SGS Société Générale de Surveillance SA v The Republic of Paraguay, Decision on Jurisdiction, Case No ARB/07/29, International Centre for Settlement of Investment Disputes

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Introduction

The institution of investment arbitration has transformed the landscape of investment protection.[1] Substantive norms aside, investors' *ius standi* to directly invoke the arbitration procedure has infused a sense of security in cross-border investment.[2] Free from the political uncertainty of diplomatic protection and (the often inadequate) local remedies, this so-called 'arbitration without privity' mitigates the substantial political risk associated with foreign investment.[3]

This 'internationalisation' of disputes, however, has witnessed a chequered past. Wary of adopting onerous obligations, host states have sought to limit the scope of their consent.[4] Controversially, this conflict has manifested itself in varying interpretations of 'umbrella clauses'. Broadly, umbrella clauses are 'catch-all statements' stipulating that conditions and privileges negotiated between the investor and the host state will be protected by a treaty.[5] These unassuming inclusions in bilateral investment treaties ('BITs'), found in almost 40 per cent of such instruments,[6] stand to elevate primarily contractual disputes between investors and host states into treaty claims. Crucially, investor-friendly investment arbitral tribunals are impinging upon the formerly exclusive jurisdiction of municipal courts.[7]

This carries an obvious risk of subjecting sovereign action (in contractual matters no less) to international tribunals. This consequence has not gone unnoticed; recently, it has

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1 For a broad historical review of investor-state arbitration, see Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) 5.

2 Georges Burdeau, 'Nouvelles Perspectives pour l'Arbitrage dans le Contentieux Economique Interestant l'Etat' (1995) *Revue de l' Arbitrage* 3, 12.

3 Jan Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Review — Foreign Investment Law Journal* 232.

4 This is expected on the part of capital importing nations, in an attempt to exclude external scrutiny of state actions. However, a careful balance is negotiated in most treaties to accommodate investors' interests. See, eg, Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121, 142–3.

5 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2nd ed, 2004) 248. Though the precise effect of an umbrella clause is closely tied to its wording, Professor Sornarajah's description adequately captures their effect.

6 Judith Gill, 'Contractual Claims and Bilateral Investment Treaties' (2004) 21 *Journal of International Arbitration* 397.

7 The Preamble to the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*') states that 'while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases'. The scope of this 'internationalisation', however, is subject to debate.

prompted capital importing[8] (and indeed exporting[9]) states to question the prudence of retaining dispute resolution clauses in BITs. This development, no doubt, is of great concern to the framework of investment protection, and more specifically, international investment arbitration. In this context, the recent decision of an International Centre for Settlement of Investment Disputes ('ICSID') Tribunal in *SGS Société Générale de Surveillance SA* v *Republic of Paraguay (Award)*[10] offers a fresh perspective on umbrella clauses.

With consistent interpretation eluding 20 tribunals in the past decade, disagreement seems to remain the only continuing feature in this area.[11] In *SGS v Paraguay*, the Tribunal adopted a broad, and largely textual, interpretation of the umbrella clause contained in art XI of the Switzerland-Paraguay BIT.[12] In doing so, it imputed an intention to state parties to include contractual undertakings within its fold. This broad interpretation, coupled with the existing uncertainty in arbitral practice, may alarm states. Accordingly, a closer look at the decision in the context of surrounding arbitral practice is in order.

Background

This dispute concerned a contract between Société Générale de Surveillance SA ('SGS'), a Swiss company, and the Ministry of Finance of Paraguay for the provision of certification services based on pre-shipment inspection of cargoes destined for Paraguay. SGS claimed a breach of art XI of the Switzerland-Paraguay BIT on account of non-payment of dues under the contract. Article XI reads: 'Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the other investors of the Contracting Party.'

The dispute in the decision on jurisdiction was not the merit of SGS' claim for breach, but, rather, whether art XI created a substantive obligation on Paraguay to perform its contract — an obligation that could be arbitrated independently under the BIT. This question of jurisdiction depended on three primary, though related, inquiries: (1) whether the language of art XI admitted such claims, given the text and context (that is, parties' intent) of the provision; (2) whether a broad interpretation rendered art XI 'susceptible of almost indefinite expansion';[13] and (3) the effect of characterisation of a contractual claim as breach of a treaty standard. A further complication resulted from art IX of the contract which contained an exclusive jurisdiction clause in favour of the Courts of the City of Asunción.[14] This raised the question of admissibility consequent to jurisdiction.

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8 The Department of Industrial Policy and Promotion of the Indian Government has 'in principle decided not to include' dispute resolution clauses as 'the state should not get drawn into private disputes'. See Asit Ranjan Mishra, *India May Exclude Clause on Lawsuit From Trade Pacts* (29 January 2012) Live Mint <http://www.livemint.com/2012/01/29231517/India-may-exclude-clause-on-la.html>.

9 Eg, the Australian 2011 Trade Policy Statement indicates the Gillard Government's intention to discontinue the practice of including dispute resolution clauses in its bilateral investment treaties: see Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (April 2011) 14.

10 (ICSID Case No ARB/07/29, 10 February 2012) ('*SGS v Paraguay*').

11 See below nn 25–6.

12 *Accord entre la Confédération suisse et la République du Paraguay concernant la promotion et la protection réciproque des investissements,* Paraguay-Switzerland, signed 31 January 1992 (entered into force 28 September 1992).

13 This concern was highlighted in a previous decision, *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/01/13, 6 August 2003) ('*SGS v Pakistan*'). This was considered by the Tribunal in *SGS v Paraguay* (ICSID Case No ARB/07/29, 10 February 2012).

14 Clause 9 read: 'Any conflict, controversy or claim deriving from or in connection with this Agreement, breach, termination or invalidity, shall be submitted to the Courts of the City of Asunción under the Law of Paraguay.'

These questions were considered previously in two seminal decisions: *SGS v Pakistan*[15] and *SGS v Philippines*.[16] Both Tribunals agreed that the characterisation of the claim (as a contractual matter, or as an investment-related matter) was up to the claimant. However, the Tribunals took diametrically opposite views on the primary question: whether the umbrella clause elevated a contractual claim to a treaty claim.

In *SGS v Pakistan*, the Tribunal rejected SGS' 'extraordinary expansive' reading, preferring to adopt a 'prudential approach' that required greater specificity in order to impose international legal obligations under the BIT.[17] For example, the Tribunal held that the umbrella clause used the word 'commitments', and not 'contractual commitments'.[18] The general nature of the clause ('constantly [to] guarantee the observance') was insufficient to establish state consent, thus rendering the umbrella clause merely procedural. Alongside its textual reading, the Tribunal was persuaded by the consequence of a broad reading, which would render the provision 'susceptible of almost indefinite expansion', thereby 'opening the floodgates' to numerous claims.[19]

The Tribunal in *SGS v Philippines* disagreed with the interpretation in *SGS v Pakistan*, labelling it 'highly restrictive'.[20] Here, the umbrella clause was substantially similar.[21] To begin with, the Tribunal offered a textual analysis. It noted that the term 'any obligation' was all-encompassing and did not require further qualification in order to meet the requisite standard of specificity.[22] Second, the Tribunal referred to the object and purpose of the treaty, considering it 'legitimate to resolve uncertainties' in the text in favour of the investor given the parties' intention 'to create and maintain favourable conditions for investments'.[23] Nonetheless, the Tribunal said that, while it did have jurisdiction over the claim, the claim was not admissible on account of the specific dispute settlement clause in the contract that was elevated, along with the other contractual provisions, into the treaty claim by virtue of art XI.[24]

Since *SGS v Pakistan* and *SGS Philippines*, Tribunals have been divided over the narrow (*SGS v Pakistan*)[25] and broad (*SGS v Philippines*)[26] views on jurisdiction, and the matter of

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15 (ICSID Case No ARB/01/13, 6 August 2003).

16 *SGS Société Générale de Surveillance SA v Republic of the Philippines (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/02/6, 29 January 2004) ('*SGS v Philippines*').

17 *SGS v Pakistan* (ICSID Case No ARB/01/13, 6 August 2003) [171].

18 Ibid [166].

19 Ibid.

20 *SGS v Philippines* (ICSID Case No ARB/02/6, 29 January 2004) [120].

21 Article X(2) of the *Accord entre la Confédération suisse et la République des Philippines concernant la promotion et la protection réciproque des investissements*, signed 31 March 1997 (entered into force 23 April 1999) stipulated that: 'Each Contracting Party shall observe any obligation it has assumed with respect to specific investments in its territory by investors of the other Contracting Party.'

22 *SGS v Philippines* (ICSID Case No ARB/02/6, 29 January 2004) [115].

23 Ibid [116].

24 Ibid [171].

25 *Joy Mining Machinery Limited v The Arab Republic of Egypt (Award on Jurisdiction)* (ICSID Case No ARB/03/11, 6 August 2004); *Salini Construction SpA v The Hashemite Kingdom of Jordan (Decision on Jurisdiction)* (ICSID Case No ARB/02/13, 29 November 2004); *El Paso Energy International Company v Argentine Republic (Decision on Jurisdiction)* (ICSID Case No ARB/03/15, 27 April 2006); *Pan American LLC and BP Argentina Exploration Company v Argentine Republic* (ICSID Case No ARB/03/13).

26 *Fedax NV v Republic of Venezuela (Decision on Jurisdiction)* (ICSID Case No ARB/96/3, 11 July 1997); *Consortium Groupement LESI — DIPENTA v Democratic Republic of Algeria (Award)* (ICSID Case No ARB/03/8, 10 January 2005); *CMS Gas Transmission Company v Argentine Republic (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/01/8, 17 July 2003); *Eureko BV v Republic of Poland (Partial Award on Liability)* (Ad Hoc Investment Treaty Case,

admissibility. Over time, the debate has reflected a divide on the policy implications of 'elevating' contractual claims into treaty claims, thus relating to a fundamental disagreement between an expansive and a narrow view of investment arbitration itself.[27] Importantly, although all decisions are informed by the text of the specific umbrella clause, the debate on core interpretative mechanisms is relevant across all clauses. Thus, the *SGS v Pakistan* and *SGS v Philippines* cases — which detail the broad contours of the debate — are helpful in understanding the *SGS v Paraguay* decision.

Facts

SGS initiated arbitral proceedings on 16 October 2007 under art IX of the Switzerland-Paraguay BIT and the *ICSID Convention*. The proceedings on merits were suspended under art 41(2) of the *ICSID Convention* and art 41(3) of the Arbitration Rules, pending resolution of Paraguay's jurisdictional objections. Consequent to the decision on jurisdiction rendered in *BIVAC BV v The Republic of Paraguay*,[28] a case with almost identical facts, the Tribunal granted both parties leave to file brief post-hearing submissions limited to the relevance of the *BIVAC* decision.

SGS claimed compensation for a violation of arts 4(1) (undue and discriminatory treatment), 4(2) (denial of fair and equitable treatment) and 11 (umbrella clause) of the BIT. Aside from its jurisdictional objection to the umbrella clause, the respondent — as is common — questioned the presence of threshold requirements for the bringing of a claim: presence of an 'investment' under art 1(2) of the BIT and art 25(1) of the *ICSID Convention*, 'in the territory' of Paraguay and 'made in accordance with [Paraguayan] law'.[29] The Tribunal dismissed all objections in its decision dated 12 February 2010, and found a breach of obligations under art 11 in its decision on merits, dated 10 February 2012. Both rulings were made available publicly on the latter date.

Parties' Claims

A *Paraguay (Respondent)*

Paraguay argued on two levels: that art XI of the BIT did not create a substantive obligation that could support a finding on jurisdiction and, in any event, the claim was inadmissible given the forum selection clause in the contract between parties. As to jurisdiction, Paraguay largely recounted arguments presented by respondents in the *SGS v Pakistan* and *SGS v Philippines* cases. It contended that a literal interpretation must be tempered with other concerns — thus arguing that art XI did not create a substantive

19 August 2005); *Noble Ventures, Inc v Romania (Award)* (ICSID Case No ARB/01/11, 19 May 2006); *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Case No ARB/02/1, 30 April 2004); *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12).

27 Cf Sornarajah, above n 5, 247–9 with Katia Yannaca-Small, 'Interpretation of Umbrella Clauses in Investment Agreements' (OECD Working Paper on International Investment No 2006/3, OECD, October 2006).

28 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay* (ICSID Case No ARB/07/9, 29 May 2009) ('*BIVAC*').

29 The Tribunal's analysis of these objections — dealt with in paras 59–123 — has not departed from settled principles in investment arbitration and followed the decisions in *SGS v Pakistan* (ICSID Case No ARB/01/13, 6 August 2003), *SGS v Philippines* (ICSID Case No ARB/02/6, 29 January 2004) and *BIVAC* (ICSID Case No ARB/07/9, 29 May 2009).

obligation due to the absence of specific party intent and the burdensome consequences it would entail. Paraguay also argued that art XI required sovereign interference beyond the ordinary conduct of a commercial counterparty, as was the case here.[30] Paraguay's 'core objection', however, was that the fundamental basis of the claim was a contractual dispute that had 'been dressed' as a BIT claim; a result of Claimant's improper 'labelling'.[31]

In the alternative, Paraguay argued that the Tribunal should follow the approach in *BIVAC* and find the art XI claim to be inadmissible in light of the forum selection clause in favour of the courts of the City of Asunción that demonstrated specific party intent.

B *SGS (Claimant)*

In response to Paraguay's jurisdictional objections, SGS contended that a literal interpretation under art 31 of the *Vienna Convention*[32] did not admit any qualifications into art XI. Rather, the umbrella clause was worded clearly and positively and couched in mandatory terms.[33] SGS requested the Tribunal to give full effect to the text. Moreover, SGS maintained that it did not claim a breach of the contract, but only the treaty. Accordingly, it argued that that treaty and contract claims could co-exist and be subject to separate dispute resolution procedures. This 'disintegrationist' approach relied on a strict distinction between the municipal and international legal order.[34]

Tribunal's Findings

The Tribunal confirmed its jurisdiction and held the claim to be admissible. While the Tribunal's analysis on the presence of threshold requirements that trigger jurisdiction followed the settled approach,[35] its views on umbrella clauses departed from previous arbitral practice. The Tribunal's analysis on jurisdiction proceeded in three steps: (1) understanding the text of art XI; (2) reconciling the apparent conflict between a broad textual interpretation of art XI and the harsh consequences it entails for the host state; and (3) determining the validity of the treaty claim versus contract claim distinction drawn by SGS.

On the text of art XI, the Tribunal followed the *SGS v Philippines* approach. It refused to read in any qualifications into the breadth of art XI, which contained 'no limitations on its face — it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally'.[36] The Tribunal noted that any contrary interpretation would render art XI inutile.[37] Similarly, the Tribunal found no textual mandate to limit the umbrella clause to instances of sovereign interference only.[38] Indeed, it also alluded to the

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30 *SGS v Paraguay* (ICSID Case No ARB/07/29, 10 February 2012) [134].

31 Ibid [133].

32 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

33 Ibid [142].

34 See Mihir Naniwadekar, 'The Scope and Effect of Umbrella Clauses' (2010) 2 *Trade Law & Development* 169, 186.

35 *SGS v Paraguay* (ICSID Case No ARB/07/29, 10 February 2012) [59]–[123].

36 Ibid [167]. The Tribunal rejected Paraguay's argument to 'read in' qualifications based on presumed party intent, in the absence of negotiating history of the BIT.

37 Ibid [182].

38 See *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador (Award)* (ICSID Case No ARB/04/19, 18 August 2008), recognising that the majority of decisions that have addressed the issue have not found that 'sovereign interference' is necessary to establish a breach of an umbrella clause.

difficulty of 'drawing a line between an ordinary commercial breach of contract and acts of sovereign interference' as '[l]ogically, one can characterize every act by a sovereign State as a "sovereign act"'.[39]

As a related inquiry, the Tribunal considered whether the effect of its interpretation imposed undue obligations on Paraguay. The Tribunal cited concerns voiced in *SGS v Pakistan* as to the 'indefinite expansion' of the umbrella clause that were 'so burdensome in their potential impact upon a Contracting Party', given the unending stream of investor-state litigation that would follow. Rejecting this view, the Tribunal deferred to the ordinary meaning, despite the possible consequences, rather than offering a countervailing consideration.[40] In support, it also relied on the objections of the Swiss Government after the decision in that case as evidence of party intent.[41]

Finally, the Tribunal rejected Paraguay's classification of the issue as a contract-based claim lying outside the reach of the Tribunal, through two lines of reasoning. First, the Tribunal maintained — in line with established jurisprudence — that it must defer to SGS' characterisation at the jurisdictional phase. Thus, it noted that SGS had 'advanced no claims under the Contract'.[42] Second, and as a logical extension, the Tribunal noted the distinct legal regimes in operation: a breach of contract under the municipal law of Paraguay and a breach of art XI of the BIT under international law.[43] Thus, while it accepted that Paraguay's failure to pay for SGS's services under the contract would result in a violation of art XI; in its view this would not merge the two distinct legal causes of action. Thus, it agreed with the Tribunal in *Impregilo SpA v Islamic Republic of Pakistan*:[44] 'Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.'[45]

Having found jurisdiction, the Tribunal further noted that the claim was admissible. Accordingly, it disagreed with *SGS v Philippines* and also *BIVAC*, a case decided during the Tribunal's deliberations. Those two decisions considered the claims inadmissible on account of exclusive jurisdiction clauses in the contract. Once confirming jurisdiction, both decisions held that all of the contract's obligations — including its forum selection clause — must then be given effect in that treaty setting.[46]

However, the Tribunal believed that declining to hear the case would be 'at risk of failing to carry out its mandate under the Treaty and the ICSID'.[47] The Tribunal noted that an exclusive jurisdiction clause within the contract would have no effect on proceedings

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39 *SGS v Paraguay* (ICSID Case No ARB/07/29, 10 February 2012) [135].

40 Ibid [169].

41 The Swiss Government's objection to the decision in *SGS v Pakistan* (ICSID Case No ARB/01/13, 6 August 2003), found in the Respondent's Counter-Memorial [92], was after the decision and its evidentiary value, given the self-serving nature of the statement, was not discussed by the Tribunal.

42 *SGS v Paraguay* (ICSID Case No ARB/07/29, 10 February 2012) [127].

43 Ibid [132].

44 (ICSID Case No ARB/03/3, 22 April 2005).

45 *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador (Award)* (ICSID Case No ARB/04/19, 18 August 2008) [254].

46 *SGS v Philippines* (ICSID Case No ARB/02/6, 29 January 2004) [154]–[155]; *BIVAC* (ICSID Case No ARB/07/9, 29 May 2009) [142]–[158].

47 *SGS v Paraguay* (ICSID Case No ARB/07/29, 10 February 2012) [172]. A similar opinion was expressed in *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic (Award)* (ICSID Case No ARB/97/3, 21 November 2000) [102]. See also Thomas Wälde, 'Energy Charter Treaty-based Investment Arbitration' (2004) 5 *Journal of World Investment and Trade* 373, 393.

under the treaty, thereby reiterating the distinction between the two sources. Indeed, the Tribunal noted that the umbrella clause would be rendered an 'empty shell' if a contrary interpretation is taken. Finally, the Tribunal disagreed with the *BIVAC* Tribunal's decision that the contract, being later in time, implied a waiver of rights under the BIT. Rather, it viewed investment arbitration as one among a 'safety net' of protections that 'should not lightly be assumed to have been waived'.[48] Accordingly, the Tribunal confirmed its jurisdiction to decide claims under art XI, and further, chose to exercise its mandate under the *ICSID Convention*.

An Assessment

The Tribunal's decision represents the high-water mark of arbitral practice.[49] Though correct in its positive findings on jurisdiction and admissibility, the Tribunal's reasoning may prove insufficient in future decisions, especially given the uncertainty in arbitral practice. The line of cases following *SGS v Pakistan* has declined a broad interpretation on account of insufficient proof of party intent. This rigorous treatment of intention is proper, and the Tribunal's blanket dismissal in favour of the ordinary meaning of the clause may not suffice. Instead, the requisite intent is derivable, as demonstrated by Sinclair,[50] from the history of umbrella clauses in the *Abs-Shawcross Draft Convention*,[51] the *Draft Convention on the Protection of Foreign Property*[52] and other instruments to which modern umbrella clauses trace their history.

Further, the Tribunal's approach may be characterised as unduly broad. Though the Tribunal alludes to a more nuanced approach that differentiates between various types of contracts,[53] it does not do so with certainty, and parts of the decision remain unclear. It has been argued that umbrella clauses contemplate only investment-related contracts, rather than all contractual obligations.[54] This *via media* approach balances parties' interests and will assuage concerns highlighted in *SGS v Pakistan* regarding the indefinite expansion of umbrella clauses.

However, the Tribunal's treatment of the overlap between treaty claims and contract claims no doubt clears confusion in arbitral practice. The presence of the two distinct legal orders — though recognised elsewhere in investment arbitration — is stated clearly by the Tribunal. However, the applicability of the principle to admissibility of the claim is unclear

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48 *SGS v Paraguay* (ICSID Case No ARB/07/29, 10 February 2012) [178]. For this, the Tribunal relied on *Aguas del Tunari v Bolivia (Decision on Respondent's Objections to Jurisdiction)* (ICSID Case No ARB/02/3, 21 October 2005): '[M]ere designation of a non-ICSID forum in a contract, without an express waiver of ICSID jurisdiction, was insufficient'.

49 Darius Chan, 'The High-Water Mark of an Umbrella Clause: SGS v Paraguay' on *Kluwer Arbitration Blog* (18 April 2012) <http://kluwerarbitrationblog.com/blog/2012/04/18/the-high-water-mark-of-an-umbrella-clause-sgs-v-paraguay/>.

50 Anthony C Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20(4) *Arbitration International* 411.

51 *Draft Convention on Investments Abroad* in United Nations Conference on Trade and Development, *International Investment Instruments: A Compendium V* (United Nations, 2000) 395.

52 OECD, *Draft Convention on the Protection of Foreign Property* (OECD, Publication No 15637, December 1962).

53 *SGS v Paraguay* (ICSID Case No ARB/07/29, 10 February 2012) [183] (relating art XI to the scope of art IX, which extends only to disputes 'related to investments').

54 Naniwadekar, above n 34.

in the decision.[55] The reasoning adopted in *SGS v Pakistan* and *BIVAC* revolves around importing the terms of the contract, including the exclusive jurisdiction clause, into the treaty. However, this is not the effect of the principle. Rather, a failure to comply with the obligations in the contract is rendered a substantive breach under art XI, without somehow elevating the terms of the contract into the treaty. This is in line with the Tribunal's general analysis, and should be clarified in order to dismiss the host states' objections in a consistent manner.

Conclusion

The Tribunal's principled approach goes a long way in introducing clarity to the scope of umbrella causes. However, the debate is far from settled and only time will tell whether the decision is accepted in investment arbitration. Given the uncertainty in arbitral practice, it is imperative that a comprehensive analysis is concluded to imbue certainty in this field.

Such certainty will benefit investors and inform future negotiation of treaties. We must also consider the effect of umbrella clauses — and their broad interpretation — on the policy decisions of states. The Australian Gillard Government, in its 2011 Trade Policy Statement,[56] decided to remove dispute resolution clauses from its treaties and advised businesses to 'make their own assessments' about sovereign risk. The Indian Department of Industrial Protection is considering a similar proposal.[57] A nuanced approach to umbrella clauses that includes reasonable limitations on their scope may mitigate states' concerns and contribute to the continued vitality of investor-state arbitration.

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55 *SGS v Paraguay* (ICSID Case No ARB/07/29, 10 February 2012) [174]. The Tribunal notes the effect of its analysis is limited to the question of jurisdiction only, but — unlike other parts of the decision — does not extend the principle to engage directly with the reasoning in contradictory decisions *SGS v Philippines* (ICSID Case No ARB/02/6, 29 January 2004) and *BIVAC* (ICSID Case No ARB/07/9, 29 May 2009).

56 Department of Foreign Affairs and Trade, above n 9.

57 Mishra, above n 8.