierarchical structure of the Convention as regards to interpretative canons according to which *in dubio mitius* merely plays a minor role as supplementary means. Applying the structure of the Vienna Convention correctly, *in dubio mitius* could only be stressed in order to confirm the result of an application of Article 31 or in case that an application leaves the meaning ambiguous or obscure.[263] This paper, however, has already shown that the interpretation of the ordinary meaning leaves no doubts or ambiguities.

IX CONCLUSION

This paper has shown that the "effective ordinary meaning" of [the umbrella clauses in the SGS cases] permits a tribunal to accept jurisdiction over a claim based on a breach of contract when that breach might not otherwise give rise to direct responsibility in international law[.]"[264] It has also shown that the narrow and intermediate approach is not reconcilable with the ordinary meaning of the clauses when interpreted in their context and in light in their object and purpose. Only the broad approach meets these demands. In addition, since the wordings of the umbrella clauses discussed by other ICSID tribunals are identical to X(2) of the Swiss-Philippine BIT the results of this paper are widely applicable.

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[261] Ibid, 299 *et seq*.
[262] Ibid, 1275; *EC Measures Concerning Meat and Meat Products (Hormones)* (13 February 1998) WT/DS26/AB/R WT/DS48/AB/R para 135, Fn 154 (Appellate Body, WTO)
[263] See also Gaffney, Loftis, above n 49, 18.
[264] Ibid 31.

As Shany puts it in a slightly differed context, "the conflicting jurisprudence of ICSID tribunals over these issues cannot be attributed to the relatively minor textual differences between the BITs applicable to those cases but, rather, to an ideological chasm."[265] The different approaches to the umbrella clause need to be regarded as a struggle between ideologies "highlightening state sovereignty" [266] and those underpinning "a liberal and cosmopolitan view in favour of international commerce."[267] "Lawyers and legal scholars closer in the background, cultural and professional affinity and loyalty to the State are likely to emphasise sovereignty over contract, while those closer to economics [...] will appreciate more the link between prosperity and sanctity of contract."[268] "[T]he disagreement over umbrella clauses in this scenario is in effect an extension of the enduring tension between developing and developed countries on foreign investment."[269]

Occasionally, advocates of the narrow approach appear to have irrational fears of international arbitration. In this context, one has to remember "that the enforcement of umbrella clauses [before international arbitral tribunals] does not lead to a final award on the merits in favor of the investor; it results rather in an arbitral procedure for resolving the dispute that does not inherently favor either party."[270] Although in the heat of the battle, advocates of these approaches might be enticed to cling to any argument apparently capable of underlining the own view, a proper solution can only be found by a meticulous application of the principles of the Vienna Convention. Possible negative consequences for host states as put forward within the discussion are self-inflicted. Maybe in the long run these consequences might contribute to more accuracy and linguistic discipline within the treaty-making process. Linguistic discipline not an end in itself but a contribution to the accuracy required by the textual approach embodied in the Vienna Convention. The future consequences of this conflict still remain to be seen. It might be that host States unsatisfied by the wide approach taken by a number of ICSID tribunals try to renegotiate BITs[271] or at least "alter their BIT drafting [...] practice" in the future.[272] Maybe "[a] domestic court will, in the long run,

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[265] Yuval Shany "Note and Comment: Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims" (2005) 99 Am J Int'l L 835, 844.
[266] Wälde, above n 1, 184.
[267] Ibid.
[268] Ibid.
[269] Wong, above n 4, 138
[270] Ibid, 176.
[271] see Seriki, above n 48, 581.
[272] Gill & Gearing, above n 48, 412.

acquire more independence if supported by international tribunals, in particular if those take on the politically most sensitive responsibilities."[273]

[273] Wälde, above n 1, 187.

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