

# The Decision of the ICSID *Ad Hoc* Committee in *CMS v. Argentina* Regarding the Conditions of Application of an Umbrella Clause: *SGS v. Philippines* Revisited

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## Abstract

In *CMS v. Argentina*, an ICSID *ad hoc* Committee partially annulled the first ICSID award on the merits dealing with the 2000–2002 Argentine crisis, for failure to state reasons regarding the conditions of application of an umbrella clause. This question was somewhat overshadowed in prior cases by the question of the clause's effect. The key finding of the Committee is that an umbrella clause does not change the content, proper law of, and parties to, the obligations of the State, the breach of which may trigger the umbrella clause. The decision of the *CMS ad hoc* Committee has sparked debate as to whether the Committee was entitled, within the limited framework of its annulment powers, to suggest such an interpretation of the conditions of application of umbrella clauses. The focus of this article is different and twofold. Because the *CMS ad hoc* Committee did suggest such an interpretation, the article first traces its roots to the decision on jurisdiction in *SGS v. Philippines*. It then evaluates the consequences that would appear to follow from the Committee's findings at three levels. 1) May all types of State obligations trigger an umbrella clause? 2) May an umbrella clause apply to obligations undertaken by a State towards a subsidiary of an investor, as opposed to the investor itself? 3) May it apply to obligations undertaken towards investments or investors by state-owned or state controlled entities having their own legal personality distinct from the State?

## Keywords

Arbitration; ICSID; ad hoc Committee; investment treaties; umbrella clause

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On September 25, 2007, an ICSID *ad hoc* Committee composed of Judge Nabil Elaraby, Professor James R. Crawford, and Judge Gilbert Guillaume as President, partially annulled the award rendered on May 12, 2005 by an ICSID Tribunal in the case of *CMS Gas Transmission Company v. Argentina*.<sup>2</sup> The decision was much awaited as the *CMS* Award was the first award on the merits resulting from the 2000–2002 Argentine crisis, which has largely fed the case load of ICSID since 2001. Argentina had been ordered by the ICSID Tribunal to pay the investor CMS Gas Transmission Company (“CMS”) an amount of \$133.2 million plus interest.

In line with the approach taken by all ICSID *ad hoc* Committees, the *CMS ad hoc* Committee recalled several times its limited function pursuant to Article 52 of the ICSID Convention and, in particular, that it is not an appellate body and cannot substitute its determination of the merits for that of the Tribunal,<sup>3</sup> regardless of possible – and as the decision shows, certain – substantive disagreements.<sup>4</sup> Based on Article 52(1)(e) of the ICSID Convention (“the award has failed to state the reasons on which it is based”), the Committee nevertheless annulled the operative part of the *CMS* Award “as far as it provided that ‘[t]he Respondent breached its obligations [...] to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty’, i.e., the so-called “umbrella clause.”<sup>5</sup> The Committee’s findings in this respect evidently have

<sup>2</sup> *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of May 12, 2005; Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic of September 25, 2007. On the *ad hoc* Committee’s decision, see, S. Lemaire, *REV. ARB.* 2007, 905–910; T. Christakis, *Quel remède à l’éclatement de la jurisprudence CIRDI sur les investissements en Argentine? La décision du comité ad hoc dans l’affaire CMS c. Argentine*, *RGDIP* 2007, 879–896; E. Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (CIRDI) – Chronique des sentences arbitrales*, *J.D.I.* 2008, 350–364; A. Crivellaro, *Actualité du contrôle des sentences arbitrales CIRDI*, in *LA PROCEDURE ARBITRALE RELATIVE AUX INVESTISSEMENTS INTERNATIONAUX, ASPECTS RECENTS*, Symposium of the Institut des Hautes Etudes Internationales, Paris, April 3, 2008, forthcoming.

<sup>3</sup> *CMS v. Argentina*, Decision of the *ad hoc* Committee, paras. 43 and 136.

<sup>4</sup> This commentary only discusses the sources and certain implications of the Committee’s decision regarding the conditions of application of umbrella clauses, leaving aside other important aspects of the decision such as state of necessity and other aspects.

<sup>5</sup> *CMS v. Argentina*, Decision of the *ad hoc* Committee, para. 163. The annulment of the Award on that point, however, did not affect the monetary award granted to CMS. To the extent that Argentina’s responsibility had been established on the basis of Article II(2)(a) of the BIT (the guarantee of “fair and equitable treatment”) in addition to Article II(2)(c) (the “umbrella clause”), the findings of the Tribunal regarding Article II(2)(a), which in the Committee’s view did not warrant annulment, stood as a sufficient basis in themselves for Argentina’s responsibility. *Ibid.*, para. 100.

the ambition to constitute guidance for future Tribunals on that controversial question.

According to the definition of Professors Dolzer and Schreuer, “an umbrella clause is a provision in an investment protection treaty that guarantees the observation of obligations assumed by the host State vis-à-vis the investor.”<sup>6</sup> Sometimes also called “observance of undertakings”, “sanctity of contract”, “*pacta sunt servanda*”, or “mirror effect” clauses, umbrella clauses are found in slightly less than half of the bilateral investment treaties (BITs).<sup>7</sup> Such clauses, which may be worded in significantly different ways,<sup>8</sup> were traced to the Anglo-Iranian Oil Company dispute in the early 1950’s.<sup>9</sup> Article II(2)(c) of the 1991 United States–Argentina BIT invoked in the *CMS* case has a rather typical wording: “[e]ach Party shall observe any obligation it may have entered into with regard to investments.” The first Arbitral Tribunal to have applied an umbrella clause is believed to be the ICSID Tribunal in *Fedax v. Venezuela* in 1998,<sup>10</sup> but it was not before the *SGS* cases in

<sup>6</sup> R. Dolzer and C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, 153 (Oxford University Press 2008).

<sup>7</sup> The October 2006 Working Paper of the OECD by K. Yannaca-Small regarding the “Interpretation of the Umbrella Clause in Investment Agreements” estimates that approximately 40% of the 2,500 or so bilateral investment treaties include a clause of that type, with some marked variations between States. Switzerland, the Netherlands, the United Kingdom and Germany, for instance, have included an umbrella clause in the vast majority of their BITs, while France, Australia and Japan only have such a clause in a minority of their BITs. Canada does not have an umbrella clause in its BITs. The United States, which used to have such a clause in their former model BIT, have now abandoned the approach in their new generation of BITs, adopting instead an enlarged definition of “investment” (Article 24 of the 2004 Model BIT). The OECD Working Paper is available at <http://www.oecd.org/dataoecd/3/20/37579220.pdf>. Certain multilateral investment agreements, such as the Energy Charter Treaty (Article 10(1) *in fine*) and the Association of Southeast Asian Nations (ASEAN) Agreement (Article III(3)), also include an umbrella clause. The North American Free Trade Agreement (NAFTA) does not.

<sup>8</sup> For a comparative analysis of the wording of different clauses, see *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of October 12, 2005, paras. 46 *et seq.* As Professor Crawford also observed, there is no such thing as “the” umbrella clause, although when these are identical or nearly identical, they should arguably be given similar meanings. J. Crawford, *Treaty and Contract in Investment Arbitration*, 4 and 17 (forthcoming in 2008 in *ARB. INT’L*. An earlier draft of the article appears in the January 2008 issue of *TDM* at [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com). The passages cited herein correspond to the final text of the article, which we thank Professor Crawford for having provided, while the page numbers correspond to the *TDM* version).

<sup>9</sup> A. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 *ARB. INT’L*, 4, 412 (2004).

<sup>10</sup> *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award of March 9, 1998.

2003 and 2004 that the effect of umbrella clauses came to be analyzed in greater detail by Arbitral Tribunals.<sup>11</sup> The conflicting approaches adopted by the SGS Tribunals are well known and were abundantly commented,<sup>12</sup> as were the subsequent and still conflicting arbitral decisions adopting one or the other approach, or a variation thereof.<sup>13</sup>

<sup>11</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003; *Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of January 29, 2004.

<sup>12</sup> W. Ben Hamida, *La clause relative au respect des engagements dans les traités d'investissement*, in *LE CONTENTIEUX ARBITRAL TRANSNATIONAL RELATIF À L'INVESTISSEMENT – NOUVEAUX DÉVELOPPEMENTS*, 53 (Anthemis 2006); E. Gaillard, *Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION*, 325 (Cameron-May 2005); T. W. Wälde, *The “Umbrella” (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6.2 *J. WORLD. INV. & TRADE*, 183 (April 2005); E. Gaillard, *LA JURISPRUDENCE DU CIRDI 832 et seq. and 896 et seq.* (Pedone 2004); J. Gill, M. Gearing and G. Birts, *Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases*, 21.5 *J. INT'L ARB.* 397 (2004); C. Schreuer, *Travelling the BIT Route, Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 *J. WORLD INVEST. & TRADE* 231, 249–255 (2004); S.A. Alexandrov, *Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty Based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, 54 *J. WORLD INVEST. & TRADE* 555 (2004); I. Fadlallah, *La distinction “Treaty Claims – Contract Claims” et la compétence de l'arbitre (CIRDI): Faisons nous fausse route?*, *GAZ. PAL. CAHIERS DE L'ARBITRAGE*, No. 2004/2, 3; E. Teynier, *Les umbrella clauses*, *GAZ. PAL. CAHIERS DE L'ARBITRAGE*, No. 2004/2, 29; J. Fourret and D. Khayat, *Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)*, 16.2 *R.Q.D.I.* 258, 272 et seq. (2003) and 17.1 *R.Q.D.I.* 159, 170 et seq. (2004).

<sup>13</sup> *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/06, Award of September 28, 2007; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of October 3, 2006; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award of May 22, 2007; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award of February 6, 2007; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentina*, ICSID Case No. ARB/03/13 and *BP America Production Co. and Others v. Argentina*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections of July 27, 2006; *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award of July 14, 2006; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of April 27, 2006; *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction of August 6, 2004; *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of October 12, 2005; *Eureka B.V. v. Poland*, Partial Award of August 19, 2005; *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, May 11, 2005; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005; *Conсорzio Groupement L.E.S.I. – DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award of January 10, 2005. For a typology of the principal cases, see J. Crawford, note 8 above, 18. For the principal commentaries see J.P. Gaffney and J. Loftis,

In substance, while the *SGS v. Pakistan* Tribunal interpreted restrictively the umbrella clause included in the Switzerland-Pakistan BIT and, in that particular instance, refused to elevate the alleged breach of contract by the State to an alleged breach of the BIT, a different Tribunal in *SGS v. Philippines* came to the opposite conclusion several months later based on similar facts and a similar clause in the Switzerland-Philippines BIT. A majority of the *SGS v. Philippines* Tribunal, however, dissociated the jurisdictional and substantive aspects of the dispute and decided that, notwithstanding its jurisdiction to hear a claim that the umbrella clause was breached due to a breach of contract, the choice of forum clause in the underlying contract between the investor and the State should receive application. As a matter of admissibility of SGS's treaty-based claim, it held that the competent Tribunal under the contract, a Philippine Court, should determine first whether the agreement had been breached under municipal law and, if so, to what extent. Confronted with a choice of forum clause in the agreement, the *SGS v. Philippines* Tribunal thus viewed its task as residual. Once the contract-based Tribunal determines if and to what extent the agreement was breached, the ICSID Tribunal may exercise its jurisdiction in order to decide that such breach, if established, amounts to a breach of the BIT.<sup>14</sup>

Much of the commentators' attention regarding umbrella clauses has concentrated since the *SGS* and subsequent cases on the question of their effect, in particular (i) whether an umbrella clause elevates breaches of contracts under municipal law to treaty breaches cognizable under international law, and (ii) whether an umbrella clause overrides a choice of forum clause in the agreement between the investor and the host State.<sup>15</sup> While

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The "Effective Ordinary Meaning" of BITs and the Jurisdiction of Treaty-Based Tribunals to hear Contract Claims, 8.1 J. W. INV. & TRADE, 5 (February 2007); S. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises – Comment on the ICSID Decision in LG&E v. Argentina*, 24.3 J. INT'L ARB. 265–286 (2007); S. Lemaire, *Treaty Claims and Contract Claims: la compétence du Cirdi à l'épreuve de la dualité de l'Etat*, REV. ARB., 353 (2006); E. Gailard, *Centre international pour le règlement des différends relatifs aux investissements (CIRDI) – Chronique des sentences arbitrales*, J.D.I. 2007, 255, J.D.I. 2006, 219, J.D.I. 2005, 235; E. Teynier, *Umbrella Clauses: le temps se couvre*, GAZ. PAL. CAHIERS DE L'ARBITRAGE, No. 2006/3, 38; J. Fouret and D. Khayat *Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)* (2005) 18.2 R.Q.D.I. 313 (2006), 19.1 R.Q.D.I. 271.

<sup>14</sup> On December 18, 2007, the *SGS v. Philippines* ICSID Tribunal issued an order confirming the resumption of the proceedings. The case, however, was settled in April 2008.

<sup>15</sup> For a study of the conditions of application of umbrella clauses prior to the *CMS ad hoc* Committee's decision, however, see W. Ben Hamida, note 12 above. See also, A. Sinclair, note 9

the question of the *conditions* of application of umbrella clauses – *i.e.*, the scope of the State commitments covered by such clauses – was certainly not ignored by investment Tribunals, it was given less emphasis and was also often overshadowed by other important aspects of those Tribunals' awards.<sup>16</sup> Because it constitutes the basis of the *CMS* Award's partial annulment, the decision of the *CMS ad hoc* Committee clearly focuses attention on the conditions of application of umbrella clauses.

This article will first recall the facts and the procedural context of the case (Section I), before tracing the decision of the *CMS ad hoc* Committee to the approach of the conditions of application of umbrella clauses in the *SGS v. Philippines* decision on jurisdiction, an aspect of that decision that had been somewhat overlooked by Tribunals in subsequent cases (Section II). Subject to the specific terms of each umbrella clause, certain consequences might be drawn from the Committee's decision regarding the conditions of application of umbrella clauses with respect to subsidiaries of the investor and possibly sub-State entities (Section III).

## I. The *CMS* Award and Argentina's Challenge

### A. *The May 12, 2005 Award*

*CMS*, a United States company, initiated arbitration against Argentina under the ICSID Convention and the United States-Argentina BIT in July 2001. *CMS* was a minority shareholder in *Transportadora de Gas del Norte* ("TGN"), an Argentine company which had received a license to transport gas (the "License") in 1992. *CMS* claimed that the suspension of TGN's tariff adjustment formula and the alteration of the regulatory regime under which TGN's tariffs were calculated in U.S. dollars (the "pesification" of the tariff) amounted to an expropriation of *CMS*'s shares

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above, 427 *et seq.*, T. Wälde, note 12 above; S. Manciaux, *Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats, Trente années d'activité du CIRDI*, Université de Bourgogne – CNRS, 591, paras. 781 *et seq.*

<sup>16</sup> This is the case for the decision on jurisdiction in *SGS v. Philippines*. Also, the October 3, 2006 award of the ICSID Tribunal in *LG&E v. Argentina* attracted much attention regarding the question of the state of necessity under international law and less for its findings regarding the conditions of applications of the umbrella clause. Among the few commentaries of that aspect, however, see E. Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (CIRDI) – Chronique des sentences arbitrales*, J.D.I. 2007, 334, S. Schill, note 13 above.

under the BIT (Article IV), violated its right to a fair and equitable treatment (Article II(2)(a)), and to a non-discriminatory and non-arbitrary treatment (Article II(2)(b)). CMS also alleged that Argentina had failed to observe any obligation it had entered into with regard to CMS's investment, thus breaching the umbrella clause (Article II(2)(c)). Specifically, CMS claimed that the umbrella clause was breached because Argentina breached the terms of the License granted to TGN and because it breached its own law regarding gas transportation (the "Gas Law").<sup>17</sup>

After the Tribunal, on July 17, 2003, had dismissed Argentina's objections to jurisdiction,<sup>18</sup> Argentina argued, with respect to the conditions of application of the umbrella clause, that (i) no commitments were made by Argentina under the Gas Law and, in the wake of *SGS v. Pakistan*, that the commitments made under the License were "purely contractual", from which it derived that they were not sufficient to trigger the application of the umbrella clause and (ii) in any event, that CMS could not invoke rights existing under the License as these concerned only TGN.<sup>19</sup>

In its May 12, 2005 Award, the Tribunal first mentioned that it would not "discuss the jurisdictional aspects involved in [Argentina]'s argument, as these were dealt with in the decision on jurisdiction."<sup>20</sup> In its decision on jurisdiction, the CMS Tribunal had found that its jurisdiction under the BIT was established, and that "[w]hether the protected investor is in addition a party to a concession agreement or a license agreement with the host State is immaterial for the purpose of finding jurisdiction under those treaty provisions, since there is a direct right of action of shareholders."<sup>21</sup>

The Tribunal then concurred with Argentina that not all contract breaches fall within the scope of the umbrella clause and result in breaches of the BIT. It distinguished between breaches of contract where the State is acting as a sovereign and a merchant respectively.<sup>22</sup> Having done so, the Tribunal noted that the measures complained of by CMS were more of a

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<sup>17</sup> *CMS v. Argentina*, Award of May 12, 2005, paras. 84–90.

<sup>18</sup> *CMS v. Argentina*, Decision on Jurisdiction of July 17, 2003.

<sup>19</sup> *CMS v. Argentina*, Award of May 12, 2005, para. 298.

<sup>20</sup> As to the merits of the argument, however, the Tribunal indicated, that "[p]urely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor." *CMS v. Argentina*, Award of May 12, 2005, para. 299.

<sup>21</sup> *CMS v. Argentina*, Decision on Jurisdiction, para. 65.

<sup>22</sup> *CMS v. Argentina*, Award of May 12, 2005, para. 299.

“sovereign” than a “commercial” nature, as “they are all related to government decisions that [...] resulted in the interferences and breaches noted.”<sup>23</sup> The Tribunal highlighted in particular the obligations provided under the License (i) not to freeze the tariff regime or subject it to price controls, and (ii) not to alter the basic rules governing the License without TGN’s written consent. Referring to these two obligations as “stabilization clauses,”<sup>24</sup> the Tribunal concluded that the umbrella clause had not been observed “to the extent that legal and contractual obligations pertinent to the investment [had] been breached and [had] resulted in the violation of the standards of protection under the Treaty.”<sup>25</sup>

### B. *The Challenge*

In September 2005, Argentina challenged the Award on a number of grounds. With respect to the umbrella clause, Argentina argued, in particular, that, apart from the provisions of the BIT, neither itself nor any of its instrumentalities assumed any obligations to CMS – as opposed to TGN – and, therefore, that finding Argentina liable under the umbrella clause constituted a manifest excess of powers (Article 52(1)(b) of the ICSID Convention) and a failure to state reasons (Article 52(1)(e) of the ICSID Convention).<sup>26</sup> Argentina notably argued that, by referring to its decision on jurisdiction, the Tribunal refused to elaborate on whether the relevant rights under Argentine law were due to CMS or TGN. The decision on jurisdiction provided that CMS had a right to bring a treaty claim as a shareholder, but did not explain whether CMS could enforce the rights of TGN under Argentine law.<sup>27</sup>

CMS responded that it did not claim for breach of TGN’s tariff rights as such but for breach of the assurances given it as regards the tariff regime resulting from “the legal instruments relating to the gas privatization, including the License” issued to TGN. Those assurances, in CMS’s view, constituted undertakings that Argentina was bound to observe under the

<sup>23</sup> *Ibid.*, para. 301.

<sup>24</sup> *Ibid.*, para. 302.

<sup>25</sup> *Ibid.*, para. 303.

<sup>26</sup> *CMS v. Argentina*, Application for Annulment and Request for Stay of Enforcement of Arbitral Award, September 8, 2005, paras. 74–75, 91 *et seq.*; Decision of the *ad hoc* Committee, para. 87.

<sup>27</sup> *Ibid.*, para. 87.

umbrella clause.<sup>28</sup> In response to questions of the Committee, CMS confirmed that its claim was not predicated on any right of CMS under Argentine law to comply with the terms of the License.<sup>29</sup> CMS's position, as summarized by the *ad hoc* Committee, was based on what would appear to be a literal reading of the umbrella clause: it contended that Argentina entered into legal obligations under the License, which were obligations "with regard to investments" as envisaged by the umbrella clause. Although CMS was not entitled as a minority shareholder to invoke those obligations under Argentine law (not being the obligee), the effect of the umbrella clause was to give it standing to invoke them under the BIT.<sup>30</sup>

Argentina thus clearly focused the debate before the Committee on the question of the conditions of application of the umbrella clause, as opposed to its effect.

## II. The Decision of the *Ad Hoc* Committee

The Committee answers in three steps. First, by clarifying the notion of "obligation" pursuant to the umbrella clause, and distinguishing it from the legitimate expectations of the investor. Second, by reconstituting the Tribunal's implicit reasoning on the conditions of application of the clause, and third, after a presentation of its own views as to the conditions of application of the umbrella clause, by highlighting what it perceives to be the missing link in the Tribunal's reasoning.

### A. *The Notion of Obligation*

The starting point of the Committee's reasoning is to clarify what an "obligation" means in the sense of the umbrella clause. The Committee states that "it is accepted that by 'obligations' is meant legal obligations".<sup>31</sup> The Committee then goes on to distinguish legal obligations and legitimate expectations of the investor:

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<sup>28</sup>) *Ibid.*, para. 88.

<sup>29</sup>) *Ibid.*, para. 90.

<sup>30</sup>) *Ibid.*, para. 92.

<sup>31</sup>) *Ibid.*, para. 89.

[a]lthough legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause contained in the BIT.<sup>32</sup>

The Committee bases itself on the fact that, if legitimate expectations play an ever greater role in the assessment of States' obligations under their BITs, particularly in the context of the fair and equitable treatment standard, the obligations that are capable of triggering the umbrella clause generally arise under municipal law (though the Committee reserved the application of possible obligations under international law in addition to those resulting from the BIT). Yet, under the law of Argentina, the notion of legitimate expectations did not give rise to a legally binding obligation of the State *vis-à-vis* TGN.<sup>33</sup> It was also undisputed in that case that Argentina had no international law obligation towards U.S. investors other than those included in the BIT.

With respect to laws and regulations, Professor James Crawford, a member of the Committee, subsequently explained his views – and one may infer, the Committee's views – as follows:

it is a confusion to equate a State law or regulation with an obligation entered into by the State, or regard an umbrella clause as implicitly freezing the laws of the State as at the date of admission of an investment. The enactment of a law by the State, whether it is specific or general, is not the entry by the State into an obligation distinct from the law itself. No doubt a State is obliged by its own laws, but only for so long as they are in force. In the absence of express stabilization, investors take the risk that the obligations of the host State under its own law may change, and the umbrella clause makes no difference to this basic proposition.<sup>34</sup>

Having clarified what it means by an "obligation", the Committee notes that, under its law, Argentina assumed no legal obligation *vis-à-vis* CMS, but only *vis-à-vis* TGN.<sup>35</sup> This point, which as indicated the Committee took care to have CMS expressly confirm, was undisputed.

<sup>32</sup> *Ibid.*, para. 89.

<sup>33</sup> In other legal systems, such as the English legal system, "legitimate expectations" play a role as a source of the State's legal obligations – under its own law (F. Orrego Vicuña, *Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society*, in 5.3 INT'L L. FORUM (August 2003), 192–193). The two concepts bear the same name but are different, as they give rise to obligations under the municipal and international legal orders respectively.

<sup>34</sup> J. Crawford, note 8 above, 20.

<sup>35</sup> *CMS v. Argentina*, Decision of the *ad hoc* Committee, para. 90.

### B. *The Implicit Reasoning of the CMS Tribunal on the Umbrella Clause*

The second step of the Committee's reasoning consists in reconstituting the implicit basis of the Tribunal's finding that "the obligation under the umbrella clause [...] has not been observed by [Argentina] to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standard of protection under the Treaty."<sup>36</sup>

The Committee finds that it is implicit that the CMS Tribunal may have accepted that, although CMS was not entitled as a minority shareholder to invoke TGN's rights under Argentine law, the effect of the umbrella clause was to give it standing to invoke them under the BIT. The Committee notes, however, that the CMS Tribunal did not address the point expressly and rather referred Argentina to its decision on jurisdiction, which did not dispose of the matter. The decision on jurisdiction recognized CMS's standing to claim under the BIT as a shareholder of TGN but did not address whether CMS could claim performance of Argentine law obligations due to TGN. The Committee was further persuaded that the decision on jurisdiction did not address the question of which rights, in addition to those set forth in the BIT, CMS could claim, because the award on the merits included a detailed discussion of whether CMS had a right to compliance with the License and the Gas Law. It held that, if the issue had been settled in the decision on jurisdiction, that discussion in the award on the merits would have been unnecessary.<sup>37</sup>

### C. *The Committee's Findings Regarding the Conditions of Application of the Umbrella Clause*

Building on the foundation it established regarding the notion of obligation and its understanding of the Tribunal's reasoning, the Committee highlights the "major difficulties" this reasoning presented in its view, through several observations.

The first observation deals with the *ratione materiae* condition of application of the umbrella clause, which, according to the Committee, covers only *consensual* and *specific* obligations:

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<sup>36</sup> *CMS v. Argentina*, Award of May 12, 2005, para. 303.

<sup>37</sup> *CMS v. Argentina*, Decision of the *ad hoc* Committee, para. 94.

[i]n speaking of ‘any obligations it may have entered into’<sup>38</sup> with regard to investments’, it seems clear that [the umbrella clause] is concerned with consensual obligations arising independently from the BIT itself (*i.e.* under the law of the host State or possibly international law). Further, they must be specific obligations concerning the investment. They do not cover general requirements imposed by the law of the host State.<sup>39</sup>

Being “consensual”, the obligations assumed by the host State may take the form of an investment agreement or a treaty – other than the BIT – creating direct rights for the benefit of investors. As for specificity, the finding of the *ad hoc* Committee is reminiscent of the *SGS v. Philippines* decision on jurisdiction, although the Committee does not cite it – nor does it cite any other authority for the purpose of its analysis regarding the umbrella clause:<sup>40</sup>

For [the umbrella clause] to be applicable, the host State must have assumed a legal obligation, and it must have assumed vis-à-vis the specific investment – not as a matter of the application of some legal obligation of a general character.<sup>41</sup>

Unlike the umbrella clause in the Switzerland-Philippines BIT, which included the word “specific”,<sup>42</sup> the United States-Argentina BIT at stake in the CMS case did not. The requirement that the obligation be specifically related to the investment therefore appears to mean that the Committee viewed this requirement as implicit in “true” umbrella clauses, regardless of whether the term “specific” is actually used.

The Committee’s second observation establishes a link between the *ratione materiae* and *ratione personae* conditions of application of the umbrella clause:

Consensual obligations are not entered into *erga omnes* but with regard to particular persons. Similarly the performance of such obligations or requirements occurs with regard to, and as between, obligor and obligee.<sup>43</sup>

<sup>38</sup>) Italicized in the original.

<sup>39</sup>) *CMS v. Argentina*, Decision of the *ad hoc* Committee, para. 95(a).

<sup>40</sup>) The *SGS v. Philippines* Tribunal had a member in common with the *CMS ad hoc* Committee, Professor Crawford.

<sup>41</sup>) *SGS v. Philippines*, Decision on Jurisdiction of January 29, 2004, para. 121.

<sup>42</sup>) Article X(2): “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.”

<sup>43</sup>) *CMS v. Argentina*, Decision of the *ad hoc* Committee, para. 95(b).

This observation culminates in a third and more general one, arguably the key finding of the Committee with respect to the umbrella clause:

The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties*<sup>44</sup> to the obligation (*i.e.*, the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.<sup>45</sup>

This approach is again a direct import of *SGS v. Philippines*:

[the umbrella clause] does not convert questions of contract law into questions of treaty law. In particular, it does not change the proper law of the [agreement] from the law of the Philippines to international law. [The umbrella clause] addresses not the *scope*<sup>46</sup> of the commitments entered into with regard to specific investments but the *performance*<sup>47</sup> of these obligations, once they are ascertained [...]

To summarize the Tribunal's conclusion on this point, [the umbrella clause] makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the *extent* or *content*<sup>48</sup> of such obligations into an issue of international law.<sup>49</sup>

The *SGS v. Philippines* Tribunal had itself noted that “this is not a novel distinction”,<sup>50</sup> referring to the 1988 UNCTAD Study which had stated that the effect of an umbrella clause:

is not to transform the provisions of State contracts into international obligations [...]. However, it makes the respect of such contracts [...] an obligation under the treaty.<sup>51</sup>

A few years before, Professor Pierre Mayer had made a similar remark:

Whether the breach by the State of its obligations pursuant to the contract also constitutes a breach of the treaty is not enough to alter the nature of one and the other.<sup>52</sup>

<sup>44</sup> Italicized in the original.

<sup>45</sup> *CMS v. Argentina*, Decision of the *ad hoc* Committee, para. 95(c).

<sup>46</sup> Italicized in the original.

<sup>47</sup> Italicized in the original.

<sup>48</sup> Italicized in the original.

<sup>49</sup> *SGS v. Philippines*, Decision on Jurisdiction of January 29, 2004, paras. 126 and 128.

<sup>50</sup> *Ibid.*, note 61.

<sup>51</sup> Emphasis in the original. Graham & Trotman, *Bilateral Investment Treaties*, NY, 1988, 55–56.

<sup>52</sup> P. Mayer, *La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat*, J.D.I. 1986, 5 *et seq.*, spec. 37 (translation from French).

Such observations are equally in line with the decision of the *Vivendi ad hoc* Committee, of which Professor Crawford was also a member:

whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the [contract] by the proper law of the contract, in other words, the [municipal law].<sup>53</sup>

There was no umbrella clause at stake in the *Vivendi* case. However, this does not seem to make the finding irrelevant. If the breach of the BIT is predicated on a breach of the contract, as will often be the case when an umbrella clause is invoked by an investor, one can argue that there is some logic in assessing whether the contract was breached in accordance with the law governing the contract, *i.e.*, in general municipal law.<sup>54</sup> As discussed below, although the Committee did not have to examine the question, one may wonder whether the international law rules of attribution of responsibility to the State are relevant for the purpose of assessing whether an undertaking of a sub-State entity can be deemed an undertaking of the State itself.

The fourth observation of the Committee is a direct consequence of the third one:

The obligation of the State covered by [the umbrella clause] will often be a bilateral obligation, or will be intrinsically linked to obligations of the investment company. Yet a shareholder, though apparently entitled to enforce the company's rights in its own interest, will not be bound by the company's obligations, *e.g.* as to dispute settlement.<sup>55</sup>

Again, this passage is directly inspired by the decision on jurisdiction in *SGS v. Philippines*:

<sup>53</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2002, paras. 95–96.

<sup>54</sup> *SGS v. Philippines*, Decision on Jurisdiction of January 29, 2004, para. 127. While the fact that most investment agreements are subject to municipal law is uncontroversial, the question of the extent to which that law should apply to the underlying obligation when an arbitral tribunal has to apply an umbrella clause – governed by the BIT – is subject to debate. See, *e.g.*, E Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (CIRDI) – Chronique des sentences arbitrales*, J.D.I. 2008, 363.

<sup>55</sup> *CMS v. Argentina*, Decision of the *ad hoc* Committee, para. 95(d). As is well known and implicit in the Committee's observations, the dispute settlement procedure in the contract is often different from the dispute settlement procedure in the BIT.

SGS should not be able to approbate [*i.e.*, claim performance] and reprobate [*i.e.*, disregard the choice of forum clause] under the same contract.<sup>56</sup>

The above passages of the *SGS v. Philippines* decision on jurisdiction were somewhat overlooked by subsequent Tribunals, at least to the extent that they were rarely cited in the context of a discussion of the *conditions of application* of an umbrella clause, as opposed to its *effect*. In the fifteen or so reported decisions or awards discussing some aspect of an umbrella clause subsequent to *SGS v. Philippines*, only three cited one of the above passages. The first one is the partial award in *Eureko v. Poland*.<sup>57</sup> However, the issue of the conditions of application of the umbrella clause was not central in that case, unlike that of the clause's effect. The issue in *Eureko v. Poland* was essentially whether there were contractual undertakings of the State at all under Polish law and, if so, whether these could be transformed into a breach of the BIT by reason of the umbrella clause, and not, assuming that such obligations were to exist, as the Tribunal ultimately found, whether they fell outside the conditions of application of the umbrella clause. The second and third cases are *El Paso v. Argentina* and the mirror case of *Pan American v. Argentina*, where the Tribunals, in similar terms, also recalled paragraph 128 of the *SGS v. Philippines* decision. However, they did not draw any clear conclusion as to the conditions of application of the umbrella clause because they rejected the interpretation of the *SGS v. Philippines* Tribunal as to the clause's effect.<sup>58</sup>

The *CMS ad hoc* Committee then observes that:

if the Tribunal's implicit interpretation is right, then the mechanism of Article 25(2)(b) of the ICSID Convention is unnecessary wherever there is an umbrella clause.<sup>59</sup>

The Committee expresses that if, in the presence of an umbrella clause, an ICSID Tribunal could assert jurisdiction over the alleged breach of an obligation of the host State towards a juridical person of the State's own

<sup>56</sup> *SGS v. Philippines*, Decision on Jurisdiction of January 29, 2004, para. 155.

<sup>57</sup> *Eureko v. Poland*, Partial Award of August 19, 2005, para. 256.

<sup>58</sup> *Pan American v. Argentina*, Decision on Preliminary Objections of July 27, 2006, para. 105; *El Paso v. Argentina*, Decision on Jurisdiction of April 27, 2006, para. 76.

<sup>59</sup> *CMS v. Argentina*, Decision of the *ad hoc* Committee, para. 95(e).

nationality but under foreign control,<sup>60</sup> this would render unnecessary the limitation of the jurisdiction of the Centre through the requirement that the investor be a national of a Contracting State other than the host State, unless it is under the control of a national of another Contracting State and the parties to the dispute have agreed to assimilate it to a national of such other Contracting State.<sup>61</sup> The implicit conclusion, according to the Committee, appears to be that only those obligations which have the foreign investor itself as a creditor may trigger the umbrella clause and fall under the jurisdiction of the Centre pursuant to Article 25 of the ICSID Convention.

The Committee finally regrets that the *CMS* Tribunal did not discuss the *travaux* of the BIT, or the prior understandings of the proponents of the umbrella clause as to its function, as some other Tribunals did.<sup>62</sup>

On the basis of these observations, the Committee concludes that it is unclear how the Tribunal found that CMS could enforce the obligations of Argentina on TGN, which in its view justifies the partial annulment of the award for a failure to state reasons. The Committee also expresses that it is not necessary for it to decide whether it would have been a manifest excess of powers for the Tribunal to have decided – explicitly this time – that the umbrella clause allowed CMS to enforce the Argentine law rights of TGN.<sup>63</sup> While it indicated that in its view there was no such right,<sup>64</sup> its absence of appellate function may have prevented an annulment on that ground, just as the Committee expresses in *obiter dicta* some substantive disagreements with other parts of the Award without annulling them. At the very least, the Committee provided no opinion on the issue of a possible manifest excess of powers.

One should now assess what legal consequences would appear to follow from the Committee's decision and whether these correspond to the approaches adopted by prior Tribunals.

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<sup>60</sup> The *CMS v. Argentina* Tribunal actually went further, because CMS was only a minority shareholder in TGN.

<sup>61</sup> See, e.g., *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Objections to Jurisdiction of October 21, 2005.

<sup>62</sup> *CMS v. Argentina*, Decision of the *ad hoc* Committee, para. 95(f).

<sup>63</sup> *Ibid.*, paras. 96–98.

<sup>64</sup> *Ibid.*, para. 90.

### III. The Obligations Covered by an Umbrella Clause

A distinction must be made between the types of obligations to which an umbrella clause applies (*ratione materiae*) and the persons bound by the obligations capable of triggering the clause (*ratione personae*).

#### A. *Ratione Materiae*

If one follows the principles laid down by the *CMS ad hoc* Committee, both contractual and conventional undertakings of the State, *i.e.*, “consensual” obligations towards investors or investments under municipal and international law,<sup>65</sup> are covered by the umbrella clause. This excludes, in particular, general legislative or other similar commitments by the State. This also excludes legitimate expectations of the investor as such, unless resulting from an identified obligation of the State distinct from its obligations under the BIT.<sup>66</sup> It is unclear that the Committee wished to exclude unilateral undertakings of the State, although this appears to be so. Would it have interpreted the clause differently if the terms “obligations entered into” – which gave rise to the “consensual” criterion<sup>67</sup> – had been replaced by “undertakings given by it”, as they appeared for instance in the 1967 OECD Draft Convention on the Protection of Foreign Property,<sup>68</sup> or “obligations it has assumed”, as in the Switzerland-Philippines BIT which gave rise to the case of *SGS v. Philippines*? One may think so, as no implicit limitation excluding unilateral undertakings of the State could then be read in the text of the clause. As to specific laws and regulations with regard

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<sup>65</sup> For instance an investment agreement between the host State and an investor, whether governed by municipal or international law, or a treaty other than the one including the umbrella clause, creating direct rights for investors.

<sup>66</sup> Contrast with the position of Sir E. Lauterpacht: “undertakings’ appears to be a concept wider than that of ‘contract’ in the technical sense of the word. An ‘undertaking’ can, for example, describe the situation arising out of a general promise made by a State to accord to foreign investors a particular standard of treatment, followed by an actual investment made in reliance on that promise. There might in these circumstances be no specific contract, but the situation would constitute an undertaking given by the State to the investor.” Drafting of Conventions for the protection of Investments in The Encouragement and Protection of Investment in Developing Countries (ICLQ Suppl. 3, 1962), pp. 218, 229, cited by A. Sinclair, note 9 above.

<sup>67</sup> *CMS v. Argentina*, Decision of the *ad hoc* Committee, para. 95(a).

<sup>68</sup> Article 2: “Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.”

to an investment, absent an express stabilization undertaking, the State would appear to be obliged by such laws and regulations for so long as they are in force.<sup>69</sup>

The Committee's approach differs in particular from the approach of the *LG&E v. Argentina* ICSID Tribunal.<sup>70</sup> Just like CMS, the LG&E companies held shares in local subsidiaries distributing gas in Argentina. The *LG&E* Tribunal decided that the Gas Law (the same as the one in the CMS case) was specific enough to constitute an undertaking by Argentina protected under the same umbrella clause.<sup>71</sup> That approach is incompatible with the one adopted by the *CMS ad hoc* Committee, not because legislative requirements are unspecific *per se* – they may or may not be, depending on cases<sup>72</sup> – but because they are not consensual and, more fundamentally, would only obligate the State for as long as they are in force absent a clear stabilization undertaking directed at the investor.

In line with the decisions of the *Noble Ventures* and *Eureko* Tribunals on this point, and the opinion of certain commentators,<sup>73</sup> the Committee also does not distinguish between undertakings of the State *jure gestionis* and *jure imperii*, a distinction that generally does not appear in the text of umbrella clauses, although it was supported by certain Tribunals and some commentators in an effort to lessen the potentially sweeping effects of the clause.<sup>74</sup> One may therefore think that, in the Committee's view, any breach of contract or conventional obligation by the State – within the strict framework it otherwise defined – may trigger an umbrella clause.<sup>75</sup>

<sup>69</sup> See the elaboration on this point by Professor Crawford, *supra*.

<sup>70</sup> See also, *Enron v. Argentina*, Award of May 22, 2007, paras. 269 *et seq.*

<sup>71</sup> *LG&E v. Argentina*, Decision on Liability of October 3, 2006, para. 175.

<sup>72</sup> For instance, a license directed at a particular investor may under certain legal systems be implemented through a specific law or decree. See, E. Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (CIRDI) – Chronique des sentences arbitrales*, J.D.I. 2007, 296.

<sup>73</sup> Ch. Leben, *La responsabilité internationale de l'Etat sur le fondement des traités de promotion et de protection des investissements*, A.F.D.I. 2004, 683, 710; E. Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (CIRDI) – Chronique des sentences arbitrales*, J.D.I. 2006, 349; W. Ben Hamida, note 12 above, 59.

<sup>74</sup> *El Paso v. Argentina*, Decision on Jurisdiction of April 27, 2006, para. 84; *Pan American v. Argentina*, Decision on Preliminary Objections of July 27, 2006, paras. 96 *et seq.*; T. Wälde, note 12 above, see *e.g.*, 197; C. Schreuer, note 12 above, 255.

<sup>75</sup> J. Crawford, note 8 above, p. 6, and p. 20 for an analysis of the “floodgates” argument.

The question of the specificity of the State's obligations covered by an umbrella clause appears to be slightly less controversial. This requirement was set out by investment Tribunals before the *CMS ad hoc* Committee, with or without an express requirement in the text of the clause, for instance in such decisions or awards as *SGS v. Philippines*,<sup>76</sup> *Noble Ventures v. Romania*,<sup>77</sup> and *LG&E v. Argentina*.<sup>78</sup> Other awards did not include such an express condition, for instance in the cases of *Eureko v. Poland* and *Enron v. Argentina*, but it is doubtful that those Tribunals wished to exclude the existence of a close connection between the obligation of the host State and the investment or the investor, which the specificity criterion embodies. In *Eureko*, the specificity of the State's undertaking was evident, as it consisted, according to the *Eureko* Tribunal, in the State's commitment to conduct an IPO in respect of a privatized company. In *Enron*, it was less clear, but the *LG&E* Tribunal, based on very similar facts, found that certain alleged legislative commitments of Argentina were specific enough to trigger the umbrella clause. As shown previously, such approach is not in line with that of the *CMS ad hoc* Committee, not because there would be a disagreement as to the specificity criterion, but because, according to the *CMS ad hoc* Committee, there was no "obligation" of the State with regard to the investment absent a stabilization undertaking directed at the investor.

## B. *Ratione Personae*

The question here is twofold: are obligations of entities other than the State, particularly State-owned or State-controlled entities, covered by an umbrella clause – which raises the question of the obligations' debtor – and does the clause cover obligations whose beneficiary is not the investor itself but one of its subsidiaries or related companies – which raises the question of their creditor?

The *CMS ad hoc* Committee had to deal with an investment channeled through a local subsidiary, not with an agreement entered into by the investor itself or such subsidiary with a sub-State entity. However, both sets

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<sup>76</sup> *SGS v. Philippines*, Decision on Jurisdiction of January 29, 2004, para. 121.

<sup>77</sup> *Noble Ventures v. Romania*, Award of October 12, 2005, para. 51.

<sup>78</sup> *LG&E v. Argentina*, Award of July 25, 2007, note 13 above, para. 174.

of questions seem to be affected by the Committee's broad finding that the umbrella clause does not change the content, parties and applicable law of the obligations covered by the clause.

### C. *Does an Umbrella Clause Cover Obligations of an Entity other than the State Itself?*

With respect to the first question, if the treaty includes a provision expressly making an obligation on the host State to have sub-State entities abide by the obligations of the State under the treaty, such as Articles 22 and 23 of the Energy Charter Treaty, a breach by such sub-State entities of obligations entered into *vis-à-vis* foreign investors or investments may in certain circumstances constitute a breach of the treaty by the State itself.

When there is no specific treaty language with respect to sub-State entities, however, which is the most frequent case in BITs, Professor Mann, who expressed himself before the advent of the present era of investment treaty arbitration, had taken a broad view of United Kingdom treaties:

the term ['observance of undertakings'] may fairly be said to comprise [State] instrumentalities, even if they are separate legal entities, as well as companies of which it is the sole shareholder.<sup>79</sup>

Consistent with Mann's position, the Tribunal in *SGS v. Pakistan* held that:

the 'commitments' subject matter of [the umbrella clause] may, without imposing excessive violence on the text itself, be commitments of the State itself as a legal person, or of any office, entity or subdivision (local governments units) or legal representative thereof whose acts are, under the law on state responsibility, attributable to the state itself.<sup>80</sup>

The approach was criticized, notably by Professor Crawford:

[...] there can only be contractual jurisdiction under a BIT in respect of an investment contract with the State itself, not with a separate State entity having its own legal personal-

<sup>79</sup> E.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 B.Y.I.L. 241, 246.

<sup>80</sup> *SGS v. Pakistan*, Decision on Jurisdiction of August 6, 2003, para. 166, cited with approval in *Pan American v. Argentina*, Decision on Preliminary Objections of July 27, 2006, para. 101 and *El Paso v. Argentina*, Decision on Jurisdiction of April 27, 2006, para. 72. In all such cases, however, the Tribunals ultimately refused to elevate alleged breaches of contracts to alleged breaches of the relevant BITs.

ity, and *a fortiori* not with a third party. It is sometimes argued that the question is one of attribution under Chapter 2 of Part I of the ILC's Articles on State Responsibility, but attribution has nothing to do with it. The issue of attribution arises when it is sought to hold the State responsible for some breach of an international obligation – including one arising under a substantive provision of a BIT. The problem here concerns jurisdiction, not merits; the formation of a secondary agreement to arbitrate, not the breach of a primary obligation concerning the protection of investments. In short, the question is one of interpretation of the jurisdictional offer, not attribution of conduct of the State.<sup>81</sup>

[...]

[a]s we have seen, the question of the scope of a commitment to arbitrate made by the State is a matter of interpretation and has nothing to do with attribution. International law does not treat separate entities with their own legal personality as part of the State *for all purposes*.<sup>82</sup> (emphasis added).

The Commentary of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts includes a relevant passage in this respect:

The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments *on behalf of the State* [...] Such rules have nothing to do with attribution for the purposes of State responsibility.<sup>83</sup> (emphasis added)

The International Law Commission had similarly noted, well before the Articles were finalized in 2001:

Attaching to the State a manifestation of will which is valid [...] is, however, in no way identifiable with the operation which consists of attributing to the State a particular conduct for the purpose of imputing to it an internationally wrongful act entailing international responsibility.<sup>84</sup>

In line with the foregoing approach, and recognizing that this constitutes an extrapolation of the key findings of the *CMS ad hoc* Committee, its decision would appear to support the proposition that, subject to the

<sup>81</sup> J. Crawford, note 8 above, 13.

<sup>82</sup> *Ibid.*, 19.

<sup>83</sup> J. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (Cambridge, 2002), para. 5, 92.

<sup>84</sup> Report of the Commission to the General Assembly, Yearbook of the International Law Commission, 1973, vol. II, 189.

specific wording of each umbrella clause and absent a sufficiently broad arbitration agreement, an investment tribunal would have no jurisdiction to hear a claim that a State is in breach of an umbrella clause under a BIT because an entity other than the State breached an obligation it entered into with regard to an investment or investor. Such a proposition finds support in at least three prior arbitral decisions: *Nagel v. Czech Republic*, *Impregilo v. Pakistan* and *Azurix v. Argentina*.

In *Nagel v. Czech Republic*, the investor Mr. Nagel, a UK national, initiated arbitration under the United Kingdom-Czech Republic BIT due to the alleged non-fulfillment by a State-owned company of its best efforts undertaking to obtain a telecommunications license. Among the provisions expressly recited by the Tribunal was an umbrella clause set forth at Article 2(3) of the BIT: “[each] Contracting Party shall, with regard to investments of investors of the other Contracting Party, observe the provisions of these specific agreements, as well as the provisions of the Agreement.” While the extent to which the investor specifically relied on the umbrella clause is unclear from a reading of the published excerpts of the award, the Tribunal decided that the investor had no investment under the BIT in the first place:

While the [State Enterprise] – [...] – was a party to the Cooperation Agreement, [the Republic] was not. Although [the State Enterprise] was a fully owned state enterprise, it was a separate legal person whose legal undertakings did not as such engage the responsibility of [the Republic].<sup>85</sup>

The Tribunal added:

It is another matter whether [the State Enterprise]’s withdrawal from the Cooperation Agreement or any other act by [the State Enterprise] constituted a breach of contract. This matter was the subject of proceedings before the Regional Commercial Court [...] which ended in a settlement. It falls outside the scope of the present proceedings, not only because [the Republic] was not a party to the Cooperation Agreement, but also because the Arbitral Tribunal has no jurisdiction in respect of breaches of the Cooperation Agreement.<sup>86</sup>

In *Impregilo v. Pakistan*, the claimant, an Italian company, acted on behalf of a consortium of companies involved in a hydroelectric construction

<sup>85</sup> *Final Arbitral Award Rendered in 2003 in SCC case No. 49/2002*, 2004:1 STOCKHOLM ARB. REP., 141, 162. obs. S. François-Poncet and C. Mouawad.

<sup>86</sup> *Ibid.*, 165.

project in Pakistan. For that purpose, the consortium signed agreements with the Pakistan Water and Power Development Authority (WAPDA), an authority under the control of the Government of Pakistan while having its own legal personality. Impregilo started arbitration pursuant to the Italy-Pakistan BIT, which did not include an umbrella clause, but, through the operation of the Most Favored Nation clause in that BIT, sought to import from the Switzerland-Pakistan BIT the benefit of an umbrella clause worded as follows: “[e]ither 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.” The Tribunal dismissed Impregilo’s claim on the following ground:

[i]n the Tribunal’s view, given that the Contracts were concluded by Impregilo with WAPDA, and not with Pakistan, Impregilo’s reliance upon Article 3 of the BIT takes the matter no further. Even assuming *arguendo* that Pakistan, through the MFN clause and the Swiss-Pakistan BIT, has guaranteed the observance of the contractual commitments into which it has entered together with Italian investors, such a guarantee would not cover the present Contracts – since these are agreements into which it has not entered. On the contrary, the Contracts were concluded by a separate and distinct entity.<sup>87</sup>

In *Azurix v. Argentina*, following a bidding process, a local subsidiary of the U.S. investor Azurix, ABA, had been awarded a concession for the distribution of water in the Province of Buenos Aires. ABA had entered into an agreement with the Province, legally distinct from the State under the law of Argentina. Because of various measures taken by the Province, Azurix commenced arbitration under the United States-Argentina BIT, claiming among other things that its investment had been expropriated. Azurix also invoked that the umbrella clause in the United-States-Argentina BIT, the same as that invoked in the CMS case, had been breached by reason of the Province’s conduct, which it claimed was attributable to Argentina under international law. The Tribunal dismissed the claim on the following grounds:

[...] The issue is whether the acts upon which Azurix bases its claim can be attributed to the Respondent. The Respondent contends that such attribution is not feasible because all the acts are contractual breaches by the Province. This is a different matter to which the Tribunal will now turn. [...]

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<sup>87</sup>) *Impregilo v. Pakistan*, Decision on Jurisdiction, April 22, 2005, para. 223.

The Tribunal also recalls that Azurix and the Respondent have no contractual relationship. The Concession Agreement is a contract between the Province and ABA, and Azurix made certain commitments and undertook certain guarantees to the Province [...] None of the allegations made by the Claimant refer to breaches of the Province in relation to Azurix itself. The obligations undertaken by the Province in the Concession Agreement were undertaken in favor of ABA, not Azurix. [...] Therefore, the underlying premise of [the umbrella clause] – that a party to the BIT has entered into an obligation with regard to an investment – is inexistent.<sup>88</sup>

The Tribunal later added:

[a]s already stated by the Tribunal in affirming its jurisdiction within the limits permitted by the Convention and the BIT, the Tribunal finds that none of the contractual claims as such refer to a contract between the parties to these proceedings; neither the Province nor ABA are parties to them. While Azurix may submit a claim under the BIT for breaches by Argentina, there is no undertaking to be honored by Argentina to Azurix other than the obligations under the BIT. Even if for argument's sake it would be possible under [the umbrella clause] to hold Argentina responsible for the alleged breaches of the Concession Agreement by the Province, it was ABA and not Azurix which was a party to this Agreement.<sup>89</sup>

The approach taken by these Tribunals can avail itself of a textual argument. When an umbrella clause refers to the promise by a State to abide by commitments it has entered into, “it” refers to the State, not legal entities distinct from the State.

Such an approach appears not to be without dissenters. The discrepancies, however, may be more apparent than real.<sup>90</sup> Two principal cases are relevant in this respect: *Eureko v. Poland* and *Noble Ventures v. Romania*.<sup>91</sup>

In *Eureko v. Poland*, the Tribunal found Poland to be in breach of the umbrella clause in the Dutch-Polish BIT, based on acts of the Polish State Treasury in charge of privatizations and having its own legal personality under Polish law. The umbrella clause was worded as follows: “[e]ach Contracting Party shall observe any obligations it may have entered into with

<sup>88</sup> *Azurix v. Argentina*, Award of July 14, 2006, paras. 50 and 52.

<sup>89</sup> *Ibid.*, para. 384.

<sup>90</sup> *Contra*, N. Gallus, An Umbrella just for Two? BIT Obligations Observance Clauses and the Parties to a Contract, *ARB. INT'L*, 1, 157, spec., 164 (2008).

<sup>91</sup> In *Nykomb v. Latvia*, the claimant also asserted against Latvia a breach of the umbrella clause in the Energy Charter Treaty, due to the breach of a contractual commitment by a State-owned company. Although the Tribunal decided in favor of the investor, it deemed that it did not have to decide the issue of breach of the umbrella clause. *Nykomb Synergetics Technology Holding v. Latvia*, SCC Award of December 16, 2003, para. 4.3.2.b).

regard to investments of investors of the other Contracting Party.” The Tribunal started by attributing to Poland the conduct of the State Treasury at the time of entering into the privatization agreement pursuant to Article 4 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>92</sup> It then decided that Poland was in breach of the umbrella clause.<sup>93</sup>

The context of the case was quite specific, however. Because, as curious as it may sound, it was uncertain for the Tribunal that, under Polish law, there was a legal entity called “the Republic of Poland”,<sup>94</sup> the Tribunal was faced with the unusual task of deciding whether a particular agreement had been entered into under municipal law by a State whose existence appeared uncertain as a matter of municipal law, as opposed to international law. The Tribunal thus avoided the discussion of the representation of the “uncertain” Polish State under Polish law and directly proceeded with a discussion of attribution under international law where the existence of the State was not in doubt. The summary of its findings by the Tribunal subsequently in its Award shows, however, that the core concern it addressed is whether a particular commitment had been made by the State Treasury *on behalf* of the State itself in the first place: “[t]he Tribunal has found that Respondent bound itself, by the combined effect of the terms of the SPA and its First Addendum, to conduct an IPO [...].”<sup>95</sup>

In *Noble Ventures v. Romania*, the Tribunal also had to deal with a question of privatization. An agreement had been entered into between a United States investor, Noble Ventures, and the Romanian State Ownership Fund (SOF), whose successor organization was the Authority for the Privatization and Management of the State Ownership (APAPS). Both entities had their own legal personality, separate from the State under Romanian law. The United States-Romania BIT also included an umbrella clause: “[e]ach Party shall observe any obligation it may have entered into with regard to investments.”

<sup>92</sup> *Eureko v. Poland*, Partial Award of August 19, 2005, paras. 115–134.

<sup>93</sup> *Ibid.*, paras. 244–260.

<sup>94</sup> See the discussion of the Tribunal at paras. 121 *et seq.* of the Partial Award. See also, an implicit recollection of the argument in a remark by Professor Crawford, who acted as co-Counsel for the Republic of Poland in that case: “I am reliably informed that there is no such entity as ‘Poland’ in Polish law”, note 8 above, 6. This does not mean, of course, that the Polish State does not exist in the eyes of international law.

<sup>95</sup> *Eureko v. Poland*, Partial Award of August 19, 2005, para. 245, see also para. 157.

With respect to that clause, the Tribunal defined the question as follows: “Considering that the Claimant’s case comprises some claims which concern alleged breaches of contractual relationships *purportedly concluded with the Respondent*, the question for the Tribunal is whether Art. II(2)(c) BIT is an “umbrella clause” that transforms contractual undertakings into international law obligations [...]”<sup>96</sup> (emphasis added). It concluded in the affirmative and then proceeded with a separate discussion of attribution.

The Tribunal indicated that the question of attribution was relevant in two different respects. First, there was the question of whether the acts committed by SOF or APAPS, which were alleged to have constituted violations of the BIT, could be attributed to Romania. Second, there was *the more specific question as to whether Romania itself, not a separate entity, entered into the privatization agreement and other contractual arrangements.*<sup>97</sup> Only the second question was relevant to the discussion of the umbrella clause. The real thrust of the discussion was whether Romania itself had entered into an obligation with regard to investments for the purposes of that clause, *i.e.*, the *representation* of the State when entering into the agreement. This is confirmed by several subsequent passages of the Award:

SOF and APAPS were entitled by law to *represent* the Respondent.<sup>98</sup>

And

[...] *Both entities were clearly charged with representing the Respondent in the process of privatizing State-owned companies and, for that purpose, entering into privatization agreements and related contracts on behalf of the Respondent.* Therefore, the Tribunal cannot do otherwise than conclude that the respective contracts, in particular the SPA, *were concluded on behalf of the Respondent* and are therefore attributable to the Respondent for the purposes of [the umbrella clause].<sup>99</sup> (emphasis added)

<sup>96</sup> *Noble Ventures v. Romania*, Award of October 12, 2005, para. 46.

<sup>97</sup> *Ibid.*, para. 68.

<sup>98</sup> *Ibid.*, para. 80.

<sup>99</sup> *Ibid.*, para. 86. The *EnCana v. Ecuador* Tribunal, in another context, used similar language: “[t]he Respondent did not deny that in entering into the Participation Contracts with foreign companies to exploit the natural resources of Ecuador, the conduct of Petroecuador as a State-owned and State-controlled instrumentality is attributable to Ecuador for the purposes of the BIT” (*EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award of February 3, 2006, para. 154). In this case, however, the text of the contract clearly indicated that it was “entered into by the State, through Petroecuador”, so that the issue was also squarely one of *representation* of the State by an entity having a distinct personality. *Ibid.*, para. 26.

Therefore, there may not be such a different approach between the *Nagel*, *Impregilo* and *Azurix* Tribunals, on the one hand, and the *Eureko* and *Noble Ventures* Tribunals, on the other hand. To the extent that, in spite of appearances, representation rather than *post hoc* attribution – or put another way, representation as a specific category of attribution, *ab initio*<sup>100</sup> – appears to have been the pivotal issue in the *Eureko* and *Noble Ventures* decisions, those decisions would remain compatible with the text of the umbrella clause. Whether directly or by representation, the entity entering into the obligation for the purposes of the umbrella clause – “it”, as referred to in the text of the respective clauses – was the State itself and not an entity distinct from the State. Applying this principle, the *Eureko* and *Noble Ventures* Tribunals concluded that, as from the inception, the State, and not some other person, was the one obliged by the relevant undertaking. The *Nagel*, *Impregilo* and *Azurix* Tribunals reached a different conclusion, not because they applied a different standard, but because they were not convinced that the relevant sub-State entity represented the State at the time the undertaking was made.

As a result, for the purposes of assessing whether an undertaking was made by the State or a separate entity, the test appears to be whether the undertaking was made *on behalf of the State in the first place*, and not the search for attribution of certain posterior acts of the sub-State entity to the State. Such an analysis is simpler, and in our view more satisfactory. It was expressed for instance by Professor Gaillard in his commentary of the *Joy Mining v. Egypt* award:

The wording of [the umbrella clause] of the United Kingdom-Egypt Treaty did not provide a response to an important question. Is the promise to observe contractual undertakings made towards investors applied only to commitments made directly by the host State in its own name or could it be considered as extending to commitments made by various entities dependent on it towards foreign investors? [...] The way Article 2(2) is worded could lead one to think that, unless it is considered that the contracting entity, the General Organization for Industrial and Mining Projects, *represented the State of Egypt at the time of signature of the contract* entered into with Joy Mining, the promise made in the Treaty to observe undertakings made towards investors was not applicable in this case because it covered only the commitments of the State as opposed to those of public entities.<sup>101</sup> (emphasis added)

<sup>100</sup> One should note, however, that representation of the State for the purposes of entering into a municipal law agreement appears to be a matter for municipal law, while attribution is one for international law.

<sup>101</sup> E. Gaillard, *Centre international pour le règlement des différends relatifs aux investissements*

In a detailed study, Professor Yves Nouvel also distinguished the question of attribution to the State of sub-State entities' conduct *in fact* from that of sub-State entities' *undertakings*. He expressed the same idea in a simple formula:

[t]he attribution [to the State] of the undertaking [of a sub-State entity] results from the relationship of representation between the [sub-State] entity and the State.<sup>102</sup>

If such an approach were to be confirmed, in the absence of some express language in the treaty, if the sub-State entity represented the State at the time of entering into the relevant undertaking, and for the purposes of entering into such undertaking, the State itself would be obliged to respect it, which may in turn trigger the umbrella clause. Otherwise, the umbrella clause would not apply.

*Does an Umbrella Clause Cover Obligations whose Creditor is not the Investor Itself?*

With respect to the second question, which formed the basis of the annulment, *i.e.*, whether the creditor of the State's obligation should be the investor itself or could be one of its subsidiaries or related companies, the decision of the *CMS ad hoc* Committee stands for the proposition that, subject again to its specific wording and that of the dispute resolution clause in the BIT, an umbrella clause would not give jurisdiction to an investment tribunal with regard to the allegation of breach by the State of an obligation to which the investor itself is not a party as creditor. Although it is hard to generalize such a finding too much, as any decision in a particular case will probably heavily depend on "who" or "what" is deemed a "beneficiary" of the obligation in the text of the umbrella clause,<sup>103</sup> it also finds support in two prior decisions: *Siemens v. Argentina* and, again, *Azurix v. Argentina*.

(CIRDI) – *Chronique des sentences arbitrales*, J.D.I. 2005, 181 (translation from French). *Adde*, from the same author, the reference to promises "made in the name of the State", J.D.I. 2006, 346.

<sup>102)</sup> Y. Nouvel, *Les entités paraétatiques dans la jurisprudence du CIRDI*, in *LE CONTENTIEUX ARBITRAL TRANSNATIONAL RELATIF À L'INVESTISSEMENT*, 25 *et seq.*, spec. 26, 41 *et seq.* and references cited. (translation from French).

<sup>103)</sup> One may argue, for instance, that an obligation entered into with regard to an "investment" does not necessarily have the exact same scope as an obligation entered into with regard to an "investor", or "an investment of an investor."

In *Siemens v. Argentina*, the German company Siemens responded to a bid from the Argentine Government regarding an immigration control, personal identification and electoral information system. The terms of the bid required that a local company be set up for that purpose. Siemens created an Argentine law company, SITS, held through another German company, SNI. SITS won the bid and, by decree, was awarded a contract with the State. The contract was subsequently terminated by the State and Siemens initiated arbitration against Argentina pursuant to the Germany-Argentina BIT, arguing, among other things, that the umbrella clause in the BIT had been breached by Argentina. It was worded as follows: “[e]ach Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory.” While the Tribunal decided that Argentina breached all principal standards of protection under the BIT, it refused to decide that the umbrella clause had been breached by Argentina, in unequivocal terms:

Whether an arbitral tribunal is the tribunal which has jurisdiction to consider [the breach of the umbrella clause] or whether it should be considered by tribunals of the host State of the investor is a matter that this Tribunal does not need to enter. The Claimant is not a party to the Contract and SITS is not a party to these proceedings.

In regard to the scope of the [arbitration agreement], the Tribunal concurs with the submission that reference to disputes related to investments would cover contractual disputes for purposes of the consent of the parties to arbitration given the wide meaning of the term ‘investments’ and the terms of [the umbrella clause]. However, to the extent that the obligations assumed by the State are of a contractual nature, such obligations must originate in a contract between the State party to the Treaty and the foreign investor as, for instance, in the SGS cases.<sup>104</sup>

As for *Azurix v. Argentina*, the relevant passage was already cited *supra* and is equally clear.

It is to be noted, however, that in both *Siemens* and *Azurix*, the Tribunals ultimately found against Argentina, which means that deciding that the investors could claim the benefit of the umbrella clause based on a breach of contract to which they were not a party may have appeared superfluous to them. This is precisely the case for the outcome of *CMS v. Argentina* as well, after the decision of the *ad hoc* Committee. There is apparently no decision yet where a Tribunal has dismissed an investor’s

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<sup>104</sup> *Siemens v. Argentina*, Award of February 6, 2007, paras. 204, 205.

claim on that ground while not finding another count of liability against the State under one of the other treaty standards.

As for the arguments in favor of the application of an umbrella clause to contracts entered into by a subsidiary of the foreign investor, one can cite the Energy Charter Treaty's Reader's Guide:

According to Article 10 (1), last sentence, each [Contracting Party] shall observe any obligations it has entered into with an investor or an investment of any other [Contracting Party]. This provision covers any contract that a host country has concluded with a subsidiary of the foreign investor in the host country, or a contract between the host country and the parent company of the subsidiary.<sup>105</sup>

It is likely, therefore, that the debate will continue on that point following the decision of the *CMS ad hoc* Committee.

Where do we stand regarding umbrella clauses after the decision of the Committee?

First, the question of the conditions of application of umbrella clauses, which had been somewhat overshadowed in prior cases by the question of their effect, is now on the front stage. Unlike its reasoning on other subjects, such as the state of necessity, the *CMS ad hoc* Committee's reasoning regarding the umbrella clause cannot be said to be *obiter dictum*, because it constitutes the underlying basis of the annulment. While it was not indispensable for the Committee to provide its reasons on the umbrella clause in such detail, yet in a still condensed form, it did so. As to the substance of such reasons, the Committee was within its mission in our view to attempt to provide clarifications regarding the scope of an umbrella clause because Argentina's allegation that the CMS Tribunal failed to state reasons provided it a possibility to do so under Article 52 of the ICSID Convention.<sup>106</sup> Close attention should naturally be paid to the exact wording of each specific umbrella clause, but general principles are desirable in order to guide arbitral tribunals and, more importantly, investors and States alike. As Professor Crawford put it, arbitral tribunals' positions – particularly on the question of umbrella clauses – reflect a level of dissent that one

<sup>105</sup> The Energy Charter Treaty, A Reader's Guide, p. 26, available at [http://www.encharter.org/fileadmin/user\\_upload/document/document1158668628.pdf](http://www.encharter.org/fileadmin/user_upload/document/document1158668628.pdf). See also, T. Wälde, note 12 above, 203, 212.

<sup>106</sup> Commentators are divided as to whether the *CMS ad hoc* Committee exceeded its powers in this respect. For two diverging views, see, E. Gaillard and A. Crivellaro, note 2.

may regard as disturbing: “the carpet looks very much as if different people have started from different ends without many common threads – a crazy quilt rather than a Persian rug.”<sup>107</sup> Whether the *CMS ad hoc* Committee’s reasons are *obiter dicta* or not ultimately matters little in practical terms in a system, such as the ICSID system, where there is no doctrine of *stare decisis*.<sup>108</sup> The key question is rather whether the principles laid down by the Committee will come to be accepted by subsequent investment Tribunals – inside and outside the ICSID system – and subsequent ICSID *ad hoc* Committees seized of the same question.<sup>109</sup> Similarly, the question remains open of what a national Court should do when confronted with such an issue, affecting jurisdiction, in the course of a challenge against an award outside of the self-contained ICSID system.<sup>110</sup> In any case, the Committee’s decision will no doubt be a focal point in any subsequent analysis of umbrella clauses. One must note, however, that certain choices which underlie the Committee’s decision were not openly discussed. Is it better to construe umbrella clauses broadly, with the outcome seen in arbitral case law that the broader the scope of a notion, the fewer its effects,<sup>111</sup> or conversely, to construe them to make sure that they produce some effects within clearly defined and predictable boundaries? On that point, the Committee probably did not wish to venture beyond its statements of principle regarding the umbrella clause, already reaching the limit of what it could do as an ICSID *ad hoc* Committee. In any event, the Committee’s decision seems to have made an implicit choice for the second branch of the alternative, even if the extent of such effects remains unsettled.

As a matter of fact – this is our second observation – even if the *CMS ad hoc* Committee’s principles came to be accepted, this would not finally

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<sup>107</sup> J. Crawford, note 8 above, 4.

<sup>108</sup> *SGS v. Philippines*, Decision on Jurisdiction of January 29, 2004, para. 97.

<sup>109</sup> For instance, on January 30, 2008, a challenge under Article 52 of the ICSID Convention was registered at the request of Argentina against the award rendered on September 28, 2007 by the ICSID Tribunal in the case of *Sempra v. Argentina*, which had two out of three arbitrators in common with the *CMS* Tribunal and had adopted a position on the umbrella clause similar to that of the *CMS* Tribunal. Another similar challenge was registered on March 7, 2008 in the case of *Enron v. Argentina*.

<sup>110</sup> As far as we are aware, there is not yet a reported case on that point. One must note, however, that an English court proceeded with a complete control of an investment treaty award on jurisdiction rendered outside the ICSID system. *The Czech Republic v. European Media Ventures SA*, 2007 EWHC 2851 (Comm).

<sup>111</sup> E. Gaillard, *LA JURISPRUDENCE DU CIRDI* (Pedone, 2004), 904.

resolve all questions regarding umbrella clauses, because of the existing conflicting cases regarding the effect of such clauses. The Committee takes no express position on that question, although one can see behind it the spirit of the decision on jurisdiction in *SGS v. Philippines*. If the *SGS v. Philippines* Tribunal's position regarding the effect of umbrella clauses came to be generally accepted, the practical difficulties regarding the dissociation of the jurisdictional and substantive aspects of a same case would remain unchanged by the decision of the Committee. As recalled above, the *SGS v. Philippines* case was recently settled. The case will therefore not give rise to clarifications on whether the ICSID Tribunal was right to have stayed its proceedings and not to have immediately exercised jurisdiction over all aspects of the case notwithstanding a choice of forum clause in the contract. These questions will be topics for other *ad hoc* Committees.