The Interpretation of “Umbrella Clause” in Investment Treaties

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Abstract

The purpose of this article is to discover the meaning of the umbrella clause, the root of the idea of this clause and formulation of umbrella clauses. Moreover, the legal consequences of this clause. Next, explore how international arbitration tribunals interpret the “umbrella clause”. This article has employed descriptive and comparative methods. The following materials are referenced as part of this article: books, journal articles, cases, reports, legislations. This article has found that Umbrella clauses seem very significant in international investment field, by attracting foreign investors since give them more protection under treaty claims. Moreover, this article has discovered that, the international tribunals follow three main approaches with regard to interpret this clause, which include: First, a narrow scope of the interpretation as adopted in SGS v. Islamic Republic of Pakistan. Secondly, the wider scope, for example in Enron Corp. v. Argentina based on this method the umbrella clause means what is says. Thirdly, a balance scope of the interpretation in which the tribunal considered umbrella cause applies as to a contract in which state as a sovereign not as a merchant, for instance, in El Paso v. Argentina. Finally, this article has found that there is no constancy with regard to formulation the umbrella clause. This article contributes to increase the understanding of the umbrella clause and discover the main approaches with regard to interpret this clause.

Keywords: Umbrella Clause, the international investment law, bilateral investment treaties, BITs, ICSID, OECD, VCLT, UNCTAD, UK.
Introduction

The international investment law has been largely organised by bilateral investment treaties (BITs) (Potts, 2011). Generally, the aim of BITs is to provide protection for a foreign investor (Potts, 2011). Moreover, there is no conformity in drafting BITs, therefore, the interpretation of BITs may be construed differently by arbitral international tribunals in particularly whose are established under the patronization of the International Centre for Settlement of Investment Disputes (ICSID) (the Convention on the Settlement of Investment Disputes between States and Nationals of Other States). Commonly, the international bilateral and multilateral agreements contain various kinds of protections, in favour of investors. For instance, ‘rights to national treatment, most favoured nation treatment, fair and equitable treatment” (Dugan & Jr & Wallace & Borzu, 2008). In addition, the international customary law includes some rights of investors, such as, compensation as to expropriation (Dugan & Wallace & Borzu, 2008). However, some BITs and multilateral international treaties, contain clause require host states to respect any undertaking for foreign investors to grant them more protection (Newcomb & Paradell, 2009). These undertakings often find in agreements, legislations, and sometimes oral announcements by government officials such as ministers (Salacuse, 2015). Dolzer (2005) pointed out that this clause called likewise: “mirror effect”, “elevator”, “parallel effect”, “sanctity of contract”, “respect clause” and “pacta sunt servanda”. These clauses called umbrella clauses. It seems as ‘Each contracting party State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting State’ (Shan, 2010). The objective of this clause in generally is transfer the breach of an agreement to the violation of treaty (Dolzer, 2005).

In addition, the root of the idea to use a treaty effectually to promote an agreement between a foreign investor and a host state to the level of treaty obligations can be attributed to a legal opinion of the Elihu Lauterpacht given between 1953 – 1954, as result of dispute about an oil nationalisation (Sinclair, 2004). The British authority sought to solve this dispute before the International Court of Justice. However, the latter refused the claim as result it had not jurisdiction (Potts, 2011). In 1965-57 Elihu Lauterpacht recommended a Consortium to include the agreement an umbrella clause in treaty to give constancy (Gallagher & Shan, 2009). Then the proposal of Elihu Lauterpacht was incorporated in the Abs-Shawcross Draft Convention on Investments of 1959. This proposal was used as foundation of OECD Draft of Conventions 1962 and 1967 (Sinclair). In addition, Germany and Pakistan concluded it in the first modern BIT in 1959 (Shan & Zhang, 2010). Furthermore, many states conclude an umbrella clause in their treaties, such as UK, France, Argentina, Germany, the US, China (OECD, 2006). In addition, there are more than 2500 BITs till 2009, less half of them contain a umbrella clause (Gallagher & Shan). Moreover, there is a big controversy about the legal consequence of this clause. However, some arbitration tribunals accepted to apply this clause, therefore, the contractual obligations may promote from contractual commitments and domestic jurisdictions to international treaties protection (Shan, 2010). This article will focus critically on the interpretation of the umbrella clauses in the light of recent BITs practice, and arbitral international tribunals. This article tends to argue that while the umbrella clause appears important for investors as to states contracts subject to BITs. However, its effect seems not positive since there is no one formulation, and tribunals have different arguments as to interpretation (Alvik, 2011). Therefore, the argumentation about its interpretation will appear to continue.

Formulation of Umbrella Clauses

Generally, BITs are drafted in different languages or terms, this phrase may apply to umbrella clauses because it apart thereof. As Dolzer said: ‘... [t]he specific terms of the clause may differ from treaty to treaty, and thus may have to be interpreted and applied differently from case to case’ (Dolzer, 2005). In other words, reforming umbrella clauses in different terms may lead to differ in the scope and effect. For
instance, article 87(2) of Japan - the Republic of India 2011 ALPPI, (Comprehensive Economic Partnership Agreement Between Japan and the Republic of India,( 2011), which states: ‘Each party shall observe any obligation it may have entered into with regard to investment activities in its area of investors of the other Party’. It appears that any obligation contains any commitment, it seems a wider phrase, may be covered oral statements (Shan, 2010). Provided that, occurring from undertaking of each party have entered into. Therefore, if a foreign investor engages with a private company, this contract will not be covered by the umbrella clause (Bishop & Crawford & Re, 2005). In addition, as to investment activities, may be interpreted to specific type of contacts. A tribunal in (Enron Corporation Ponderosa Assets, L.P v. Argentina, 2007), pointed out that: ‘Under its ordinary meaning the phrase ‘any obligation’ refers to obligations regardless of their nature’ (Enron Corporation Ponderosa Assets, L.P v. Argentina, 2007). Some BITs adopted a narrow scope, such as (Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment, 2011). For instance, provides written obligations and reading to specific investments. In other words, the umbrella clause does not cover all investments (Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment, 2011).

Furthermore, there are treaties extended the scope of umbrella clauses to include contracts between the foreign investors and private parties (Gallagher& Shan, 2009). For instance, Article 15 of Singapore - The Socialist Republic of Vietnam BITs, ‘which states:’ ...Each Contracting Party shall observe any commitment in accordance with its laws additional to those specified in this Agreement entered into by the Contracting Party, its nationals or companies with nationals or companies of the other Contracting Party as regards to their investments” (Agreement Between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Singapore on the Promotion and Protection of Investments, 1992). It seems broader and impractical, because it’s not easy for a host state to observe any commitment towards private foreign investors who enter into with national parties. Arguably, private – privat agreement generally is not intentional investment contract as such. Furthermore, a state seems play a role to organise contracts or involve through its courts to solve any dispute. As Gallagher and Shan state; “[I]t seems excessive to required it to likewise ‘observe’ ‘any commitment’ entered into between two private parties without any involvement of the host state” (Gallagher& Shan, 2009). However, it appears acceptable to require from parties that do not interfere in the relationship between private parties or regard the freedom of agreement (Gallagher& Shan, 2009). It could be argued that, the freedom of contract is limited according to public order in most states. It should be pointed out that, article (15) of the Czech Republic - Singapore BIT 1995, oblige parties do not interfere in private - private contracts. It has been highlighted that, not all undertakings of a states cover by umbrella clauses, such as, completely commercial agreements (Shan, 2010). Moreover, as to limit formulations Professor Shan declared that: ‘There are five categories of restrictive formulations, imposing restorations such as ‘subject to local laws’, ‘written obligations’, ‘specific investment’, ‘contractual obligation’, concerning ‘approved investments’, and ‘approved investment contracts’ and documents of approval’ (Shan, 2010).

The interpretation of the “umbrella clause” according to investment treaties practice and arbitration decisions

Based on differences in formulation of umbrella clauses international arbitration tribunals may interpret umbrella clause in different ways. However, a typical clause may give a dissimilar meaning. Generally, international arbitration tribunals follow three approaches: a narrow, wide, and a balance (Gallus, 2008). Some examples of interpretation of umbrella clauses will be evaluated as follows:

Commonly, umbrella clauses contain obligatory language, in order to bear parties to fulfil their obligations. For instance, article 7(2) of the German Model Treaty -2008, which states: ‘Each Contracting State shall
fulfil any other obligations it may have entered into with regard to investments in its territory by investors of the other Contracting State’ (The German Model Treaty, 2008). Shall mean strong mandatory. As a result parties have to do their obligations. Moreover, any other obligations clear and wide scope, it includes obligations under BIT and other obligations, a limitation may be seemed as regards investments. Some BITs trend to define investors or investments. For instance, article (1) of ( the Agreement Between the Government of the People’s Republic of China and the Government of the State of Qatar Concerning the Encouragement and Reciprocal Protection of Investments, 1999), which states ‘The term “investment” means every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particular, though not exclusively, includes: (a) movable, immovable property and other property rights such as mortgages and pledges; (b) shares, stock and any other kind of participation in companies; (c) claims to money or to any other performance having an economic value; (d) copyrights, industrial property rights, know-how and technological process; (e) concessions conferred by law, including concessions to search for or exploit natural resources’. Article (1) (2) investors mean: ‘(a) natural persons who have nationality of the People’s Republic of China in accordance with its laws; (b) economic entities established in accordance with the laws of the People’s Republic of China and domiciled in the territory of the People’s Republic of China; in respect of the State of Qatar; (a) citizens who have nationality of the State of Qatar; (b) legal persons including companies, general corporations, public organizations, public and semi-public entities constituted in accordance with the legislations of the State of Qatar and domiciled in its territory; (c) the Government of the State of Qatar’.

However, this clause is a wider, a tribunal interpreted similar clauses narrowly. For instance, in case (SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, 2003). It is the first leading case dealt with an umbrella clause (Gallagher & Shan, 2009). The fact of this case, Islamic Republic of Pakistan entered into agreement with SGS, the matter of contract was to supply pre-shipment inspection services to Pakistan, and the aim of agreement to identify goods for duty reasons. A dispute arose with regard to the efficiency of performance of each other, therefore, Pakistan terminated the agreement. SGS argued that, the termination invalid and against conditions of the agreement and BIT. Parties agreed in the contract to refer any conflict or complain arising out or connecting with agreement or validate, cancellation thereof to an arbitration under Pakistan law (SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, 2003).

Moreover, the SGS requested an ICSID abstraction. Pakistan argued that by virtue of the agreement, and the article 26 of ICSID, the tribunal had lack of jurisdiction. The SGS arguments among other things that, Pakistan breached umbrella clause, article 11 of BIT which provides: ‘Either 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’ (SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, 2003). Which is transformed all agreement claims to claims of a breach of treaty or international law. Furthermore, as to legal effects of application Article 11 of the BIT, Tribunal stated that:

[a]re so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant. Clear and convincing evidence of what? Clear and convincing evidence that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan (SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, 2003).

Furthermore, the tribunal appeared the intention of this narrow interpretation because it worried about extending the effective of this clause, which would include tremendous number of state undertakings and state agreements. Generally, the limitation of the narrow scope was adopted by this arbitral seems against the intention of the parties. Simply the question may arise here, why parities inserted the Article 11 in BIT?
It appears the aim of BIT to protect the investors. In addition, the award appears contradictory with Article 31 (1) of the (Vienna Convention on the Law of Treaties, 1969), which states: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context, and in the light of its object and purpose’. Furthermore, it has been criticised that, the tribunal did not provide any evidence about its result. In addition, the award of the tribunal contradicted with main idea of creating umbrella clause. As Wong Jarrod (2006) pointed out: ‘[t]he history of the umbrella clause makes clear that it was designed to allow for any breach of a relevant investment contract to be resolved under the treaty in an international forum’. Moreover, UNCTAD’s study as regards analysis umbrella clauses, trends to a wide interspersion. It should be pointed out that, states have power if they want to limit the scope of umbrella clauses.

Furthermore, the narrow approach applied in (Gustav F W Hamester GmbH & Co KG v. Rep. of Ghana, 2010). Hamester signed a Joint Venture Contract with the Ghana Cocoa Board (Cocoa Board) which constituted by Ghana law, to prompt marketing local cocoa beans. Disputes arose as to supply and prices. Hamester requested ICSIC arbitration, among others claimed that, a respondent breached Article 9 (2) of the Germany-Ghana BIT, which provides: ‘Each Contracting Party shall observe any other obligation it has with regard to its investments in its territory by nationals or companies of the other Contracting Party’ (Gustav F W Hamester GmbH & Co KG v. Rep. of Ghana, 2010). In other words, the breach of the joint venture agreement elevated into breach of treaty because Cocoa Board was considered the state or state entity. The respondent alleged that, the umbrella clause could apply only if the contract signed by the Republic of Ghana. The tribunal agreed with the respondent view. The phrase ‘assumed by the State’ is limited, therefore, no justification to expand the scope of provision to contractual commitments by other independent bodies (Gustav F W Hamester GmbH & Co KG v. Rep. of Ghana, 2010).

Furthermore, the tribunal considered that the acts of the Cocobod did not attribute to the state, according to Article 5 or Article 8 of the ILC Articles. Therefore, the Cocobod did exercise the state authority since there was no supervision or instructions by the state. It has been argued that, Article 9(2) of IBT seems has a wide meaning since includes mandatory word ‘shall’ and any other obligation in respect to investments. There was no specific investment. Furthermore, the interpretation of tribunal as regards the umbrella clause, it appears not comply with the international law foundations of attribution. Obviously, the Cocobod was state entity because it was established by the government under a specific law. It carries special activities as to investment, these may be subject to Article 5 or Article 8 of the ILC Articles. Therefore, the Cocobod did not attribute to the state, according to Article X(2) of BIT.

Moreover, just after six months of a ward issued about SGS v. Islamic Republic of Pakistan, a different tribunal, as to not an identical umbrella clause, and the same claimant (Dolzer, 2005), adopted a wide scope as regards interpret an umbrella clause in (SGS Soci ete G en erale de Surveillance v. The Philippines 2004). In August 1991 the SGS signed contract with Philippines to provide specialized services. Disputes arose about breaches the contract. The SGS brought the dispute as regards due payments did not pay, before a tribunal based on some claims include an umbrella clause Article X(2) of BIT signed.
between Switzerland and the Philippines, which provides: ‘Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party’ (SGS Societe Générale de Surveillance v. The Philippines, 2004). The tribunal held that, it had jurisdiction over both SGS’s treaty claims and its contract claims, and ‘Article X (2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments’. In addition, the tribunal criticised evaluation of the tribunal in SGS v. Pakistan, it states that: it is unconvincing, and failed to present any precise definition to the umbrella clause. Furthermore, the tribunal held that, ‘Article X(2) means what is says’ which is different from that mentioned in case SGS v. Pakistan, the latter was undefined (SGS Societe Générale de Surveillance v. The Philippines, 2004). As Shan and Gallagher state that this interpretation seems more correctly (Gallagher & Shan, 2009).

Furthermore, tribunal held that, a phase ‘the commitments it has entered into with respect to the investments’ less clear than ‘any obligation it has assumed with regard to specific investments in its territory’ (SGS Socit et G’en’erale de Surveillance v. The Philippines, 2004). Nevertheless, it seems that, there is no clear difference as to the meaning. As Naniwadekar (2010) emphasised that, ‘It is hard to see how “shall constantly guarantee the observance of commitments” is meaningfully weaker than “shall observe any obligation”…’. In addition to, the tribunal held that: “… [i]t has jurisdiction over SGS’s claim under Articles X (2) and IV of the BIT, but that in respect of both provisions, SGS’s claim is premature and must await the determination of the amount payable in accordance with the contractually-agreed process’ (SGS Societe Générale de Surveillance v. The Philippines, 2004). It has been criticised that, it is not obvious in which situations the suspension may be removed (Jarrod, 2006). Moreover, It has been argued that, this award seems contradict with the objective of umbrella clause as mentioned above. In other words, the tribunal failed to respect an intention of parties BIT to elevate contractual disputes to treaties level (Dimsey, 2008). A question may be raised is there difference between this award and decision as to conclusion in SGS v. Pakistan. It has been argued that, there is a difference as to justifications since two tribunals refused to decide on merits (Gallagher & Shan, 2009). Nevertheless, as mentioned above tribunal in SGS v. The Philippines did not specify in which situation suspension will be remove, it seems there is possibility to exercise the jurisdiction.

Moreover, the wide scope of the interpretation followed in (Noble Ventures, Inc. v. Romania, 2005). A dispute with regard to privatization the contract of steel factory. The Noble Ventures an American company, among others alleged that, a respondent breached Article II (2) (c) of the US-Romania BIT, which states; ‘Each Party shall observe any obligation it may have entered into with regard to investments’ (Noble Ventures, Inc. v. Romania, 2005). The tribunal seems followed a right way to interpret by referring Article 31 of VCLT. This approach was followed by (CMS Gas Transmission Co v Argentina, 2005), in which states that ‘[the] Tribunal believes the Respondent is correct in arguing that … purely commercial aspects of contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor’.

In addition to, the tribunal mentioned that the word ‘shall’ in Article II (2) (c) BIT makes obligations clearly separated from what were included in BIT itself (Noble Ventures, Inc. v. Romania, 2005). To put this another way, it indicated apparently to investment agreements (OECD, 2006). It has been argued that, the tribunal decided its jurisdiction, and did not consider a clause in the agreement between the foreign an investor and the host state with regard to the forum of dispute (Schil, 2009). It appears that, the tribunal award complied with the umbrella clause in BIT, logically if the tribunal did not decide its jurisdiction, the umbrella clause could be meaningless. Dolzer (2008) has criticised that, the award leaves the debate going on about following the narrow interpretation of the umbrella clauses in several situations, because it includes that ‘[d]espite its apparent breadth, must be understood to be subject to some limitation in the
Furthermore, the wide approach adopted by tribunal in (*Eureko B.V. v. Poland*, 2005), the tribunal based on *Article 31(1) of the (Vienna Convention on the Law of Treaties, 1969)*, and Article 3.5 of BIT which provides that ‘Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party’. This tribunal obviously followed *SGS v. Philippines* with regard to an umbrella clause ‘means what it says’. It seems it interpreted the umbrella clause according to intention of the parties accurately. As Sinclair (2004) said : ‘When interpreting an article of a treaty a tribunal must always look first to the plain meaning of the words used and the context in which it is placed’. Moreover, it has been criticised that, this dispute with regard to completely a contract and not a treaty. Furthermore, it misused the interpretation of Polish law. Compared with *SGS v. Philippines* the trend of this tribunal appears stronger since proceeded to the merits of the claim (Gallagher & Shan, 2009).

Moreover, a wide approach is adopted in (*Enron Corporation Ponderosa Assets, L.P v. Argentina*, 2007). A claimant’s allegations included that, the Respondent breached an umbrella clause which states: ‘[e]ach party shall observe any obligation it may have entered into with regard to investments’. A tribunal based on *Article 31 (1) of the (Vienna Convention on the Law of Treaties, 1969)*, held that: ‘any obligation’ cover obligations nevertheless of their character. However, these obligations subject to their object, as regards investments. It seems this award is more accurate since there is no limitation as the umbrella clause unless provisions of treaties show otherwise. In addition, the tribunal applies *Article 31 (1) of the (Vienna Convention on the Law of Treaties, 1969)*. Furthermore, in 2010 an annulment committee, confirmed the interpretation of the tribunal, and it declared that, ‘Any breach of those license rights constituted an independent violation of the BIT under the umbrella clause in respect of an investment’ (*Enron Corporation Ponderosa Assets, L.P v. Argentina*, 2010). In addition, the umbrella clause refers to investments no specific investment, moreover, any obligations conclude any type under BIT. Furthermore, a wide approach was adopted recently in (*Bureau Veritas, Inspection, Valuation, Ssessment and Control, Bivac B.V. v. The Republic of Paraguay*, 2009). The BIVA alleged that Paraguay did respect its obligations as to payments, which were considered breached of Article 3(4) of the Netherlands - Paraguay BIT provides that: ‘Each Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party’. The tribunal interpreted an umbrella clause as follows: ‘The words “any obligation” are all encompassing. They are not limited to international obligations, or non-contractual obligations, so that they appear without apparent limitation with respect to commitments that impose legal obligations’.

It appears the tribunal construed the umbrella clause as it says, and may be accurately. However, the tribunal held that, it had jurisdiction over the claim by virtue of umbrella clause article 3(4). Nevertheless, that claim was not acceptable, because the parties determined agreed on an exclusive jurisdiction. Furthermore, Paraguay according to the umbrella clause should ensure availability of this jurisdiction (*Bureau Veritas, Inspection, Valuation, Ssessment and Control, Bivac B.V. v. The Republic of Paraguay*, 2009). It has been argued that, its interpretation appears contrary to the object of umbrella clause (Jarrod, 2006). A question remains open with respect to effective of inadmissibility. Whether the claim would be dismissed or suspended as happened in *SAS v Philippine*. It seems fair for a claimant to suspend a case since domestic court may fail to reach equitable award. It has been argued that, this may reduce costs and time.

Furthermore, the third approach called a balance has adopted with regard to interpreting the umbrella clause. For instance, in (*El Paso Energy International Company v. Argentina Republic*, 2006). This tribunal considered the umbrella clause is covered only breaches against agreement based on sovereign conduct or abuse of government authority. However, it is not protected commercial contracts nature. It
held that: ‘[i]t is necessary to distinguish the State as a merchant from the State as a sovereign…’. Moreover, the tribunal pointed out that, a balance is required considering sovereignty and a state’s liabilities to establish advancement structure for increasing of economic movements, and the essential to prevent foreign investments and its transferability. It seems the tribunal focused on results if would apply the umbrella clause. To put this another way, the jurisdiction of tribunal appears to apply rules and what parties agreed within its jurisdiction. Obviously, seeking the balance may be reasonable, if the parties agreed about conciliation pursuant to Article (1) (2) of ICSIC, which states ‘The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention’.

In addition, it has been criticised that, there are practical complications as to distinguish between the breach the commercial nature and sovereign one. Furthermore, a host state undertakings must be prevented not any against wily conduct in kind of sovereign tactics, but also against failures of commercial nature (Schil, 2009). Moreover, it has been criticised that, the term of sovereignty is unclear and not support based on international law (Naniwadekar, 2010). In addition, someone argued that, the umbrella clause was not determine to deal with commercial contracts, but to grant investors more protections as agreed with a host state (Klager, 2011). Furthermore, it has been argued that, states contracts seem include pure commercial as Shan and Gallagher (2009) state that: ‘These states contracts cover a wider range of areas such as…purchases contacts for supplies…’.

Moreover, it seems a proper way to interpretation this clause according to the (Vienna Convention on the Law of Treaties, 1969). Therefore, tribunals apply the actual result on an umbrella article whether conduct of state as sovereign or not. Furthermore, it has been found out that, a tribunal in (Siemens A.G. v. Argentine Republic, 2007), rejected to make difference between the commercial agreements and concession contracts, based on an umbrella clause refers to any obligation. Apparently, this tribunal interpreted the umbrella clause according the purpose of IBT, and the ordinary meaning, which comply with the (Vienna Convention on the Law of Treaties, 1969) accurately. In addition, it has been argued that, it appears there is no justification to ignore the intention of parties if they agreed to expand the scope of an umbrella clause (Dolzer, 2008). Nevertheless, tribunal in the case (Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic, 2006), followed the same approached applied on in El Paso v. Argentina, and it declared that:

It would be strange indeed if the acceptance of a BIT entailed an international liability of the state going far beyond the obligation to respect the standards of protection of foreign investments embodied in the treaty and rendered it liable for any violation of any commitment in national or international law with regard to investments... (Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic, 2006).

It seems that, the same arguments mentioned above with regard to El Paso v. Argentina, could be applied as to this tribunal. However, this award appears not provide real support for the balance approach because the majority of arbitrators, whom decided the award as to El Paso v. Argentina (Schreuer & Muchlinski & Ortino, 2008).

In short, it may be more justified and legally to interpret the umbrella clause based on intention of the parties, even this interpretation lead to elevate the commercial obligations to international plane. Nevertheless, since the awards of the ICSID are not binding as precedent, and tribunals have different view as to umbrella clauses, it appears the controversial as to this clause will continue in the future.
Conclusion

Umbrella clauses seem very important in international investment field, by attracting foreign investors since give them more protection under treaty claims. However, there is no one formulation, this creates differences from one treaty to another. Sometimes a hosting state may use different umbrella articles. Generally, international tribunals follow three main approaches with regard to interpret this clause, which include: First, a narrow scope of the interpretation as adopted in SGS v. Islamic Republic of Pakistan. Secondly, the wider scope, for example in Enron Corp. v. Argentina based on this method the umbrella clause means what is says. Thirdly, a balance scope of the interpretation in which the tribunal considered umbrella cause applies as to a contract in which states as a sovereign not as a merchant. For instance, El Paso v. Argentina. In addition, this article has shown that the courts even accept admissible the case may refuse jurisdiction since if a contract is specified the domestic courts as a forum, such as, SGS v. The Philippines. In addition, the significant interference by governments may grant protection under umbrella clause as to commercial contracts as decided in CMS Gas Transmission Co v Argentina. However, this award is dubious since the breach of this clause was annulled latter. Furthermore, this article has found that, the wide scope of the interpretation appears compliant with intention of the parties and follows the rule of interpretation contain in the (Vienna Convention on the Law of Treaties, 1969). Moreover, this article has suggested that constancy with regard to formulation the umbrella clause is required. Whereby increasing the legal knowledge as to an umbrella clause regionally and globally, which may be lead to uniformity of the intentional tribunals' awards. In addition, may create international customary law, if its conditions are completed, however, debates about interpretation of umbrella clauses will seem to continue in the future.

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