

“UMBRELLA CLAUSES” AS GUARANTEES OF THE RIGHT OF FOREIGN INVESTORS AND A MECHANISM FOR PROTECTING FOREIGN INVESTMENTS

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Abstract The article analyzes international legal guarantees of foreign investors' rights, which can be classified as special in relation to general international legal guarantees, since they have a special subject of regulation - the obligations of states that accept foreign investments. International legal guarantees of foreign investors' rights, being special, are contained in international multilateral and bilateral agreements and include guarantees of foreign investors' property rights, compensation, insurance, guarantees of resolution of international investment disputes, but at the same time, these guarantees are aimed at ensuring the protection of foreign investors' property rights. One such guarantee of an international legal nature is the reservations contained in bilateral investment agreements, which in international law doctrine are referred to as “umbrella” reservations. These clauses are provisions under which the host state undertakes to comply with any obligations to the foreign investor in relation to investments, including contractual obligations. An umbrella clause allows a breach of obligations under a private law contract to be interpreted as a breach of an investment agreement, and despite its prevalence in both bilateral investment agreements and arbitration awards, many questions regarding the nature and application of umbrella clauses remain unanswered.

Keywords international investment arbitration, umbrella clauses, investor rights guarantees, bilateral agreements, investment protection mechanism

1 INTRODUCTION

When resolving issues related to civil law relations with a foreign element, the state, in its domestic laws or international agreements, in all cases defines its attitude to issues of international cooperation, in particular, in the field of international investment, which is actively developing in the contemporary world. Recipient states independently determine their attitude towards issues of international cooperation, including in the field of providing guarantees of rights for foreign investors. In order to attract foreign capital for economic development, states must provide appropriate legal guarantees, without which it is impossible to create a favorable investment climate. Without assuming obligations to ensure the security of assets, the recipient state is unable to attract capital investments for the development of its economy. To this end, a mechanism for applying investor rights guarantees has been developed in the field of international investment law, which includes various measures by the host state to protect foreign investments. The application of “umbrella clauses” is a guarantee of the rights of foreign investors, the study of which necessarily raises questions about its nature, the need to include it in international multilateral and bilateral agreements, as well as its practical application by international arbitration institutions in the resolution of investment disputes.

2 METHODOLOGY

The methodological basis of the study is made up of general scientific methods, including the dialectical, system-structural approach, methods of induction and deduction, as well as special ones – primarily, formal-legal, comparative-legal, and

historical-legal methods. The main research method is the formal-legal and historical method analysis, which are used to research current trends in the development of state immunity in private international law relations, conceptual approaches to the main principles of development of this institution, their reflection in the rules of law.

3 RESULTS AND DISCUSSION

International legal guarantees of foreign investors' rights can be classified as special in relation to general international legal guarantees, as they have a specific subject of regulation – the obligations of states receiving foreign investments. Such international legal guarantees of foreign investors' rights are contained in international multilateral and bilateral agreements and include various guarantees of foreign investors' property rights (compensation, insurance, guarantees of international investment dispute resolution, etc.), but these guarantees are aimed at ensuring the protection of foreign investors' property rights.

According to the Legal Encyclopedia, international guarantees are a set of legal principles and measures based on agreements between states and international organizations that ensure a certain state of international relations, the status of subjects of international law, the fulfillment of international obligations, and compliance with the rights provided for in the relevant agreement. Agreements on international guarantees belong to the conventional mechanism for the implementation of international legal norms, in particular, to its regulatory system, and are of a law enforcement nature. The implementation of these agreements constitutes international guarantees (Isakovich, 2001). This definition of international guarantees characterizes them as international legal acts, but these guarantees are rather obligations enshrined in these international legal acts. Guarantees are also understood as measures that protect investments from a number of political events and actions of the authorities in the host country, insuring against risks associated with such events and actions. Recipient states that provide legal guarantees to foreign investors thus implement their foreign investment policy, since a state can become a party to a multilateral agreement regulating investment relations with foreign investors, thereby voluntarily assuming the obligations contained therein or, for some reason, refusing to participate in it. At the same time, states, by concluding bilateral agreements on the promotion and mutual protection of capital investments (BAPMCI), also pursue their foreign investment policy, establishing certain guarantees for foreign investors, as well as certain mutual obligations.

At the same time, since investment relations can be conducted at the national and international levels, they have both a public and private legal nature. The public legal nature of international investment relations lies in the fact that, first, BITs are concluded at the state level, after which the state receiving foreign investments and the foreign investor investing in the economy of the recipient state conclude investment contracts within the framework of the BIT, which are of a private law, i.e., civil law nature. Thus, international investment relations are transformed from public law investment relations into private law investment relations with a foreign element, which are subject to international private law.

International legal guarantees for foreign investors, as legal obligations of recipient states, are enshrined in international multilateral and bilateral agreements and apply to foreign investors, through which they are able to exercise their rights and legitimate interests in the field of investments owned by them in recipient states. Among the multilateral treaties containing international standards for the protection of foreign investors' rights, we highlight the Convention establishing the Multilateral

Investment Guarantee Agency, adopted by the International Bank for Reconstruction and Development in Seoul on January 1, 1985 (Seoul Convention) (*Convention establishing the Multilateral Investment Guarantee*, 1985), the International Energy Charter, adopted in December 1991 (International Energy Charter, 1991), and the Convention on the Settlement of Investment Disputes between States and Foreign Nationals of May 18, 1965 (Washington Convention) (*Convention on the Settlement of Investment Disputes between States and Foreign Persons*, 1965).

The Seoul Convention provides guarantees of insurance compensation for foreign investors against non-commercial (political) risks. The international body that performs the functions of insuring foreign investments against political risks is *the Multilateral Investment Guarantee Agency*, established under the Seoul Convention. The task of the Agency is to stimulate the flow of investment between member countries, especially to developing countries, thus complementing the activities of the International Bureau for Reconstruction and Development, the International Finance Corporation, etc. Such stimulation of investment flows is regulated by the provisions of the Seoul Convention, as this international document contains guarantees for the protection of foreign investors' property against the following political risks: currency transfer, expropriation or similar measures, breach of contract, wars, and civil unrest.

The International Energy Charter, adopted in 1991, was supplemented in 1994 by an international multilateral agreement that established general principles of cooperation in the energy sector, including the protection of foreign investments and guarantees for the transit of energy resources. The Energy Charter contains legal guarantees for foreign investors in the form of basic principles of a new legal framework for global energy cooperation: non-discriminatory promotion and protection of investments, including new investments in all links of the energy chain, ensuring non-discriminatory access to energy technologies and participation in technology transfer, liability of the parties for damages caused by failure to comply with the requirements of the agreement and transit contracts. The energy concept is based on the preference for diplomatic channels of conflict resolution over judicial ones, with the possibility of resolving disputes in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). Among the international guarantees of the rights of foreign investors enshrined in the Charter, the following guarantees should be noted: guarantees of encouragement, protection, and treatment of capital investments (Article 10), compensation for damages (Article 12), guarantees in cases of expropriation (Article 13), transfer of payments related to investments (Article 14), subrogation (transfer to the party compensating the foreign investor for losses all rights and obligations in relation to the expropriated investments for which the party compensates the foreign investor for losses) (Article 15).

Another international document that contains guarantees of the rights of foreign investors in terms of resolving disputes between foreign investors and host states is the Washington Convention, under which the International Centre for Settlement of Investment Disputes (ICSID) was established as an institution facilitating the settlement of international investment disputes.

It should be noted that, along with the aforementioned international legal guarantees contained in multilateral international agreements, the guarantees of foreign investors' rights enshrined in bilateral agreements on the promotion and mutual protection of capital investments (BAPMCIs) play an important role. Bilateral investment agreements (BIAs) create the basis for international legal regulation necessary for the settlement of international investment relations in conjunction with the national investment legislation of the contracting states and supplement the guarantees

contained in multilateral international investment agreements, resulting in their interaction and ensuring more effective protection of the rights of foreign investors. The leading role of international guarantees contained in BITs and ensuring the property rights of foreign investors is noted by Hallward-Driemer: “The central component of the guarantees contained in BITs is the provision of guarantees to foreign investors for the protection of their property rights, which should be considered very important in the field of foreign investor rights” (Hallward-Driemer, 2003). International legal guarantees of such agreements should be considered as obligations of the recipient state towards foreign investors, which are the result of a bilateral agreement between states and are aimed at realizing the rights and legitimate interests of foreign investors within the framework of bilateral investment agreements on the promotion and mutual protection of capital investments.

The main task of FTAs, which contain various guarantees for foreign investors, is to create favorable conditions for foreign investors in order to attract foreign capital for the development of the state's economy. At the same time, favorable conditions are possible through the establishment of appropriate legal guarantees. To address this issue, a special mechanism called “*umbrella clauses*” was developed in international investment law. Its essence lies in the inclusion in the relevant BIT text of a clause stating that the host party undertakes to comply with any obligations it has assumed in relation to investments made on its territory by citizens or legal entities of the other party to the agreement. According to the parties to the bilateral investment agreement, such a provision allows erasing the difference between a breach of contractual obligations and a breach of the BIT: any conduct that is unlawful from the point of view of the contract will automatically be grounds for filing a claim with the competent arbitration on the basis of a breach of the BIT. At the same time, a breach of a contract covered by an umbrella clause should automatically constitute a breach of the host state's international legal obligations under the BIT. As Dolzer and Stevens (1995) write, such provisions are included in the agreement to ensure that each party to the agreement will comply with all specific obligations undertaken in relation to the citizens and legal entities of the other party. These provisions are extremely important because they protect the investor's contractual rights from any violation, whether caused by a breach of contractual obligations or resulting from the adoption of certain administrative or legislative acts. They are also important because it is not immediately clear from sources of international law whether such actions constitute a violation of international legal obligations (Dolzer & Stevens, 1995). In essence, umbrella clauses have become an extension of the universally recognized international principle of *pacta sunt servanda*, which is based on the principle of the binding nature of international agreements and international legal liability for their violation, to investment contracts (Newcombe & Paradell, 2009). It should be particularly noted that this international legal guarantee is intended to secure any obligations assumed by the recipient state of foreign capital under bilateral agreements on the promotion and mutual protection of capital investments, and not only its obligations specified in international investment contracts, as a result of which the foreign investor is provided with the maximum amount of guarantees.

In international investment law, there is an established division of disputes between an investor and a host state into a) disputes arising from a state's violation of the provisions of a bilateral investment agreement, and b) disputes related to a violation of the provisions of an investment contract. This division is of great importance for determining the jurisdiction of international arbitration tribunals formed to consider investment disputes. The consent of the parties to the jurisdiction of a particular

commercial arbitration tribunal is a mandatory and most important condition for its jurisdiction (Broches, 1996). The most common form of concluding an agreement on the transfer of disputed legal relations to such arbitration is the inclusion of a relevant provision in the BIT concluded between the state of which the investor is a national and the state receiving the investment. This form of expressing the state's consent to the jurisdiction of international arbitration, directly related to the public-law nature of the state as a party to the dispute, is recognized as valid by the vast majority of international investment arbitrations: it is known to the practice of the International Centre for Settlement of Investment Disputes (ICSID) and international arbitrations formed on the basis of the UNCITRAL Rules¹. At the same time, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which regulates the activities of ICSID, and the UNCITRAL Arbitration Rules do not require the investor to additionally express its consent to the jurisdiction of the relevant arbitration – it is sufficient to perform implied actions in the form of filing a claim (Schreuer, 2008).

Most bilateral investment treaties provide that disputes arising from a violation of the provisions of the bilateral agreement by the host state will be referred to a specific international tribunal. Accordingly, the second category of disputes remains outside the jurisdiction of international arbitration. This significantly reduces the level of guarantees for the rights of foreign investors. It is quite possible that the BIT is not formally violated, but the investor's rights under the investment contract are *de facto* already violated (Amerasinghe, 2003). A question arises: can such a dispute be referred to international arbitration? The umbrella clause mechanism allows answering this question in the affirmative. An umbrella clause stipulates that the host state must “comply with any obligation it may have assumed with regard to investments” or “continually guarantee compliance with its obligations” (Yannaca-Small, 2010). The inclusion of umbrella provisions in BITs provides a mechanism for “enforcing” the obligations of host states and acts as additional protection for foreign investors (Schill, 2009).

Umbrella clauses make it possible to transfer a dispute between an investor and a state from the contractual to the international legal sphere and refer the case to international arbitration, the jurisdiction of which is established by the BIT, since in the event of a breach of the terms of any investment contracts, the provisions of the clause will apply. This will allow the investors to effectively defend their rights. An umbrella clause will create an additional basis for claims in the event of a breach by the state of a contract with an investor, but in the formal absence of violations of other provisions (except for the umbrella clause) of the relevant international investment agreement. The inclusion of such provisions in the BIT is aimed at ensuring that the parties comply with their obligations. It is particularly important for protection against interference that may be caused by administrative and legislative actions of the state, as it is not entirely clear whether such measures constitute a violation of international obligations (Gilas et al., 1996). Thus, the umbrella clause is one of the legal guarantees contained in bilateral agreements on the promotion and mutual protection of investments and establishes

¹ According to the annual review “Recent Developments in Investor-State Dispute Settlement,” the total number of known disputes between investors and host states at the end of 2023 was more than 1,300 (60 of which arose in 2023). Most of them were considered by the ICIS in accordance with the Washington Convention, and the rest by various arbitrations (both *ad hoc* and institutional) in accordance with the UNCITRAL Arbitration Rules. These figures suggest the existence of two dominant systems for the consideration of investment disputes and the vast majority of existing investment arbitrations (<https://investmentpolicy.unctad.org/publications/1302/facts-and-figures-on-investor-state-dispute-settlement-cases>)

compliance with all obligations set forth in investment contracts concluded between the investor and the host state. Since investment contracts between foreign investors and host states are concluded within the framework of BITs, a literal interpretation of the umbrella clause implies that all guarantees specified in BITs, including the umbrella clause, apply to these investment contracts if the umbrella clause is included in the BIT. As noted by American professor K. Yannaca-Small, “some BITs extend their effect only to disputes relating to ‘obligations under the agreements’, i.e., only to claims arising from a breach of the BIT. Other ICSID frameworks include “any disputes relating to investments,” some create international obligations for the host state, such as “compliance with any obligations,” “continuous guarantee and compliance with obligations,” “compliance with any obligations undertaken,” and other formulations relating to investments” (Yannaca-Small, 2010).

An umbrella clause similar to the modern understanding was first formulated in the 1959 Draft Convention on Foreign Investment: “Each Party shall at all times ensure the observance of any obligations it may have undertaken in respect of investments made by nationals of any other Party” (UNCTAD, 2000). In the same year, a similar clause was included in the text of a bilateral investment agreement between Germany and Pakistan (Yannaca-Small, 2010). The first precedent case in which the International Centre for Settlement of Investment Disputes considered a dispute over the application of an umbrella clause in 2003 was *SGS v. Pakistan (SGS de Surveillance S. A. v. Islamic Republic of Pakistan)*. Umbrella clauses, which emerged simultaneously with the first BITs, as noted in the sources, subsequently became widespread in international investment law (Sinclair, 2004) and, at the beginning of the 21st century, approximately 40% of the 2,700 existing bilateral investment treaties contained provisions on such clauses (Gill et al., 2004), which are also mentioned and analyzed in 44 decisions and rulings of arbitration tribunals (Galagan & Fokina, 2013). “However, despite such ‘popularity’, some questions regarding the application and legal nature of ‘umbrella clauses’ remain unanswered, and investors remain without ‘umbrellas’ in the rain” (Galagan & Fokina, 2013). The use of umbrella clauses is also widespread in agreements involving Ukraine - they are contained in more than 20 investment agreements concluded by the state and in the Energy Charter Treaty, which Ukraine ratified without reservations (Chernykh, 2011). In disputes involving Ukraine, foreign investors have repeatedly attempted to justify their claims arising from breaches of contractual obligations by the existence of an “umbrella clause.” The first time the application of the “umbrella clause” in relation to Ukraine was analyzed in the case of *AMTO v. Ukraine*. AMTO, a Latvian investor in CJSC Elektropivdenmontazh-10 (EPMT), appealed to the Arbitration Institute of the Stockholm Chamber of Commerce, basing its claims on violations of the Energy Charter Treaty in the context of the bankruptcy proceedings of the state-owned company NAEK Energoatom, which owed EPMT several tens of millions of hryvnias. The Arbitration Tribunal denied the claim, including the claims regarding non-compliance with contractual obligations based on the “umbrella clause,” justifying its conclusion by stating that the wording of the “umbrella clause” in the Energy Charter Treaty is very broad and imposes obligations on the state receiving the investment not only in relation to the investor, but also in relation to a subsidiary company established in the state receiving the investment (paragraph 110). Thus, Ukraine’s contractual obligations with respect to EPMT (a subsidiary company in the host state) could trigger the “umbrella clause.” However, in this case, Ukraine did not violate its obligations under the Energy Charter Treaty, since the unfulfilled contractual obligations to the investor (its Ukrainian subsidiary) did not exist on the part of the state of Ukraine, but of the state-owned company NAEK

Energoatom, which is a separate legal entity and a separate subject of law (paragraph 110).

In the literature devoted to international investment relations, umbrella clause terms have different definitions. “These terms are collectively referred to as ‘umbrella clauses’, although other similar terms are also used, such as ‘mirror effect’, ‘elevator’, ‘parallel effect’, ‘contractual integrity’, ‘respectable clause’ or ‘pacta sunt servanda’ (Yannaca-Small, 2006). These terms have the same meaning as “umbrella clause.” For example, the concept of “mirror effect” can be characterized as an exact (mirror) reflection in the investment contract of all the obligations of the recipient state contained in the BIT. The concept of “elevator” characterizes an increase, or rather an expansion, of the recipient state’s obligations contained in the investment contract to the level of the BIT. “These general provisions are intended to ensure that the recipient state fulfills its obligations towards foreign investors. For example, Article 2(2) of the 1983 BIT between Saint Lucia and the United Kingdom stipulates that “each Contracting Party shall treat investments of nationals or companies of the other Contracting Party.” Such a reservation is called an “umbrella clause” (*State Contracts UNCTAD Series on issues in international Investment agreements*, 2004).

The lack of a uniform understanding and the numerous formulations of umbrella provisions lead to different interpretations of such clauses. Sometimes, the opposing positions of courts on the issue of umbrella clauses reflect an alarming level of disagreement – “it is as if different people started weaving a carpet from different ends without common threads, resulting in a crazy blanket instead of a Persian carpet” (Crawford, 2008). The exact contours of umbrella clauses remain the subject of serious debate (Crawford, 2008). Ambiguity and competition with arbitration clauses are grounds for refusing to consider a dispute by an international tribunal, which severely limits the effect of umbrella clauses.

The usual meaning of a “proper” umbrella clause was clarified in the decision in the case of *Eureko B.V. v. Poland*: the host state must comply with all obligations undertaken in relation to foreign investors (*Eureko B.V. v. Poland, Partial Award*, 2005). This interpretation can be called literal. However, even slight differences in wording leave room for interpretation by the tribunal, which has led to two approaches in practice: narrow and broad.

A narrow (restrictive) approach was expressed in the position of the International Centre for Settlement of Investment Disputes (ICSID) in the case of *SGS v. Pakistan*. The bilateral agreement between Switzerland and Pakistan stipulated that “each Contracting Party shall ensure that its obligations with respect to investments of investors of the other Contracting Party are complied with”.² This provision was referred to by the claimant in the case, who considered that Switzerland's failure to comply with a specific investment agreement also constituted a breach of international legal obligations. The ICISD, however, decided that this statement only describes the subject matter of the dispute, but does not relate to the legal basis for the claim and does not describe the circumstances on which the claimant bases its claims.³ In the Tribunal's view, this provision does not mean that the parties to the agreement intended to extend the jurisdiction of international arbitration to disputes arising exclusively from contractual obligations. The legal consequences would be so burdensome in terms of their potential impact on the state that, in order to apply the umbrella clause, it would be

² Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, at Article 6(1); signed on 11 July 1995; entered into force on 6 May 1996

³ *Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13

necessary to provide “clear and convincing evidence of such intent on the part of the parties”⁴. Other arguments are also put forward in favor of a restrictive interpretation of the effect of umbrella clauses. First, it is assumed that the dispute resolution mechanism provided for cannot take precedence over and replace the actual arbitration clauses contained in contracts previously concluded between the host state and the investor.⁵ In other words, priority should be given to the arbitration clause. Secondly, in the court's opinion, if the parties intend to create a substantive legal obligation through an umbrella clause, they must place it alongside other so-called “first-order” obligations, which is logical.⁶ In the case of *Joy Mining Machinery Limited v. Arab Republic of Egypt*, the court was guided by a similar argument: “it cannot be argued that an umbrella clause included in a contract and not occupying a prominent place can lead to the transformation of all contractual disputes into investment disputes under the Treaty”.⁷ Thirdly, the wording of the host state's obligation itself is of great importance. In the case of *Salini Costruttori S.p.A. & Yaky S.p.A. v. Hashemite Kingdom of Jordan*, the claimant requested the court to recognize that it had the right to arbitration under the umbrella clause, since, according to the BIT between Italy and Jordan, the state must comply with its obligations under agreements between the investor and the state. The BIT did indeed contain such a provision, but the Tribunal referred to its full wording: “Each Contracting Party shall establish and maintain within its territory a legal framework capable of guaranteeing investors a stable legal regime, including the faithful fulfillment of all commitments made in relation to each specific investor”.⁸ Thus, the recipient states did not even guarantee compliance with all their obligations regarding the investments of other Contracting Parties. They only undertook to establish and maintain a legal framework capable of guaranteeing compliance with all obligations undertaken in relation to each specific investor.⁹ Thus, for the provisions on the extension of the jurisdiction of the international tribunal to be valid, it is necessary to have unambiguous wording not only of the umbrella clause itself, but also of the obligations assumed by the states. Thus, some bilateral agreements provide for a more specific scope of application by precisely defining the obligations covered by this provision, for example, by referring to “written commitments” (Yannaca-Small, 2010).

The broad approach is based on the desire to interpret the umbrella reservation in accordance with the theory of “*effect utile*” (Yannaca-Small, 2010), which provides that the interpretation and application of the norm should be carried out in such a way that the contractual objective can be achieved in the best and simplest way.¹⁰ This provision was applied in the case of *SGS v. Philippines*¹¹. The tribunal found the decision in *SGS v. Pakistan* unconvincing and extremely limited and came to the following conclusion: an umbrella clause defines a breach of an IIS, a breach of any obligation, including contractual obligations, that the host state has undertaken in relation to specific investments. The same opinion was expressed in the case of *Sempra*

⁴ Ibid

⁵ *Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6

⁶ *Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13

⁷ *Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6

⁸ Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments (<https://arbitrationlaw.com/library/italy-jordan-bit>. P.3)

⁹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13

¹⁰ Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments (<https://arbitrationlaw.com/library/italy-jordan-bit>. P.3)

¹¹ *Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6

Energy International v. Argentina, in which the Tribunal found a violation of the BIT for failure to comply with the provisions of a specific agreement and argued that failure to comply with contractual obligations affects the rights that the investor claims in light of the provisions of the agreement and guarantees on the basis of which it made protected investments.¹² Professor Jost Pauwelin notes that broad interpretation has significant advantages and that treaties, and therefore their provisions, should be interpreted in such a way as to make them effective rather than invalid (Pauwelyn, 2010).

5 CONCLUSIONS

“Umbrella clauses” are one of the international legal guarantees of foreign investors' rights contained in bilateral agreements on the promotion and mutual protection of capital investments and are designed to ensure any obligations assumed by the recipient state of foreign capital under the BIT, and not only its obligations specified in international investment contracts, as a result of which the foreign investor is provided with the maximum amount of guarantees. In any case, the provision of such maximum guarantees by the recipient state is necessary to create a more favorable investment climate and, as a result, to attract more foreign investment.

Umbrella clauses included in bilateral investment agreements confirm the important link between the protection of foreign investments under international public law, on the one hand, and the protection of foreign investments under state contracts and the legislation of the host state, on the other. The inclusion of this institution in investment agreements is intended to eliminate shortcomings in the protection of contractual relations between the investor and the state. Umbrella clauses represent a mechanism that makes the host state's obligations truly enforceable. An umbrella clause provides the investor with an additional basis for claims in the event of a breach of contract by the state, but in the formal absence of breaches of other provisions (except for the umbrella clause) of the relevant international investment treaty.

References

- Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments.
<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2130/download>
- Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments.
<https://arbitrationlaw.com/library/italy-jordan-bit>. P.3.
- Amerasinghe, C.F. (2003). *Jurisdiction of International Tribunals*. The Hague: Kluwer Law International.
- Broches, A. (1996). The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction. *Columbia Journal of Transnational Law*, 5, 263.
- Chernykh, Yu.S. (2011). Umbrella clause in Ukrainian bilateral investment protection agreements: New challenges for legal science. *International private law: development, comparative aspect, harmonization*, 10, 213-216.

¹² *Sempra Energy International v. Republic of Argentina*, ICSID Case No. ARB/02/16

- Convention establishing the Multilateral Investment Guarantee Agency of January 1, 1985. <https://ips.ligazakon.net/document/MU85K06R>
- Convention on the Settlement of Investment Disputes between States and Foreign Persons (1965), https://zakon.rada.gov.ua/laws/show/995_060#top
- Crawford, J. (2008). Treaty and contract in investment arbitration *Arbitration International*, 24(3), 351.
- Dolzer, R., & Stevens, M. (1995). *Bilateral Investment Treaties*. The Hague: Kluwer Law International.
- Eureko B.V. v. Poland, Partial Award, August 19, 2005.
- Galagan, D., & Fokina, A. (2013). Pat with an umbrella. *International Arbitration*, 8(791). <https://pravo.ua/articles/pat-zontom>
- Gill, J., Gearing, M., & Birt, G. (2004). Contractual claims and bilateral investment treaties. *Journal of International Arbitration*, 21, 397.
- Hallward-Driemer, M. (2003). Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit ... and They Could Bite. The World Bank Development Research Group Investment Climate August 2003. <http://documents.worldbank.org/curated/en/2003/08/2507711/bilateral-investment-treaties-attract-foreign-direct-investment-only-bit-bite>
- Isakovich, S.V. (2001). *International Guarantees. Legal Encyclopedia: In 6 volumes*. Vol. 3: K-M. Kyiv: Publishing House "Ukrainian Encyclopedia named after M.P. Bazhan".
- International Energy Charter, adopted in December 1991. https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_RU.pdf
- Newcombe, A. P., & Paradell, L. (2009). *Law and Practice of Investment Treaties: Standards of Treatment*. Alphen aan den Rijn: Kluwer Law International.
- Pauwelyn, J. (2010). Rational design or accidental evolution? In: K. Yannaca-Small (Ed.). *Arbitration under international investment agreements: A guide to the key issues* (pp. 11-43). Oxford University Press, 2010
- Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13
- Schill, S. W. (2009). Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties. *Minnesota Journal of International Law*, 143. <https://scholarship.law.umn.edu/mjil/143>
- Schreuer, C. (2008). Consent to Arbitration. In: P. Muchlinski, F. Ortino, & C. Schreuer (Eds.), *The Oxford Handbook of International Investment Law* (pp. 830-867). Oxford University Press.
- Sempra Energy International v. Republic of Argentina, ICSID Case No. ARB/02/16
- SGS de Surveillance S. A. v. Islamic Republic of Pakistan. ICSID Case N ARB/01/13
- Sinclair, A. (2004). The Origins of the Umbrella Clause in the International Law of Investment Protection. *Arbitration International*, 20(4), 411-434.
- Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13
- Societe Generale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6
- State Contracts UNCTAD Series on issues in international Investment agreements (2004). United Nations New York and Geneva. http://unctad.org/en/Docs/iteiit200411_en.pdf
- UNCTAD (2000). *International Investment Instruments: A Compendium in United Nations*, Vol. V. P. 395.
- Yannaca-Small, K. (2010). *Arbitration under international investment agreements: A guide to the key issues*. Oxford University Press.