Umbrella Clause – A Desirable Instrument?

Dr. Markus Burianski

Inaugural Conference of EFILA
23 January 2015, London, UK
Content

1. Overview of the Umbrella Clause
   - History
   - Interpretation

2. Inclusion of Umbrella Clause in TTIP?
An Overview of the Umbrella Clause and Its Interpretation
Characteristics

Umbrella Clauses are treaty provisions found in a large number of BITs:

“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.” [Art. 7 German Model BIT]

“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.” [Art. 2 UK Model BIT]

“Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the other Contracting Party.” [Art. 11 Switzerland-Pakistan BIT]
Historic Overview

The first Umbrella Clause was intended to bring an otherwise independent settlement between the AIOC and Iran under the „protective umbrella“ of a treaty between Great Britain and Iran.

1959: The first known BIT between Germany and Pakistan contains an Umbrella Clause.
SGS and the Umbrella Clause

SGS v. Pakistan (2003): restrictive understanding

- The tribunal refuted the idea that the Umbrella Clause elevated breaches of a contract to a breach of the BIT
  - “The text itself […] does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State […] are automatically “elevated” to the level of breaches of international treaty law.”

- The tribunal relied on the systematic difference between municipal law and international law and feared the consequences of “almost indefinite expansion” of BIT protection
SGS and the Umbrella Clause (II)

SGS v. Philippines (2004): broader understanding

- Specific rejection of the findings in SGS v. Pakistan

- The tribunal decided that the terms of the clause were capable of applying to obligations arising under national law, such as those arising from an investment contract

- However, the arbitral proceedings were stayed because the tribunal found that the BIT did not purport to override the exclusive jurisdiction clause in the investment agreement
SGS v. Paraguay (2010/2012): extensive understanding

- “One can characterize every act by a sovereign State as a “sovereign act”, including [its] acts to breach or terminate contracts to which the State is a party.”

- The tribunal did not interpret the wording of the Umbrella Clause, but found that every act of the state could potentially breach the treaty.

- The forum selection clause in the investment contract was irrelevant in the BIT context.
Summary of Recent Case Law

The issue whether or not Umbrella Clauses elevate contractual breaches to breaches of the BIT remains disputed:

- Exercise of sovereign power – necessary or implied?
- Specific types of contractual obligations concerning investment?
- Impact of forum selection clause in the contract?
- Statutory public obligations as „commitments“ towards the investor?

There is no legal certainty yet as to the interpretation.
Inclusion of Umbrella Clause in TTIP?
Empirical observation: Germany, UK and the Netherlands frequently include Umbrella Clauses in their BITs, France less frequently.

Art. X. 9 CETA Agreement:
“For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article [the fair and equitable treatment standard].“ (emphasis and comment added)

Public Consultation Process (TTIP):
- “The EU shall also strive, where necessary, to provide protection to foreign investors in situations in which the host state uses its sovereign powers to avoid contractual obligations towards foreign investors or their investments, without however covering ordinary contractual breaches like the non-payment of an invoice.”
Arguments pro Umbrella - Why not?

- Comprehensive protection of investments more attractive for investors
- Neutral dispute resolution forum is the core matter of any BIT
- Better drafting can reduce legal uncertainty
Arguments con Umbrella – Is it necessary?

- **Legally:** Legal uncertainty

- **Systematically:** Should international public law be used to solve commercial disputes? Should ISDS be used for settlement of petty disputes?

- **Politically:** Increased public opposition

- Is there really that little trust between EU and US for contractual claims to be dealt with in a satisfactory manner in other dispute settlement procedures?
Questions?
Thank you!