The year 2012 brought eight new investor-state arbitration decisions on umbrella clauses. Although tribunals in three of the disputes resolved claims without confronting controversial aspects of umbrella clauses, the other five tribunals issued yet another vintage of divergent decisions. Placing the decisions of 2012 within the framework of prior umbrella clause decisions also presents an opportunity to examine how that framework has been evolving.

**Early Development of the Umbrella Clause Jurisprudence**

Umbrella clauses, known also as “observance of undertakings” clauses, are common to investment treaties and exist in myriad formulations. Under a more expansive version, each state commits to “observe any obligation it may have entered into with regard to investments.” E.g., Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, art. II(2)(c) (Oct. 20, 1994). Controversy over these provisions erupted in August 2003 with the decision in SGS v. Pakistan. Concerned that “a matter of textuality,” the umbrella clause “appears susceptible of almost indefinite expansion,” the tribunal in that case held that the claimant needed to adduce “clear and convincing evidence” that the parties to the investment treaty intended that the umbrella clause elevate a contract breach to the level of a treaty breach. Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 166-67 (Aug. 6, 2003). Finding that the claimant failed to provide sufficient evidence, the tribunal rejected its
Only five months later, in January 2004, the tribunal in SGS v. Philippines interpreted another umbrella clause, worded slightly differently. The arguably material distinctions between the two umbrella clauses are in the phrases “shall constantly guarantee the observance of commitments it has entered” in the Swiss-Pakistan BIT and, in the Swiss-Philippines BIT, “shall observe any obligation it has assumed.” Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 115, 119 (Jan. 29, 2004). The SGS v. Philippines tribunal commented that the umbrella clause of the Swiss-Pakistan BIT is “formulated in different and rather vaguer terms” and is “less clear and categorical.” SGS v. Philippines (2004) ¶ 119. to “say, and to say clearly, that each Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT.” [fn]¶ 115. Opinions differ on whether this “broader” interpretation is attributable to the textual distinctions. Compare, e.g., Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 56 (“{I}t is the differences in the wording . . . that go far to explain the different positions taken by different ICSID tribunals that have in recent times had to consider {umbrella} clauses.”), with Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, ¶ 138 (May 29, 2009) (“{T}he two decisions {in SGS v Pakistan and SGS v. Philippines} cannot be reconciled, reflecting different approaches to this issue.”).[fn] But despite firmly concluding that the provision “means what it says,”[fn]SGS v. Philippines (2004) ¶ 119.¶ 119. the tribunal then decided that an exclusive forum selection clause in the contract precluded it from adjudicating the alleged breach of contract, a necessary antecedent to deciding the treaty claim. As a result, the tribunal stayed arbitration proceedings pending resolution of the contract claim in the forum contemplated in the contract.

Since then, discussion about umbrella clauses has tended to begin with a framework in which SGS v. Pakistan and SGS v. Philippines rest at the two poles: SGS v. Pakistan as the “narrow” or restrictive interpretation, and SGS v. Philippines as the “broad” interpretation. Meanwhile, an intermediate set of decisions exists in which a pivotal element is the nature of the state’s conduct — whether the state formed or breached the contract acting in its capacity as a sovereign (ius imperii), or acting solely in a commercial capacity (ius gestionis).[fn]One such line of decisions looks to the nature of the conduct through which the contract was formed (for example, El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶¶ 79-80 (Apr. 27, 2006)), while another looks to the nature of the state conduct that is alleged to have breached the contract (for example, Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, ¶ 310 (Sept. 28, 2007)).[fn]
found the umbrella clause to mean that a contract breach leads to a treaty breach, while also finding — unlike SGS v. Philippines— Arbitrator Antonio Crivellaro wrote a separate declaration endorsing an approach akin to that of SGS v. Paraguay, in which the forum selection clause would not render the umbrella clause claim inadmissible. Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Declaration (Jan. 29, 2004).— that a forum selection clause in the contract was no obstacle to reaching this legal conclusion. The SGS v. Paraguay tribunal explicitly rejected “non-textual limitations” to the umbrella clause that the respondent had proposed.

In light of these developments since the initial two SGS disputes, a remapping of the landscape of umbrella clause decisions is warranted. A more accurate categorization of the decisions could still encompass three categories, but defined in a slightly different manner. First, there is the narrow or restrictive pole, of which SGS v. Pakistan, with its avowed “prudential” interpretation, remains the hallmark. Second, there is the broad “plain meaning” pole, but instead of SGS v. Philippines, its standard-bearer would be SGS v. Paraguay. In a third and more nuanced category, between the two poles, are a cluster of decisions that reflect a “conditional plain meaning” application of umbrella clauses.

The “conditional plain meaning” group would include, among others, SGS v. Philippines. The SGS v. Philippines tribunal reached a plain meaning interpretation, but before the investor could vindicate its rights, it first needed to abide by the contract’s forum selection clause — essentially an implied condition that the claimant reciprocate observation of contractual obligations. Among the reasons that the SGS v. Philippines tribunal provided for its determination that the exclusive forum selection clause rendered the treaty claim inadmissible was “the principle that a party to a contract cannot claim on that contract without itself complying with it.” SGS v. Philippines (2004) ¶ 154. with the submission of disputes to the selected forum being an obligation that the investor owes to the state. Later decisions, such as Toto Costruzioni v. Lebanon and BIVAC v. Paraguay, have followed SGS v. Philippines when examining similar scenarios. Together, these decisions constitute one line of holdings within the “conditional plain meaning” category.

Other tribunals have likewise been willing to grant claimants access to a plain meaning interpretation while subjecting that access, for practical purposes, to conditions. At least five such conditions are identifiable: for claims founded on a contract breach, (1) that the investor comply with its own contract obligations, viz., that it honor a forum selection clause in the contract, (2) that the state entered the contract as an act of ius imperii, (3) that the state breached the contract as an act of ius imperii, and (4) that the state and claimant each be parties to the contract (i.e., privity of contract). The fifth condition is unique to the context of legislative or regulatory obligations: (5) that the legislative or regulatory obligations target investors specifically. Some of these conditions could prove to be quite restrictive in effect and, collectively, could even be insurmountable.

2012 Count: Narrow: 0; Broad: 2; Conditional: 3; Abstaining: 3

Using the new framework identified above, an attempt may be made to classify the eight umbrella clause decisions that tribunals issued in 2012:

Narrow, Restrictive, or Prudential
• No decisions of 2012 seem to fit in this category.

Broad, Unconditional Plain Meaning
• SGS v. Paraguay (Feb. 2012) (rejecting conditions #1 and #3): Contract obligations regarding forum selection had no bearing on whether the state breached other, independent obligations in the contract, and the state failed to establish that if the investor had breached other aspects of the contract, which was not proven, then such breach would have relieved the state of its contractual
obligations; breach of the umbrella clause did not require an abuse of sovereign power.

- **EDF v. Argentina** (June 2012) (rejecting condition #4): Breach of a contract between an Argentine province and a company in which the claimant was a majority shareholder constituted a breach of the umbrella clause (although also suggestive that a breach of the umbrella clause may require that the contract breach be due to an act of *ius imperii*, condition #3)

*Conditional Plain Meaning*

- **BIVAC v. Paraguay** (Oct. 2012) (endorsing condition #1): Following its decision of 2009, the tribunal issued a continued stay pending a disposition of the alleged contract breach in Paraguayan courts. In the prior award, the tribunal determined that an exclusive forum selection clause in the contract rendered the umbrella clause claim inadmissible. In the 2012 decision, the tribunal remarked that if the state does not comply with any eventual decision by Paraguayan courts, the umbrella clause claim “might then become admissible.”[fn]BIVAC v. Paraguay (2012) ¶ 290.[/fn]

- **Bosh v. Ukraine** (Oct. 2012) (endorsing condition #1): The alleged contract breach was not attributable to the state, but even if the alleged breach had been attributable to the state, the tribunal would have deferred to a forum selection clause in the contract and denied the umbrella clause claim.

- **Burlington Resources v. Ecuador** (majority) (Dec. 2012) (endorsing condition #4): Because only a subsidiary of the claimant was privy to the contract, not the claimant itself, the tribunal rejected the umbrella clause claim. (The dissenting opinion, by Francisco Orrego Vicuña, would fall in the category of broad or unconditional plain meaning; Orrego Vicuña opined that the BIT’s umbrella clause covered contractual obligations related to direct or indirect investments regardless of whether the obligation was due directly to the claimant, rejecting condition #4.)

The three remaining decisions from 2012 did not discuss in detail the umbrella clauses at issue in those cases. In **Swisslion v. FYROM** (July 2012), the tribunal found that the claimant was unable to establish any contract breach, thus obviating any need to interpret the provision in depth. In **Daimler Financial Services v. Argentina** (Aug. 2012) and **Occidental v. Ecuador** (Oct. 2012), the tribunals likewise reached a disposition without entangling themselves in the more controversial elements of an umbrella clause interpretation. In **Daimler Financial Services**, the tribunal found the argument against its jurisdiction over umbrella clause claims to be “patently groundless.”[fn]Daimler Financial Services v. Argentina (2012) ¶ 283.[/fn] In **Occidental**, the tribunal found that the state was in breach even under its own proposed interpretation of the umbrella clause.

While classifying the range of umbrella clause decisions is useful for understanding how tribunals have applied such clauses, caution is due in attempting to generalize. Each decision typically examines only a particular umbrella clause (which, as noted, can take any of myriad textual formulations) in a specific fact scenario. Also, decisions that rejected possible implied conditions did not evaluate every recognized or potential implied condition, so they should be viewed as suggesting an unconditional plain meaning *only* with regard to the proposed conditions that the tribunals considered and rejected.

**Conclusion: More Evolution To Come**

The decisions of 2012 did not bridge the chasm that separates divergent conclusions on umbrella clauses. But those decisions nevertheless contribute to the jurisprudence by helping to more clearly identify and delineate patterns that have developed over nearly a decade of searching inquiries. Perhaps 2013 will bring more clarity on this issue, but it is reasonable to expect that umbrella clauses will remain among the most controversial and uncertain areas of international investment law, at least for the near future.
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