Umbrella Clauses in Bilateral Investment Treaties: An Evolved Controversy from Interpretation to Treaty Making

Abstract
The central argument of this paper is that the controversy over umbrella clauses in international investment law has evolved from one about interpretation by arbitral tribunals to treaty making by states. Umbrella clauses in bilateral investment treaties (BITs) ensure that each party will respect specific undertakings towards nationals of the other party. These undertakings are generally investors’ contractual rights, and umbrella clauses aim to protect these rights from state interference in the form of contractual breach, administrative or legislative acts.

The seminal cases *SGS v Pakistan* and *SGS v Philippines* introduced seemingly divergent lines of authorities in the interpretation of umbrella clauses, respectively, the restrictive and expansive. The restrictive interpretation either gives no effect to umbrella clauses or confines their scope, while the expansive interpretation generally gives full effect to umbrella clauses. This paper reviews and reconciles recent authorities in light of the *SGS v Pakistan* and *SGS v Philippines* divergence, with a focus on ICSID jurisprudence. This paper first argues that the seeming divergence in the interpretation of umbrella clauses by arbitral tribunals is a result of diverse formulation in the clauses rather than genuine inconsistency. As a result, the interpretive differences can be reconciled and do not discount the function of umbrella clauses as important mechanisms in the protection of investors and investments.

Having reconciled the seeming interpretive divide, this paper then turns to survey and compare the umbrella clause regimes of ten major investment player states’ BITs. The survey is presented as a table appended to the paper. It finds that the majority of these states' treaty practices is not sensitive to the developing jurisprudence. The paper calls for more informed drafting and active treaty making by states, especially in light of the recent development of extending most-favoured-nation (MFN) treatment to umbrella clauses.

**Keywords:** Investment Treaties; ICSID; Umbrella Clause; Treaty Practice; Most-Favoured-Nation Clause
1. Introduction

Since *SGS v Pakistan* and *SGS v Philippines*,¹ there has been much debate on the interpretation of umbrella clauses by scholars and practitioners. These two seminal cases introduced seemingly divergent lines of authorities, respectively, the restrictive and expansive split. The restrictive interpretation either gives no effect to umbrella clauses or attempts to confine their scope, while the expansive interpretation gives effect to umbrella clauses subject to differing analyses where there is a dispute settlement provision in an investment contract.

This paper argues that the debate concerning umbrella clauses has evolved from one concerning tribunals’ interpretation to states’ treaty making. While there continues to be issues unresolved with regard to the interpretation of umbrella clauses, much of the divergence in interpretation can be accounted for in the language of the umbrella clause. Tribunals have also been inclined to give effect to umbrella clauses in the most recent cases. Despite the importance attached to the wording and formulation of the umbrella clause, modern treaty practice has yet to contemplate the significance of effective drafting, clarity of intention and anticipating future developments as to the scope and application of umbrella clauses.

The structure of this paper is as follows: Section 2 begins by reconciling and explaining the seeming divergence in the interpretation of umbrella clauses, taking into account the jurisprudential development post-*SGS v Pakistan* and *SGS v Philippines*. In discussing cases on umbrella clauses, the focus of this paper is on ICSID jurisprudence, which is the most frequently used arbitration

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¹ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on the Tribunal on Objections to Jurisdiction, 6 August 2003; *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004.
facility in the context of investment disputes. Section 3 then examines the significance of umbrella clauses in modern treaty practice, and surveys the BIT programmes of major investment players on umbrella clauses. Section 4 explores the controversial development of extending most-favoured-nation (MFN) treatment to umbrella clauses. Section 5 concludes with some observations on the interpretation, treaty making and future development of umbrella clauses.

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2 Sasse, Jan Peter *An Economic Analysis of Bilateral Investment Treaties* (Gabler Verlag, 2011), 59.
2.  Reconciling the Restrictive and Expansive Divide

2.1  Variance in Wording

The restrictive and expansive divide results from the multiplicity in the way umbrella clauses are formulated. As there is no particular requirement on how umbrella clauses should be worded, variance in drafting results in difference in interpretation. All-inclusive wording, such as covering ‘all disputes’, generally accounts for the expansive interpretation of the umbrella clause. The *SGS v Philippines* Tribunal interpreted ‘any obligation’ as capable of applying to contractual obligations under national law, and the *BIVAC v Paraguay* Tribunal interpreted ‘any obligation’ in the umbrella clause as all-encompassing and not limited to international or non-contractual obligations.

In contrast, less clearly drafted clauses invite a restrictive interpretation. In *SGS v Pakistan*, the term ‘constantly guarantee the observance’ of a commitment did not signal with sufficient clarity that the contracting party was accepting a new obligation under international law. In *Salini v Jordan*, the tribunal found the formulation ‘create and maintain a legal framework apt to guarantee the compliance of undertakings’ ambiguous and did not amount to a mandatory obligation.

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6 *SGS v Philippines* (n 1) [115], [119].
7 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay*, ICSID Case No ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 [141].
8 *SGS v Pakistan* (n 1) [166].
9 *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 9 November 2004 [126].
2.2 Theoretical Support

A question then follows as to whether the interpretive divide can be explained by justifications beyond variations in formulation, and if so, whether these justifications are valid. One of the theoretical justifications propounded by those who favour the restrictive interpretation is that an umbrella clause is susceptible to ‘indefinite expansion’ when interpreted expansively such that it is ‘destructive of the distinction between national legal orders and the international legal order’.\(^{10}\) To counter this argument, it is submitted that the expansive interpretation is grounded in the wording of the umbrella clause which specifies its scope. The *SGS v Philippines* Tribunal reasoned that the scope of the umbrella clause in question was limited to obligations assumed with regard to ‘specific investments’, and these obligations could not be of a general character.\(^{11}\) It follows that contractual disputes arising out of simple sales or services contracts, which do not qualify as ‘investments’ under the BIT or the ICSID Convention where applicable, will not be covered by an umbrella clause.\(^ {12}\)

Another attempt to restrict the scope of the umbrella clause is the proposition that the clause only applies to a state’s sovereign, as opposed to commercial, conduct.\(^ {13}\) However, such a proposition is not reflected in the language of the umbrella clause.\(^ {14}\) A number of cases also did not recognize such

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\(^{10}\) *SGS v Pakistan* (n 1) [166]; *El Paso Energy International Co v Argentina*, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April 2006 [72]-[74], [82]; *Pan American Energy LLC v The Argentine Republic*, ICSID Case No ARB/03/13 and *BP America Production Co & others v The Argentine Republic*, ICSID Case No ARB/04/8, Decision on Preliminary Objections, 27 July 2006 [101]-[103].

\(^{11}\) *SGS v Philippines* (n 1) [121].


\(^{13}\) *El Paso v Argentina* (n 10) [81]; *Pan America/BP v Argentina* (n 10) [108]; *Sempra Energy International v The Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007 (Award annulled on 29 June 2010) [310].

a distinction.\textsuperscript{15} Beyond wording, the \textit{SGS v Paraguay} Tribunal pointed out the practical difficulty in determining whether the state was acting in its sovereign or commercial capacity.\textsuperscript{16} Schill also finds the distinction artificial: ‘the risk of rent-seeking behaviour by the host state can manifest itself in sovereign as well as in commercial conduct’.\textsuperscript{17}

On the other hand, Potts argues that differences in drafting cannot completely justify the internal inconsistency in tribunals’ reasoning.\textsuperscript{18} There is some truth in this statement, an example would be the umbrella clauses in \textit{SGS v Pakistan} and \textit{SGS v Paraguay}, which were worded identically but where very different outcomes were rendered, this fact was acknowledged by the \textit{SGS v Paraguay} Tribunal.\textsuperscript{19} However, it is contended that inconsistency results when tribunals fail to apply the interpretive rules under Art. 31 Vienna Convention on the Law of Treaties (VCLT). These rules constitute the proper approach in interpreting umbrella clauses, Yannaca-Small reiterates:

\begin{quote}
There is diversity in the way the umbrella clause is formulated in investment agreements. Because of this diversity, the proper interpretation of the clause depends on the specific wording of the particular treaty, its ordinary meaning, its context, and the object and purpose of the treaty, as well on negotiating history or other indications of the parties’ intent.\textsuperscript{20}
\end{quote}

\textsuperscript{15} \textit{Eureko BV v Republic of Poland}, Partial Award, 19 August 2005 [115]-[134]; \textit{Noble Ventures Inc v Romania}, ICSID Case No ARB/01/11, Award, 12 October 2005 [51], [82]; \textit{Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador}, ICSID Case No ARB/04/19, Award, 18 August 2008 [325]; \textit{SGS Société Générale de Surveillance SA v The Republic of Paraguay}, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 [135].
\textsuperscript{16} \textit{SGS v Paraguay} (n 15) [135].
\textsuperscript{17} Schill, Stephan (n 12), 325.
\textsuperscript{18} Potts, Jonathan Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization (2010-2011) 51 \textit{Va J Int’l L} 1005,1028.
\textsuperscript{19} \textit{SGS v Paraguay} (n 15) [169].
\textsuperscript{20} Yannaca-Small (n 14) 502.
Tribunals which gave effect to umbrella clauses tend to adopt this approach, thus according the expansive interpretation stronger theoretical grounds. This is contrasted with the restrictive interpretation. The SGS v Pakistan Tribunal failed to apply the interpretive rules under Art. 31 VCLT at all, while the Joy Mining v Egypt Tribunal imposed an additional restriction that was not apparent from the ordinary meaning of the clause - requiring a clear violation of treaty rights and obligations or a violation of contract rights ‘of such a magnitude to trigger the Treaty protection’. The requirement for states to act in their sovereign capacity is, similarly, not found in the ordinary meaning of the clause. Applying the Art. 31 VCLT interpretive rules is in line with the proposition that formulation determines interpretation, it is also the preferred approach as it instils consistency into tribunals’ reasoning.

2.3 Uncertainties concerning Dispute Settlement Clauses

Uncertainties remain concerning the effect of dispute settlement clauses in investment contracts on claims brought under umbrella clauses. The difference in language of the umbrella clauses does not generally account for the outcome of the cases on this issue. The SGS v Philippines and BIVAC v Paraguay Tribunals found that while they had jurisdiction over claims under the umbrella clauses, such claims were inadmissible because of the exclusive jurisdiction clauses in the investment contracts. These decisions underscore the tension between treaty and contractual jurisdictions. The

21 SGS v Philippines (n 1) [116]-[117]; Eureko v Poland (n 15) [246]; Noble Ventures v Romania (n 15) [52]; BIVAC v Paraguay (n 7) [141]; SGS v Paraguay (n 15) [168];[169].

22 SGS v Pakistan (n 1); Joy Mining Machinery Limited v Arab Republic of Egypt, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004 [81].

23 El Paso v Argentina (n 10) [81]; Pan America/BP v Argentina (n 10) [108]; Sempra v Argentina (n 13) [310].


25 SGS v Philippines (n 1) [154]; BIVAC v Paraguay (n 7) [145];[146].
BIVAC v Paraguay Tribunal reasoned that the parties could not pick and choose the parts of the contract that they wished to incorporate into an umbrella clause.\(^{26}\)

Conversely, the *Eureko v Poland* and *SGS v Paraguay* Tribunals assumed jurisdiction under the umbrella clause and found the claims admissible despite the presence of a dispute settlement clause in the investment contract.\(^{27}\) In essence, the basis of such finding is that a claim under an umbrella clause is a legally distinct treaty claim, it cannot be affected by a contractual dispute settlement clause.\(^{28}\) The *SGS v Paraguay* Tribunal also made clear that investors should not be able to impliedly waive their treaty rights. The question of an express waiver was left open.\(^{29}\)

\(^{26}\) *BIVAC v Paraguay* (n 7) [148].

\(^{27}\) *Eureko v Poland* (n 15) [92]-[114], [250]; *SGS v Paraguay* (n 15) [138], [142].

\(^{28}\) Antony, Jude Umbrella Clauses Since *SGS v Pakistan* and *SGS v Philippines* – A Developing Consensus (2013) 29(4) *Arb Int’l* 607, 626.

\(^{29}\) *SGS v Paraguay* (n 15) [177]-[180].
3. Trends in Modern Treaty Practice

3.1 Significance of Umbrella Clauses in Investment Treaties

The abovementioned cases illustrate the underlying purpose for which umbrella clauses are drafted and included in investment treaties. Case authorities recognized the *effet utile* principle - an interpretation that renders a provision effective rather than not is preferred - which favours investors in the context of umbrella clauses. Such a pro-investor approach is a logical consequence of adopting the interpretive rules under Art. 31 VCLT, where the ‘object and purpose’ of an investment treaty is to provide protection to investments. In this regard, Schreuer points out that the expansive approach is preferred as it ‘does justice to a clause that is evidently designed to add extra protection for the investor’.

Douglas criticizes the pro-investor approach as biased as it can ‘never result in an interpretation favourable to the host State both as a matter of experience and as a matter of logic’. Similarly, Franck warns against an overly exuberant use of the object and purpose test, which will distance the interpretation from an objective analysis of a treaty’s text, and promote an interpretation based on subjective whims. In defence of the pro-investor approach, additional protection given to investors should be understood in the context of how investment contracts are being negotiated, the process of

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30 SGS v Philippines (n 1) [116]; Eureko v Poland (n 15) [248]-[249]; Noble Ventures v Romania (n 15) [52]; SGS v Paraguay (n 15) [90].
31 Voss, Jan Ole The Impact of Investment Treaties on Contracts between Host States and Foreign Investors (Martins Nijhoff Publishers, 2011), 254.
which tends to significantly favour host States. Umbrella clauses are most closely associated with investment contracts known as ‘concession agreements’ or state contracts, where it is common for terms to be prescribed by national legislation and offered by the host State on a ‘take it or leave it’ basis.\textsuperscript{35} When market situations and socio-political conditions fluctuate, host States may be tempted to back out from their original contractual commitments in search of better opportunities.\textsuperscript{36} The ‘obsolescing bargains between the investor and the host country’ arise as a result, as the investor’s bargaining power diminishes after the host State has acquired the investment.\textsuperscript{37}

In a cost-benefit analysis, the umbrella clause ensures continued state compliance by increasing the costs of a host State in failing to observe contractual commitments, and increasing an investor’s bargaining power through a right to bring investor-state arbitration.\textsuperscript{38} Schill thus regards umbrella clauses as an enforcement mechanism for host State promises in mitigating inequalities between investors and the host State, and targeting shortcomings in dispute settlement and enforcement of non-sovereign breaches by the host State in investment contracts.\textsuperscript{39} It is for this reason that Schill rejects a restrictive interpretation of the umbrella clause, as he considers it reduces the ability of host States to make credible commitments and lessens efficient cooperation between investors and host States.\textsuperscript{40}


\textsuperscript{36} Vernon, Raymond Sovereignty at Bay: The Multinational Spread of US Enterprises (Basic Books, 1971) 46.

\textsuperscript{37} Salacuse, Jeswald The Law of Investment Treaties (Oxford University Press, 2010), 271-272.

\textsuperscript{38} Ibid. 273.


\textsuperscript{40} Ibid. 44-45.
3.2 Modern Treaty Practices of Major Investment Players

Bearing in mind the protection of investments as a fundamental notion in the inclusion of umbrella clauses in treaties, this paper now turns to examine whether modern treaty practice is sensitive to the developing jurisprudence. It is estimated that of the approximately 2700 BITs currently in existence, about 40% contain an umbrella clause.\(^4\) The table in the Appendix surveys umbrella clauses from selected BITs of ten major investment players, which have been ranked by investment promotion agencies as the top ten most promising investor home economies for foreign direct investment from 2013 to 2015.\(^2\) It is noted that there is no single centralized database on these treaties and selected sources have been consulted, as specified in the Appendix.

There are three main observations worth noting. Firstly, some states adopt a consistent regime in relation to umbrella clauses. Canada, France, India and Russia do not generally adopt umbrella clauses in their treaties, while Germany and the UK tend to do so. The UK regime, in particular, adopted the same formulation in its Model BIT 2008 as the umbrella clause in UK-China BIT 1986. An interesting example is where two contrasting practices are at play, for instance, Art. 13.2 India-Germany BIT provided that disputes arising from breach of observance of obligations were limited to the remedies specified under the investment contract, which could potentially exclude investor-state arbitration.\(^3\) Unlike the practices of most German BITs, the clause was placed near the end of the BIT and distanced from provisions on substantive treaty standards, potentially with the aim of diluting the effect of the clause.

\(^4\) Yannaca-Small (n 14) 483.


\(^3\) Art. 13.2 India-Germany BIT (13 July 1998).
Secondly, some states do not demonstrate a consistent pattern in their treaty making, notably, China and Korea. China’s situation is particularly unique. 50 out of 120 strong Chinese BITs have an umbrella clause of either a broad or narrow formulation.\(^{44}\) However, pre-2005 Chinese BITs generally only allow for submission of expropriation claims before investor-state arbitration,\(^{45}\) the China-Australia BIT and China-Belgium BIT which contained umbrella clauses are such examples.\(^{46}\)

The wording of the umbrella clauses in those two BITs was also restrictive, requiring ‘written undertakings’ and ‘special contracts’ respectively. Shan also interprets the latter clause as making clear that host States are not precluded from laying down new laws and regulations on foreign investment.\(^{47}\) It is difficult to ascertain the precise reasons behind states adopting an inconsistent regime. Many diverse variables may account for such practices, for example, changes in political environment, adjustment of economic policies, timing of negotiations, and the relative leverage of the partner states in the BITs. The detailed consideration of these exogenous factors is beyond the scope of this paper.

Finally, only Japan and the US respond to the jurisprudential development. Umbrella clauses in post-2004 Japanese BITs have a much more restrictive scope, for instance, both Art. 5.2 Japan-Lao PDR BIT and Art. 4.3 Japan-Colombia BIT required written obligations.\(^{48}\) In the Japan-Peru BIT, the observation of commitments did not even have a standalone provision, but was reduced into a

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\(^{46}\) Art. 11 China-Australia BIT (11 July 1988); Art. 9 China-Belgium and Luxembourg BIT (1 December 2009).

\(^{47}\) Shan (n 44), 140.

\(^{48}\) Art. 5.2 Japan-Lao PDR BIT (3 August 2008); Art. 4.3 Japan-Colombia BIT (Not yet entered into force).
principle under the Preamble with no binding effect. As for the US, umbrella clauses in pre-2004 US BITs had a very broad formulation, some of these earlier umbrella clauses were subjects of considerable dispute, such as, Art. II.2(c) US-Argentina BIT, Art. II.2(c) US-Romania BIT, and Art. II.3(c) US-Ecuador BIT. Given the disputes surrounding such broad formulation, post-2004 US BITs and the US Model BIT 2012 understandably discarded such formulation, these treaties merely reserve the possibility of submitting disputes concerning ‘investment agreements’ to investor-state arbitration.

While much of the debate over umbrella clauses has focused on their interpretation by arbitral tribunals, there is little discussion about states’ lack of responsiveness to jurisprudential development. Only a minority of these major investment players have modernized the language of their umbrella clauses. In light of *SGS v Paraguay* addressing the issue of implied waiver of treaty rights and potentially express waiver, this development has implications as to the question of onus. The host State is the only party to both the BIT and the investment contract, it is entirely open to the host State to limit the effect of the umbrella clause in the BIT or exclude the application of any BIT in their

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50 *CMS Gas Transmission Co v The Argentine Republic*, ICSID Case No ARB/01/18, Decision on Annulment (Award dated 12 May 2005, partially annulled on 25 September 2007), [95]-[96]; *El Paso v Argentina* (n 10) [84]-[85]; *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006 [384]; *Pan American/BP v Argentina* (n 10) [114]; *Sempra v Argentina* (n 13) [310]-[314]; *Continental Casualty Co v The Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008 [300]-[303].

51 *Noble Ventures v Romania* (n 15) [60].

52 *Noble Energy Inc and Machalapower Cia Ltda v The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12, Decision on Jurisdiction, 5 March 2008 [154]-[157]; *Duke Energy v Ecuador* (n 15) [319]-[325]; *MCI Power Group LC and New Turbine Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Decision on Annulment, 19 October 2009 [70].

investment contracts. Any ambiguity in interpreting the umbrella clause could then be resolved against the host State.\textsuperscript{54} It is thus in the states’ interests to engage in more informed drafting and active treaty making. This notion is reinforced by recent developments concerning the extension of MFN treatment to umbrella clauses.

4. The Way Forward: Multilateralization through Extending Most-Favoured-Nation (MFN) Treatment to Umbrella Clauses

A controversial but potentially far-reaching development is extending the application of MFN clauses to umbrella clauses. The complexity of such application is apparent, as it involves the interplay of two of the ‘most debated treaty mechanisms’ in international investment law.\textsuperscript{55} The application of the MFN standard depends on a basic treaty and a third party treaty.\textsuperscript{56} The basic treaty contains the MFN clause, whereas the third party treaty determines the ‘extent of the favours that the beneficiary of the MFN clause may enjoy’. The favours invoked are confined by the \textit{ejusdem generis} principle,\textsuperscript{57} which means MFN clauses only attract rights of the same subject matter.\textsuperscript{58}

The most recent case considering the issue of extension is \textit{Arif v Moldova}. Arif alleged violations of Art. 9 France-Moldova BIT, he sought to invoke the MFN clause in Art. 4 France-Moldova BIT to import umbrella clauses in Art. 2.2 Moldova-UK BIT and Art. II.3(c) Moldova-US BIT, which were broadly formulated umbrella clauses. Art. 9 France-Moldova BIT provided that:

\begin{quote}
Investments having been the subject of a particular [the] specific commitment of one of the Contracting Parties towards the nationals and companies of the other Contracting Party, are regulated, without prejudice to the dispositions of the present Agreement, by the provisions of such commitment as far as it contains more favourable provisions than those provided for in the present Agreement.\textsuperscript{59}
\end{quote}

\textsuperscript{55} Gaillard, Emmanuel Establishing Jurisdiction Through a Most-Favoured-Nation Clause (2005) 233(105) \textit{NYLJ} 1.

\textsuperscript{56} Sir Gerald Fitzmaurice, \textit{I The Law and Procedure of the International Court of Justice} (Grotius Publications, 1986), 324.

\textsuperscript{57} Ibid. 326.

\textsuperscript{58} Ibid.

\textsuperscript{59} Franck Charles \textit{Arif v Moldova}, ICSID Case No ARB/11/23, Award, 8 April 2013 [385].
The precise formulation of this clause, which had minor variations from Art. 9 of the latest French Model BIT, is of particular interest as the Tribunal here ruled that Art. 9 was not an umbrella clause but a ‘preservation of rights’ clause:

Firstly, the ordinary meaning of these Articles within their context and in light of the BIT’s object and purpose makes the Tribunal find that Article 9 (and Article 5(2) to the extent that it refers to “a specific commitment”) has its own specific meaning and purpose, separate from that of an “umbrella” clause, and agrees with Respondent in this regard. According to the ordinary meaning of the text, the specific purpose of these clauses is not to guarantee the observation of obligations assumed by the host State vis-à-vis the investor, but rather to provide investors with the right to claim the application of any rule of law more favourable than the provisions of the BIT. The doctrine refers to such clauses as preservation of rights clauses.60

This type of clause, in its usual wording, simply says that in applying or enforcing the existing protections offered by the BIT, attention should be paid to any more favourable provisions contained in domestic law or specific agreements. It therefore confirms that the investor may benefit from more favourable treatment, but does not add a new, specific or distinct, treaty obligation to respect commitments made.61

Nevertheless, the Tribunal did not agree with Moldova that umbrella clauses were merely procedural in nature, but that they were substantive and capable of importation through an MFN clause.62 The

60 Ibid. [388].
61 Ibid. [389].
62 Ibid. [395].
Tribunal then concluded that since the MFN clause was broadly drafted, it could import an umbrella clause from either the Moldova-UK or Moldova-US BIT, and found jurisdiction over Arif’s specific commitments claim by importing a more favourable standard of protection granted by either of the umbrella clauses. Gazzini and Tanzi point out that the Arif v Moldova Tribunal fails to make any reference to the *ejusdem generis* principle. They argue that the Arif v Moldova Tribunal should have rejected the incorporation of the umbrella clause through MFN treatment following its logic, as there were no rights on the same subject matter granted under the basic treaty. They further argue that Art. 9 should be interpreted as an umbrella clause.

It is proposed that the crux of this issue is the formulation of the specific commitments clause. In the context of China-France preservation of rights clauses, Shan argues that umbrella clauses and preservation of rights clauses differ in terms of perspective:

Unlike the umbrella clauses, which address the issue (of assurance of special investment projects) from the perspective of the host state by forcing it to observe its obligations/commitment towards investments, these "preservation of rights" clauses address the same issue from the angle of the foreign investors, by entitling them to the more favourable treatment under such special undertakings or commitments. In other words, both of them serve the same aim, although the routes taken to achieve it are different.

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63 Ibid. [396].
64 Gazzini, Tarcisio and Tanzi, Attila Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration (2013) 14 *J World Investment & Trade* 978, 983.
65 Ibid. 990.
66 Ibid.
67 Shan (n 44) 144.
Following this analysis, the importation of the umbrella clause is justified in *Arif v Moldova*, as it does not offend the *ejusdem generis* principle. Preservation of rights clauses and umbrella clauses deal with rights on the same subject matter as they are essentially two sides of the same coin. This justification widens the scope of protection for investors and is in line with the object and purpose of BITs in promoting and protecting investments. The implication being that investors will be able to import a more beneficial umbrella clause from a third party treaty through MFN treatment, subject to the presence of an effective MFN clause, even where the specific commitments clause in the basic treaty has an unorthodox formulation or where it is not entirely clear whether the clause should be categorized as a preservation of rights clause or an umbrella clause.

The far-reaching consequence of extending MFN treatment to umbrella clauses is multilateralization. The extension makes the interaction of treaties more likely as rights conferred to one partner state in the form of an umbrella clause could be extended to another through MFN treatment. The effect of multilateralization is all the more problematic in the context of umbrella clauses, as opposed to other substantive protections in BITs such as expropriation, given the general lack of responsiveness and modernization in current treaty practice. The failure to anticipate these developments by way of effective treaty making not only affects state interests in terms of onus, it could further muddy the debate concerning umbrella clauses by creating the illusion that there was a lack of consensus in the interpretation of umbrella clauses when in fact the formulation was to blame. This could lead to the unfortunate and undeserved result of a decreased usage of an important mechanism that protects investors and investments.
5. Conclusion

To conclude, it is argued that the controversy over umbrella clauses has evolved from one concerning interpretation by arbitral tribunals to treaty making by states. The oft-debated interpretive divide is illusory, as it could be reconciled with regard to the specific wording of each umbrella clause. Recent cases have also been inclined towards giving effect to the umbrella clause. The most recent *SGS v Paraguay* has accorded, by far, the most expansive interpretation to the umbrella clause, accepting jurisdiction for a claim brought under an umbrella clause notwithstanding a dispute settlement clause in the investment contract. While uncertainties remain and further scrutiny by future tribunals is to be anticipated, prudent treaty practice calls for the clear delineation of the scope of umbrella clauses in future investment treaties, and in particular, of the relationship between the treaty clause and a contractual dispute settlement clause.\(^{68}\) Similarly, in assessing whether MFN treatment can be extended to umbrella clauses, any variation in the wording of MFN and umbrella clauses can significantly alter their scopes. States should actively review these clauses in light of recent jurisprudential developments and modify these clauses accordingly to ensure that they operate in the manner intended.

\(^{68}\) Yannaca-Small (n 24) 313.
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|----------|--------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|-------------------------------|
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● China-Japan BIT 1988: (-)  
● China-Australia BIT 1993 Art. 11: A Contracting Party shall, subject to its law, adhere to any written undertakings given by a competent authority to a national of the other Contracting Party with regard to an investment in accordance with its law and the provisions of this Agreement.  
● China-Bahrain BIT 1999: (-)  
● China-Germany 2003 Art. 10.2 (Other Obligations): Each Contracting Party shall observe any other obligation it has entered into with regard to investments in its territory by investors of the other Contracting Party. | ● China-Belgium BIT 2005 Art. 9: Investors of either Contracting Party may make investments under special contracts. Each Contracting Party shall observe any obligations it may have entered into with investors of the other Contracting Party. The above special contracts or obligations shall be in conformity with the laws of the Contracting Party accepting the investment and the provisions of this Agreement.  
● China-Bulgaria BIT 2007: (-)  
● China-Canada BIT 2012: (-) (Not yet entered into force) | n/a iv                                                                                      |
| Contracting Party          | US-Panama 1982 Art. II.2: [FET provision]… Each Party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party. (Not affected by 2000 amendment)  
|                           | US-Czech BIT 2003: Art. II.2(c): Each Party shall observe any obligation it may have entered into with regard to investments.  
|                           | 2012: (-), though Art. 24.1 allows investors to submit to investor-state arbitration claims concerning a breach of an ‘investment agreement’.  
| Germany                   | Germany-USSR BIT 1989 Art. 7.2: Each Contracting Party shall comply with any other obligation it assumes in respect of investments made by investors of the other Contracting Party in its territory.  
|                           | Germany-Yemen BIT 2005 Art. 7.2: Either Contracting Party shall fulfil any other obligation it may have entered into with regard to  
<p>|                           | 2008, Art. 7.2: Each Contracting State shall fulfil any other obligations it may have entered into |</p>
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</tr>
<tr>
<td>Germany</td>
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<td>8.2</td>
<td>Each Contracting Party shall observe any obligation it has assumed with regard to investments in its area by investors of the other Contracting Party.</td>
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<tr>
<td>Germany</td>
<td>Philippines</td>
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<td>3.5</td>
<td>(Treatment): [NT provision]...Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the Contracting State.</td>
</tr>
<tr>
<td>Germany</td>
<td>Bahrain</td>
<td>2007</td>
<td>8.2</td>
<td>Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting State.</td>
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<tr>
<td>Germany</td>
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<tr>
<td>Germany</td>
<td>Jordan</td>
<td>2007</td>
<td>8.2</td>
<td>Each Contracting Party shall observe any obligation it has assumed with regard to investments in its area by investors of the other Contracting Party.</td>
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<tr>
<td>United Kingdom</td>
<td>China</td>
<td>1986</td>
<td>II.2</td>
<td>(Promotion and Protection of Investment): [FET provision]...Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investments in its territory made by nationals or companies of the other Contracting Party.</td>
</tr>
<tr>
<td>United Kingdom</td>
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<td>UK-Jamaica BIT 1987</td>
<td>-</td>
<td>nationals or companies of the other Contracting Party.</td>
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</tr>
<tr>
<td>UK-USSR BIT 1989 Art. 2.2</td>
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<td>[FET provision]... Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments of investors of the other Contracting Party.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK-India BIT 1994 Art. 3.3</td>
<td>-</td>
<td>Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party, provided that dispute resolution under Article 9 of this Agreement shall only be applicable to this paragraph in the absence of a normal local judicial remedy being available.</td>
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</tr>
<tr>
<td>UK-South Africa BIT 1994, UK-Moldova BIT 1996, UK-Hong Kong BIT 1998, UK-EI Salvador BIT 1999 Art. II.2</td>
<td>-</td>
<td>Investment): [FET provision]... Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party. (Not yet entered into force)</td>
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<td>UK-Colombia BIT 2010</td>
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<tr>
<td>UK-Canada BIT 2011</td>
<td>-</td>
<td>Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.</td>
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</tr>
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</table>
[FET provision]…Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

- **UK-Lebanon BIT 1999 Art. 10.2 (Other Obligations):** Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

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<tr>
<th>Japan</th>
<th>Japan-China BIT 1988: (-)</th>
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<tr>
<td></td>
<td>Japan-Hong Kong BIT 1997, Art 2.3: [FET provision]…Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.</td>
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<th>Japan</th>
<th>Japan-Lao PDR BIT 2008 Art. 5.2 (General Treatment): Each Contracting Party shall observe any obligation it may have entered into in a written form with regard to investments of investors of the other Contracting Party.</th>
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<td>Japan-Peru BIT 2008 Preamble: Recognising the importance of observance and fulfilment of the obligations that one country may</td>
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</tr>
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</table>
this Agreement, each Contracting Party shall observe any particular obligation it may have entered into with regard to investments of investors of the other Contracting Party, including provisions more favourable than those of this Agreement.

- France-India BIT 1997: (-)
- France-Mexico BIT 1998 Art. 10.2 (Special Commitments): Each Contracting Party shall observe any other obligation it has assumed in writing, with regard to investments in its territory by investors of the other Contracting Party. Dispute arising from such obligations shall be settled under the terms of the contracts underlying the obligations.

<table>
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<tr>
<th>Contracting Party</th>
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<td>India</td>
<td>India-France BIT 1997: (-)</td>
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<td>India-Mexico BIT 2008: (-)</td>
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<td>India-Colombia BIT 2009: (-)</td>
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</tbody>
</table>
|                   | 2003: (-) | Investments having formed the subject of a special commitment of one Contracting Party, with respect to the nationals or companies of the other Contracting Party, shall be governed, without prejudice to the provisions of this Agreement, by the terms of the said commitment if the latter includes provisions more favourable than those of this Agreement...
Party, provided that dispute resolution under Article 9 of this Agreement shall only be applicable to this paragraph in the absence of a normal local judicial remedy being available.

- India-Germany 1995 Art. 13.2 (Application of other Rules): Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party, with disputes arising from such obligations being only redressed under the terms of the contracts underlying the obligation.
- India-Australia BIT 1999: (-)

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<td>Canada-Philippines BIT 1995: (-)</td>
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<td>Canada-Slovakia BIT 2010: (-)</td>
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<td>Republic of Korea</td>
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<tr>
<td>Russia-Ukraine BIT 1989 Art. 2.2 (Promotion and Protection of Investments): [FET provision]… Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement</td>
<td>Either Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party.</td>
<td>Russia-United Arab Emirates BIT 2010: (-) (Not yet entered into force)</td>
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<td>n/a</td>
<td>Korea-Argentina BIT 1994: (-)</td>
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<tr>
<td>n/a</td>
<td>Korea-India BIT 1996: (-)</td>
<td>Korea-Belgium BIT 2006: (-)</td>
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<tr>
<td>n/a</td>
<td>Korea-El Salvador BIT 1998 Art. 12.3 (Application of Other Rules): Either Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party.</td>
<td>Korea-Lebanon BIT 2006 Art. 10.2 Other Obligations: Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.</td>
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<tr>
<td>n/a</td>
<td>Korea-Honduras BIT 2000 Art. 10.3 (Application of Other Rules): Either Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party.</td>
<td>n/a</td>
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<td>n/a</td>
<td>Korea-Japan BIT 2002: (-)</td>
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with regard to investments of investors of the other Contracting Party.

- **USSR-Germany BIT 1989 Art. 7.2**: Each Contracting Party shall comply with any other obligation it assumes in respect of investments made by investors of the other Contracting Party in its territory.

- **USSR-Netherlands BIT 1989 Art. 3.4**: Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

- **USSR-Canada BIT 1989**: (-)

- **USSR-Korea BIT 1990 Art. 2.4 (Promotion and Protection of Investments)**: Either Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments in its territory of investors of the other Contracting Party.

- **Russia-Greece BIT 1993 Art. 10.2 Application of Other Rules**: Each Contracting Party shall observe all other obligations it may have entered into with regard
The selected BITs cover partner states from developed and developing states where possible, and subject to the availability of the treaty text in English.

The sources consulted in compiling this survey are as follows:


2. Russia-Turkey BIT 1997 Art. II.2 (Promotion and Protection of Investments): [FET provision]… Each Contracting Party shall observe any obligation it may enter into with regard to investments of investors of the other Contracting Party.
3. Russia-Japan BIT 1998 Art. 3.3: [FET provision]…Each Contracting Party shall observe any obligation it may have entered into with regard to investments made by an investor of the other Contracting Party.
4. Russia-Italy BIT 2002: (-)

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ii All BIT year references cited in this table (except for the Model BITs) refer to the year of signing, as opposed to the year the treaty was entered into force.

iii ‘(·)’ denotes the absence of an umbrella clause in the relevant treaty.

iv ‘n/a’ denotes that the relevant treaty was not available in English or not available at all in the sources consulted.

v According to *Global Arbitration Review Investment Treaty Arbitration Know-How*, all German BITs contain an umbrella clause.

vi According to *Global Arbitration Review Investment Treaty Arbitration Know-How*, all UK BITs contain an umbrella clause, except for the ones with Jamaica, Lebanon, Mexico and Colombia. Upon verification, an umbrella clause was found in the UK-Lebanon BIT.

vii According to *Global Arbitration Review Investment Treaty Arbitration Know-How*, only four France’s BITs contain a typical umbrella clause (those with Hong Kong, Mexico, Russia, and Yemen).

viii A similar wording was adopted in Art. 9 France-Moldova BIT, note that the *Arif v Moldova* Tribunal did not regard this formulation as constituting an umbrella clause, this will be further discussed in section 4 of this paper.

ix According to *Global Arbitration Review Investment Treaty Arbitration Know-How*, all Canadian BITs do not contain an umbrella clause.

x According to *Global Arbitration Review Investment Treaty Arbitration Know-How*, only twelve Russian BITs in force contain umbrella clauses (those with France, China, Germany, Greece, Denmark, Japan, Korea, Kuwait, the Netherlands, Switzerland, Turkey and the United Kingdom).