Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.61, 2017

The Protection of Energy Investments under Umbrella Clauses in Bilateral Investment Treaties: A Myth or a Reality?

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Abstract
This paper examines the effectiveness or otherwise of the protection of energy investments granted by the umbrella clause provisions of bilateral investment treaties. It seeks to justify the reality that energy investments made by foreign investors are not always assured of protection in the host state and to dispel the myth that once the "umbrella clause" exists in the Bilateral Investment Treaty (BIT) of the host state and the foreign investor's country, that the investment is automatically protected under the host state's protective umbrella. This line of argument is reinforced by the fact that many States, mostly developing countries, enjoy significant flexibility to exit the BIT system when they come to realisations that the BITs they signed where they made the binding commitments to investors were undesirable. The paper thus further examines the purports and challenges of the protection supposedly granted to energy investments through the umbrella clause by dispelling the myth and reinforcing the reality of the lack of protection of energy investments despite the provision of the umbrella clauses. It concludes by making a set of recommendations that could help in securing the protection of energy investments made by foreign companies in host countries.
Keywords: Energy, Investments, BITs, Umbrella clauses, host states, protection.

1.0 Background of Energy Investments

The capital-intensive and long term nature of energy infrastructural investments has necessitated foreign investors to demand some sort of protection, legal guarantee and a binding promise that a host nation will abide by the contractual obligations it entered into before it decided to transfer its hard-earned private capital, expertise and expensive technology into the host state's country as investment[1]. One of the means of protecting these investments is termed the 'Umbrella clause'. This clause is a provision in an investment protection treaty that guarantees the observance of obligations assumed by the host state for investors by bringing the contractual and other transactional commitments under the treaty's protective shadow[2]. Most often times than not, these protections and safeguards eventually do not provide the expected protection for the investors in respect of their investments which form the basis of a regrettable reality discussed in this paper.

1.1 Introduction

First, what constitutes an investment has been variously defined by statutes, multilateral treaties providing for the International Convention on the Settlement of Investment Disputes, (ICSID)'s jurisdiction[3], case law, bilateral treaties, and the Energy Charter Treaty[4]. The term 'Investment' especially energy investment broadly means:
"every kind of asset, owned or controlled directly or indirectly by an investor and it includes tangible and intangible, and movable and immovable property and any property rights such as leases, mortgages, liens, and pledges; a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise; claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment; intellectual property; returns; any right conferred by law or contract by virtue of any licences and permits granted pursuant to law to undertake any economic activity in the energy sector."[5] Four criteria have also been identified as essentials for the definition of investment[6]. They are 'substantial commitment, certain duration, assumption of risk, and significance for the host state's development'[7]

One of the ways by which investors endeavour to protect their investments in a host state is by entering into bilateral investment treaties, (BITs) between two countries that govern the treatment and protection of the

[1]M.A.F.M Maniruzzaman 'Damages for Breach of Stabilisation Clauses in International Investment Law: Where do we stand today? [2007] IELTR 11.
[2] Rudolph Dolzer, Christoph Schreuer, *Principles of International Investment Law* (Oxford Publishing 2012).
[3]Art 1139, North America Free Trade Agreement 1994.
[4] Dolzer (n2).
[5]Art 1(6) Energy Charter Treaty 2006.
[6] International Centre for the Settlement of Investments Disputes.
[7] *Salini V Morocco*, Decision on Jurisdiction, 23 July 2001, 56.

investments made in their respective territorial jurisdiction by individuals and corporation from the contractual company[1] These BITs serve to attract foreign investments by granting broad investment rights to investors, creating obligations for the parties and creating flexibility in the resolution of investment disputes[2]. This flexibility specifically includes allowing for any investment dispute to be resolved by international arbitration[3], making provisions in the treaties that guarantee the observance of obligations assumed by the host state in respect of the investor[4], making stabilisation clause provisions that seek to protect the investor against the modification of the contractual regime by a Legislative Act or otherwise freezing the host state's national laws and consequently preventing the change of laws from affecting their contractual commitments under the contract.[5] There are other measures by which investors seek to protect their investments in a host state, but they would not be discussed in this instant work, as they do not fall under the scope of this discussion.

The central theme of this paper is therefore to justify the reality that energy investments made by foreign investors are not always assured of protection in the host state and to dispel the myth that once the "umbrella clause" exists in the Bilateral Investment Treaty (BIT) of the host state and the foreign investor's country, that the investment is automatically protected under the host state's protective umbrella. This line of argument is reinforced by the fact that many States, mostly developing countries, enjoy significant flexibility to exit the BIT system when they come to realisations that the BITs they signed where they made the binding commitments to investors were undesirable[6]or affecting their sovereign rights over their natural resources[7]in the long run or their right over the proper governance of their country taking into consideration public policy objectives, taxation motives, state policies and the citizenry's welfare. This they do without causing any harm to their ability to making binding commitments to investors on a case-by-case basis through other investments' contracts supported by International Arbitration.[8]

The ubiquity of BITs, the insertion of "Umbrella Clauses" and the potential expansion of the unclear causes of action that these set of ambitious promises that the host states make to foreign investors to attract investments have led to a substantial increase in International Investment Arbitration.[9] The International Centre for the Settlement of Investment Disputes (ICSID) which is an Arbitral Institution affiliated with the World Bank is often granted jurisdiction over BIT-based investment disputes.[10] Both parties must have however consented to ICSID's jurisdiction[11].

1.2 Meaning of Umbrella Clause

An Umbrella clause is not often uniform in its construction in all BIT's. This dissimilarity in its wording is deemed by some scholars[12]as the justification for its difference in interpretation. A classic modern umbrella clause will contain words like:

"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".[13] The Energy Charter Treaty has a similar content as its Umbrella clause.[14] A distinction has also been made between "Umbrella Clauses" which seek to protect an already concluded contractual obligation of a host state to a foreign investor and a clause which addresses the future legal order of the host state. The latter is not an Umbrella clause[15] and it is worded as:

"Each contracting party 'shall' create and maintain in its territory a legal framework apt to guarantee to investors

[1] J. Wong, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes' [2006] GMLR 14.
[2] Maniruzzaman (n1).
[3] UNCTAD, *Dispute Settlement: Investor-State 41*, Geneva, Switzerland, May 2003, U.N. Doc of UNCTAD/ITE/IIT/30 < http://www.unctad.org/Templates/Download.asp?docid=3496&lang=1&int.ItemID=2314> Accessed 08 March 2017.
[4] Dolzer (n2).
[5] Walde T.W and N'Di G, 'Stabilising International Investment Commitments: International Law versus Contract Interpretation' [2005] OGEL 3.
[6] Jason Webb Yackee 'Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality' [2008] 5 FILJ 32.
[7] Dolzer (n2).
[8] ICSID (n6).
[9] Wong (n8).
[10] Art 25(1) ICSID Convention.
[11] Ibid 67.
[12] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (Oxford Publishing 2012).
[13] Article 2(2) British Model Treaty.
[14] Art 10(1) Energy Charter Treaty 1994.
[15] Dolzer (n2).

the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor."[1]

Historically, in the year 1959, the German Government considered the effect of an Umbrella clause and it was deduced that the violation of an investment-protection obligation also amounted to a violation of an international legal obligation contained in the present treaty in question[2].

1.3 The Function of Umbrella Clauses

The Umbrella clause is a provision usually found in many BITs that imposes a requirement on each contracting State to observe all investment obligations hitherto entered into with investors from the other Contracting State[3]. The function of Umbrella Clauses is then to stabilise investor-state relations by enacting the avenue for recourse to dispute settlement by Arbitral tribunals for breaches of specific and individual investment-protection promises made by the state to the investors[4].

Umbrella clauses in this regard enable investors to institute claim for the breach of an investment-related promise of protection made by a particular host state under the jurisdiction of a Tribunal stated by such a treaty for the purpose of dispute resolution[5]. These clauses could then be deemed to allow "private ordering" in investor-state relations by preventing host states from taking opportunistic advantage of foreign investors, acting malicious by reneging on its earlier promise of investment-protection, both of regulatory undertaking and commercial nature[6]. Thus, Umbrella clauses are predicated on the International law principle of *pacta sunt servanda* meaning 'promises in a contract shall be kept' as the fundamental bedrock for investor-state contractual obligations[7].

Umbrella clause has been referred to as the clause for the observance of contractual undertakings by a host state which has entered into an investment-protection treaty with an Investor's state[8]. They are principally referred to as "umbrella clauses" because they bring contractual and other commitments under the treaty's protective umbrella[9].

2.0 The Challenges of Scope, Enforcement and Compliance Based On the Interpretation of Umbrella Clauses

Umbrella clauses have come under severe criticism regarding the kind of circumstances and determining when contracts between the host state and the investor come under the treaty's protection[10]. One of the controversial issues that have arisen in the field of International Investment Law is the proper delineation of the term: "umbrella clause," which imposes a promise-keeping requirement on each contracting State to abide by all investment obligations entered into with foreign investors from the other Contracting State[11]. In these two ICSID decisions, *SGS v Pakistan*[12] and *SGS v. Philippines*[13], the recurring question whether the umbrella clause is applicable to ensuing obligations arising under otherwise independent investment contracts between the investor and the host State was addressed; a question which addressing will have significant effect on the proper understanding of the "umbrella clause" and the implication of both decisions. The importance of such an application is that the International Arbitration Tribunal constituted under the BIT, the "BIT tribunal", ICSID would by so doing assume jurisdiction over breach-of-contract claims since a breach of the investment contract is also a breach of the umbrella clause, an indication of the perspective of the correlative that a breach of contract

[1] Art 2 (4) Italy and Jordan BIT, *Salini V Jordan*, Decision on jurisdiction, 29 Nov 2004 deduced that the violation an investment- protection obligation also amounted to a violation of an international legal obligation contained in the present treaty in question.
[2] Dolzer(n2).
[3] Wong (n8).
[4] S.W Schill, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' [2009] 18 MJIL 2.
[5] Dolzer (n2).
[6] Dolzer (n2).
[7] Schill (n26).
[8] K Yannaca-Small, 'What About This Umbrella Clause' in K Yannaca-Small (ed), *Arbitration Under Investment Agreements* (2010) 479.
[9] Man Fred Streit, Michael Wohlgemuth, 'The Market Economy and the State: Hayekian and Ordoliberal conceptions', (Jena Discussion Paper, 1997).
[10] Dolzer (n2).
[11] Wong (n8).
[12] Société Général de Surveillance S. A. v. Pakistan, Decision on Objections to Jurisdiction, (No. ARB/01/13 (2003) < http://www.worldbank.org/icsid/cases/SGS-decision.pdf > Accessed 11 March 2017.
[13] *Ibid* .

is a breach of the treaty[1]. Consequently, this means that the investor can now seek redress of a breach of any investment contract between it and a contracting State through International Arbitration under the prevalent BIT.

In the case of SGS V Pakistan[2], tribunals imposed several limitations on the application of the Umbrella clause[3]. This case concerns a Swiss claimant that had entered into a contract with Pakistan on pre-shipment inspection services with a forum selection clause for Pakistani courts. The Host state, Pakistan arbitrarily terminated the contract, the claimant commenced proceedings at the International Centre for Settlement of Investment Disputes, (ICSID) under the BIT between Pakistan and Switzerland. The Umbrella clause in the said BIT was worded thus:

"Each 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".

The tribunal held in favour of a restrictive interpretation of the clause (*in dubio mitius*) in the principle of restrictive application[4], the Tribunal refrained from making reference to the modes of broad interpretation laid down in the Vienna Convention on the Law of the Treaties, VCLT[5]. The Tribunal further stated that a contrary interpretation of the clause would impair the sovereignty of the host state which in any case cannot just be presumed in the absence of an unambiguous expression of a corresponding intention to be bound by the parties[6]. It is instructive that the Tribunal backed up its position based on four reasoning:

1. The fact that a broad conventional interpretation of the umbrella clause would lead to abuse; the tendency of bringing non-contractual obligations arising under the laws of the host state, including insignificant commitments and consequently opening an arbitrary floodgate of litigation against the host state before tribunals[7].
2. It will render the other guarantees contained in investment treaties superfluous, such that a little inevitable violation of a trivial obligation would result in a law suit[8].
3. The fact that the umbrella clause appeared only towards the end of the treaty like an after-thought 'guarantee' rather than an integral part of the substantive guarantees in the fore provisions suggested a far-reaching obligation[9] and lastly;
4. That the forum selection in investment agreements under the broad conventional circumstance would not be binding for the investor but on the other hand, the host state would be bound to honour the obligation[10]. This seems to me to the instant writers as too investors-biased.

A distinction between what constituted 'commercial acts' and 'sovereign acts' was interestingly not drawn by the Tribunal[11]. Thus, what was held in essence in *SGS v. Pakistan* was that a BIT tribunal does not have jurisdiction over contractual claims on the ground that umbrella clauses do not in general extend to such claims[12].

In *SGS V Phillipines*[13] the Tribunal held that because there was a forum selection clause in favour of the courts of the host state, the Philippine courts had the jurisdiction to rule on the obligations encompassed in the investment contract in question[14].

Another challenge with the Umbrella Clause is the consideration of the status of Investment-agreements as mere contracts subject to the domestic laws of the host state, or as undertakings with the backing of international Law.[15] This reasoning is reinforced by the decision reached in the Serbian Loan's case[16] that any contract which is not a contract between States in their capacity as subjects of International law is based on the municipal law of some country.

Also in *Noble Ventures V Romania*, [17] where the U.S claimant alleged that the Romanian

[1] Wong (n8).
[2] SGS V Pakistan, Decision on Jurisdiction, 6 August 2003.
[3] S W Schill, 'Umbrella Clauses as Public Law Concepts in Comparative Perspective' in S W Schill (ed), *International Investment Law and Comparative Public Law* (2010) 317.
[4] SGS V Pakistan, Decision on Jurisdiction, 6 August 2003.
[5] Article 31, The Vienna Convention on the Law of the Treaty.
[6] *SGS V Pakistan*, Decision on Jurisdiction, 6 August 2003 8 ICSID 406.
[7] *Ibid* 166.
[8] *Ibid* 168.
[9] *Ibid* 169.
[10] *Ibid* 168.
[11] Dolzer(n2).
[12] Wong (n8).
[13] *SGS V Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID 518, 155
[14] Ibid 155.
[15] Dolzer (n2).
[16] *Serbian Loan's Judgement* PCIJ Series A, No 20, 12 July 1929.
[17] *Noble ventures V Romania*, Award Decision, 12 October 2005 53.

Government/Respondent breached the umbrella clause by not abiding by its earlier contractual obligation to renegotiate the debts of a company hitherto owned by the Romanian Government but has been sold to them as the Investor. The Tribunal reiterated the rule of general international law that in normal circumstances *per se*, a breach of a contract by the state does not confer international responsibility for default on the host state. More so that not every intentional harm caused by the state is a wrong[1]

2.1 The Two Broad Ways of Interpreting the Umbrella Clause

There are thus two clear ways of understanding the concept of umbrella clause; the first is the expression that it is a clause in a treaty which protects a contract which an investor has entered into based on the latin maxim: *pacta sunt servanda* and a breach of which, does not only amount to a contractual breach, but a breach of an international treaty obligation that can give rise to an International Arbitration on one hand (the conventional and the broad interpretation); and the conceptualization of an 'Umbrella clause' as a mere contractual promise by the host state which breach cannot be equated with a breach of a treaty obligation.[2] (the restrictive and the narrow interpretation). This latter interpretation does not only make a proper distinction between International Arbitration and Commercial arbitration, but distinguishes between the capacity of the state as a sovereign and its position as a merchant in commercial contracts.[3]

Expectedly, the Tribunal attempted to defend its interpretation of the Umbrella Clause, that its taking such a narrow interpretation of the Umbrella clause will not deprive it of its meaning[4] ; rather it stated that the Umbrella clause would be relevant in the context of implementation of the investment protection treaty under domestic legal arrangements particularly when the host state refuses to participate in International proceedings to which it had earlier agreed.

Despite the criticism of this decision by the Deputy Secretary of ICSID on 1st October 2003,[5]some other cases[6] have also followed its line of reasoning. Thus, in Pan *America V Argentina,* the narrow and restrictive application of the Umbrella Clauses was supported because of the belief that the wider and broad interpretation will lead to unnecessary and arbitrary law suits against the host state and equating contractual guarantees with treaty guarantees open to International Arbitration.[7]

The distinction between the character of the state as a sovereign (entering into treaty and binding itself by its obligations) and actions as a merchant (entering into a contract and making promises to abide by its commercial obligations) were set out in *SGS V Pakistan.*[8] It was further held that Investment Arbitration arising from treaty obligations and its breach will only cover the disputes emanating from investment agreements or state contracts involving the state in its capacity as a sovereign, but not merely in its capacity in Commercial Contracts[9]. It is in the sense of not totally leaving the foreign investors unprotected that the Tribunal sought to balance State Sovereignty and its responsibility to encourage economic development by encouraging investments with the protection of foreign investors' investments on the other hand.

Whilst, the decision in *SGS V Pakistan* is the strictest in terms of interpreting the Umbrella clause, but *El Paso Energy V Argentina* and *Pan America/BP V Argentina* decisions were more lenient as it allowed the obligations in investment agreements to be covered by the clause as it deems them binding on the state even though it is acting in its sovereign capacity. The rationale for this view reinforces the theory that administrative contracts have a firm place in International Law.[10]

3.0 The Derogation from the Strict Interpretation (The Myth) Based On the Type and Nature of Obligation

There is no doctrine of precedent in International investment Arbitration at least as it is largely formulated in the common law system[11] irrespective of this, Arbitrators increasingly refer to and discuss earlier cases in reaching a

[1] Santiago Montt, 'State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation *(Hart Publishing 2009)*.
[2] *SGS V Pakistan*.Decision on Jurisdiction, 6 August 2003. 8 ICSID R 388.
[3] *El Paso Energy V Argentina*, Decision on Jurisdiction, 27 April 2006, ICSID Review-FILJ (2006) 488.
[4] *SGS V Pakistan,* Decision on Jurisdiction, 6 August 2003 8 ICSID Reports 406;42 ILM.
[5] ICSID Review Foreign Investment Law Journal 82.
[6] Toto *Costruzioni Generali V Lebanon* Decision on Jurisdiction, 11 September 2009 ; *El Paso V Argentina,* Decision on Jurisdiction, 27 April 2006, 21 ICSID Review-FILJ [2006] 488.
[7] *Pan America/BP V Argentina,* decision on Preliminary Objections, 27 July 2006.
[8] *SGS V Pakistan*, Decision on Jurisdiction, 27 April, 2006. P77
[9] Noble Ventures (n52).
[10] *Aramco V Saudi Arabia*, Award Decision on 23 August 1958, 27 ILR (1963)117.
[11] Catherine A. Rogers, 'Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration' (2003) 39 SFIL 37.

decision[1] as in the later case of *Siemens V Argentina,*[2] ICSID refused to distinguish between the different types of Investment disputes. It considered both Investment agreements and administrative concession promises as the same and thus falling under the omnibus phrase 'any obligations' in the definition of Investment in the Article 7(2) of the ICSID Treaty. Thus, it was held that any agreement related to an investment that qualifies as such under the Treaty would be part of the obligations covered under the Umbrella Clause.[3]

3.1 Limitation on the Interpretation of the Umbrella Clause Based on the Nature and Gravity of Violation

It is not only the nature of the contract that limits the effect of the Umbrella Clause, the nature and gravity of its breach also limited the 'protection' granted to foreign investors' investments in *CMS V Argentina*[4]. The Tribunal made a distinction between governmental and commercial actions and the significance of the interference with the contract. It aligned itself with host state's argument that not all contract breaches amounted to a treaty breach. Thus, even though purely commercial concerns of a contract might not be protected by the treaty in some circumstances, but where there is significant interference or severe violation by the governments or any of its ministries, departments and agencies with the rights of the investor, then it will be a treaty violation covered by the umbrella clause protection[5]. This decision is similar to what was held in *Sempra V Argentina*,[6]where the Tribunal held that ordinary commercial breaches of a contract would not necessarily amount to a breach of the umbrella clause. Therefore, the fact that the bureaucratic reforms embarked upon by Argentina/ Respondent were exercised by the State in its public capacity as a sovereign, then it amounted to a breach of the obligations and consequently a breach of the Umbrella Clause.[7]

It is clear from the foregoing that the "Umbrella Clause" in BITs is capable of conflicting interpretation. It can be an Umbrella truly by not only binding the host state to abide by its earlier promise of investment-protection, but bringing the contractual obligation of the parties under the protective umbrella of the treaty (the myth) on one hand and it can also be a 'basket' meaning that the Umbrella of protection can be leaking, if the interpretation given by the Tribunal at the time of dispute resolution is the narrow and restrictive one which clearly separates 'Treaty Claims' and 'contract claims' and does not deem them to be covered by the phrase; "any obligations". [8] Put differently, distinguishing between Treaty violation and contractual/commercial violations (the reality).

One important concern as identified by the Vivendi Annulment Committee and which Tribunals[9] now follow is the distinction between 'treaty claims' and 'contractual claims', but some Scholars[10] have argued that this distinction does not aid the proper understanding of this Umbrella clause, but that all or some breaches of contractual agreements between the state and the foreign investors will amount to a violation of the treaty obligations so long as an umbrella clause is present. A 'reality' with this assertion is that the mere insertion of an 'umbrella clause' in a BIT does not necessarily bring the contractual obligation of the State under the protective umbrella of the host State especially if the parties define the scope of the treaty and the extent of investment protection guarantees, whether to include both commercial and public bureaucratic transactions, as their intention supersedes the mode of interpretation to be employed[11].

Consequently, it can be safely stated that wording the 'umbrella clause' to reflect whether the obligation qualifies as 'sovereign acts' or 'commercial acts' has no capacity to influence tribunals in determining the scope with the view to ascertaining if it is indeed a treaty claim or a mere contractual claim.[12] The idea that any commercial contract concluded by state entities in their private law role, and as such, the state public institutions entered them, arguably not the state, and the state itself was unaware and it therefore was not debated.[13]This is another challenge posed by the doctrine of privity of contract: since in principle, contracts to which the 'umbrella clause' is to apply would be between the disputing parties: a host state and the foreign investor.[14] Thus, a

[1] Pascal Jeffery Commission 'Precedent in Investment Treaty Arbitration: The Empirical Backing on Transnational Dispute Management' *Report of Inquiry* 28 March 2007 p. 6.
[2] *Siemens V Argentina*, Award 6, February 2007 14 ICSID Reports 518.
[3] *Ibid* 206.
[4] CMS V Argentina, Decision on Jurisdiction, 17 July 2003 ICSID Reports 494.
[5] *Ibid* 298.
[6] *Ibid* 299.
[7] *Ibid* 305.
[8] Dolzer (n2).
[9] Vivendi V Argentina, Decision on Annulment, 3 July 2002, ICSID Reports 340.
[10] Rudolf Dolzer and Christoher Schreuer, Thomas W. Walde.
[11] Dolzer (n2).
[12] Dolzer (n2).
[13] T.Walde 'The"umbrella clause" in Investment Arbitration- A Comment on Original Intentions and Recent Cases'. [2005] 6 JWT 183.
[14] Dolzer (n2).

controversy that would arise is whether a contract entered into by a state entity or a component state within the host state on one hand and a subsidiary of a foreign investor, whose parent company (foreign investor) had an umbrella clause provision with the host state will be protected by the umbrella clause. This was answered in the affirmative in *Noble Ventures V Romania* [1]

One other significant 'reality' also is that the 'the umbrella clause' which is supposed to be an additional investment-guarantee instrument to "internationalize" i.e equate or otherwise bring contractual claims under international law province by instituting investment disputes at International Arbitration Tribunals, has now become counter-productive as it forces them to face domestic courts when it is interpreted to cover only contractual breach and not as treaty violations.[2]

4.0 Conclusion and Recommendations

The resultant denial of justice is predicated on the foreign investor's lack of confidence in the host state's domestic courts as they are seen as an integral part of the host state and cannot be seen to be fair: It is realistically the regulator, the contractor and even the adjudicator in the domestic courts; this is an important issue in the quest of foreign investors in securing their energy investment in the host state's territory. The most important thing is that irrespective of the presence or absence of the "Umbrella Clause", states must be willing to abide by their contractual commitments, sovereign or commercial, exhibit fairness, equality, good governance, sincerity of purpose and give constant protection, ensure non-discrimination and in case of expropriation whether directly or indirectly by carrying out measures that have the same effect as expropriation or by regulatory overtaking, ensure the prompt payment of adequate compensation in case of expropriation, make sure the expropriation is not targeted to only the foreign investor, a particular investment, act in good faith, follow due process of the law and ensure justice is done whether in domestic courts or at International Tribunals.

Host States should endeavour to live by their word and be bound by it. When the will to be fair and not renege on contractual promises is present, the standards of protection and the effectiveness of the "umbrella clause" which ultimate aim is to prevent host States from employing its governmental powers and sovereign rights over its natural resources to exit otherwise binding contractual commitments can then be achieved.

Furthermore, It is not just entering into a BIT that matters, but States must cultivate the enduring culture of commitment, a habit of integrity, obedience and respect to obligations freely entered into with a foreign investor as No society that refrains from honouring contracts has ever been able to develop economically, achieve prosperity and qualify as a well-governed society.[3] Also, foreign investors can ensure the insertion of contractual adaptation mechanisms like renegotiation which brings both contracting parties back to a roundtable in the eventual change of circumstance affecting the observance of their earlier contractual commitments.

References

Primary Sources

Table of Cases

Aramco V Saudi Arabia, Award Decision, 23 August 1958, 27 ILR (1963) 117
CMS V Argentina, Decision on Jurisdiction, 17 July [2003], ICSID Rep 494
El Paso Energy V Argentina, Decision on Jurisdiction 27 April [2006], ICSID Review-FILJ [2006] Rep 488
Noble Ventures V Romania, Award Decision, 12 October 2005, 8 ICSID Rep 115
Pan America/BP V Argentina, Decision on Preliminary objections, 27 July 2006, [2006] 8 ICSID Rep 33
Salini V Jordan, Decision on jurisdiction, 29 Nov 2004, [2005] 14 ICSID Rep 306
Salini V Morocco, Decision on Jurisdiction, 23 July 2001, [2003] 6 ICSID Rep 400
Sempra V Argentina, Decision on Jurisdiction, 11 May 2005
Serbian Loan Re, PCIJ-Series A, No 20, 12 July 1929
SGS V Pakistan, Decision on Jurisdiction, 27 April 2006, [2006] 8 ICSID 406
SGS V Philippines, Decision on Jurisdiction, 29 January 2004, [2005] 8 ICSID 518
Siemens V Argentina, Award Decision, 6 February 2007, 14 ICSID Rep 518
Toto Costruzioni Generali V Lebanon, Decision on Jurisdiction, 11 September 2009, 11 ICSID 310
Vivendi V Argentina, Decision on Annulment, 3 July 2002, ICSID Rep 340

Table of Legislation, Treaties and Agreements

British Model Treaty
Convention on the Settlement of Investment Disputes Between States and National of Other States 1965
Energy Charter Treaty 1994

[1] *Noble Ventures V Romania,* Award Decision, 12 October, 2012.
[2] Vivendi (n72).
[3] Deepak Lal and H. Myint, The Political Economy of Poverty, Equity and Growth, A Comparative study, Claredon. (*Oxford Publishing 1996).*

North America Free Trade Agreement 1994
Pakistan-Switzerland BIT
Philippines-Swiss BIT Art X(2)
United States – Romania BIT Art II (2)(c)
Vienna Convention on the Law of the Treaties

Secondary Sources
Books and Edited Books
Dolzer R, Schreuer C, *Principles of International Investment Law* (Oxford Publishing 2012)
Lal D and Harold M, *The Political Economy of Poverty, Equity and Growth, a Comparative study, Claredon* (Oxford Publishing 1996)
Montt S, 'State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (Hart Publishing 2009).
Schill S.W, 'Umbrella Clauses as Public Law Concepts in Comparative Perspective' in S W Schill (ed), *International Investment Law and Comparative Public Law* (2010) 317
Small K.Y, 'What about This Umbrella Clause' in Small K.Y (ed), *Arbitration Under Investment Agreements* (2010) 479

Journal Articles
Maniruzzaman M A F M. 'Damages for Breach of Stabilisation Clauses in International Investment Law: Where do we stand today? [2007] IELTR 11
Rogers C.A, 'Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration' (2003) 39 SFIL 37
Schill S.W, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' [2009] 18 MJIL 2
Walde T.W 'The"Umbrella clause" In Investment Arbitration- A comment on Original Intentions and Recent Cases'. [2005] 6 JWT 183
Walde T.W and N'Di G, 'Stabilising International Investment Commitments: International Law versus Contract Interpretation' [2005] OGEL 3
Wong J, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes' [2006] GMLR 14
Yackee J.W 'Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality' [2008] 5 FILJ 32

Websites
Société Général de Surveillance S. A. v. Pakistan, Decision on Objections to Jurisdiction, (No. ARB/01/13 (2003) < http://www.worldbank.org/icsid/cases/SGS-decision.pdf > Accessed 11 March 2017.
UNCTAD, *Dispute Settlement: Investor-State 41*, Geneva, Switzerland, May 2003, U.N. Doc of UNCTAD/ITE/IIT/30
< http://www.unctad.org/Templates/Download.asp?docid=3496&lang=1&int.ItemID=2314> Accessed 08 March 2017.

Other Sources
Jeffery P. Commission 'Precedent in Investment Treaty Arbitration: The Empirical Backing on Transnational Dispute Management' *Report of Inquiry* 28 March 2007
Streit M.F, Wohlgemuth M, 'The Market Economy and the State: Hayekian and Ordoliberal conceptions', (Jena Discussion Paper, (1997)

List of Abbreviations and Acronyms

BIT	Bilateral Investment Treaty
ECT	Energy Charter Treaty
FILJ	Fordham International Law Journal
GMLR	Geo Mason Law Review
JWIT	Journal on World Investment and Trade
ICSID	International Centre for the Settlement of Investment Disputes
ILM	International Legal Materials
MJIL	Minnesota Journal of International Law
NAFTA	North American Free Trade Agreement
OGEL	Oil, Gas and Energy Law Journal

PCIJ	Permanent Court of International Justice
PCIJ-R	Permanent Court of International Justice Report
Rep	Report
SFIL	Standard Fordham International Law Report
UNCTAD	United Nations' Conference on Trade and Development
VCLT	Vienna Convention on the Law of the Treaty

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