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Siqing Li

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Convergence of WTO Dispute Settlement and Investor-State Arbitration: A Closer Look at Umbrella Clauses

Siqing Li*

Abstract

Since the 1950s, the international community has increasingly recognized the fragmentation of international law, including of international dispute resolution. Inconsistent interpretations by different dispute settlement mechanisms have led to uncertain and confusing outcomes. In a recent case, Phillip Morris Asia v. Australia, the investor subjected disputes arising under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), a World Trade Organization (WTO) agreement to an investor-state arbitral tribunal rather than to the WTO. The investor claimed that the host state, by failing to keep its promise under TRIPS, violated the umbrella clause in the bilateral investment treaty (BIT) between it and the investor's home state. An umbrella clause requires a state party to observe any obligation or commitments it enters into with respect to investments of the other state party. Investors frequently use umbrella clauses to bring claims arising outside of the BIT in investor-state arbitral tribunals. The Phillip Morris Asia v. Australia tribunal dismissed the case without answering its jurisdiction over TRIPS claims. Yet the investor's argument here further broadened the scope of the umbrella clause and garnered much attention.

This Comment analyzes the validity of this argument and asserts that a broad interpretation may violate the WTO's exclusive and compulsory jurisdiction under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It also argues the scope of the umbrella clause largely depends on its language and context. The Comment proposes two solutions for this issue: first, states should clarify the scope of the umbrella clause through its drafting; second, the WTO should clarify its jurisdiction over WTO claims.

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I. INTRODUCTION

The boom of international organizations and agreements over the last century has led to the proliferation of international dispute settlement mechanisms.¹ These mechanisms have developed separately in different regions and have diverse historical and functional features.² However, the issues that these dispute settlement rules govern are not always clearly distinct.³ Multiple forums can decide that they have jurisdiction, even exclusive jurisdiction, over the same dispute.⁴ For example, the North American Free Trade Agreement (NAFTA) allows parties to choose either the WTO or the NAFTA forum to address issues arising under both the 1994 General Agreements on Tariffs and Trade (GATT) and NAFTA.⁵ Yet once a party chooses to initiate proceedings at the NAFTA forum, the NAFTA forum needs to be exclusive.⁶

However, Article 23 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that WTO has exclusive jurisdiction over disputes arising under the SPS Agreement.⁷ Sometimes parties choose a mechanism *ex ante* by agreements when a conflict of jurisdictions exists, but most of the time they do not.⁸ Thus, the overlapping jurisdictions of different mechanisms and the lack of hierarchy among them have led to inconsistent interpretations over the same factual and legal issues.⁹

¹ See, for example, August Reinisch, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION 107–09 (Isabelle Buffard et al. eds., 2008); Thomas Buergerthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, 22 ARB. INT'L. 495, 495–96 (2006).

² Report of the International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, ¶ 5, U.N. Doc. A/CN.4/L.682 (2006) (citing C. Wilfried Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L.L. 401, 403 (1953)).

³ Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 467 (Lorand Bartels & Federico Ortino eds., 2006).

⁴ *Id.*

⁵ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), at art. 2005(1), [hereinafter NAFTA].

⁶ *Id.* at art. 2005(2)–(6).

⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, annex 2, art. 23 ¶ 1, 2(a), Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

⁸ See Kwak & Marceau, *supra* note 3, at 467–68.

⁹ Brooks E. Allen & Tommaso Soave, *Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration*, 30 ARB. INT'L 1, 2 (2014).

This phenomenon is recognized as a part of the fragmentation of international law.¹⁰

The fragmentation of international dispute settlement has led to inconsistent interpretations by different dispute resolution forums. The different interpretations of the national treatment principle¹¹ by the WTO and various arbitral tribunals established under bilateral investment treaties (BITs) illustrate this trend.¹² While the WTO, for example, has held that an impact on the competitive conditions between domestic and imported products breaches the national treatment principle, some tribunals have found that insufficient for demonstrating a violation of the national treatment.¹³ Consequently, parties are confused as to which precedent to follow.¹⁴

Further, BITs usually contain substantive rights and obligations parallel to some of the WTO agreements while subjecting all disputes arising under the BITs to arbitral tribunals rather than the WTO.¹⁵ Thus disputes arising from the same factual background can be litigated in both investor-state arbitral tribunals and the WTO.¹⁶ For example, the softwood lumber dispute between the U.S. and Canada led to “[four] WTO disputes, [fifteen] NAFTA Chapter 19 cases, and [six] disputes under NAFTA Chapter 11.”¹⁷

In some recent cases, investors have brought WTO claims in arbitral tribunals, even though the pertinent BIT did not contain substantive terms

¹⁰ Margaret A. Young, *Fragmentation*, OXFORD BIBLIOGRAPHIES, <https://perma.cc/6BY4-R7SE> (last reviewed May 12, 2017); see also Simon Klopschinski, *The WTO's DSU Article 23 as Guiding Principle for the Systemic Interpretation of International Investment Agreements in the Light of TRIPs*, 19 J. INT'L ECON. L. 211, 220 (2016).

¹¹ National treatment principle requires imported and locally-produced goods to be treated equally. In international investment law context, it requires foreign and domestic investors receive equal treatment.

¹² See Allen & Soave, *supra* note 9, at 17; Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EUR. J. INT'L L. 749, 752–55 (2009). See generally YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003).

¹³ Allen & Soave, *supra* note 9, at 17 (citing Appellate Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 137, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Dec. 11, 2000); Appellate Report, *Chile—Taxes on Alcoholic Beverages*, ¶ 71, WTO Doc. WT/DS87/AB/R, WT/DS110/AB/R (adopted Dec. 13, 1999); *Methanex Corp. v. United States*, NAFTA Chapter 11 Arbitral Tribunal, Final Award of the Tribunal on Jurisdiction and Merits, 17–19, ¶ 34–37, 44 I.L.M. 1345 (Aug. 3, 2005)).

¹⁴ Allen & Soave, *supra* note 9, at 2.

¹⁵ Gaetan Verhoosel, *The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT'L ECON. L. 493, 495 (2003).

¹⁶ See generally Allen & Soave, *supra* note 9 (discussing “the *Softwood Lumber* disputes between the United States and Canada, and disputes over taxes imposed by Mexico on high fructose corn syrup”).

¹⁷ *Id.* at 33.

parallel to the WTO agreements.¹⁸ Instead, they have argued that a tribunal's jurisdiction over WTO claims arose purely from the "umbrella clause" in the BIT.¹⁹

A typical umbrella clause requires a state party to "observe *any obligation* it may have entered into with regard to investments of nationals or companies of the other Contracting Party."²⁰ The scope of "any obligation" remains unclear.²¹ Investors often interpret "any obligation" broadly to bring a wider range of claims against a host state in investment tribunals. Investors frequently argue that the term "any obligation" includes a host state's contractual obligations under an investment agreement,²² so that a pure contract violation can be elevated to the level of a treaty violation (even though the host state did not violate any substantive provisions in the BIT).²³

For example, the private investor in *Phillip Morris Asia v. Australia*²⁴ argued that "any obligation" included a host state's commitments under other international treaties, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).²⁵ The investor argued that they were entitled therefore to bring claims under TRIPS at the investor-state arbitral tribunal established under the Australia–Hong Kong BIT.²⁶ Australia, the host state, objected strongly to the investor's attempt to broaden the coverage of the umbrella clause and insisted that the WTO had exclusive jurisdiction over the TRIPS claims.²⁷ The arbitral tribunal did not ultimately address this argument on the merits because the investor did not raise this argument in subsequent

¹⁸ See, for example, *Philip Morris Asia Ltd. v. Austrl.*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 4 Regarding the Procedure until a Decision on Bifurcation, ¶ 40 (Oct. 26, 2012).

¹⁹ *Id.*

²⁰ RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 166–67 (2d ed. 2012) (emphasis added).

²¹ See, for example, Mihir C. Naniwadekar, *The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference?*, 2 *TRADE L. & DEV.* 169, 170–172 (2010); Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches Of Contract, Treaty Violations, and The Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 *GEO. MASON L. REV.* 135, 152–56 (2006).

²² Christoph Schreuer, *Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 832, 839–40 (Peter Muchlinski et al. eds., 2008).

²³ *Id.*; *SGS Société Générale de Surveillance S.A. v. Phil.*, ICSID Case No. ARB/02/6, *Objections to Jurisdiction*, ¶ 95 (Jan. 29, 2004), 8 *ICSID Rep.* 518 (2005).

²⁴ *Philip Morris Asia Ltd. v. Australia*, Procedural Order No. 4, *supra* note 18, at ¶ 40.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

hearings.²⁸ Under this interpretation, a tribunal can exercise jurisdiction over WTO claims even when the BIT at issue contains no substantive provisions similar to those in WTO agreements.

Allowing investors to bring WTO claims in arbitral tribunals solely under the umbrella clause would likely further increase the fragmentation of international law. Where investment arbitrations under BITs and WTO proceedings govern similar issues, private investors typically prefer arbitration to WTO proceedings²⁹ due to a few differences between the forums.³⁰ The first difference is that only states have standing to sue in the WTO forum,³¹ whereas private investors can sue directly in arbitral tribunals.³² For the former to occur, an exporting industry needs to lobby its home state to initiate WTO proceedings.³³ Whether the lobby succeeds depends largely on non-economic factors such as political relationships between the states.³⁴

Moreover, the remedies offered by the WTO are almost exclusively prospective³⁵ in contrast to arbitral tribunals where damages are likely to be retrospective.³⁶ These features of WTO proceedings will likely incentivize

²⁸ See Philip Morris Asia Ltd. v. Austrl., UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8 Regarding Bifurcation of the Procedure, ¶ 34 (Apr. 14, 2014). For a discussion of what would have happened had the tribunal taken up the issue, see Stephanie Hartmann, *When Two International Regimes Collide: An Analysis of the Tobacco Plain Packaging Disputes and Why Overlapping Jurisdiction of the WTO and Investment Tribunals Does Not Result in Convergence of Norms*, 21 UCLA J. INT'L L. FOREIGN AFF. 204, 240–42 (2017).

²⁹ JÜRGEN KURTZ, *THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS* 229 (2015).

³⁰ For a discussion of how these tribunals advantage private investors, see Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in *INTERNATIONAL INVESTMENT LAW* 1324 (José E. Alvarez ed., 2017).

³¹ See DSU, *supra* note 7, at art. 1; Christian Walter, *Article 17 DSU*, in *WTO: INSTITUTIONS AND DISPUTE SETTLEMENT* 445, 470 (Rüdiger Wolfrum et al. eds., 2006); KURTZ, *supra* note 29, at 229.

³² KURTZ, *supra* note 29, at 229.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 230. In practice, a state usually only needs to bring the trade practice into conformity with the WTO provisions prospectively if a violation is found. *Id.* (“[S]ole responsibility is to remove the measure”). Compensation has been rare because parties have been reluctant to reach an agreement. *But see* Geraldo Vidigal, *Re-Assessing WTO Remedies: The Prospective and the Retrospective*, 16 J. INT'L ECON. L. 505, 505 (2013) (“Although it would be beyond the current powers of WTO adjudicators to grant reparation, this does not exhaust, the possibilities of ‘retrospective’ remedies.”).

³⁶ By contrast, an arbitration award typically allows retrospective damages. KURTZ, *supra* note 29, at 230. *See, for example*, *SGS Société Générale v. Phil.*, *supra* note 23, at ¶ 127 (claiming retrospective damages).

investors to bring claims in arbitral tribunals.³⁷ At least one scholar has commented that arbitrations provide foreign investors with “an opportunity directly to challenge breaches of WTO law and to seek relief in the form of cessation of the WTO-inconsistent measure.”³⁸

Most BITs allow parties to use both state-to-state and investor-state investment arbitrations³⁹ to settle disputes.⁴⁰ Although state-to-state arbitration remains the main dispute resolution mechanism, investor-state arbitrations have grown exponentially in the last decade.⁴¹ Only a small number of articles have analyzed the overlapping jurisdictions of investor-state arbitration and WTO proceedings. Among them, even fewer works have addressed the umbrella clause’s coverage of WTO claims.⁴² This Comment will address that gap.

This Comment addresses whether an investor-state arbitral tribunal has jurisdiction over World Trade Organization (WTO) claims brought under a BIT’s umbrella clause.⁴³ Specifically, I argue that allowing private investors to bring WTO claims in investor-state arbitral tribunals may deepen inconsistency in interpreting WTO agreements, and thus, lead to greater fragmentation of international law. Further, there are key differences between WTO proceedings and investor-state arbitration that are likely to incentivize private investors to bring WTO claims in arbitral tribunals rather than in the WTO if such claims are allowed to proceed in that forum.

³⁷ Verhoosel, *supra* note 15, at 494–95; KURTZ, *supra* note 29, at 229–33.

³⁸ Verhoosel, *supra* note 15, at 493.

³⁹ All investment arbitrations discussed in this Comment are investor-state arbitrations.

⁴⁰ See, for example, Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, Switz.-Pak., art. 10, July 11, 1995, SR 0.975.262.3 [hereinafter Swiss-Pakistan BIT].

⁴¹ United Nations Conference on Trade and Development, *Latest Developments in Investor–State Dispute Settlement*, UNCTAD/WEB/TTE-IIA/2008/3 (2008), at 1–2.

⁴² Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT’L L. 35, 56 (2013) (“There is virtually no discussion as to whether WTO commitments, including provisions of the TRIMs Agreement, constitute an investment obligation within the meaning of BIT umbrella clauses.”); see also Hartmann, *supra* note 28, at 240–42 (examining *Phillip Morris Asia v. Australia*, *supra* note 28, but focusing on parallel substantive rules and only briefly discussed the scope of the umbrella clause); Klopschinski, *supra* note 10, at 213–14 (limiting his discussion to whether Article 23 of the DSU prevented the umbrella clause from covering TRIPS claims); LUKAS VANHONNAEKER, INTELLECTUAL PROPERTY RIGHTS AS FOREIGN DIRECT INVESTMENTS 133–40 (2015) (focusing on the regulation of performance requirements); DOLZER & SCHREUER, *supra* note 20, 166–67 (briefly discussing the scope of the umbrella clause without analyzing its coverage of WTO claims in detail).

⁴³ This Comment only focuses on situations where: 1) a host state does not violate the substantive terms of the BIT, and 2) an investor brings WTO claims at a tribunal without bringing claims at the WTO.

Section II examines the background of this topic. Section III then analyzes how the WTO's exclusive and compulsory jurisdiction may prevent an investor-state arbitral tribunal from exercising jurisdiction over WTO claims. Specifically, this Section examines Article 23 of the DSU may apply to investor-state disputes. And if so, Article 23 may prevent investor-state arbitral tribunals from governing WTO claims.

Section IV explains the origin of the umbrella clause and its various iterations. The broadest type of umbrella clause requires states parties to "observe any obligations" undertaken towards the foreign investors. Concerned about the indefinite scope of this type of clause, many BITs have introduced qualifying words into their umbrella clauses. The parties know that drafting of the umbrella clause is important because many tribunals interpret a clause's scope based on its wording.

Section IV also describes jurisprudence on the umbrella clause issue and explores the general trend of this area of law to date. The cases that are relevant here are responding to three questions: whether the umbrella clause covers contractual claims between states and foreign investors; if so, whether the umbrella clause requires privity of contract; and whether the umbrella clause applies to general legislation. The jurisprudence in these three areas suggest a broadening scope of the umbrella clause.

Section V offers solutions and analyzes their potential impacts. I caution that states should draft umbrella clauses clearly, and should unambiguously specify whether the umbrella clause covers WTO claims. Alternatively, if states do not want any unexpected claim to sneak in, they may delete the umbrella clause altogether from the BIT. The WTO also needs to clarify whether Article 23 applies to investor-state disputes. Although the WTO has been unwilling to defer jurisdiction to another forum, it has never stopped members from seeking redress in another forum on similar issues. At this point, the WTO is in the best position to clarify whether private parties can bring WTO claims in another dispute resolution forum.

II. THE WTO'S EXCLUSIVE AND COMPULSORY JURISDICTION OVER WTO CLAIMS

Private investors have brought WTO claims under a BIT's umbrella clause in at least three arbitral tribunals. Investors in all three cases claimed that the host state violated its obligations under TRIPS.

In 2010, in *Phillip Morris v. Uruguay*,⁴⁴ Phillip Morris challenged an ordinance enacted by the Uruguayan Ministry of Public Health. The ordinance required graphic images illustrating the adverse health effects of smoking to be included with warnings on cigarette packaging⁴⁵ and mandated cigarettes sold under each brand to have uniform packaging and presentation.⁴⁶ Phillip Morris argued that the ordinance violated Uruguay's promises under TRIPS, the Paris Convention for the Protection of Industrial Property (the "Paris Convention"), and other international treaties.⁴⁷ The company claimed that Uruguay had therefore breached the umbrella clause in the BIT between Switzerland and Uruguay to "observe the commitments it has entered into with respect to the investments of Swiss investors."⁴⁸ Uruguay's response is not available to the public.⁴⁹

The following year, in *Phillip Morris Asia v. Australia*, Phillip Morris Asia challenged Australia's tobacco plain packaging rule, which prohibited the use of trademarks and other symbols on tobacco packaging in order to eliminate tobacco branding.⁵⁰ Phillip Morris Asia argued that Australia's tobacco plain packaging rule violated its international obligations under TRIPS, the Paris Convention, and the Agreement on Technical Barriers to Trade.⁵¹ It further claimed that Australia failed to comply with the umbrella clause of the Australia-Hong Kong BIT of 1993, which "requires each Contracting Party to observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."⁵²

Australia responded that the umbrella clause did not cover Australia's general obligations under other international treaties,⁵³ and that even if it did, the umbrella clause could not disrupt the dispute resolution mechanisms (especially those with exclusive jurisdiction) provided for by those international treaties.⁵⁴ It

⁴⁴ Philip Morris Brands Sàrl v. Oriental Repub. of Uru., ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013).

⁴⁵ *Id.* at ¶ 5.

⁴⁶ *Id.* at ¶ 6.

⁴⁷ Philip Morris Brands Sàrl v. Oriental Repub. of Uru., ICSID Case No. ARB/10/7, Request for Arbitration, ¶ 86 (Feb. 19, 2010).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Philip Morris Asia Ltd. v. Austrl., UNCITRAL, PCA Case No. 2012-12, Notice of Arbitration, ¶ 4.12 (Nov. 21, 2011).

⁵¹ *Id.* at ¶ 7.17.

⁵² *Id.* at ¶ 7.15–7.17.

⁵³ Philip Morris Asia Ltd. v. Austrl., UNCITRAL, PCA Case No. 2012-12, Australia's Response to the Notice of Arbitration, ¶¶ 35, 57 (Dec. 21, 2011).

⁵⁴ *Id.* at ¶ 35.

argued that the umbrella clause could not “establish a *roving jurisdiction* that would enable a BIT tribunal to make a broad series of determinations” and therefore potentially in conflict with determinations from other agreed forums.⁵⁵ It also indicated that WTO obligations are undertaken at the interstate level and therefore have their “own particular inter-State dispute resolution procedures.”⁵⁶

Three years later, in *Eli Lilly v. Canada*,⁵⁷ Eli Lilly brought a claim against Canada for a violation of TRIPS in a tribunal established under NAFTA Chapter 11.⁵⁸ Canada countered that the tribunal lacked jurisdiction over the TRIPS claims because that provision may only be challenged at the WTO.⁵⁹

In both *Phillip Morris Asia* and *Eli Lilly*, the respective state party’s main argument was that the WTO possessed exclusive jurisdiction over these claims and that arbitral tribunals did not. This argument finds support in Article 23 of the DSU, which provides that “[w]hen Members seek the redress of a violation of obligations . . . under the covered agreements . . ., they *shall* have recourse to, and abide by, the rules and procedures of this Understanding.”⁶⁰ In other words, Article 23 “mandat[es] recourse to the multilateral system of the WTO for the settlement of disputes,”⁶¹ and the jurisdiction of the WTO is exclusive and compulsory to all WTO members for “all disputes arising under the WTO Agreement.”⁶²

While the tribunals in the above cases did not address whether they had jurisdiction over WTO claims,⁶³ the remainder of this Section examines the validity of the jurisdictional question from three perspectives: 1) whether Article 23 applies to investor-state disputes; 2) whether Article 23 disallows a private investor from bringing WTO claims at an arbitral tribunal; and 3) whether parties can contract out of Article 23.

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Id.* at ¶ 58.

⁵⁷ *Eli Lilly v. Can.*, UNCITRAL, Case No. UNCT/14/2, Notice of Arbitration (Sept. 12, 2013).

⁵⁸ *Id.* at ¶¶ 3, 42.

⁵⁹ *Eli Lilly v. Can.*, UNCITRAL, Case No. UNCT/14/2, Government of Canada Statement of Defense, ¶¶ 83–84 (June, 30 2014).

⁶⁰ *See* DSU, *supra* note 7, at art. 23.1 (emphasis added).

⁶¹ *Dispute Settlement System Training Module*, WORLD TRADE ORGANIZATION, Chapter 1.3: Introduction to the WTO Dispute Settlement System, <https://perma.cc/6JN2-3VLP> (last visited May 30, 2017).

⁶² *Id.*

⁶³ The tribunals decided the case based on other issues raised in the cases.

A. Applying Article 23 to Investor-State Disputes

Entitled “Strengthening of the Multilateral System,” DSU Article 23 seeks to prevent unilateralism.⁶⁴ Evidence of this purpose is found in its legislative history. Faced with the U.S.’s unilateral efforts to address perceived WTO violations,⁶⁵ the Uruguay Round⁶⁶ of negotiations centered on “the limitation of unilateral action.”⁶⁷ The WTO repeatedly emphasized the importance of strengthening multilateralism under Article 23. For example, the arbitral panel in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*⁶⁸ stated that “Article 23.1 of the DSU . . . stresses the primacy of the multilateral system and rejects unilateralism. . . .” Likewise, the panel in *Canada—Export Credits and Loan Guarantees for Regional Aircraft*⁶⁹ also asserted that “Article 23.1 of the DSU provides that Members shall resolve all disputes through the multilateral dispute system, to the exclusion of unilateral self-help.”⁷⁰ Specifically, the WTO has held that Article 23 prohibits a Member State from “submit[ting] a dispute concerning rights and obligations under the WTO Agreement to an international dispute settlement body outside the WTO framework” or “act[ing] unilaterally to seek to obtain the results that can be achieved through the remedies of the DSU.”⁷¹

WTO members may regard foreign investors’ WTO claims in a non-WTO forum as a unilateral action violating Article 23. Yet a literal reading of Article 23 seems to require only *Member States* to subject WTO claims to the WTO, and therefore it does not prohibit private parties from bringing WTO claims in arbitral tribunals. For example, Article 23.1 discusses “[w]hen *Members* seek the redress of a violation,” and Article 23.2 requires “*Members* . . . not to make a

⁶⁴ See Arthur Steinmann, *Article 23 DSU*, in WTO: INSTITUTIONS & DISPUTE SETTLEMENT, *supra* note 31, at 558.

⁶⁵ Such as the enactment of Section 301.

⁶⁶ Ernest H. Preeg, *The Uruguay Round Negotiations and the Creation of the WTO*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 122 (Martin Daunton et al. eds. 2012) (“The Uruguay Round, launched at Punta del Este, Uruguay, in September 1986, and concluded at Marrakesh, Morocco, in March 1994, was the most important and successful of the eight General Agreement on Tariffs and Trade (GATT) rounds of multilateral negotiations.”).

⁶⁷ Steinmann, *supra* note 64, at 558.

⁶⁸ Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58 (adopted May 15, 1998).

⁶⁹ Panel Report, *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WTO Doc. WT/DS222/R (adopted Jan. 28, 2002).

⁷⁰ *Id.* at ¶ 7.170 (footnote excluded).

⁷¹ Panel Report, *European Communities—Measures Affecting Trade in Commercial Vessels*, ¶ 7.195, WTO Doc. WT/DS301/R (adopted Apr. 22, 2005) [hereinafter *E.C.—Commercial Vessels*].

determination.”⁷² When the WTO interpreted Article 23, it also focused on state actions. For example, the panel in *United States—Sections 301–310 of the Trade Act of 1974*⁷³ indicated that Article 23 was targeted at “state conduct” such as domestic legislation.⁷⁴ Likewise, the panel in *United States—Import Measures on Certain Products from the European Communities*⁷⁵ also stated that Article 23 applied to “a reaction by a *Member* against another *Member* because of a perceived (or WTO determined) WTO violation.”⁷⁶ Indeed, these cases addressing Article 23 have focused on state actions rather than private conduct.

Some believe that allowing private parties to address WTO violations in investment tribunals is reasonable because the DSU only gives state parties standing to sue at the WTO. One view is that “WTO dispute bodies and investor-State tribunals do not compete for jurisdiction” because the parties in the two situations are different.⁷⁷ Further, “overlap is only objectionable where there is meaningful jurisdictional competition—i.e., where the parties and issues are essentially the same.”⁷⁸

However, there are counterarguments to this explanation both in theory and in practice. First, some scholars hold the view that private investors’ rights to assert claims in tribunals are “derivative” of their home states’ rights under their BITs.⁷⁹ Under this theory, when an investor brings a claim at a tribunal formed under a BIT, it “step[s] into the shoes of the home State, and exercise[s] rights that are essentially those of the State.”⁸⁰ “It is essentially the home State that is asserting the investment claim—conceivably the same State that is

⁷² DSU, *supra* note 7, at art. 23.1 (emphasis added).

⁷³ Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R (adopted Dec. 22, 1999).

⁷⁴ *Id.* at ¶ 7.45.

⁷⁵ Panel Report, *United States—Import Measures on Certain Products from the European Communities*, WTO Doc. WT/DS165/R (adopted July 17, 2000) [hereinafter *U.S.—Certain E.C. Products*].

⁷⁶ *Id.* at ¶ 6.22.

⁷⁷ See Allen & Soave, *supra* note 9, at 14; see also generally SHANY, *supra* note 12.

⁷⁸ Allen & Soave, *supra* note 9, at 14. See also *id.* at 42 (“[I]t is difficult to see how the dispute settlement clauses in a BIT and the DSU would conflict.”); see also generally SHANY, *supra* note 12.

⁷⁹ Allen & Soave, *supra* note 9, at 14–15; Riikka Kuoppamäki, *Overlapping Jurisdictions between the World Trade Organization and Preferential Trade Agreements*, 14 (Mar. 2016) (Master’s Thesis, University of Helsinki), <https://perma.cc/G9SF-XSDC>.

⁸⁰ Allen & Soave, *supra* note 9, at 14.

pursuing a parallel WTO claim.”⁸¹ According to this view, Article 23 likely applies to private investors.⁸²

Second, a home state may also subsidize, or in other ways incentivize, private investors to challenge WTO violations in tribunals, which likely constitutes state action. The WTO tends to interpret state action under Article 23 broadly.⁸³ As such, state action is likely when private parties in one state systematically bring WTO claims in arbitral tribunals on a large scale or focused on a particular industry.⁸⁴ If the private parties involved are state-owned companies, the state government may find it even harder to argue that it is not involved. States such as China, whose overseas investments are predominantly directed by state policy and state-owned companies, are particularly vulnerable to this view.⁸⁵

Third, states themselves are involved in investor-state arbitrations by signing a BIT that creates tribunals that reach WTO claims. This is especially true when states do so with the intention of seeking redress for WTO violations in a non-WTO forum.

Lastly, allowing private parties to bring WTO claims in tribunals may produce the same effects as unilateral state action.⁸⁶ For example, an arbitration award may indirectly lead to the “removal of [a] WTO-inconsistent measure.”⁸⁷ A tribunal’s jurisdiction over WTO claims “involves the risk of disrupting the complex balance of rights and obligations of WTO Member States,” and “[t]he

⁸¹ *Id.*

⁸² By contrast, some other scholars believe that “the investor is not a proxy for the State, and has direct dispute settlement rights.” Under a “direct right theory,” investors’ WTO claims at arbitral tribunals unlikely conflict with the Article 23 jurisdiction. *See id.*

⁸³ As the *U.S.—Sections 301 Trade Act* panel stated, “There is a great deal more State conduct . . . can violate the general obligation in Article 23.1 to have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2.” *See U.S.—Sections 301 Trade Act*, *supra* note 73, at ¶ 7.45.

⁸⁴ As of 2014, for example, nearly 60 arbitration cases were filed against Argentina, the highest number among all states, while only 22 cases were filed against Argentina through WTO proceedings. Venezuela and the Czech Republic, the second and third largest respondent states in investment arbitration as of 2014, were not among the top ten respondent states in WTO proceedings. *See* Simon Lester, *Investment Complaints vs. Trade Complaints, by Respondent States*, INT’L ECON. L. & POL’Y BLOG (Mar. 29, 2016), <https://perma.cc/57AV-96DP>.

⁸⁵ *See generally* Lin Cui & Fuming Jiang, *State Ownership Effect on Firms’ FDI Ownership Decisions Under Institutional Pressure: A Study of Chinese Outward-Investing Firms*, 43 J. INT’L. BUS. STUD. 246 (2012); Chih-shian Liou, *Bureaucratic Politics and Overseas Investment by Chinese State-Owned Oil Companies: Illusory Champions*, 49 ASIAN SURV. 670 (2009).

⁸⁶ *See* Klopschinski, *supra* note 10, at 229.

⁸⁷ *Id.* at 232.

frictions caused thereby are at least comparable to those that might arise from the unilateral enforcement of WTO rules by WTO members.”⁸⁸

The four considerations above indicate that permitting private investors to bring WTO claims in investment tribunals may constitute a unilateral act to address WTO violations in an alternative forum, as is prohibited by DSU Article 23. This is especially true when a state incentivizes private investors to bring WTO claims on a large scale in investment tribunals, when those large-scale actions target a specific industry or host state, and when arbitral awards achieve similar effects to remedies provided through WTO proceedings. Although a superficial reading of Article 23 may lead us to conclude that it does not apply to private parties, the purpose of Article 23 arguably favors its application to investor-state dispute resolutions whose effects are large enough to constitute unilateral action.

B. Article 23 May Prevent a Private Investor from Bringing WTO Claims at an Arbitral Tribunal

1. Article 23.1

As a general principle, DSU Article 23.1 applies when Members “seek the redress of a violation.”⁸⁹ The WTO has interpreted “seeking the redress” broadly as “a reaction . . . because of a perceived . . . WTO violation, with a view to remedying the situation.”⁹⁰

In *E.C.—Commercial Vessels*, the European Communities urged the Panel to limit the scope of “seeking the redress” in two ways. First, the European Communities argued that Article 23.1 was “entirely procedural in nature” and functioned as an “exclusive jurisdiction clause.”⁹¹ Under this narrow interpretation, the WTO likely only governs interstate disputes, and even if arbitration is authorized, incentivized, or otherwise derived from state actions, it does not interfere with the exclusive jurisdiction clause prescribed by Article 23. However, the WTO rejected the European Communities’ narrow interpretation.

Then the European Communities insisted that measures prohibited by Article 23 were limited to “retaliatory measures in the form of suspension of WTO concessions or obligations.”⁹² This definition excludes other remedial actions. Bringing WTO claims in an arbitral tribunal does not constitute retaliation or suspension of WTO obligations. Thus, under this argument,

⁸⁸ *Id.* at 229.

⁸⁹ *See* DSU, *supra* note 7, at art. 23.1.

⁹⁰ *See* U.S.—*Certain E.C. Products*, *supra* note 75, at ¶ 6.22.

⁹¹ *See* *E.C.—Commercial Vessels*, *supra* note 71, at ¶ 7.179.

⁹² *Id.*

Article 23 does not prohibit states from subsidizing private parties to bring WTO claims in arbitral tribunals. Nevertheless, the panel rejected European Communities' argument again and held that "seeking the redress" broadly included "seek[ing] to obtain the results that can be achieved through the remedies of the DSU."⁹³

The WTO has strictly enforced Article 23 by prohibiting the referral of WTO claims to other forums. In *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*,⁹⁴ Article II of GATT was in dispute.⁹⁵ The panel held that it "it lack[ed] the authority to refer the dispute . . . to the [World Customs Organization] or any other body"⁹⁶ because its jurisdiction over disputes arising under GATT was required by the DSU.⁹⁷ Given the broad definition of "seeking the redress," a state subsidizing or otherwise incentivizing private parties to bring WTO claims in arbitral tribunals likely constitutes "seeking the redress" and is likely prohibited by Article 23.

2. Article 23.2

Article 23.2 prescribes specific obligations guided by the general principle in Article 23.1.⁹⁸ Article 23.2(a) prohibits members from "mak[ing] a determination to the effect that a violation has occurred" without recourse to the WTO or inconsistently with the findings contained in the WTO's reports.⁹⁹

The WTO construes the "determination" narrowly. The Appellate Body in *Canada—Continued Suspension of Obligations in the E.C.—Hormones Dispute*¹⁰⁰ explained that a determination needed to be a final decision, which "implies a high degree of firmness or immutability."¹⁰¹ Therefore, Article 23.2(a) does not cover "preliminary opinions or views expressed without a clear intention to seek redress."¹⁰²

⁹³ *Id.* at ¶ 7.195.

⁹⁴ Panel Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WTO Doc. WT/DS269/R (adopted May 30, 2005) [hereinafter *E.C.—Chicken Cuts*].

⁹⁵ General Agreement on Tariffs & Trade 1994 art. II, Apr. 14, 1994, 1867 U.N.T.S. 190.

⁹⁶ *E.C.—Chicken Cuts*, *supra* note 94 at ¶ 7.56.

⁹⁷ *Id.* at ¶¶ 7.58–59.

⁹⁸ See U.S.—*Sections 301 Trade Act*, *supra* note 73, at ¶ 7.44 (stating that Article 23.2 is "explicitly linked to, and has to be read together with and subject to, Article 23.1").

⁹⁹ See DSU, *supra* note 7, at art. 23.2(a).

¹⁰⁰ Appellate Report, *Canada—Continued Suspension of Obligations in the E.C.—Hormones Dispute*, WTO Doc. WT/DS321/AB/R (adopted Oct. 16, 2008).

¹⁰¹ *Id.* at ¶ 396.

¹⁰² *Id.*

In this case, the delegates of the U.S. and Canada expressed their dissatisfaction with the European Communities' alleged compliance with the WTO Appellate Body's recommendations during two meetings.¹⁰³ The European Communities argued that such statements at the meetings constituted "a determination to the effect that a violation has occurred."¹⁰⁴ However, the Appellate Body disagreed and held that these two statements were "no more than initial actions in response to the European Communities' self-proclaimed compliance," "not intended to have legal effects," and "[did] not have the legal status of a definitive determination in of themselves."¹⁰⁵ A conclusion otherwise, the Appellate Body explained, would have a "chilling effect" on preliminary statements.¹⁰⁶

Although an arbitration award seems to be a final determination of the dispute between private investors and the host state, it can also be understood as merely a preliminary opinion that WTO may look at if interstate WTO proceedings arise in the future. The home state is free to bring another suit later in the WTO, and the previous arbitration award does not bind the WTO in the later proceeding. In this sense, the award may not constitute a final determination of a WTO violation. On the other hand, if an arbitration award is significant enough to have the effects of changing a host state's policies or otherwise affecting the state's investment regulations, a host state may argue that this award constitutes a "final determination." The DSU text and WTO case law leave both interpretations possible.

C. Contracting out of Article 23

The Vienna Convention on the Law of Treaties (VCLT) allows for *inter se* modification to a treaty. This means that parties may modify a treaty between them if the treaty does not explicitly prohibit the modification, the modification does not affect third parties' rights, and provided that the *inter se* modification does not "relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."¹⁰⁷ Private investors may argue that any two states have modified Article 23 between them through the umbrella clause in a given BIT. Contracting out of Article 23 likely does not go against the object and purpose of the DSU as a whole because,

¹⁰³ *Id.* at ¶ 395.

¹⁰⁴ *Id.* at ¶ 218.

¹⁰⁵ *Id.* at ¶ 398.

¹⁰⁶ *Id.* at ¶ 399.

¹⁰⁷ Vienna Convention on the Law of Treaties art. 41, May 23, 1969, 1155 U.N.T.S. 331. *See also id.*, at arts. 30, 31.3(a).

unlike unilateral action by one state, both states agreed to subject the dispute to another forum. Recent WTO cases offer more insight on the validity of this argument.

On the one hand, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*¹⁰⁸ found that parties were allowed to give up the right to sue under the DSU through *ex ante* agreements.¹⁰⁹ In that case, the European Communities, the United States, and Ecuador disagreed about whether they had waived the right to bring complaints in the WTO with respect to the European Communities' regulations for importing bananas.¹¹⁰ The Appellate Body held that the parties could waive WTO proceedings by an understanding if the language in the understanding "reveal[s] clearly that the parties intended to relinquish their rights."¹¹¹

In *United States—Continued Suspension of Obligations in the E.C.—Hormones Dispute*,¹¹² the Appellate Body permitted the parties to contract out of Article 17(10) of the DSU, which provides that the appellate proceeding be confidential.¹¹³ The Appellate Body ruled that contracting out of Article 17(10) was allowed because the confidentiality requirement operated "in a relational manner."¹¹⁴ Scholars have argued that Article 23 also works "in a relational manner" because it is "a promise of each WTO member to each other WTO member," different from "an absolute commitment that is subject to derogation by two disputing parties jointly."¹¹⁵

¹⁰⁸ Appellate Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Second Recourse to Article 21.5 of the DSU by Ecuador, WTO Doc. WT/DS27/AB/RW2/ECU (adopted Nov. 26, 2008) [hereinafter *E.C.—Bananas III*].

¹⁰⁹ *Id.* at ¶ 217. However, different parties expressed different attitudes towards contracting out WTO's jurisdiction by FTA. "[T]he US is willing to accept waivers expressed in DSU understandings, but not in FTAs (see para. 7.520). The EU and, interestingly, also Brazil, in contrast, explicitly open the door for FTAs to impact WTO rights even in WTO dispute settlement (see paras. 7.66 and 7.522 and paras. 7.62 and 7.518, respectively)." See *Waiving WTO Rights in an FTA? Panel Report on Peru—Agricultural Products*, INT'L ECON. L. & POL'Y BLOG (Dec. 3, 2014), <https://perma.cc/3AMA-RGPY>.

¹¹⁰ See Appellate Report, *E.C.—Bananas III*, *supra* note 108, at ¶¶ 217–28.

¹¹¹ *Id.* at 217.

¹¹² Appellate Report, *United States—Continued Suspension of Obligations in the E.C.—Hormones Dispute*, WTO Doc. WT/DS320/AB/R (adopted Oct. 16, 2008).

¹¹³ See *id.* at Annex IV ¶ 6.

¹¹⁴ *Id.*

¹¹⁵ Luiz E. Salles, *A Deal is a Deal: Party Autonomy, the Multiplication of PTAs, and WTO Dispute Settlement*, 16 QUESTIONS INT'L L. 15, 28 (2015). However, the fact that investors increasingly base their claims upon umbrella clauses between two states under Most Favored Nation doctrine might turn Article 23 from a relational matter into an absolute one.

On the other hand, the panel in *Peru—Additional Duty on Imports of Certain Agricultural Products*¹¹⁶ held that parties did not contract out of the WTO proceeding through an *ex ante* agreement.¹¹⁷ The Appellate Body upheld this finding.¹¹⁸ In 2011, Guatemala concluded a BIT with Peru, which explicitly recognized Peru’s right to maintain a price range system for certain agricultural products,¹¹⁹ which Guatemala argued allowed Peru to impose an additional duty.¹²⁰ Oddly, Guatemala approved and formally ratified the BIT while the case was proceeding (Peru did not), which led Peru to argue that Guatemala had failed to engage in the proceedings with good faith and waived the right to the WTO proceeding since the BIT explicitly allowed Peru to maintain the Price Range System.¹²¹ However, the panel found Peru’s argument unconvincing.¹²² Instead, the panel indicated that parties could waive WTO proceedings only when the WTO rules explicitly authorize a departure.¹²³

Some have argued that the decision in *Peru—Agricultural Products* “clogged up the avenue” to depart from WTO provisions.¹²⁴ WTO agreements do not explicitly allow parties to depart from Article 23, and, thus, parties cannot modify the WTO’s exclusive and compulsory jurisdiction under Article 23 *inter se* under *Peru*.¹²⁵ Importantly, in a footnote, the Appellate Body explicitly warned that Article 23 of the DSU prohibited Members from “relinquish[ing] their rights and obligations under the DSU *beyond the settlement of specific disputes*.”¹²⁶ The umbrella clause made as a general matter in a BIT likely does not satisfy the

¹¹⁶ Panel Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, WTO Doc. WT/DS457/R (Nov. 27, 2014).

¹¹⁷ *Id.* at ¶ 7.84.

¹¹⁸ Appellate Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, WTO Doc. WT/DS457/AB/R, ¶ 5.28 (July 20, 2015).

¹¹⁹ *Id.* at ¶ 2.2.

¹²⁰ *Id.* at ¶ 7.206.

¹²¹ Appellate Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, *supra* note 118, at ¶¶ 5.91, 5.106. For a discussion of the good faith requirement in DSU, Article 3.10, *see* Panel Report, *Peru—Certain Agricultural Products*, *supra* note 116, at ¶ 3.5.

¹²² Panel Report, *Peru—Certain Agricultural Products*, *supra* note 116, at ¶ 7.96; Appellate Report, *Peru—Certain Agricultural Products*, *supra* note 118, at ¶ 6.1.

¹²³ *Id.*

¹²⁴ *See* Salles, *supra* note 115, at 28.

¹²⁵ Yet others argue against this narrow interpretation of *Peru—Agricultural Products*. They believe that WTO Members can give up their right to sue in the WTO forum if “(i) such waiver/consent can be firmly established and is legal/valid, and (ii) it does not affect the rights of third parties.” Joost Pauwelyn, *Waiving WTO Rights in an FTA? Panel Report on Peru—Agricultural Products*, INT’L ECON. L. & POL’Y BLOG (Dec. 3, 2014), <https://perma.cc/HD98-R9AX>.

¹²⁶ Appellate Report, *Peru—Certain Agricultural Products*, *supra* note 118, at ¶ 5.26 n. 106.

“specific dispute” requirement.¹²⁷ The specific meaning of this requirement depends on further clarification by WTO.

Lastly, specific WTO agreements may explicitly allow Members to contract out of the DSU. For example, Article 1(1) of TRIPS allows Members to implement “more extensive protection” than that required by TRIPS, so long as the protection “does not contravene” the provisions in TRIPS. At the same time, Article 64(1) subjects all dispute resolution to the DSU, which includes Article 23 of the DSU. Allowing private investors to bring WTO claims in arbitral tribunals likely constitutes “more extensive protection” because it provides for one more way to sue on TRIPS violations. However, whether this practice contravenes Article 64(1) remains unclear.

III. THE ORIGIN AND TEXT OF UMBRELLA CLAUSES

A. The Origins of the Umbrella Clause

The umbrella clause originated in the context of the controversies in the 1950s over whether an investment agreement between a host state and a private investor should be subject to the municipal law of the host state or to international law.¹²⁸ On the one hand, the Permanent Court of International Justice indicated in *Case Concerning the Payment of Various Serbian Loans Issued in France*¹²⁹ that a contract between a host state and a private party was governed by municipal laws.¹³⁰ On the other hand, *Oppenheim’s International Law* suggests that disputes arising from investment agreements should be referred to international tribunals, which apply international law.¹³¹

¹²⁷ See Joost Pauwelyn, *Interplay Between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution After 20 Years of WTO Jurisprudence*, in PROCEEDINGS OF THE QUÉBEC CITY CONFERENCE ON THE WTO AT 20 HELD IN SEPTEMBER 2015 (C.-E. Côté et al. eds.) (forthcoming).

¹²⁸ DOLZER & SCHREUER, *supra* note 20, at 167.

¹²⁹ *Case Concerning Various Serbian Loans Issued in France (Fr. v. Yugoslavia)*, Judgment, 1929 P.C.I.J. (ser. A) No. 20 (July 12).

¹³⁰ *Id.* at 41 (“Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.”); see also *Noble Ventures, Inc. v. Rom.*, ICSID Case No. ARB/01/11, Award, ¶ 53 (Oct. 12, 2005) (“The Tribunal recalls the well-established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State.”).

¹³¹ ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW* 927 (9th ed., vol. 1 1996) (“[E]ither by virtue of a term in the contract itself or of an agreement between the state and the alien, or by virtue of an agreement between the state allegedly in breach of its contractual obligations and the state of which the alien is a national, the disputes as to compliance with the terms of contracts may be referred to an internationally composed tribunal, applying, at least in

After 1945, large-scale foreign investments raised concerns over whether municipal laws were adequately protecting these foreign investment projects.¹³² Mr. Elihu Lauterpacht, a renowned British lawyer, first raised the idea of the umbrella clause to the Anglo-Iranian Oil Company (AIOC) for settling the Iranian oil nationalization dispute in late 1953 and into 1954.¹³³ AIOC had a long-standing Persian oil concession until 1951, when Iran went through radical political change.¹³⁴ The newly appointed prime minister issued the Iranian Oil Nationalization Law on his first day in office, which gave the Iranian government the exclusive right to run oil operations in Iran.¹³⁵ As a result, AIOC sought redress through a number of actions and finally pressured the Iranian government into a settlement.¹³⁶

Lauterpacht, having realized that the Iranian municipal laws might not adequately protect the settlement agreement between AIOC and the Iranian government, proposed the usage of an “umbrella treaty” to “incorporat[e] the settlement [agreement] in a treaty which is automatically governed by international law.”¹³⁷ Under the umbrella treaty, a dispute between AIOC and the Iranian government would transform into a dispute between the U.K. government and the Iranian government. Although the parties did not adopt the idea of the umbrella treaty, this case gave rise to the notion of the umbrella clause,¹³⁸ known as “parallel protection” at that time.¹³⁹

In 1959, Hermann J. Abs, a German banker, together with Lord Shawcross, a British lawyer and politician, proposed a “Draft Convention on

part, international law.”) (footnotes omitted) (cited in DOLZER & SCHREUER, *supra* note 20, at 168).

¹³² DOLZER & SCHREUER, *supra* note 20, at 168.

¹³³ Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 *ARB. INT'L* 411, 412 (2014). This article also mentions early examples of elevating municipal legal rights to the level of international law, such as the Agreement between the United Kingdom and Peru Respecting the Mineral Property ‘*La Brea y Pariñas*,’ Aug. 27, 1921, 7 *L.N.T.S.* 280 (1921), no. 195, 280. *See id.* at 414 & 414 n. 12.

¹³⁴ *Id.* at 414.

¹³⁵ *Id.*

¹³⁶ *Id.* at 415.

¹³⁷ *Id.* (quoting Note from E. Lauterpacht, Anglo-Iranian Oil Company Ltd. Persian Settlement—Note (Dec. 7, 1953)) (on file with Anthony C. Sinclair).

¹³⁸ Lauterpacht then again proposed the notion of “parallel protection” in a couple of different situations from 1959–1967. *Id.* at 412.

¹³⁹ *See id.* at 415 (quoting Note from E. Lauterpacht, Anglo-Iranian Oil Company Ltd. Persian Settlement—Opinion, (Jan. 20, 1954) at p. 4).

Investments Abroad.”¹⁴⁰ Article II of the Draft provides that “[e]ach party shall at all times ensure the observance of any undertakings which it may have given in relation to investment made by nationals of any other Party.”¹⁴¹ Unlike Lauterparcht’s version of parallel protection, the Abs-Shawcross Draft “applied to *any undertakings* of the host state towards covered investors rather than to a particular, named agreement.”¹⁴²

In the same year, the “first modern investment treaty”—the Germany-Pakistan BIT—incorporated an umbrella clause, which provided that “[E]ach Party shall observe any other *obligation [sic]* it may have entered into with regard to investments by nationals or companies of the other Party.”¹⁴³ The German government clearly stated that violating an investment agreement amounted to violating an international obligation under the BIT.¹⁴⁴ The umbrella clause has since become prevalent in ratified BITs and has become a “standard feature” of many model BITs.¹⁴⁵ According to research conducted by the U.N. Conference on Trade and Development, at the time of this writing, there are currently 2,946 BITs (with 2,362 in force).¹⁴⁶ Research as early as 2004 found that forty percent of BITs contain an umbrella clause.¹⁴⁷

The doctrine of *rebus sic stantibus* may help explain the origination of the umbrella clause.¹⁴⁸ This is the idea that, like a rational individual, a state will observe its obligations only if the benefits of its performance exceeds the

¹⁴⁰ Mary E. Footer, *Umbrella Clauses and Widely-Formulated Arbitration Clauses: Discerning the Limits of ICSID Jurisdiction*, 16 L. PRAC. INT’L CTS. TRIBS. 87, 90 (2017) (citing DOLZER & SCHREUER, *supra* note 20, at 18).

¹⁴¹ *Id.* (quoting The Proposed Convention to Protect Private Foreign Investment: A Roundtable, 9 J. PUB. L. 115, 116 (1960)).

¹⁴² *Id.*

¹⁴³ See Footer, *supra* note 140, at 90, citing Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments art. 7, Nov. 25 1959, 6575 U.N.T.S. 24; see also DOLZER & SCHREUER, *supra* note 20, at 167.

¹⁴⁴ See DOLZER & SCHREUER, *supra* note 20, at 167 (quoting J. ALENFELD, DIE INVESTITIONEN FÖRDERUNGSVERTRÄGE DER BUNDESREPUBLIK DEUTSCHLAND 97 n. 180 (1971) (“The violation of such an obligation [of an investment agreement] accordingly will also amount to a violation of the international legal obligation contained in the present Treaty.”)).

¹⁴⁵ Footer, *supra* note 140, at 91; see also OECD Draft Convention on the Protection of Foreign Property art. 2, Oct. 12, 1967, 2 INT’L LAW. 330 (“Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.”).

¹⁴⁶ *International Investment Agreements Navigator*, UNCTAD, <https://perma.cc/U587-WHDB> (last visited May 6, 2018).

¹⁴⁷ VANHONNAEKER, *supra* note 42, at 136.

¹⁴⁸ Footer, *supra* note 140, at 91. There were a number of names for the umbrella clause in its early stages, including “elevator,” “mirror effect,” “parallel effect,” “umbrella,” or “sanctity of contract/*pacta sunt servanda*.” *Id.* at 89.

benefits of violation.¹⁴⁹ In other words, if the net costs of breaching an investment agreement are less than the costs of performing the contract, the state is likely to violate the contract or seek re-negotiation.¹⁵⁰ Therefore, the umbrella clause, by elevating the obligation to the international level, adds to a host state's net cost of violating its contractual obligations.

The umbrella clause may have also originated under the viewpoint that investors lose some or all of their bargaining power once they make the investment,¹⁵¹ which reflects the “obsolescing bargain” between a host state and a foreign investor.¹⁵² Investors have more power during the negotiation stage because a host state is willing to accommodate the investor to attract the investment.¹⁵³ Host states then regain their bargaining power as the investors inject capital into their projects.¹⁵⁴ Therefore, incorporating an umbrella clause in the BIT *ex ante* protects investors when things go wrong after making the investment.

B. The Wording of Umbrella Clauses

The language in the umbrella clause is important for defining its scope. Whether an umbrella clause covers WTO claims largely depends on the text of the umbrella clause. Under Article 31 of the Vienna Convention, a treaty shall be interpreted according to the “ordinary meaning of its terms in context.”¹⁵⁵ Tribunals often make decisions based on the differences in how a particular umbrella clause is drafted. For example, the tribunals in *SGS v. Philippines* and *SGS v. Pakistan* interpreted the scope of umbrella clauses differently partly because of the different wording.¹⁵⁶

There is no standard language for an umbrella clause.¹⁵⁷ The broadest version of the umbrella clause, called the proper umbrella clause,¹⁵⁸ mandates

¹⁴⁹ *Id.* at 91.

¹⁵⁰ *Id.* at 92.

¹⁵¹ *Id.*

¹⁵² *Id.* at 91 (citing JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 271–72 (2010)).

¹⁵³ *Id.* at 92.

¹⁵⁴ *Id.*

¹⁵⁵ *See* Vienna Convention, *supra* note 107, at art. 31.

¹⁵⁶ *SGS Société Générale de Surveillance S.A. v. Islamic Repub. of Pakistan*, ICSID Case No. ARB/01/13, *Objections to Jurisdiction*, ¶ 164, (Aug. 6, 2013); *SGS Société Générale de Surveillance S.A. v. Phil.*, *supra* note 23, ¶ 115 (Jan. 29, 2004).

¹⁵⁷ *See* LUKAS VANHONNAEKER, *INTELLECTUAL PROPERTY RIGHTS AS FOREIGN DIRECT INVESTMENTS* 136 (2015).

¹⁵⁸ Katia Yannaca-Small, *Parallel Proceedings*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 1009, 1031 (Peter Muchlinski et al. eds., 2008); Katia Yannaca-Small,

each state party to “observe any obligation” it assumed with respect to the foreign investments.¹⁵⁹

Tribunals have interpreted the proper umbrella clause broadly.¹⁶⁰ The tribunal in *Enron Corp. v. Argentine Republic* explained that this language applies to obligations “regardless of their nature.”¹⁶¹ Some scholars have argued that the proper umbrella clause covers not only investment agreements but also “all kinds of obligations, explicit or implied, contractual or non-contractual, undertaken with respect to investment generally.”¹⁶² Under this interpretation, the proper umbrella clause covers obligations under WTO agreements.

Yet many states have expressed concern that a proper umbrella clause might be “undesirably broad” and constitute “an unjustified intrusion” into their sovereignty.¹⁶³ Some states have thus introduced qualifying language in their umbrella clause. For instance, Article 11 of the Switzerland–Pakistan BIT is a narrow umbrella clause that only requires states to “constantly guarantee the observance” of their commitments to foreign investors.¹⁶⁴ The tribunal in *SGS v. Pakistan* held that the language of Article 11 did not “automatically elevate” a contract claim to international law level.¹⁶⁵

States have limited the scope of umbrella clauses in three ways. First, they have required a host state’s promises to foreign investors to be in writing and relate to a specific investment. Thus, an umbrella clause would not cover domestic general legislation enforcing WTO obligations.¹⁶⁶ Second, some

Interpretation of the Umbrella Clause in Investment Agreements, 22 (OECD Working Papers on International Investment, Working Paper No. 2006/03, 2006).

¹⁵⁹ Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment [U.S.–Argentina BIT] art. II(2)(c), Nov. 14, 1991, 31 I.L.M. 124 (emphasis added); *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, *supra* note 156, at ¶ 166 (emphasis added); *see also* Agreement Between the Government of the Republic Of Korea and the Government of the Republic of Belarus for the Promotion and Protection of Investments, Belarus-S. Kor., art. 10, Apr 22, 1997; Agreement Between the Kingdom of Denmark and the Republic of Lithuania Concerning the Promotion and Reciprocal Protection of Investments, Den.-Lith., art. 3(1), Mar. 30, 1992, 1787 U.N.T.S. 246.

¹⁶⁰ *See* Katia Yannaca-Small, *supra* note 158, at 1031.

¹⁶¹ *Enron Corporation Ponderosa Assets, L.P v. Arg.*, ICSID Case No ARB/01/3, Award, ¶ 274 (May 22, 2007) (emphasis added).

¹⁶² *See* JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 305–06 (2d ed. 2015).

¹⁶³ *Id.* at 306.

¹⁶⁴ *See* Swiss-Pakistan BIT, *supra* note 40, at art. 11.

¹⁶⁵ *See* *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, *supra* note 156, at ¶ 166.

¹⁶⁶ *See* SALACUSE, *supra* note 162, at 306; *International Investment Agreements Navigator*, *supra* note 146, at 73.

umbrella clauses require the interpretation of the umbrella clause subject to the host state's domestic law.¹⁶⁷ A host state can explicitly exclude WTO claims from the scope of the umbrella clause through its domestic laws. Third, some umbrella clauses state that the umbrella clause cannot interfere with the forum selection clause in investment agreements.¹⁶⁸ Therefore, if Article 23 works like a choice of forum clause, then investors are not allowed to bring WTO claims in arbitral tribunals.

Sometimes drafting even leads tribunals to doubt whether an umbrella clause exists at all. For example, a clause that requires a state to "create and maintain in its territory a legal framework" for protecting foreign investments and comply with the undertakings in good faith¹⁶⁹ is not an umbrella clause.¹⁷⁰

On the other hand, some tribunals have questioned whether a difference in drafting makes a meaningful difference to the scope of an umbrella clause. For example, the tribunal in *SGS v. Paraguay* rejected the textual approach.¹⁷¹ It did not find that the wording of the umbrella clause was "so general or hortatory" as to be meaningfully different from a narrow drafting.¹⁷² Likewise, the tribunal in *PM v. Uruguay* ruled that the textual approach needed to be understood as "a drive to defend the coherence of the arbitration system in the face of apparently contradictory awards involving the same claimant."¹⁷³ It further held that the "textual differences [were] too subtle to bear the weight of such a distinction."¹⁷⁴

¹⁶⁷ Agreement Between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments [hereinafter Australia-China BIT], art. 11, Jul. 11, 1988, 1514 U.N.T.S. 65 ("[A] Contracting Party shall, *subject to its law*, adhere to any written undertakings given by a competent authority to a national of the other Contracting Party with regard to an investment in accordance with its law and the provisions of this Agreement").

¹⁶⁸ See UNCTAD, *supra* note 146, at 74; see also Agreement Concerning the Promotion and Reciprocal Protection of Investments, art. 2(4), Sept. 6, 1995, 1942 U.N.T.S. 154 [hereinafter Denmark-India BIT] (providing that the disputes arising under the umbrella clause can "only [be] redressed under the terms of the *contracts* underlying the obligations") (emphasis added).

¹⁶⁹ Agreement Between the Government Of The Hashemite Kingdom Of Jordan And The Government Of The Italian Republic On The Promotion And Protection of Investments, art. 2.4, It.-Jordan, July 21, 1996, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3379>.

¹⁷⁰ See SALACUSE, *supra* note 162, at 307 (citing Salini Costruttori SpA and Italstrade SpA v. Hashemite Kingdom of Jordan, ICSID Case No ARB/02/13, Decision on Jurisdiction (Nov. 9, 2004)).

¹⁷¹ The tribunal in *Philip Morris v. Uru.* also expressed similar views. See *Philip Morris v. Uru.*, ICSID Case No. ARB/10/7, Award, ¶ 471 (Jul. 7, 2016).

¹⁷² *SGS Société Générale De Surveillance S.A. v. Repub. of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 169 n. 95. (Feb. 12, 2010).

¹⁷³ See *Phillip Morris v. Uru.*, Award, *supra* note 171, at ¶ 471.

¹⁷⁴ *Id.*

However, very few tribunals hold this position. Most tribunals first look at the language of the umbrella clause to determine its scope. Therefore, the drafting of an umbrella clause affects whether it covers WTO claims.

IV. JURISPRUDENCE ON UMBRELLA CLAUSES

Although tribunals have never answered whether umbrella clauses cover WTO claims, cases examining three issues offer insights on this question. These issues are, first, whether an umbrella clause covers claims arising from an investment agreement between a host state and an investor; second, whether an umbrella clause requires privity of contract; and third, whether an umbrella clause covers general domestic legislation.

A. Contract Claims

Extending an umbrella clause to cover contract claims is the first step towards allowing claims arising outside of a BIT to be brought in an investment tribunal. If a tribunal disallows contract claims, then it will likely not exercise jurisdiction over WTO claims either.

Despite the fact that the origin of the umbrella clause was to offer more protection to investment agreements,¹⁷⁵ a split over whether an umbrella clause elevates contract claims to the international level arose in the twenty-first century. Most tribunals have given a positive answer to this question and allowed contract claims to come into the tribunals.¹⁷⁶

1. *SGS v. Pakistan*

In 2003, *SGS v. Pakistan* first addressed whether investors could bring contract claims under an umbrella clause.¹⁷⁷ In 1994, SGS contracted with the Pakistani government to inspect goods imported to Pakistan from other countries.¹⁷⁸ Both parties were dissatisfied with each other's performance, and the Pakistani government notified SGS in 1996 that it was going to terminate the agreement.¹⁷⁹

The procedural background of this case was bizarre. After several rounds of unsuccessful communication, SGS brought an action for the alleged wrongful

¹⁷⁵ DOLZER & SCHREUER, *supra* note 20, at 167.

¹⁷⁶ Kingsbury & Schill, *supra* note 30, at 1324; SURYA P SUBEDI, INTERNATIONAL INVESTMENT LAW, RECONCILING POLICY AND PRINCIPLE 134 (3d ed. 2016).

¹⁷⁷ SGS Société Générale de Surveillance S.A. v. Pakistan, Objections to Jurisdiction, ICSID Case No. ARB/01/13, Objections to Jurisdiction, *supra* note 156, at ¶ 164.

¹⁷⁸ *Id.* at ¶ 11.

¹⁷⁹ *Id.* at ¶ 16.

termination in Swiss courts.¹⁸⁰ Pakistan opposed the Swiss courts' jurisdiction because the dispute settlement provision in the investment contract subjected all disputes arising under the contract to domestic arbitration in Pakistan.¹⁸¹ This argument prevailed in Swiss court.¹⁸² Pakistan then initiated a domestic arbitration in Pakistan.¹⁸³

SGS objected to the Pakistani tribunal's jurisdiction and submitted a Request for Arbitration to ICSID based on the umbrella clause in the BIT. Article 11 of the Swiss-Pakistan BIT provided that "[e]ither Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party."¹⁸⁴ SGS argued that Article 11 "elevates" all contract claims to the level of claims of a breach of the BIT.¹⁸⁵ The Pakistani government opposed the jurisdiction of ICSID based on the dispute settlement clause in the contract.¹⁸⁶

Before making a decision, the ICSID tribunal in this case examined the text of the umbrella clause. Although the word "commitments" in the umbrella clause seemed to include "statutory, administrative or contractual commitment," the tribunal indicated that this broad interpretation was not its ordinary meaning.¹⁸⁷ The tribunal also found that Article 11 was not located together with substantive obligations, and therefore Article 11 was not intended by the parties to have substantive effect.¹⁸⁸

Moreover, the tribunal believed that SGS's elevation of contract claims subjected the umbrella clause to "almost indefinite expansion."¹⁸⁹ The elevation was "so far-reaching in scope, and so automatic and unqualified and sweeping in [its] operation, so burdensome in [its] potential impact upon a Contracting Party," that "clear and convincing evidence" was required to demonstrate the parties' intentions of incorporating these consequences.¹⁹⁰ Yet the tribunal did not find "clear and persuasive evidence" of such intentions.¹⁹¹

¹⁸⁰ *Id.* at ¶ 19.

¹⁸¹ *Id.* at ¶ 22.

¹⁸² *Id.* at ¶ 23.

¹⁸³ *Id.* at ¶ 26.

¹⁸⁴ *Id.* at ¶ 97.

¹⁸⁵ *Id.* at ¶ 54.

¹⁸⁶ *Id.* at ¶ 1.

¹⁸⁷ *Id.* at ¶ 166.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at ¶ 167.

¹⁹¹ *Id.* at ¶ 173.

The tribunal went on to set out three possible consequences of the elevation. First, Article 11 would cover “an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments [to investors].”¹⁹² Second, Article 11 would make substantive provisions of the BIT “substantially superfluous.”¹⁹³ If an investor could sue contract violations in an international arbitral tribunal, then there “would be no real need to demonstrate a violation of those substantive treaty standards.”¹⁹⁴ Third, this interpretation might allow “an investor [to], at will, nullify any freely negotiated dispute settlement clause in a State contract.”¹⁹⁵ Such benefit would only flow to investors but not host states because host states could not sue private investors through the umbrella clause.¹⁹⁶ In conclusion, the tribunal in *SGS v. Pakistan* refused to exercise jurisdiction over the disputes arising from the investment contract.

Yet the tribunal did not categorially deny jurisdiction over contract claims. The elevation of contract claims to the international law level could be allowed “under exceptional circumstances,” demonstrated by a “considerably more specifically worded” umbrella clause.¹⁹⁷ To constitute an exceptional circumstance, the drafting of the umbrella clause would need to be clear enough to “signal the creation and acceptance of a new international law obligation”¹⁹⁸ and present the parties’ clear and persuasive intention for the elevation.¹⁹⁹

2. *SGS v. Philippines*

Only a year later, the ICSID tribunal in *SGS v. Philippines* explicitly rejected the approach in *SGS v. Pakistan* and affirmed that the umbrella clause covered contract claims even in unexceptional circumstances.

In this case, SGS contracted with the Philippines to improve its customs clearance and control processes.²⁰⁰ Later a dispute arose under the contract. SGS submitted a Request for Arbitration to ICSID based on the umbrella clause in

¹⁹² *Id.* at ¶ 168.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at ¶¶ 171–72.

¹⁹⁸ *Id.* at ¶ 168.

¹⁹⁹ *Id.* at ¶ 172.

²⁰⁰ *SGS Société Générale de Surveillance S.A. v. Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, *supra* note 23, at ¶ 1.

the Swiss-Philippines BIT.²⁰¹ The Philippines opposed the jurisdiction of the ICSID tribunal.²⁰²

Similar to the tribunal in *SGS v. Pakistan*, the tribunal here examined the text of the umbrella clause. Article X(1) of the Swiss-Philippines BIT provided that “Each Contracting Party shall observe any obligation it has assumed . . . with regard to specific investments in its territory by investors [of the other Contracting Party].”²⁰³ The tribunal found that the mandatory nature of the word “shall” indicated that the umbrella clause was intended to be as substantive as other articles.²⁰⁴ The phrase “any obligation” broadly covered “obligations arising under national law, e.g. those arising from a contract.”²⁰⁵

The tribunal explicitly distinguished the present case from *SGS v. Pakistan* based on the different drafting of the umbrella clauses.²⁰⁶ “Shall constantly guarantee”—the language of the umbrella clause in *SGS v. Pakistan*—was ambiguous because it did not specify what constituted an inconstant guarantee.²⁰⁷ The phrase “the commitments it has entered into with respect to the investments,” the language in *SGS v. Pakistan*, was “less clear and categorical” than the umbrella clause in this case—“any obligation it has assumed with regard to specific investments in its territory.”²⁰⁸

The tribunal also found that the object and purpose of the BIT supported SGS’s argument. The purpose of the BIT was “the promotion and reciprocal protection of investments.”²⁰⁹ Its preamble, which provides that the BIT was intended “to create and maintain favourable conditions for investments by investors,” justified the decision to resolve the uncertainties in favor of the investors.²¹⁰ The tribunal believed that the umbrella clause covered a contract obligation once it was found to be binding under domestic law.²¹¹

Additionally, the tribunal addressed the concerns raised in *SGS v. Pakistan*. It found that the elevation would not make Article X(2) “susceptible of almost

²⁰¹ *Id.* at ¶ 2.

²⁰² *Id.* at ¶ 6.

²⁰³ *Id.* at ¶ 115.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* The Tribunal also responded to the argument in *SGS v. Pakistan* that the location of the umbrella clause was not together with substantive provisions of the BIT by saying the location of the umbrella clause was entitled to “some weight,” but it was not decisive.

²⁰⁷ *Id.* at ¶ 119.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at ¶ 116.

²¹⁰ *Id.*

²¹¹ *Id.* at ¶ 117.

indefinite expansion.” The obligation here was only assumed towards a specific investment.²¹² It did not create a general route for unlimited claims. The broad interpretation would not lead to “a full-scale internationalisation of domestic contracts” or “instant transubstantiation” either.²¹³ The “scope” or “content” of the contract obligations was still governed by domestic laws of the host state.²¹⁴

3. Subsequent Cases

SGS v. Pakistan and *SGS v. Philippines* represent the divided opinions on the scope of umbrella clauses.

Some tribunals followed the *SGS v. Pakistan* approach and refused to exercise jurisdiction over contract claims. For example, the tribunal in *El Paso Energy International Company v. Argentina* found the *SGS v. Pakistan* approach “more than conclusive.”²¹⁵ Similarly, the tribunal in *Pan American Energy LLC and BP Argentina Exploration Company v. Argentina* interpreted the umbrella clause narrowly and balanced the states and the investors’ interests together.²¹⁶

In contrast, other tribunals have interpreted umbrella clauses as broadly as the tribunal in *SGS v. Philippines*. For instance, the *Eureko BV v. Poland* tribunal followed *SGS v. Philippines* and found that the presumption “that sovereign rights override the rights of a foreign investor could be seen as a reversion to a doctrine that has been displaced by contemporary customary international law.”²¹⁷ Likewise, the *Noble Ventures Inc. v. Romania* tribunal upheld the decision in *SGS v. Philippines* and believed that an umbrella clause “introduce[d] an exception to the general separation of states obligations under municipal and under international law.”²¹⁸

Some tribunals have adopted an approach somewhere in the middle, elevating contract claims only when they involve state action. The *Joy Mining Machinery Limited v. Egypt* tribunal found no elevation unless there was “a clear violation of . . . contract rights of such a magnitude as to trigger the Treaty

²¹² *Id.* at ¶ 121.

²¹³ *Id.* at ¶ 126.

²¹⁴ *Id.* at ¶ 126–28.

²¹⁵ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 71 (Apr. 27, 2006) (explicitly supporting the first and second arguments set out in *SGS v. Pakistan*: risk of flood of lawsuits, overreaching scope compared to other treaty guarantees).

²¹⁶ *Pan Am. Energy LLC v. Arg.*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, ¶ 99 (Jul. 27, 2006).

²¹⁷ *Eureko B.V. v. Republic of Poland*, Partial Award (Aug. 19, 2005), IIC 98, ¶ 259 (Aug. 19, 2005).

²¹⁸ *Noble Ventures, Inc. v. Rom.*, Award, *supra* note 130, at ¶ 54.

protection.”²¹⁹ In *Salini Costruttori SpA and Italstrade SpA v. Jordan*, the umbrella clause required the host state to “maintain . . . a legal framework” to guarantee its observation of obligations. The tribunal distinguished the case from *SGS v. Philippines*, noting the different wordings.²²⁰ Yet it also held that a breach of contract might violate the treaty when the state’s behavior went beyond that which an ordinary contracting party could adopt.²²¹ The tribunal in *El Paso Energy v. Argentina* took a slightly different approach, holding that an umbrella clause covers contractual claims only when a state acts as a sovereign entity rather than as a private contracting party.²²²

In reaching these conclusions, tribunals have relied on different factors, including the text as well as the the object and purpose of the treaty. They have also looked into the relationship between municipal law and international law, between the umbrella clause and the choice of forum clause in the contract, and between the umbrella clause and other substantive provisions in a BIT.

To argue that an umbrella clause covers WTO claims, private investors should first focus on interpreting the text of the umbrella clause and the intentions of state parties. For example, the *SGS v. Philippines* tribunal regarded an umbrella clause requiring a host state to “observe any obligation it entered into” as broader than one mandating a host state to “guarantee the observance of any obligations it entered into.”²²³ Even the *SGS v. Pakistan* tribunal, which interpreted the umbrella clause narrowly, agreed that the umbrella clause could cover contract claims if such an intention was clearly manifested in the BIT.²²⁴ Thus, it is important for state parties to manifest their intentions to include or exclude WTO claims clearly in the wording or the drafting history of the umbrella clause.

4. Forum Selection Clause

Oftentimes, even when a tribunal recognizes the validity of the elevation argument, it refuses to exercise jurisdiction over contract claims if the forum

²¹⁹ Joy Mining Machinery Ltd. v. Egypt, Award on Jurisdiction, ICSID Case No. ARB/03/11, ¶ 81 (Aug. 6, 2004).

²²⁰ Salini Costruttori SpA v. Jordan, Decision on Jurisdiction, ICSID Case No. ARB/02/13, ¶ 155 (Nov. 15, 2004).

²²¹ *Id.* at ¶ 130.

²²² El Paso Energy Int’l Co. v. Arg., ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 82 (Apr. 27, 2006).

²²³ SGS Société Générale de Surveillance S.A. v. Phil., ICSID Case No. ARB/02/6, Objections to Jurisdiction, *supra* note 23, at ¶ 119.

²²⁴ SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, Objections to Jurisdiction, *supra* note 156, at ¶ 168.

selection clause in the contract subjected all disputes exclusively to domestic forums.²²⁵

The tribunal in *SGS v. Philippines* explained the rationale for this conclusion. First of all, “the maxim *generalialia specialibus non derogant*” mandated that the forum selection clause override the general umbrella clause.²²⁶ The BIT, as a “framework treaty,” should not “override or replace, the actually negotiated investment arrangements made between the investor and the host State.”²²⁷ Moreover, “the maxim *lex posterior derogat legi priori*”²²⁸ requires a later agreement of the same character between same parties to override an earlier one.²²⁹

This suggests that if private investors would like to leave the possibility of bringing WTO claims in a tribunal open, they should not include any forum selection clause in their investment contract. However, even if they did not include any such clause, Article 23 of the DSU may work as an exclusive forum selection clause that prevails over the general umbrella clause in the BIT.

In light of *SGS v. Philippines*, the first question is whether the DSU can be regarded as a more particular agreement than the BIT.²³⁰ On the one hand, the DSU is similar to a framework treaty,²³¹ whereas a BIT proscribes specific rights and obligations between two states. On the other hand, the umbrella clause itself is general in defining a tribunal’s jurisdiction which covers “any obligation” a state entered with respect to the investments,²³² while the DSU stipulates a specific scope of jurisdiction and detailed procedures.²³³ Moreover, whether the BIT was concluded before or after the DSU also matters.²³⁴ Parties that concluded an umbrella clause after the DSU can turn to “the maxim *lex posterior*

²²⁵ See, for example, *SGS Société Générale de Surveillance S.A. v. Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, *supra* note 23, at ¶¶ 134, 141; *Abacat v. Arg.*, ICSID Case No. ARB/07/5, Jurisdiction and Admissibility (Aug. 4, 2011).

²²⁶ *SGS Société Générale de Surveillance S.A. v. Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, *supra* note 23, at ¶ 141.

²²⁷ *Id.*

²²⁸ *Id.* at ¶ 142.

²²⁹ *Id.* at ¶ 145.

²³⁰ *SGS Société Générale de Surveillance S.A. v. Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, *supra* note 23, at ¶ 141.

²³¹ For example, it requires all disputes arising under all WTO agreements to be subjected to its dispute settlement bodies. See DSU, *supra* note 7, at art. 23.

²³² See, for example, Swiss-Pakistan BIT, *supra* note 40.

²³³ See, for example, DSU, *supra* note 7, at art. 25.

²³⁴ *SGS Société Générale de Surveillance S.A. v. Phil.*, *supra* note 23, at ¶¶ 142, 145. See, for example, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Nov. 5, 1997, S. TREATY DOC. No. 103–15 (1993).

derogat legi priori?²³⁵ and argue that they have contracted out of Article 23 of the DSU.

B. Privity of Contract

An umbrella clause, whether narrow or proper, does not internationalize all obligations of a host state. Instead, Such clauses usually only apply to the commitments “with respect to investments of the investors.”²³⁶ The interpretation of the phrase “with respect to investments of the investors” varies from case to case. Sometimes, a host state only signed a contract with a subsidiary of the investor, and the investor brings contract claims on behalf of its subsidiary at a tribunal. Tribunals split over whether, under this situation, the host state had undertaken a contract obligation with respect to the investments of this investor.

1. *Burlington v. Ecuador*

The *Burlington v. Ecuador* tribunal denied jurisdiction over disputes arising under the contract between the claimant’s subsidiary and the host state for lack of privity. In 1993, Ecuador initiated a production sharing model for developing its oil industry, under which private contractors bore all costs and risks of developing oil reserves while receiving a share of oil production.²³⁷ Burlington acquired interests in the models from Ecuador through its wholly owned subsidiaries.²³⁸ Later, Burlington claimed that Ecuador failed to offer enough protections to them, and that Ecuador unilaterally increased its participation in Burlington’s business.

Burlington filed a Request for Arbitration at ICSID²³⁹ under the umbrella clause.²⁴⁰ Ecuador challenged the ICSID tribunal’s jurisdiction over these contract claims for the lack of privity between Burlington and Ecuador.²⁴¹ It

²³⁵ *SGS Société Générale de Surveillance S.A. v. Phil.*, *supra* note 23, at ¶¶ 142, 145.

²³⁶ *See Swiss-Pakistan BIT*, *supra* note 40, at art. 11 (“Either Contracting Party shall constantly guarantee the observance of the commitments *it has entered into with respect to the investments of the investors of the other Contracting Party*”) (emphasis added); Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, art. II(2)(c), Nov. 14, 1991, 31 I.L.M. 128 (“Each party shall observe any obligation *it may have entered into with regard to investments.*”) (emphasis added).

²³⁷ *Burlington Resources Inc. v. Repub. of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 9 (June 2, 2010).

²³⁸ *Id.* at ¶ 14.

²³⁹ *Id.* at ¶ 53.

²⁴⁰ The umbrella clause states “Each Party shall observe any obligation it may have entered into with regard to investments.” *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 211 (Dec. 14, 2012).

²⁴¹ *Id.* at ¶ 208.

argued that privity was within the ordinary meaning of the word “obligation” and the phrase “with regard to investments.”²⁴² Burlington, however, interpreted the phrase “any obligation” broadly.²⁴³ It asserted that the phrase “with regard to [Burlington’s] investments” focused on investments rather than investors.²⁴⁴ And “investments” included both direct and indirect investments through its subsidiaries.²⁴⁵

The ICSID tribunal found in favor of Ecuador. First, the ordinary meaning of an obligation was “in correlation with the right of another”—an obligation presupposes an obligee and an obligor.²⁴⁶ Without signing the model-acquiring contract, Burlington could not become an obligee solely “for the reason that it owns all the shares of a signatory party.”²⁴⁷ The phrase “entered into” also emphasized the importance of privity.²⁴⁸ The tribunal then held that the municipal (Ecuadorian) law determined the scope of a host state’s obligation. Under Ecuadorian law, Burlington, as a non-signatory parent, was not entitled to directly enforce its subsidiary’s rights.²⁴⁹ The *Burlington* decision was not the only decision requiring privity of contract.²⁵⁰ In *Azurix Corp. v. Argentina*, another ICSID tribunal faced the same situation and umbrella clause as *Burlington*.²⁵¹ In that case, the contract was between Argentina and Azurix’s subsidiary.²⁵² The *Azurix* tribunal denied Azurix’s rights to bring contract claims for lack of privity.²⁵³ Again, in *Siemens A.G. v. Argentina*, the contract was signed by Argentina and Siemens’ subsidiary.²⁵⁴ The *Siemens* tribunal, chaired by the same

²⁴² *Id.*

²⁴³ *Id.* at ¶ 209.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at ¶ 214.

²⁴⁷ *Id.* at ¶ 229.

²⁴⁸ *Id.* at ¶ 216. The Tribunal also looked into the object and purpose of the BIT and reasoned that, although the BIT was to “encourage and protect investments,” it did not mandate “investments” to include both direct and indirect investments. *Id.* at ¶ 218.

²⁴⁹ *Id.* at ¶¶ 214–15.

²⁵⁰ *Id.* at ¶ 233.

²⁵¹ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 384 (Jul. 14, 2006).

²⁵² *Burlington Resources Inc. v. Ecuador*, Decision on Liability, *supra* note 240, at ¶ 223.

²⁵³ *Id.* (citing *Azurix Corp. v. The Argentine Republic*, Award, *supra* note 251, at ¶ 67 (Exhibit. CL-121)).

²⁵⁴ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 204 (Feb. 6, 2007).

arbitrator as the *Azurix* tribunal,²⁵⁵ refused to exercise jurisdiction over Siemens' contract claims because Siemens was not a party to the contract in dispute.²⁵⁶

Likewise, in the *CMS* annulment proceedings, the party faced a similar situation.²⁵⁷ The ruling on *CMS*'s contract claims arose under the contract between Argentina and an entity in which *CMS* held a minority interest.²⁵⁸ Then Argentina sought to nullify the *CMS* award for lack of privity.²⁵⁹ Although the award was eventually annulled on other grounds, the *ad hoc* committee indicated the importance of privity by saying "the *parties* to the obligation . . . are likewise not changed by reason of the umbrella clause."²⁶⁰ The committee also said that the percentage of shares an investor held in the signatory party of the contract did not affect the result.²⁶¹

Although the *Burlington* tribunal acknowledged that the *Azurix*, *Siemens*, and *CMS* annulment decisions might not have constituted a "series of consistent cases" requiring privity, it believed that the majority of ICSID tribunals certainly required privity of contract between the claimant and the host state.²⁶²

2. *SyC v. Costa Rica*

Another line of decisions suggests that an umbrella clause does not require privity of contract as long as its obligations are with respect to investments.²⁶³ *Continental Casualty* is one of the early cases which held that obligations with regard to investments included those "entered with persons or entities other

²⁵⁵ *Burlington Resources Inc. v. Ecuador*, Decision on Liability, *supra* note 240, at ¶ 224 n. 363.

²⁵⁶ *Id.* at ¶ 224 (citing *Siemens A.G. v. Argentine Republic*, Award, *supra* note 254, at ¶ 204 (Exhibit CL-79)).

²⁵⁷ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. Arb/01/8, Annulment Proceeding, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ¶ 46 (Sep. 25, 2007).

²⁵⁸ Although *CMS* was a minority shareholder in the annulment proceedings while *Burlington* was a parent which wholly owned the subsidiary, the tribunal did not see the difference in shareholding interest as a distinguishing factor. *See Burlington Resources Inc. v. Ecuador*, Decision on Liability *supra* note 240, at ¶ 229.

²⁵⁹ *Id.* at ¶ 227 (citing *CMS Gas Transmission Company v. Argentine Republic*, Annulment Proceeding, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic *supra* note 257, ¶ 46 (Exhibit CL-72, ¶¶ 9798)).

²⁶⁰ *Burlington Resources Inc. v. Ecuador*, Decision on Liability *supra* note 240, at ¶ 227 (citing *CMS Gas Transmission Co. v. Arg.*, Annulment Proceeding, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, *supra* note 257, at ¶ 95(c) (Exhibit CL-72)).

²⁶¹ *Id.*

²⁶² *Id.* at ¶ 233.

²⁶³ *See, for example*, *EDF International S.A. v. Arg.*, ICSID Case No. ARB/03/23, Decision on Annulment (Feb. 5, 2016).

than foreign investors themselves,” and thus “an undertaking by the host State with a subsidiary . . . is not in principle excluded.”²⁶⁴

A recent case, *SyC v. Costa Rica*, elaborates this position in detail.²⁶⁵ In 2001, Costa Rica signed a contract with Riteve, in which SyC holds 55% shares, for integrated vehicle technical inspection service.²⁶⁶ Later disputes arose, and SyC brought contract claims to ICSID after unsuccessful proceedings in Costa Rica’s domestic courts.²⁶⁷ Costa Rica disputed the jurisdiction of the ICSID tribunal on the ground that SyC was not a party to the contract.²⁶⁸

The umbrella clause governed obligations “related to investments by investors of the other Party.”²⁶⁹ The question was whether Costa Rica’s intention in drafting the umbrella clause was to cover the obligations with respect to the *investors* or the *investments*.²⁷⁰ In the first case, the umbrella clause only covered Costa Rica’s obligations directly to the investor, which required privity of contract. However, in the latter case, the clause did not require privity of contract as long as the obligations were undertaken with respect to the investments.²⁷¹ The *SyC* tribunal then found that the phrase “related to *investments* by investors of the other Contracting Party”²⁷² suggested the latter situation—the umbrella clause went “beyond the simple direct contractual relationship between the investor and the host State.”²⁷³ The umbrella clause was sufficiently broad to cover the obligations Costa Rica made to Riteve because Riteve was “a

²⁶⁴ Continental Casualty Company v. The Argentine Repub., ICSID Case No. ARB/03/9, Award, ¶ 297 (Sep. 5, 2008); see also EDF International S.A. v. Arg., ICSID Case No. ARB/03/23, Award, ¶ 938 (June 11, 2012); EDF International S.A. v. Arg., ICSID Case No. ARB/03/23, Decision on Jurisdiction (Aug. 5, 2008). The broad language of the umbrella clauses, particularly that in the Argentina-Germany BIT, which spoke of commitments undertaken (or entered into) with regard to *investments*, rather than with *investors*, was also emphasized.

²⁶⁵ Supervisión y Control S.A. v. Costa Rica, ICSID Case No. ARB/12/4, Award, ¶ 287 (Jan. 18, 2017).

²⁶⁶ *Id.* at ¶¶ 65–66.

²⁶⁷ *Id.* at ¶¶ 88–117.

²⁶⁸ *Id.* at ¶¶ 126–27.

²⁶⁹ *Id.* at ¶ 285 n. 428.

²⁷⁰ *Id.* at ¶ 289.

²⁷¹ *Id.* Arbitrator Silva Romero disagreed with the decision and argued that privity is within the meaning of “obligation” in the umbrella clause, as decided by the *ad hoc* annulment Committee in *CMS v. Argentina* and the tribunal in *Burlington v. Ecuador*. He, however, found that the tribunal had jurisdiction because the investor and its subsidiary here were “to be considered as a single entity in this matter.” See *id.* at ¶ 287.

²⁷² *Id.* at ¶ 289 (emphasis added).

²⁷³ *Id.*

company controlled by the [SyC] and created exclusively to hold the rights of the Contract.”²⁷⁴

However, the SyC tribunal later held that the contract claims brought were inadmissible because the forum selection clause in the contract subjected all disputes to domestic courts in Costa Rica, and SyC failed to comply with procedural requirements set out in the BIT.²⁷⁵

3. Analogy to WTO Claims

Similar to *Burlington* and *SyC v. Costa Rica*, where the claimant was not a party to the investment contract, a private investor is not a party to WTO agreements.²⁷⁶ Tribunals are likely to draw analogies from the cases above to address whether a private party, which is not a party to WTO agreements, can bring claims arising from WTO agreements through an umbrella clause.

A tribunal likely first looks at the language of the umbrella clause. In light of *Continental Casualty* and *SyC v. Costa Rica*, the question is whether the state parties assumed obligations with respect to investors or investments.²⁷⁷ A narrowly drafted umbrella clause, which restricts states’ obligations directly to investors, more likely requires privity of contract. For example, an umbrella clause requiring a host state to observe obligations “with respect to investments”²⁷⁸ more likely allows private investors to bring WTO claims than one limiting a host state’s obligation to “a *specific* investment of an investor.”²⁷⁹

The interest an investor has in the specific WTO provision is also relevant. The stronger an investor’s interest is in the WTO provision, the more likely a tribunal will exercise jurisdiction over its WTO claims. For example, the SyC tribunal found privity of contract unnecessary, but limited its holding to “a company *controlled* by the [SyC] and *created exclusively* to hold the rights of the Contract.”²⁸⁰ Likewise, the *Continental Casualty* tribunal indicated that it had jurisdiction if the investor was close enough to the contracting party (e.g., parent

²⁷⁴ *Id.* at ¶ 287.

²⁷⁵ *Id.* at ¶ 291–35.

²⁷⁶ These agreements are only state to state.

²⁷⁷ *Supervisión y Control S.A. v. Costa Rica*, Award, *supra* note 265, at ¶ 289.

²⁷⁸ *See, for example*, Swiss—Phil. BIT, art. 11; *see also* *Continental Casualty v. Arg.*, *supra* note 264, at ¶ 297.

²⁷⁹ *See, for example*, Agreement between the Government of the United Mexican States and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, *supra* note 166, at art. 19 (emphasis added).

²⁸⁰ *Supervisión y Control S.A. v. Costa Rica*, Award, *supra* note 265, at ¶ 287 (emphasis added). *But see* *Burlington Resources Inc. v. Ecuador*, Decision on Liability, *supra* note 240, at ¶ 229 (saying the shareholding percentage in the subsidiary does not matter).

and subsidiary).²⁸¹ In contrast, tribunals have expressed reluctance to extend jurisdiction to claims where investors have only a remote interest.²⁸² If an investor has direct or substantial interest in a WTO provision (e.g., if the WTO provision is narrowly tailored to affect only a few specific industries or if the investor's investments depend largely on the enforcement of the WTO provision), then a tribunal will more likely find jurisdiction over the disputes arising under the WTO provision.

Lastly, the arbitrators' personal opinions matter. It may not be a coincidence that the same arbitrator chaired *Siemens* and *Azurix*, which both explicitly denied jurisdiction for lack of privity. If a tribunal follows the strict interpretation in *Burlington*, which required privity of contract no matter how much interest an investor had in the contract,²⁸³ WTO claims will likely not be allowed. In contrast, if a tribunal adopts a broad interpretation of the umbrella clause, following *SyC v. Costa Rica*,²⁸⁴ which required no privity of contract when the investor had a significant interest in the contract, WTO claims where an investor has substantial interest in the WTO provision will likely be allowed.

C. General Legislation

Another important question is whether the umbrella clause covers commitments a host state made in its general legislation. As many WTO agreements are general legislation or framework treaties and states often enforce their WTO commitments through general municipal law, a tribunal may analogize to cases examining whether the umbrella clause covers general domestic legislation.

1. *Enron v. Argentina*²⁸⁵

In 2003, Enron submitted a Request for Arbitration over the Argentine government's denial of tariff adjustments and related issues.²⁸⁶ Enron argued that Argentina's measures violated the commitments it made in "the Gas Law, the Gas Decree and the License, with particular reference to the tariff regime."²⁸⁷

The umbrella clause in this case was a proper umbrella clause, stating "[e]ach party shall observe any obligation it may have entered into with regard to

²⁸¹ *Continental Casualty v. Arg.*, *supra* note 264, at ¶ 297.

²⁸² *Burlington Resources Inc. v. Ecuador*, Decision on Liability, *supra* note 240, at ¶ 233.

²⁸³ *Id.*

²⁸⁴ *Supervisión y Control S.A. v. Costa Rica*, *supra* note 265, at ¶ 287.

²⁸⁵ The tribunal in *LG&E* also adopted a similar ground.

²⁸⁶ *Enron Corporation Ponderosa Assets, L.P v. Arg.*, *supra* note 161, at ¶ 270.

²⁸⁷ *Id.* at ¶ 270.

investments.²⁸⁸ Enron argued that obligations arising “from broader undertakings contained in the State’s own law” fell within the scope of “obligations . . . with regard to investments.”²⁸⁹ In contrast, Argentina maintained that investment legislation did not constitute “specific obligation[s]” to Enron’s investments²⁹⁰ and urged the *Enron* Tribunal to limit the application of the umbrella clause to contractual claims.²⁹¹

The *Enron* tribunal found for Enron. It held that the ordinary meaning of “any obligation” included “obligations regardless of their nature.”²⁹² Previous tribunals had interpreted the umbrella clause as “cover[ing] both contractual obligations such as payment as well as obligations assumed through law or regulation.”²⁹³ Argentina’s undertakings embodied in general legislation constituted specific obligations with respect to Enron’s investments.²⁹⁴ The tariff arrangements stipulated by the legislation “were intended to establish a tariff regime that assured the influx of capital into the newly privatized companies such as [Enron] and ensured the value of such investment.”²⁹⁵

2. *Philip Morris Asia v. Uruguay*

The investor in *Philip Morris Asia v. Uruguay* not only brought TRIPS claims in front of a tribunal; it also claimed that Uruguay breached its commitments made in its domestic trademark legislations.

A narrow umbrella clause identical to the one in *SGS v. Pakistan* was at issue here. It required each contracting party to “constantly guarantee the observance of the commitments.”²⁹⁶ Philip Morris Asia argued that trademark registration constituted a specific commitment Uruguay made to its investors because a trademark right was granted to a specific individual.²⁹⁷

²⁸⁸ *Id.* at ¶ 273.

²⁸⁹ *Id.* at ¶ 270, 274.

²⁹⁰ *Id.* at ¶ 271.

²⁹¹ *Id.* at ¶ 272.

²⁹² *Id.* at ¶ 274.

²⁹³ *Id.* For contractual obligations, see *Fedax N.V. v. Venez.*, ICSID Case No. ARB/96/3, Award, ¶ 29, (Mar. 9, 1998), 5 ICSID Rep 200 (2002); *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, *supra* note 23, at ¶¶ 127–28. For obligations assumed through law or regulation, citing *SGS v. Pakistan*, Decision on Objections to Jurisdiction, *supra* note 156, at ¶ 166; *LG&E Energy Corp. v. Arg.*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 175 (Apr. 30, 2004), 8 ICSID Rep. 518 (2005).

²⁹⁴ *Enron Corporation Ponderosa Assets, L.P. v. Arg.*, *supra* note 161, at ¶¶ 274–75.

²⁹⁵ *Id.* at ¶ 275.

²⁹⁶ *Phillip Morris v. Uru.*, Award, *supra* note 171, at ¶ 463. The tribunal denied that the different wordings urged a different conclusion in this case. *Id.* at ¶¶ 468–72.

²⁹⁷ *Id.* at ¶ 461.

The *Philip Morris Asia v. Uruguay* tribunal took a more restrictive position. It agreed with *Enron v. Argentina* that “municipal legislative or administrative or other unilateral measures” do not by themselves fall outside of umbrella clauses.²⁹⁸ But the umbrella clause only covered commitments more specific than general obligations made through state legislation.²⁹⁹ A trademark registration was specific enough because it was granted “by reason of the individual consideration involved in the initial grant [of trademark rights].”³⁰⁰

Yet the *Philip Morris Asia v. Uruguay* tribunal believed that the trademark registration did not constitute a “commitment” in the umbrella clause.³⁰¹ A trademark was not a commitment “in order to encourage or permit a specific investment.”³⁰² By granting a trademark, Uruguay “simply allowed the investor to access the same domestic IP system,” but it did not “actively agree to be bound by any obligation or course of conduct.”³⁰³ Moreover, even if a host state made commitments by granting trademarks, “the scope of any such commitment remain[ed] [too] uncertain” to be covered by the umbrella clause.³⁰⁴ Unlike contract obligations, which are “specific” and “quantifiable,” the rights embodied in a trademark registration were “subject to the applicable law.”³⁰⁵ A trademark constitutes “simply a part of its general intellectual property law framework.”³⁰⁶ The tribunal believed that “if investors want stabilization they have to contract for it.”³⁰⁷

Both *Enron v. Argentina* and *Philip Morris Asia v. Uruguay* seem to suggest commitments need to be specific and particular to be covered by the umbrella clause. Still, few tribunals excluded state legislations from the umbrella clause as a whole. For example, the *Noble Ventares* tribunal held that “the notion ‘entered into’ indicate[d] that specific commitments are referred to and *not* general commitments, for example by way of legislative acts.”³⁰⁸ A letter sent by Switzerland to ICSID in *SGS v. Pakistan*, which Uruguay relied upon in *Philip*

²⁹⁸ *Id.* at ¶ 477.

²⁹⁹ *Id.* at ¶ 478.

³⁰⁰ *Id.* at ¶¶ 479–80.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at ¶¶ 479–80.

³⁰⁴ *Id.* at ¶ 481.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Noble Ventures, Inc. v. Rom.*, Award, *supra* note 130, at ¶ 51 (emphasis added). However, the claimant in this case did not argue the umbrella clause covered a general legislation. Therefore, the tribunal did not address the issue of general legislation in details.

Morris Asia v. Uruguay, also stated that the umbrella clause “was not intended to cover obligations arising under general legislative, administrative, or other unilateral measures.”³⁰⁹

3. Application to WTO Claims

A tribunal would likely first look to the language of the umbrella clause. For example, in *Enron v. Argentina*, the tribunal held that “any obligation” included obligations regardless of their nature.³¹⁰ It also recognized that the obligation should be “with regard to investments.”³¹¹ An umbrella clause which requires a host state to observe any obligation “with regard to investments” is likely broader than one under which a host state shall observe any obligation “with regard to a *specific* investment of an investor.”

Whether a WTO provision or domestic legislation enforcing a WTO provision is specific to an investor is also important. In light of *Enron v. Argentina* and *Phillip Morris Asia v. Uruguay*, even if the umbrella clause did not exclude a piece of general legislation *per se*, it required the general legislation to be specific or particular to the investor.³¹² In *Enron v. Argentina*, a tariff law was specific because it established a tax regime which guaranteed the investor’s investments.³¹³ Likewise, in *Phillip Morris Asia v. Uruguay*, a general trademark law became specific through the investor’s individual application of a trademark and the government’s grant of the trademark to the investor individually.³¹⁴

Taking TRIPS as an example, Article 13 provides a three-step test for national exceptions to copyright. The test requires member states to limit exceptions to exclusive copyrights to “certain special cases,” “which do not conflict with a normal exploitation of the work” and “do not unreasonably prejudice the legitimate interests of the right holder.”³¹⁵ In compliance with Article 13, the U.S. made a more specific test for the exception. 17 U.S.C. § 107 considers specific factors for determining fair use, which include “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” “the nature of the copyrighted work,” “the amount and substantiality of the portion used,” and “the effect of the use

³⁰⁹ Phillip Morris v. Uru, Award, *supra* note 171, at 465.

³¹⁰ Enron Corporation Ponderosa Assets, L.P v. Arg., Award, *supra* note 161, at ¶ 274.

³¹¹ *Id.* at ¶ 273.

³¹² *See, for example*, Phillip Morris v. Uru., Award, *supra* note 171, at ¶ 478.

³¹³ Enron Corporation Ponderosa Assets, L.P v. Arg., Award, *supra* note 161, at ¶ 270.

³¹⁴ Phillip Morris v. Uru., Award, *supra* note 171, at ¶ 478.

³¹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Jan. 1, 1995, 108 Stat. 4809, 1869 U.N.T.S. 299.

upon the potential market.”³¹⁶ As the provisions in section 107 are more specific and particular than Article 13, a tribunal may be more willing to exercise jurisdiction over claims arising under section 107 rather than Article 13.

Lastly, arbitrators’ personal opinions matter. If an arbitrator follows *Noble Ventares*, then general legislations, including WTO agreements and their enforcing legislations, are categorially excluded from the umbrella clause. However, if an arbitrator prefers the approach in *Enron v. Argentine* or *Phillip Morris Asia v. Uruguay*, a WTO provision specifically affecting the claimant may be covered by the umbrella clause.

V. PROPOSALS

A. Manifesting Parties’ Intentions in the Language of the Umbrella Clause

As explained above, tribunals pay particular attention to the language of an umbrella clause in determining its scope. Many tribunals have inferred the intentions of parties from the text. Although some tribunals found that minimal textual differences did not mandate different interpretations of the umbrella clause,³¹⁷ they generally believe the scope of the umbrella clause varies according to its wording. Therefore, state parties should make the scope of the umbrella clause clear in its drafting. For example, states can add phrase “including/excluding obligations undertaken under other international treaties, including the WTO agreements” to their umbrella clause. Also, states can delete an umbrella clause as a whole if they are not sure about its scope. The U.S. has deleted the whole umbrella clause in its newest model BIT to avoid the risk of unexpected claims.³¹⁸

Revising or renegotiating an umbrella clause is an effective way to clarify its scope. However, in practice, parties might have different preferences over whether the umbrella clause should cover WTO claims. Capital-importing states may be more willing to revise umbrella clauses and exclude WTO claims from their scope, whereas capital-exporting states may prefer to include unclear umbrella clauses. Given that, states should still try to clarify the scope of the umbrella clause when negotiating a new BIT.

³¹⁶ 17 U.S.C. § 107.

³¹⁷ See, for example, *Phillip Morris v. Uru.*, Award, *supra* note 171, at ¶ 471.

³¹⁸ 2012 U.S. Model Bilateral Investment Treaty, <https://perma.cc/8WK3-52M4>.

B. Clarification by the WTO

The WTO has been unwilling to refer to other bodies' interpretation of WTO agreements. The softwood lumber dispute between the U.S. and Canada is a good example, where the U.S. alleged that Canadian subsidies to softwood lumber producers violated its commitments under WTO agreements and NAFTA.³¹⁹ The parties sought redress in both WTO and NAFTA forums, leading to "4 WTO disputes, 15 NAFTA Chapter 19 cases, and 6 disputes under NAFTA Chapter 11."³²⁰ However, none of the 12 decisions by WTO mentioned the merits of the corresponding NAFTA decisions.³²¹

Likewise, *Brazil—Retreaded Tyres* involved proceedings in both the WTO and *Mercado Comum do Sul* (MERCOSUR), a South American trade bloc. Brazil banned the import of retreaded tires on the basis of GATT Article XX(b) as a measure "necessary to protect human, animal or plant life or health."³²² It excluded members of the MERCOSUR customs union from its ban in order to comply with an earlier decision from a MERCOSUR tribunal. Then the European Communities sued in the WTO for arbitrary or unjustifiable discrimination by Brazil against its retreaded tires. The Panel found the MERCOSUR ruling binding³²³ and recognized that the MERCOSUR rulings served as "*res judicata* for the parties involved."³²⁴ The Appellate Body, however, reversed the Panel's decision.³²⁵ It found that "the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination."³²⁶ The Appellate Body indicated, in this case, that the MERCOSUR ruling "was not viewed as relating to or supporting the GATT Article XX(b) objective; its logic was foreign to the WTO system, and incapable of justifying deviation from GATT principles of non-discrimination."³²⁷

Generally speaking, the WTO has "not shown an inclination to consider and rely upon decisions rendered by non-WTO tribunals in situations of

³¹⁹ Allen & Soave, *supra* note 9, at 33.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.* at 34.

³²³ *Id.*

³²⁴ Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/R, ¶ 56 (adopted June 12, 2007).

³²⁵ Allen & Soave, *supra* note 9, at 34.

³²⁶ *Id.* at 35 (citing Appellate Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R, ¶ 228 (adopted Dec. 3, 2007)).

³²⁷ *Id.*

overlap.”³²⁸ After an arbitration award over WTO claims, the host state or the home state of the private investor can still bring the dispute to the WTO, and the WTO is unlikely to find itself bound by the arbitral award. The attitude of the WTO may incentivize parties to bring WTO claims in a tribunal first and then relitigate the same issue (or, for investors, lobby its origin state to litigate the same issue) at the WTO if they receive an unfavorable decision. To deal with this problem, the WTO should clarify that Article 23’s exclusive jurisdiction clause covers the claims brought by private investors in arbitral tribunals, or otherwise defer to arbitral awards when necessary to disincentivize repetitive litigation.

VI. CONCLUSION

Compared to the WTO dispute settlement mechanism, arbitration is much faster and more flexible, especially for investors who prefer to sue for themselves and seek retrospective damages. Once arbitration opens the door for WTO claims, investors will likely continue to claim WTO violations through arbitration rather than by lobbying their home states to sue at the WTO. This trend, in turn, could completely change the picture of international dispute resolution. The international community has not come up with rules coordinating the arguably overlapping jurisdictions of arbitral tribunals and the WTO, nor has it devised means by which to ensure consistency in decisions made by multiple forums. This problematically worsens the fragmentation of international law.

Allowing investors to bring WTO claims in arbitral tribunals through umbrella clauses without any mechanism to coordinate tribunals and the WTO’s jurisdiction may violate WTO’s compulsory and exclusive jurisdiction over WTO claims under Article 23 of the DSU. On several occasions, the WTO has expressed its unwillingness to recognize or defer to the jurisdiction of other institutions.

Yet, Article 23 only facially applies to state actions. It fails to clarify whether private investors are entitled to bring WTO claims in other forums. A few arguments advocate for the application of Article 23 to proceedings brought by private investors. The purpose of Article 23—preventing unilateral state actions—also arguably favors its application to investor-state dispute resolutions whose effects are large enough to constitute unilateral actions.

The current jurisprudence on the umbrella clause thus leaves room for uncertainty in this expansive interpretation. Although most tribunals have recognized that umbrella clauses cover investment contract disputes, a wide split

³²⁸ *Id.* at 41.

exists among tribunals over whether umbrella clauses require privity of contract and whether they cover a host state's commitments embodied in general legislation.

Some tribunals obviously disfavor the expansive coverage of the umbrella clause, but some others are unwilling to block the arbitration proceeding as a whole at the outset. Overall, the investors' broad interpretation of the umbrella clause will lead to a new expansion of investor-state arbitral tribunals' jurisdiction. The lack of precedent on this specific issue renders outcomes unpredictable.

This Comment recommends two ways to address this issue. First, in light of the textual approach adopted by most tribunals, states should pay particular attention to the language of umbrella clauses when they negotiate BITs. Importantly, states should realize the large scope of the typical umbrella clause and explicitly exclude WTO claims from umbrella clauses if they prefer the WTO as an exclusive dispute settlement forum. Second, the WTO needs to clarify the scope of Article 23. Although the WTO refused to bind itself to the decisions from other forums, it never explicitly prohibited other forums from governing WTO claims brought by private parties. This ambiguous attitude incentivizes investors to turn to other dispute resolution mechanisms.