

ENFORCING MULTILATERAL TRADE OBLIGATIONS VIA UMBRELLA CLAUSES IN INVESTOR-STATE ARBITRATION– HOW DO BITS FARE?

- Vishakha Choudhary* and Noyanika Batta**

ABSTRACT

Arbitration as envisaged under Bilateral Investment Treaties has resulted in speedy, effective resolution of investor-state disputes. Ambiguously worded umbrella clauses in Bilateral Investment Treaties call into question the appropriate interpretation of these clauses - the nature of obligations enforceable under the wide ambit of the same is a contentious challenge to effective investor-state dispute settlement. An expansive connotation of Umbrella Clauses would enable enforcement of varied obligations, unilateral, bilateral and plurilateral, under them. Jurisprudential development may also be interpreted to indicate the possibility of enforcing general international obligations of a sovereign under broadly framed Umbrella Clauses.

This Article seeks to analyse the plausibility of enforcement of WTO trade obligations through investor-state arbitration- it evaluates the wide construction of the term 'any obligation' used in Umbrella Clauses to assess possibilities of inclusion of WTO obligations therein. The feasibility of the same in light of the differing objectives of WTO Dispute Settlement and Investment Arbitration, insofar as the former concerns liberalization of trade and the latter concerns investment protection, is evaluated through the course of this Article. The possible pitfalls of such enforcement of multilateral trade obligations are also extensively discussed– in conclusion, we seek to examine whether the Indian Model BIT provides for a scope of enforcement of Trade Obligations of India via an Investor-State Arbitration mechanism.

* Fourth year Student of B.BA LL.B (Hons.) at Gujarat National Law University.

** Fourth year Student of B.BA LL.B (Hons.) at Gujarat National Law University.

INTRODUCTION

Bilateral Investment Treaties between States have facilitated cross-border investments by accounting for safety of foreign investments and businesses without compromising the interests of the State. Clauses and concepts that occupy prominence in such treaties include Umbrella Clauses, Expropriation Clauses, Fair Treatment Clause, 'Most Favoured Nations' Clause, Performance Clause, National Treatment Clause, Admission Clause, et al. By creating mutual rights and obligations between investor and a Nation, aforesaid clauses provide for balance of interests.

Perhaps of all the generic clauses that make an appearance in Bilateral Investment Treaties, Umbrella Clauses are the widest in their scope. The requirement contained therein is for State Parties to undertake to observe any obligation they may have entered into with an investor of the other state party. Due to their contentious and expansive nature, the interpretation of Umbrella Clauses has been subjected to sever scrutiny before Arbitral Tribunals, which have chosen to give varying degrees of scope to such clauses.

Emerging trends in Investment Arbitration have witnessed attempts of investors to seek enforcement of International Trade obligations of Contracting States by virtue of expansive Umbrella Clauses which often mandate a Contracting Party to observe any obligation it may have assumed with regard to investments. This Article seeks to analyse the feasibility of a wide interpretation of Umbrella Clauses, thereby facilitating enforcement of trade obligations.

Part I of the Article discusses the scope of Umbrella Clauses and the diverging interpretations of the Clause in recent arbitral practice. Part II discusses the enforcement of international obligations of the State party to a Bilateral Investment Treaty in Investor-State Arbitration. By applying the findings therein, in Part III the authors seek to discuss the importation of International Trade Obligations contained in the various WTO Agreements within the realm of Investor-State Arbitration, whereas Part IV discusses the workability of such practices, if deemed permissible. In Part V of the Article, the authors analyse the recent Model Indian Bilateral Investment Treaty and the possibility of enforcement of WTO Obligations of India under the same.

1. PART I: INCORPORATION OF UMBRELLA CLAUSES IN BILATERAL INVESTMENT TREATIES

The practice commenced with the incorporation of an ‘Umbrella Clause’ in the first modern BIT entered in 1959 between Germany and Pakistan.³ Umbrella clauses are a reflection of the *Pacta Sunt Servanda* Doctrine. The intention contained in such clauses is to impose an international treaty obligation on host countries that requires them to respect obligations they have entered into with respect to investment protected by the treaty.⁴

The scope of umbrella clauses is determined largely on the basis of the language in the relevant Bilateral Investment Treaty – hence, the possibility of uniform interpretation of these clauses is entirely precluded. This has led to multiple constructions of such clauses in Investor-State Arbitration, conferring varied scope or reach upon Umbrella Clauses.

1.1. *Narrow Construction of Umbrella Clauses: a Restricted, Apprehensive Approach:*

The most pertinent arbitral dispute in this regard is *SGS v. Pakistan* wherein a restrictive interpretation of the umbrella clause was preferred by the Tribunal, stating that a broader interpretation could lead to a flood of lawsuits regarding the smallest claims and be subject to indefinite expansion.⁵ The following formed the basis for the Tribunal’s conclusion:

- i. Flood of lawsuits concerning the smallest claims;
- ii. Blurring the sense of other protective standards;
- iii. Breach of contract per se does not amount to a breach of international law;

³ K. Yannaca-Small, *Interpretation of Umbrella Clause in Investment Agreements*, OECD Working Papers on International Investment, 2006/03, Organisation for Economic Co-operation and Development (2006).

⁴ *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/08, Award (12 May 2005).

⁵ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Award (6 August 2002).

- iv. Feared the consequences of ‘almost indefinite expansion’ of BIT protection;
- v. Relied on systematic differences between municipal and international laws;

In *Joy Mining v. Egypt*, the claim stemmed from the United Kingdom-Egypt BIT concerning a dispute over bank guarantees for equipment at a desert mining site. The Tribunal, ultimately referring contractual disputes to UNCITRAL arbitration, decided to reject the claim, given the noninvestment nature of the original transaction. The narrow construction of Umbrella Clauses was held by ICSID Tribunal to imply the lack of any link between a contractual breach and a treaty breach of the BIT – thereby implying that breaches governed by Contracts between Investors and the State could not be elevated to treaty breaches of a BIT by resorting to an Umbrella Clause.⁶

“In this context, it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect.”

The rationale of the ICSID Tribunals in denying a broad construction of Umbrella Clauses contained in BITs rests on the apprehension that such interpretation of the so-called umbrella clauses would have far reaching consequences. This, in the Tribunal’s opinion could be destructive of the distinction between national legal orders and the international legal order and would render useless all substantive standards of protection of the Treaty.⁷ Thus, the practice of the Tribunal is often to adopt a conservative approach vis-à-vis application of Umbrella Clause to

⁶ *Joy Mining Machinery Ltd. v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004).

⁷ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011).

contracts concluded between the investor and the State acting as a sovereign.⁸

1.2. Broad Construction of Umbrella Clauses: Envisaging a wide scope

The ICSID tribunal prominently took to a broad interpretation of the umbrella clause, rejecting the findings in the *SGS v. Pakistan*⁹ case in the *SGS v. Philippines* Case - concluding, that under the ambit of an extensive Umbrella Clause, the breach of a contract could be elevated to a treaty breach.¹⁰ A similar finding was echoed by the Tribunal's opinion in the *Noble Ventures, Inc. v. Romania*¹¹ where the scope of the Umbrella Clause was extended beyond the specified provisions of the BIT itself and was deemed to envisage the Sovereign's investment contracts.

The motivation of the Tribunals in conferring a wide interpretation is to give effect to the language of the Umbrella Clause in the BIT – wherein the intention of the Contracting Parties in including a broadly-worded clause was given due acknowledgment and importance.¹²

1.3. Critique: Ideal interpretation of Umbrella Clauses?

In par. 166 of its decision, the Tribunal in *SGS v. Pakistan*¹³ implicitly raised the argument that a narrow interpretation is necessary because SGS's view of the umbrella clause would make the provision

⁸ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. 01/08, Award (12 May 2005).

⁹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003).

¹⁰ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction and Separate Declaration (29 January 2004).

¹¹ *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11 Award (12 October 2005).

¹² *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (10 February 2012); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID case No ARB/02/1, Decision on Liability (3 October 2006).

¹³ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2002) para 166.

“susceptible of almost indefinite expansion.

However:

- i. This is not a legal argument;
- ii. The mere fact that a provision in a BIT has far-reaching consequences cannot be used as a justification for its narrow interpretation;
- iii. Moreover, should the parties to a treaty want to confer upon the respective investors a lower level of protection, they would stipulate the clauses of the BIT differently.

As was explained by the tribunal in the case of *SGS v. Pakistan*, the umbrella clause, as an exception to the general rule that a violation by a state of a contract with an alien does not, by itself, constitute a violation of international law, has to be interpreted restrictively unless there is clear evidence giving rise to the fact that the Contracting Parties had intended to give the clause the far-reaching effect of imposing obligations on the host state.

It is pertinent to note that:

- i. The Tribunal showed no evidence that, as a rule of international law, exceptions from general international law principles had to be interpreted in a restrictive way;
- ii. Secondly, it would be totally impractical would the contracting parties to a treaty always have to add clear evidence that they mean what they say when stipulating, in very clear terms, exceptions from a general rule that they purport to have far-reaching consequences.

It may be argued that a wide Umbrella Clause interpretation is likely to render all the other current standards of treatment, ‘substantially superfluous’ as there would be no real need to demonstrate a violation of substantive treaty standards if a simple breach of contract would

suffice to constitute treaty violation and impose an international responsibility on the Party.¹⁴

The above view was supported by the Tribunal in the case of *El Paso v. Argentina*, where the Tribunal argued in favour of the narrow interpretation given in *SGS v. Pakistan* and stressed upon the fact that the interpretation given in *SGS v. Philippines* renders the whole Treaty completely useless and if this interpretation were to be followed – the violation of any legal obligation of a State, and not only of any contractual obligation with respect to investment, is a violation of the BIT, whatever the source of the obligation and whatever the seriousness of the breach – it would be sufficient to include a so-called ‘umbrella clause’ and a dispute settlement mechanism, and no other articles setting standards for the protection of foreign investments in any BIT.¹⁵

However, in the view of the authors, the BIT’s substantive provisions deal with non-discrimination, fair and equitable treatment, national treatment, MFN treatment, free transfer of payments and protection from expropriation. These issues are not normally covered in contracts. There is no substantive evidence as to why the acceptance of an umbrella clause covering breaches is likely to render the *other* provisions superfluous. Therefore, extending the BIT’s protection to investment contracts would not make the substance of a BIT superfluous.¹⁶

Although, it will hold true for several cases¹⁷ that the acts and omissions of a state which are in violation of a protective BIT standard also constitute a breach of the umbrella clause [such as a simultaneous FET and Umbrella Clause violation]. However, laws and contracts also cover violations of substantive BIT standards other than the umbrella clause. Therefore, not every set of facts that gives rise to a claim based on one of the current BIT standards necessarily constitutes at the same time, a breach of the umbrella clause. It is thus dependent on the circumstances of each case, whether both a BIT standard and the umbrella clause, one

¹⁴ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2002) para 168.

¹⁵ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011) para 76.

¹⁶ *Eureko BV v. Poland*, Ad Hoc UNCITRAL Arbitration, IIC 98 (2005), Partial Award and Dissenting Opinion (19 August 2005).

¹⁷ *Ioan Micula & ors. v. Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013).

or even none of them is violated. It is justified to include in a BIT, both the common protective standards and other like standards and the umbrella clause without rendering the prior useless or having to interpret the latter in a narrow way whatsoever.

2. PART II: ENFORCING UNILATERAL AND INTERNATIONAL OBLIGATIONS OF A SOVEREIGN IN INVESTOR-STATE ARBITRATION

The famed Award of the Tribunal in the *Metaclad Corporation v. Mexico*¹⁸ lends to the practice of enforcing general international obligations under Investor-State Disputes, whereby importation of other obligations on “transparency” under NAFTA through the “international law” gateway was permitted by the Tribunal. While a similar practice has not been noticed in the Awards by ICSID Tribunals, the principle of Investment Arbitration relating to widely-worded clauses as expounded by the Metaclad Award may pave the way for enforcement of international, multilateral obligations under Bilateral Investment Treaties.

Even the UNCITRAL case concerning an alleged breach of an agreement between foreign investors and the Polish government in connection with the privatization of a major Polish state-owned insurance company saw the following observation of the Tribunal:

*“...Shall observe any obligations it may have entered into' with regard to certain foreign investment is not obscure. The phrase 'shall observe' is imperative and categorical. 'Any' obligation is capacious; it means not only obligations of a certain type, but 'any'—that is to say, 'all'—obligations entered into with regard to investments of investors of the other Contracting Party...”*¹⁹

The ICSID Award that lends most support to a possible future practice of enforcement of WTO Obligations of States via investor-state arbitration is *Enron v. Argentina*, where the tribunal concluded that the

¹⁸ *Metaclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award (NAFTA Ch. 11 Arb. Trib. 2000) 40 I.L.M. 36, 70–99.

¹⁹ *Eureko BV v. Poland*, Ad Hoc UNCITRAL Arbitration, IIC 98 (2005), Partial Award and Dissenting Opinion (19 August 2005).

umbrella clause referred to “any obligations regardless of their nature²⁰; not only contractual obligations, but also “obligations assumed through law or regulation” that are “with regard to investments.”²¹ This is further supported by the Award in *SGS v. Paraguay*, where the Umbrella Clause was interpreted as creating “an obligation for the State to constantly guarantee observance of its commitments entered into with respect to investments of investors of the other party. The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally.”²² The partial award rendered in *Eureko v. Poland*²³ concluded that Article 3.5 of the Netherlands-Poland BIT, which stated that each contracting party “shall observe any obligations it may have entered into with the investments of investors” of the other contracting party, must be afforded:

*“...the plain meaning – the ‘ordinary’ meaning – of a provision prescribing that a State ‘shall observe any obligations it may have entered into’ with regard to certain foreign investments is not obscure. The phrase ‘shall observe’ is imperative and categorical. ‘Any’ obligations is capacious; it means not only obligations of a certain type, but ‘any’ – that is to say, all obligations entered into with regards to investments of investors of the other Contracting Party”.*²⁴

Similarly, the *LG&E v. Argentina*²⁵ Award also imported contractual obligations within the ambit treaty obligations – without limiting the obligations envisaged by an Umbrella Clause to that of a contractual nature alone. The Tribunal held that the provisions of the Gas Law obligations in dispute in the case were not merely generic legal obligations; recognizing the pertinence of the aforesaid laws in relation to LG&E’s investment in Argentina, the Tribunal held that “these laws

²⁰ *Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007) para 274)

²¹ *Ibid.*

²² *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (10 February 2012) para 167.

²³ *Eureko BV v. Poland*, Ad Hoc UNCITRAL Arbitration, IIC 98 (2005), Partial Award and Dissenting Opinion (19 August 2005).

²⁴ *Ibid.*

²⁵ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID case No ARB/02/1, Decision on Liability (3 October 2006).

and regulations became obligations That gave rise to liability under the umbrella clause.”

A similar rationale can be applied to trade obligations’ enforcement in investor-state arbitration – when obligations arising out of trade agreements deal with the subject matter pertinent to the investors’ interest in the host country, plea for enforcement of such obligations and remedies for their violations should not be completely barred.

This wide wording and connotation thus imply that the nature of the obligation is irrelevant – whether multilateral, unilateral, or bilateral. The pertinent test for whether an obligation of a sovereign can be enforced under the ambit of an Umbrella Clause is the nexus of the obligation with ‘investment’. Trade Related obligations under the Marrakesh Agreement are aimed at enhancing investments – such would fall squarely within the textual confinements of the phrase ‘any obligations’ in Umbrella Clauses. If these investment-related obligations, unilateral or multilateral, can be viewed through umbrella clauses, their enforcement in investor-state arbitration may be possible.

3. PART III: TRADE OBLIGATIONS VIS-À-VIS ENFORCEMENT THROUGH UMBRELLA CLAUSES

It is pertinent to note that obligations unilaterally assumed by a State, whether in exercise of its legislative or executive actions, or as a result of its international obligations have been previously held to be envisaged under Umbrella Clauses – and thus arbitrable as a treaty obligation of the BIT.²⁶ The nature of the obligation in a widely worded umbrella clause (“any obligations regardless of their nature”) is irrelevant²⁷; such is thus not merely limited to contractual obligations, but also “obligations assumed through law or regulation” that are “with regard to investments.”²⁸ Even legal and regulatory changes brought unilaterally by

²⁶ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID case No ARB/02/1, Decision on Liability (3rd October 2006) para 175.

²⁷ *Enron Corporation Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007) para 274.

²⁸ *Ibid.*

the State as part of its public function could be considered treaty violations under a wide umbrella clause.²⁹

The most succinct explanation of the non-specificity of obligations contemplated by wide umbrella clauses was perhaps elucidated in *SGS v. Paraguay* where a tribunal interpreted a broad umbrella clause as creating-

*“an obligation for the State to constantly guarantee observance of its commitments entered into with respect to investments of investors of the other party. The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally.”*³⁰

Conferral of an all-encompassing scope of a nature as discussed above leads one to believe that the nature of obligations that may be enforced through loosely worded and generic Umbrella Clauses are thus unrestricted³¹ - meaning thereby, that trade obligations if closely related to investment would be readily encompasses within the same.

3.1. Investor-State Disputes: Is there an existing nexus with Trade Obligations?

The practice of reference to WTO jurisprudence to interpret investment obligations of sovereigns is not unknown. The investor-State tribunal in *Continental Casualty v. Argentina*, in its analysis of the defenses available to the State, interpreted the term “necessary” in the U.S.-Argentina BIT in accordance with WTO jurisprudence.³²

The Marrakesh Declaration establishing the World Trade Organization identifies the objective of the WTO regime to “lead to more ... investment ... throughout the world.”³³ A close nexus between trade

²⁹ *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, (28 September 2007) paras 310-313.

³⁰ *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (10 February 2012) para 167.

³¹ M. Sallas, *Do Umbrella Clauses Apply to Unilateral Undertakings*, 490 in *International Investment Law For The 21st Century: Essays In Honour Of Christoph Schreuer* (Christina Binder et al., eds. 2009).

³² *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008) para 87.

³³ Article 1, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154.

and investment can be observed herein.³⁴ This is further cemented by various multilateral WTO agreements – By way of illustration: The WTO Agreement on Trade Related Investment Measures (TRIMS³⁵) prohibits a Member State from applying investment measures in a manner inconsistent with the State's national treatment obligations; The WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS³⁶) affords enhances protection to firms investing in goods and services that are IP intensive. The General Agreement on Trade in Services (GATS³⁷) of the WTO is also aimed at protection of cross-border investment in services.

In light of this observably close nexus, the plausibility of enforcing trade obligations under the WTO agreements by means of widely worded Umbrella Clauses becomes concretized.

An umbrella clause, which typically incorporates obligations “with regard to investments”,³⁸ may thus prove to be a tool for securing arbitration and enforcement of trade obligations by private parties and not merely sovereign states. Investors have, in the past used WTO rules and decisions to interpret BIT obligations under National Treatment.³⁹

³⁴ P. Sauvé, *A First Look at Investment in the Final Act of the Uruguay Round*, 241,242 in *Globalization And International Investment* (Fiona Beveridge., 1st ed., 2005).

³⁵ Agreement on Trade-Related Investment Measures, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S. 186.

³⁶ General Agreement on Trade in Services, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

³⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 320 (1999) U.N.T.S. 299, 33 I.L.M. 1197 (1994).

³⁸ *Eureko BV v. Poland*, Ad Hoc UNCITRAL Arbitration, IIC 98 (2005), Partial Award and Dissenting Opinion (19 August 2005); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction and Separate Declaration (29 January 2004).

³⁹ *S.D. Myers Inc. v. Canada*, Ad Hoc UNCITRAL Arbitration IIC 249 (2000), Partial Award paras 244-46, 291-93; *Pope & Talbot Inc. v. Canada*, Ad Hoc UNCITRAL arbitration, IIC 193 (2001) Award on the Merits of Phase 2, paras 45-63.

3.2. Illustrative List: Umbrella Clauses in Bilateral Investment Treaties and their textual outreach

The following illustrative Bilateral Investment Treaties may be referred to substantiate such a contention:

3.2.1. US-Argentina BIT, Article II.2(c) (1994): *Each Party shall observe any obligation it may have entered into with regard to investments.*⁴⁰

‘Any’ obligations here may connote all kinds of obligations.⁸⁶ The open-ended nature of these terms would not limit the reach of such an Umbrella Clause and consequently, the Bilateral Investment Treaty to WTO and its related disciplines.

3.2.2. Germany-Pakistan BIT, Article 7 (1959): *Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party.*⁴¹

It is the authors’ belief that the same is just as wide in scope as the illustration that it succeeds. Any claim or assertion of a WTO-Agreement violation would necessarily be a violation of an obligation owed to national or company of another State. Thus, the interpretation that such ‘obligations’ would be limited to merely the contractual investors appears flawed.

3.2.3. Germany-China BIT (2003), Article 10(2): *Each Contracting Party shall observe any other obligation it has entered into with regard to investments in its territory by investors of the other Contracting Party.*

Akin to the Germany-Pakistan BIT, the term ‘any other obligation’ contemplates that all obligations pertaining to investments in the host state’s territory must be respected – which would de facto be inclusive of investment obligations contained in WTO trading agreements such as TRIPs, TRIMS, GATS, TBT (WTO Agreement on Technical Barriers to Trade⁴²), et al.

⁴⁰ Article II.2(c), United States-Argentina Bilateral Investment Treaty, 1991.

⁴¹ Article 7, Germany-Pakistan Bilateral Investment Treaty, 1959.

⁴² Article 10(2), Germany-China Bilateral Investment Treaty, 2003.

3.3. Recent Jurisprudence: Exploring the likelihood of invoking WTO Obligations in Investor-State Arbitration

The plausibility of enforcement of Multilateral Trade Obligations under the WTO Regime was most recently explored in *PMA v. Australia*⁴³ - the investment treaty claim made by Philip Morris Asia Ltd. against Australia's plain tobacco packaging legislation. The contention of Australia being in violation of its WTO-TRIPS obligation was resorted to by PMA, which sought enforcement of such obligations under the wide ambit of the Umbrella Clause⁴⁴. The contention rested on pertinent lack of any qualification or limitation of the scope of 'obligations' in the Umbrella Clause (by usage of textual restraints such as 'specific' or 'contractual'). Australia responded to the said contention by seeking a narrower interpretation of the Umbrella Clause – denying the possibility of Umbrella Clauses encompassing general obligations under multilateral treaties.⁴⁵ In this case, PMA's contentions were given no merit by the tribunal, which declined jurisdiction. However, contentions on violation of TRIPS Obligations were also discussed previously in the *Eli Lilly and Company v. The Government of Canada*⁴⁶.

WTO law has, on previous occasions, been referred to in investor-state arbitration, prominently featuring in *Methanex Corporation v. United States of America* where the Tribunal stated:

“[T]he Tribunal may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past. Whilst such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant.”⁴⁷

⁴³ *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Notice of Arbitration (21 November 2011) paras 6.6-6.11.

⁴⁴ *Ibid.*

⁴⁵ *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Notice of Arbitration (21 November 2011) paras 56-58.

⁴⁶ *Eli Lilly and Company v. The Government of Canada*, ICSID Case No. UNCT/14/2, Notice of Arbitration (12 September, 2013).

⁴⁷ *Methanex Corporation v. United States of America*, (2005) 44 ILM 1345 Final Award of the Tribunal on Jurisdiction and Merits, (3 August 2005), para. 6

Taking the likelihood of invocation of trade obligations in Investor-State Arbitration into consideration, it is thus necessary to explore the merits and demerits of such invocation.

4. PART IV: ENFORCING WTO OBLIGATIONS VIA INVESTOR-STATE ARBITRATION: A SLIPPERY SLOPE?

Trade and investment are often believed to be different sides of the same coin – this stems from the following reasons, inter alia:

- i. Promotion of similar objectives—globalization, economic integration, trade promotion, and investment protection;
- ii. Embodiment in the same treaties, such as preferential trade agreements;
- iii. Incorporation similar substantive protections, particularly the rules against discrimination and protectionism.⁴⁸

Thus, the question that looms in the present context is – how fruitful would a practice of enforcing trade obligations through Investor-State Arbitration and Umbrella Clauses be?

4.1. *Arguments pro-enforcement:*

Narrow umbrella clauses are unlikely tools to secure international trade rights in Investment Arbitration. The widely worded clauses, however, as discussed above, may allow for such a possibility.

The most important crisis that such enforcement would tackle is the uniformity in Investor-State Arbitration jurisprudence⁴⁹: tribunals in Investor-State Arbitration are plagued by conflicting awards, as elucidated through aforementioned cases, concerning interpretation of

⁴⁸ A. Newcombe & L. Paradell, *Law And Practice Of Investment Treaties: Standards Of Treatment*, 436-478 (1st ed., 2009); M. Sasson, *Substantive Law In Investment Treaty Arbitration: The Unsettled Relationship Between International And Municipal Law* 193-94 (2010); M. Sallas, *Do Umbrella Clauses Apply to Unilateral Undertakings*, 490 in *International Investment Law For The 21st Century: Essays In Honour Of Christoph Schreuer* (Christina Binder et al., eds. 2009).

⁴⁹ Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20, *European Journal of International Law* 749 (2009), <http://ejil.oxfordjournals.org/cgi/reprint/20/3/749> last seen on 14/07/2016.

Umbrella clauses, thereby defeating any opportunity to develop a uniform set of legal practices. Au contraire, the WTO has proved to be exponentially successful in following the consistent practice of 'stare decisis' in its decisions. Enforcement of trade obligations in Investor-State Arbitration would also ensure adherence of tribunal to the uniform jurisprudential principles developed by WTO Panels and Appellate Body – consequently resulting in uniformity in Investment Arbitration jurisprudence.

More pertinently, in overlapping regime of trade and investment, inter-regime cross cutting and contradictory judgments can hamper positive jurisprudential growth. Accounting for enforcement of trade obligations via Investment Arbitration would allow the mutually-dependent disciplines to grow simultaneously and symbiotically, thereby leading to a more uniform approach to trade and investment in the global scenario.

In addition, the possibility of compensating and mitigating damage to investors by a sovereign through awarding of unilateral trade remedies may be made possible without approaching the WTO, which restricts any grant of unilateral trade remedies.

Lastly, this may discourage the practice of party-shopping: the same disputes shall not be taken up by State parties and Private/Contracting parties separately or simultaneously before arbitration forums and WTO to seek multiple redressal on the same investment related issue.

4.2. Arguments contra-enforcement:

Intention of Law is the paramount consideration across legal disciplines. World Trade Organization (WTO) Member countries proposed the inclusion of international investment in the next Round of WTO negotiations, attempting to bring investment within a multilateral regulatory forum in December 1999. The lack of consensus on this issue is indicative of the distinctiveness between trade and investment – and thus demands to be respected.⁵⁰ It must also be noted that the power to interpret WTO law and State obligations arising out of the same is solely

⁵⁰ A. Oxley, *Sharing the Blame for WTO Wash-out*, *The Australian* 15 (06/12/1999).

vested in the WTO Dispute Settlement System i.e. the Secretariat, the Panel and the Appellate Body.⁵¹

The multitudes of problems that are invited by such enforcement are further aggravated by the possibility of exploitation of this enforcement mechanism –By way of illustration⁵²:

4.2.1. *Treaty shopping:*

Attempts by parties to invoke obligations under multiple treaties by wide Umbrella Clauses to avail remedies - irrespective of the remoteness of such remedy.

4.2.2. *Relief Shopping:*

Parties may bring trade disputes before Arbitral Tribunals in the attempt to secure better remedies than simply rollback of restrictive policies [which is the remedy generally preferred in trade disputes before the WTO]

This would further allow investor-state arbitration to circumvent the traditional barriers to initiating a WTO dispute - Diplomatic espousal, which is a procedural check to ensure that merely meritorious claims are raised for enforcement of WTO agreements would be rendered insignificant since parties would be free to enforce the same through means of Investment Arbitration. A consequential result would also be the resounding defeat of the purpose of WTO agreements and trade obligations contained therein – to protect the interest of member states and not private or contractual investors. This would also, by way of a chain reaction, incentivize private interest protection over sovereign interest and secures monetary benefit for private investors in cases of violation of obligations owed to and by sovereigns, thereby violating the basic tenets of International Law.

⁵¹ A. Hertz, *Shaping the Trident: Intellectual Property under NAFTA, Investment protection Agreements and at the World Trade Organisation*, 23 *Canada-United States Law Journal* 261, 278 (1997); S. Frankel, *The Legitimacy and Purpose of Intellectual Property Chapters in FTAs*, 185, 195 in *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential, and Regional Agreements* (R Buckley et al, 2008).

⁵² S. Puig, *The Merging of International Trade and Investment Law*, 33 *Berkeley Journal of International Law*, <http://www.berkeleyjournalofinternationallaw.com/wp-content/uploads/2015/09/The-Merging-of-International-Trade-and-Investment-Law.pdf>, last seen on 14/07/2016.

It is additionally significant to note Article 23 of the Dispute Settlement Understanding of the WTO in this regard: Article 23 provides that Member States “shall not make a determination to the effect that a violation has occurred ... except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding.” This establishes the sole right and prowess of the World Trade Organization to interpret and uphold trade obligations and remedies, a largely established principle of international law which would be vitiated by initiation of investor-state arbitration for enforcement of WTO rights and obligations.

Another important consideration is the nature of remedies afforded by the WTO and Investment arbitration: the former are prospective in nature, while the latter may be retroactive. While the obligations of WTO dispute settlement is to ensure conformity of Member States with trade obligations, investment arbitration seeks to espouse the principles of state responsibility contained in international law – that is, to remove the consequences of the illegal act and restore the situation as would have existed in the absence of such illegal act. The confluence of these two mechanisms with differing goals and remedies might thus be a foolhardy attempt.

Lastly, it is noteworthy that not a single decision where an investment tribunal has held a broad umbrella clause to cover obligations resulting from international trade agreements of the host states can be demonstrated in the vast body of ICSID’s work.⁵³ The authors believe that this demonstrates the following: the ICSID’s unwillingness to encroach on WTO jurisdiction, its conservative approach in extending the scope of Umbrella Clauses beyond BITs and investment contracts, and its practice of distinguishing trade obligations of states from the ambit of ‘investment’.

5. PART V: THE INDIAN MODEL BILATERAL INVESTMENT TREATY AND ENFORCEMENT OF TRADE OBLIGATIONS

The recently published Indian Model Bilateral Investment treaty avoids

⁵³ R. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 Santa Clara Journal of International Law 35, 55-57 (2014), <http://digitalcommons.law.scu.edu/scujil/vol12/iss1/3> last seen on 14/07/2016.

the complexities and scope of enforcement of trade obligations under investor-state arbitration mechanism largely – due to the absence of an Umbrella Clause in the BIT. Such is further cemented by the following article of the BIT:

“Article 2.3: This Treaty shall not impose any obligations on the Parties other than that which are explicitly set forth herein....”

This is reflective of the practice increasingly adopted by the United States and ASAN States to exclude Umbrella Clauses as sovereign rights take precedence over investor interests in an era of wildly expansive Umbrella Clause interpretation.

However, it may be pertinent to note, in this regard, the following provisions of the Indian Model BIT:

Article 19.1: This Treaty or any action taken hereunder shall not affect the rights and obligations of the Parties under existing Agreements to which they are parties

Article 3: Each Party shall not subject investment of investors of the other party to measures which constitute:

5.1. Denial of justice under customary international law:

Thus, the scope of enforcement of customary international law obligations is still envisaged by the Indian BIT, which does not prejudice obligations of the Indian state under any other agreement to which it is a Party. Status of WTO Obligations as customary international law having been confirmed by leading jurisprudence, the same may thus be sought to be respected even within the ambit of the model Indian Bilateral Investment Treaty. Despite having avoided the hurdles of an umbrella clause, investor-state arbitration in India could still be tripped up by its other widely worded clauses – thereby inviting the complexities of enforcing trade obligations in investor-state arbitration, as discussed in Part IV.B.

CONCLUSION

The concept explored through the paper is the plausibility and the efficiency of enforcement of public rights through a private dispute

settlement mechanism. The theme of the paper extensively explored the overlapping regimes of trade and investment and the results of a conflation of the two under the wide of ambit of Umbrella Clauses as envisaged under Bilateral Investment Treaties.

The conclusion that the above discourse seeks to expound is the demerits of affording an unnaturally extensive interpretation to an Umbrella Clause in a BIT – leading to private parties infringing on the domain of rights of a Sovereign. A narrow construction of such clauses thus seems more prudent; it is pertinent to note that the authors do not suggest a narrow interpretation to merely restrict and Umbrella Clause to contractual obligations.

However, the intention is to avoid construction of Umbrella Clauses in a manner so wide as to allow importation and enforcement of State Obligations under other multilateral treaties or international obligations owed to other States. Such an expansive construction would have multifarious effects on the trade regime – including but not limited to frivolous litigation, breach of the WTO's exclusive right to address disputes arising of its trade agreements, private investor-initiated arbitration to enforce obligations owed by sovereigns to sovereign, et al. And this is a slippery slope that will not cease to fumble relations between the trade and investment sector for several decades to come.