What undertakings are protected under Umbrella Clauses of BITs.
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I. Introduction.

1.1. Brief explanation of Umbrella Clauses.
In recent BIT practice Umbrella Clauses has become of the important treaty provisions that is aimed to guarantee observance of host state's private undertakings given towards investment of investor. These provisions are commonly called “umbrella clauses”, although other formulations have also been used: “mirror effect”, “elevator”, “parallel effect”, “sanctity of contract”, “respect clause” and “pacta sunt servanda”.¹

Umbrella Clause have been added as an additional protection to other substantive rules and it is seen as a clause that would enforce state's private undertakings under international law.² Because the breach of private undertakings of the clause is seen as a breach of Umbrella Clause, thus causing international responsibility of the state. In practice, in the absence of clause, private undertakings of the every state is seen as a domestic law matter unless those breaches amounted to breaches of treaty standards or customary law obligations of the state.³

As well as, apart from causing international responsibility, umbrella clauses elevate private disputes into international tribunal, thus it gave opportunity for investors to resolve their claims arising from municipal law of the host state under dispute settlement mechanism offered by applicable BITs.⁴ Before, BIT dispute settlement mechanism was

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³ Position of international in relation to private breaches of states are expressed in Vivendi II case where the Tribunal stated: "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 Concession Contract, by the proper law of the contract, in other words, the law of Tucuman. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucuman, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts" para. 96.

closed for investors, unless they could prove that state acts amounted to violation of standards of the law of foreign investment.

1.2. The problem.
Despite recognition of Umbrella Clause as creating international obligation of states for their private undertaking, still there is no universal consensus surrounding the scope of such provisions. Some arbitral Tribunals hold the view that Umbrella Clauses can cover wide scope of state undertakings, including undertakings arising from general domestic law of host states. Others prefer more limited approach by extending the scope of the clause to contractual undertakings by excluding general legislation from its scope. According to another view, Umbrella Clauses are so narrow that they only can protect those undertakings where the state act as a sovereign party rather than commercial.

1.3. Object and Purpose.
The aim of this thesis work is to establish what state's private undertakings can enjoy protection under Umbrella Clauses. Since the clause is an international obligation of the state, this should lead us to determine specific undertakings that will be enforceable under international by virtue of the clause.

To address this issue, the thesis will conduct a brief look at the historical origin of Umbrella Clause and compare it with recent BIT formulations in different treaties. This is crucial in terms it will help to reveal why the international society felt a need for creating such a treaty standard and what undertakings it intended to protect. Reference to Modern BITs is important since there should a linkage between origin of Umbrella Clause.

Further, the thesis will be dealing with notion of investment within respective BITs, because the applicability of the clause is conditioned on existence of investment in

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5 SGS v. Pakistan case, LG&G v. Argentina case.
6 Noble Ventures v. Romania, CMS v. Argentina Annulment Commission, Joy Mining v. Egypt, SGS v. Paraguay, and etc.
7 El Paso v. Argentina, Pan America v. Argentina.
particular investment regime. As well as, the purpose investment treaties is to regulate only investment related activities rather than non-investment, thus Umbrella Clause must deal with investment related undertakings rather than non-investment.\(^8\)

Further, the author will discuss the scope of obligations within Umbrella Clause. In this part it will be discussed whether Umbrella Clauses can be limited to certain type of state commitments or it must be given an extensive scope.

Moreover, supposing that Umbrella Clause creates international obligation of the host state for its private undertakings necessitates establishing a linkage between state's undertakings with regard to investment. This is crucial in terms if particular state is claimed to have breached its international obligation under international Tribunal, then the claimant must *prima facie* prove if there was any obligation that state was thought to have breached. Under Umbrella Clauses the investor must seek the linkage between state and its private undertakings towards the formers investment.

Additionally, according to law on foreign investment and well known decided arbitral cases, international responsibility of states derive only from breaches committed by the state in exercising their sovereign function. This concept explicitly disregards the ordinary contract breaches to amount to international law breach. Whether Umbrella Clauses should also obey to this concept and excludes ordinary contract breaches from its scope.

However, present work will not touch upon jurisdictional issues arising from application of Umbrella Clauses and only be limited, as has been stated above, to two important aspects.

- in determining the scope of undertakings Umbrella Clauses,
- in determining what undertakings can cause international responsibility of the state by virtue of Umbrella Clause.

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\(^8\) Purpose of Investment Agreement is to promote and protect investment. For example, Switzerland - Philippines BIT preamble: "promoting and protecting of foreign investment with the aim to foster economic prosperity of both States."
1.4. Methodology.
In responding to the issue under the present thesis work, the author will conduct analytical study of practice of Arbitral Tribunals and decided cases available in public which may be useful for this work. As well as, the author will refer to well known articles and work of commentators to discuss the issue. Additionally, thesis will refer to ILC Articles on state responsibility which is a source of state obligation and other relevant rules.

1.5. Structure.
Structure of this thesis work will consist of following chapters.
II. Chapter will be dedicated to historical origin Umbrella Clause and recent practice of BITs.
III. Chapter will discuss the scope of Umbrella Clauses.
IV. Chapter will deal with breach of state undertakings for the purpose of state responsibility.
V. Chapter is conclusion.
II. Umbrella Clause.

2.1. Historical Background.
Before analyzing the issue in the light of international law, brief look at historical origin of Umbrella Clause is important in terms it will best serves in establishing what Treaty Parties had actually in their mind while drafting observance of undertakings clauses. The development of Umbrella Clauses ran concurrently with the other progress in international investment law. In particular, all modern umbrella clauses spring from the 1954 draft settlement agreement between the Anglo-Iranian Oil Company (AIOC) and the Iranian government surrounding an oil nationalization dispute. Efforts by the British government to espouse the company’s claim before the ICJ failed, following a previous attempt to arbitrate under a defective clause in the concession agreement. At the time, Elihu Lauterpacht, who was advising the AIOC, suggested that the municipal law of both Iran and the United Kingdom could not govern any potential settlement between the parties. As a result, he suggested that the AIOC consider incorporating the settlement into a treaty that would be automatically governed by international law.9

Lauterpacht's proposal of Umbrella Treaty was expected to cover two important aspects. First, it was expected to lift out the settlement from the domain of domestic law into international as to avoid any changes that could be made unilaterally by the Iranian government. Second, to create a remedy for disputes between investor and Iranian Government according to the consortium dispute settlement provision or elevate those dispute into interstate remedy between UK and Iran that appointed ICJ.10

Further, in 1959, the German Society to Advance the Protection of Foreign Investments, a collection of lawyers, bankers and economists directed by the Chairman of Deutsche Bank, Dr Hermann Abs, published a draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (‘the Abs Draft’). Abs was particularly concerned by recent unlawful attacks on the sanctity of investments and the shortcomings of existing Friendship, Commerce and Navigation (FCN) treaties that did

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not offer an adequate degree of redress for violations of justice and were seldom addressed to the very states where capital was at greatest risk.\textsuperscript{11}

The resulting draft was a lengthy and legalistic text, which Abs hoped could become a “Magna Carta on Investments”. It comprised “defensive measures, designed to discourage the impairment and expropriation of foreign rights” and to make it “perfectly clear to the capital importing countries that they are expected....to leave alone the duly established rights of foreigners who are working for their benefit”.\textsuperscript{12}

Article IV of the Abs Draft Convention:

“In so far as better treatment is promised to non-nationals than to nationals either under intergovernmental or other agreements or by administrative decrees of one of the High contracting Parties, including most – favored nation clauses, such promises prevail”\textsuperscript{13}

Abs himself described the effect of Article IV (4) to mean, \textit{inter alia}, that if “individual private agreements” promised “better treatment to investors.....than to residents, the promise to accord such treatment must in all circumstances be respected”. Although Abs referred to “private agreements”, the Article indicates that unilateral undertakings to investors made by way of administrative decree must also be observed.\textsuperscript{14}

Further on, the wording of the clause in Abs-Shawcross Draft Convention on Foreign Investment\textsuperscript{15}, which was adopted in April of 1959\textsuperscript{16}, offered different formulation than the work presented by Abs. Article II of the Draft Convention contained the following language:

“Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other party”\textsuperscript{17}

The text of Article II refers to “any undertakings”\textsuperscript{18} Commentators at the time agreed that the clause covered unilateral as well as consensual undertakings, including contractual

\begin{footnotes}
\item[12] Anthony Sinclair. p. 419
\item[14] Anthony Sinclair. p. 420
\item[16] Anthony Sinclair. p. 421
\item[17] Anthony Sinclair. p. 421
\item[18] Anthony Sinclair. p. 421
\end{footnotes}
commitments. One of them was Schwarzenberger who upheld this view with regards to the scope of undertakings to be extended not only to consensual but also to unilateral undertakings but however, Fatour, in contrast, suggested that article II of Draft Convention was intended to cover only contractual undertakings. Less clear, however, was the degree of contract protection afforded by the clause. The general concern may have been to counter the all-too-frequent governmental revocation of concession contracts, arguably already covered by customary international law rules. The broad wording of the clause suggests, however, that any strict limitations on state conduct targeted by the clause were deliberately avoided.

In 1962, the OECD published for discussion a draft Convention said to embody recognized principles of international law relating to the protection of foreign property. The draft was revised and reissued in 1967, but it failed to obtain sufficient support from members and was never opened for signature. By way of compromise, the Council of the OECD resolved at its 150th Meeting on 12 October 1967 to recommend the draft Convention on the Protection of Foreign Property ('OECD Draft') to member states as a model for their bilateral investment protection treaties and as a general affirmation of international law rules applicable to foreign investment. One of the core substantive rules was Article 2, entitled 'Observance of Undertakings', which provided that:

Each Party shall all times ensure the observance of undertakings given by it in relation to property of nationals of any other Contracting Party.

However, the term “property” was used in the wide sense, meaning that undertakings does not only relate to the “investment”, but to “property” in whole. Notes and Comments to draft Convention with regards to the nature of undertakings:

An undertaking may be embodied in a contract or in concession – it is not possible on legal

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21 Anthony Sinclair. p.422
23 Anthony Sinclair. p. 427
grounds to draw a distinction between the two, and such an undertaking may represent a consensual or a unilateral engagement on the part of the Party concerned.  

Lauterpacht considered the word “undertakings” to have a wider meaning still:

“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.

2.2. Modern BIT practice.
Interpretation of international instruments are, to most extent, depends on the formulation contained in international instruments and the language plays a crucial role in establishing the will of contracting parties as to what they wished to protect. Modern BIT formulation of Umbrella Clauses in respective Treaties lacks any uniform language that makes interpretation of treaties more complicated.

Czech Republic and Singapore BIT considers state undertakings as "commitments" As it stated in Article 15 of BIT “(2) Each Contracting Party shall observe commitments, additional to those specified in this Agreement it has entered into with respect to investments of the investors of the other Contracting Party. Each Contracting Party shall not interfere with any commitments, additional to those specified in this Agreement, entered into by nationals or companies with the nationals or companies of the other Contracting Party as regards their investments”. BIT practice of Switzerland, for example, is not uniform and it formulates state undertakings differently with respective states. In 1995, it concluded a Treaty with Pakistan which referred to commitments as it stated: Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to investments of the investors of the other Contracting Party. But in its second agreement with Philippines they formulate undertakings as: Each Contracting Party shall observe any obligation it has assumed

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26 Notes and Comments to the Draft Convention on the Protection of Foreign Property.
27 Anthony Sinclair. p.428
with regard to specific investments in its territory by investors of the other Contracting Party.\textsuperscript{28}

Austria-Chile BIT, however, offers more clarified and narrower formulation of Umbrella Clause as to limits its scope to contractual obligations of treaty parties. According to Article 2.(4) Each Contracting Party shall observe any \textit{contractual obligation} it may have entered into towards an investor of the other Contracting Party with regard to investments approved by it in its territory.\textsuperscript{29}

\textbf{III. Scope of Umbrella Clauses.}

\textsuperscript{28} Switzerland - Philippines BIT. Signed in 1997.

\textsuperscript{29} Austria - Chile BIT. Signed in 1997.
3.1. Notion of investment.

One of the most important aspects of applicability of treaty regime to particular undertakings of the host to investors requires existence of investment in the host state. This requirement as well as is present in the language Umbrella Clauses require establishing connection between contractual promises and investment under respective BITs.\textsuperscript{30} In this part, the meaning of investment and its application under Umbrella Clauses will be discussed.

Umbrella Clause can not be considered as a clause which applies to all undertakings entered into by the host state. State may conclude various types of contracts such as procurement, service, concession and loan agreements and others. Inclusion all type of contracts as an object of protection of particular BIT is against the spirit of object and purpose of investment agreements.\textsuperscript{31} Satisfying this condition is also applied in other standards which primarily deal with contractual relations between investor and host state.\textsuperscript{32} Therefore, Umbrella Clauses clearly require establishing linkage between contract and investment under respective BITs by referring to "with regard to investment".\textsuperscript{33} Apparently, it will help to filter out non-investment related contracts from investment-related contracts. Accordingly, this approach is only possible when involved contract is tested against the conditions of satisfying the investment under respective BITs.\textsuperscript{34}

a). Investment for the purpose of applicability of BITs.

In modern BIT practice, there is no uniform understanding of the meaning of investment.\textsuperscript{35} Some BITs limit the scope of investment only to public concessions.\textsuperscript{36}

\textsuperscript{30} Most often used formulation of BITs refer that obligations must be entered into with regard to investment.

\textsuperscript{31} Object and Purpose of Investment Agreement can be found in Preambles of BITs as promoting and protecting of foreign investment with the aim to foster economic prosperity of both States (Switzerland and Philippines BIT).

\textsuperscript{32} Expropriation and Fair and Equitable standards also deal with contractual rights of the investor. As long as they are standards of particular Investment Treaty, their extension is also be limited to investment.

\textsuperscript{33} Tribunal in Noble Ventures v. Romania. considering the wording of Art. II (2)(c) which speaks of “any obligation [a party] may have entered into with regard to investments”, it is difficult not to regard this as a clear reference to investment contracts. Similar position was taken by SGS v. Philippines. para. 115. Eureko v. Poland. para.246


Some others, in contrast, cover wide range of contracts as turnkey, construction and other similar contracts.\(^{37}\) Apart from contracts of long term character, BITs often recognize certain types of *claims to money and claims to performance.*\(^{38}\) Or "*rights to any contractual benefit having an economic value*" or "*any right of an economic nature conferred by law or by contract.*"\(^{39}\)

However, one must note that interpreting investment in legal terminology enshrined in BITs can lead to abstract result, especially when it concerns widely formulated BITs, which require *claims to money or claims to performance.* In general, claims to money and

\(^{36}\) Ecuador and United Kingdom BIT. 1994. Article 1. *For the purposes of this Agreement*: (a) "*investment* means every kind of asset and in particular though not exclusively, includes: (i) movable and immovable property and any other property rights such as mortgages, liens or pledges; (ii) shares, stock and debentures of companies or interests in the property of such companies; (iii) claims to money or to any performance under contract having a financial value; (iv) intellectual property rights and goodwill; (v) business concessions conferred by law or under contract, including concessions to search for; cultivate, extract or exploit natural resource".

\(^{37}\) NAFTA 1139. (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h);

\(^{38}\) UNCTAD. State Contracts. UNCTAD Series on issues in international investment agreements. United Nations. New York and Geneva. 2004. p. 17; Switzerland and Uzbekistan BIT of 1993, Switzerland and Philippines BIT of 1997, for example, are among those Treaties that offer protection to any kind assets to be considered as investment by including *claims to money and to any performance having an economic value*; Tribunal, in SGS v. Philippine case, recognized that Service Contract could satisfy the condition of investment under BIT which referred to *claims to money and to any performance having an economic value.* (SGS v. Philippines. para.33) Similarly, Tribunal in SGS v. Pakistan case: "The BIT definition is so broad. "Investment" is defined so as to ......include every kind of asset and particularly: ......claims to money or to any performance having an economic value " para. 134.

\(^{39}\) Italy and Kingdom of Morocco BIT. Tribunal Salini v. Morocco case while interpreting investment under Article 1 of Italy and Morocco BIT stated: "The construction contract creates a right to a "*contractual benefit having an economic value*" for the Contractor, mentioned in Article 1 (c). The Contractor also benefits from a "*right of any economic nature conferred by ....(.....)by contract*" dealt with by Article 1 (e) " upheld the argument of the claimant that construction contract could created a right of the accepted that he
performance may derive from ordinary commercial transactions or metro ticket can qualify to be an investment, thus falling within protective umbrella of Umbrella Clauses. Rather, legal terminology is required to be read with economic terminology of investment which contains the elements of transfer of funds, longer term project, the purpose of regular income, business risk, participation of the investor.

b). Investment for the purpose of applicability of ICSID.
Establishing the linkage between contract and investment within Umbrella Clause context is also important for the purpose of jurisdiction under ICSID, since definition of investment contained in BITs does not necessarily warrant those contracts to fall as investment within ICSID regime. Tribunal in Joy Mining: The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise, Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.

ICSID, being one of the most important arbitration for resolving investment disputes, has developed its own criteria of determining the meaning of investment. Although, the history of ICSID Convention indicates that drafters left this right to Contracting States.

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42 Article 25 of ICSID determines jurisdiction of the Tribunal and as it states: (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
43 Joy Mining v. Egypt. Award on Jurisdiction. ICSID Case No. ARB/03/11. para 50
44 Some ICSID Tribunals, in order to establish existence “investment” for the purpose of jurisdiction, do not necessarily refer to the BIT definition of investment. Rather, they require particular transaction to be tested against the existence of “investment” within ICSID Convention. Although, Convention does not determine what is “investment” in ICSID regime, history of the Convention leaves this right to contracting States.
45 The Report of the executive directors: "No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the notification mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Center". citation from Laurence Burger. The trouble with Salini (Criticism of and Alternatives to the Famous Test)
Salini v. Jordan first introduced its well known "Salini criteria"\(^{46}\) for the purpose of jurisdiction under ICSID. The Tribunal, in that case, had to establish whether construction contract concluded between ADM and two claimants was an "investment" under BIT and ICSID.\(^{47}\)

Upholding the argument of the claimant it held:

The doctrine generally considers that investment infers: *contributions, a certain duration of performance of the contract and a participation in the risks of the transaction*. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the *contributions and the duration of performance of the contract*. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.\(^{48}\) (emphasis added)

c) Application of "investment" in Umbrella Clause cases.

In cases decided by Tribunals within context of Umbrella Clauses Tribunals agree state undertakings should be linked to undertakings of the state.

Tribunal in SGS v. Philippines had dealt with dispute that arise from ordinary commercial service that related to inspection services rendered by swiss company SGS.

Tribunal in interpreting Article I (2)\(^ {49}\) that defined "investment" contained in Switzerland and Philippines had stated: ".......it is not denied by the Respondent that the services provided by SGS, itself or through its wholly-owned Swiss affiliates, and the resulting rights to payment are capable of constituting an investment. Under Article I(2) of the BIT, the term “investments” is defined to include “every kind of asset” including “(c) claims to money or to any performance having an economic value”\(^ {50}\).

Similarly, in SGS v. Paraguay case, where the dispute arose from the "pre - shipment" inspection services, e.g. services involving the inspection of imported goods prior to shipment to ensure the


\(^{48}\) Salini v. Morocco. para. 52.

\(^{49}\) Switzerland and Philippines BIT.

\(^{50}\) SGS v. Philippines case. para 33.
accurate collection of import information and facilitate collection of customs duties.\textsuperscript{51} Tribunal dismissed the arguments developed by the respondent that "claims to money" under Article 1(2(c)) were limited to promissory notes or judgments or other documents evidencing liquidated debts,\textsuperscript{52} but held: "The Contract and the Parties’ performance of it give rise to “claims to money or to any performance having an economic value” (Article 1(2)(c))."\textsuperscript{53}

Privatization Agreement concerning the acquisition, management, operation and disposition of a substantial steel mill with associated and other assets, Combinatul Siderurgic Resita (CSR), located in Resita, Romania, concluded between Romanian State Ownership Fund and investor - Noble Ventures was found to be an investment within the meaning of Article 1 of USA - Romania BIT.\textsuperscript{54}

Eureko v. Poland case, the dispute arose from the Share Purchase Agreement concluded between the Ministry of State Treasury with Eureko B.V. and Big Bank Gdanski S.A. where the Eureko purchased 20% of shares PZU (Powszechny laklad Ubezpieczen S.A). Shares Purchase agreement was found as investment according to applicable BIT.\textsuperscript{55} However, in contrast to abovementioned commercial transactions, Tribunal in Joy Mining refused to recognize that commercial transaction could qualify to be an investment and disregarded the contentions of the claimant that Umbrella Clause was breached. In that case the dispute arose from the “Contract for the Provision of Longwall Mining Systems and Supporting Equipment for the Abu Tartur Phosphate Mining Project” concluded between Joy Mining Machinery Limited and IMC (the General Organization for Industrial and Mining Projects of the Republic of Egypt).\textsuperscript{56} According to the supply contract IMC had to release bank guarantees for the performance of the contract on agreed dates and conditions. However, at the stage of installation parties encountered with performance problems of the Longwall. Joy Mining asserted that

\textsuperscript{51} SGS v. Paraguay case. Award. para 26
\textsuperscript{52} SGS v. Paraguay. Decision on Jurisdiction. ICSID. para. 84.
\textsuperscript{53} SGS v. Paraguay. Decision on Jurisdiction. para. 84
\textsuperscript{54} Noble Ventures v. Romania. Award. ICSID Case No. ARB/01/11. para. 32
\textsuperscript{55} Article 1 of Netherlands and Republic of Poland BIT: a) the term "investments" shall comprise every kind of asset and more particularly, though not exclusively: [...] ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures iii) title to money and other assets and to any performance having an economic value [...] v) right to conduct economic activity [...] granted under contract [...] See Eureko v. Poland case. para. 76.
\textsuperscript{56} Joy Mining v. Egypt case. para.15
geological problems and the poor management of the Project by IMC were main causes for performance problems to occur while IMC asserted that the problem caused by malfunctioning of the equipment. Further, IMC decided not to release bank guarantees until performance and commissioning tests were not carried out "satisfactorily" by Joy Mining which, consequently, brought the parties before ICSID Tribunal. Tribunal dismissed claim on the ground that bank guarantees did not fall within the meaning of "investment" and therefore could not be eligible for the protection of umbrella clause of applicable BIT. As it said:

"The Tribunal is not persuaded by the Company’s argument that this is an investment, as a bank guarantee is simply a contingent liability. This same understanding is apparent in a witness statement submitted by the Financial Director of the Company to the effect that “The value of the guarantee is a real contingent liability which has the ongoing potential to affect the day-to-day operation of Joy and its ability to do business. The contingent liability only exists because Egypt have failed to return the guarantees”.

The Tribunal is also mindful that if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. Of course, the nature of most commercial contracts could hardly pass the test of investment within respective BITs and ICSID. But at the same time, explicit exclusion of sales contracts from scope of investment regime and specifically, from the scope of Umbrella Clause should not be accepted as a general rule. Because, investment activity

57 Joy Mining v. Egypt. para. 20
58 Joy Mining v. Egypt. para 71-82
59 Joy Mining Machinery v. Egypt. para.44
60 Joy Mining p 54. See also. Tribunal, in Petrobart v. Kyrgyz Republic, reviewing the case over the sales transaction, states: ‘Foreign investment’ is mostly defined as a transfer of tangible or intangible property from one country to another for the purpose of use in that country with a view to generating profit, or at least wealth, under the control of the owner of the property. Such transfers are to be distinguished from the much more frequent export transactions where goods are sold by manufacturers, or owners, in one state to traders or users in another state. Foreign investment involves a more permanent relationship between the foreign investor and the host state than is involved in the transitory international sales transaction. [The Contract] falls unquestionably into the latter category."


61 Velimir Zivkovic. Contractual Rights as Protected Investments in International Investment Law. p
may involve rather complex and various interrelated economic activities which should not be seen in isolation.\textsuperscript{62} As Tribunal in SCOB v. Slovakia stated:

*An Investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Center must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that particular transaction forms an integral part of an overall operation that qualifies as a an investment.*\textsuperscript{63}

As a prime task of interpreter, Tribunals must be concerned with establishing the intent of treaty parties and examine carefully the provision of investment while conducting test of sales contracts to the subject of investment. Especially, this relates Treaties that contain quite broad formulation of investment without limiting its scope to certain kind of contracts.\textsuperscript{64} Reviewing sales contracts under Umbrella Clauses can explicitly be excluded when treaty parties intend to do so. For example, Article 1139 of the NAFTA is among the treaties\textsuperscript{65} which states:

“[…] investment does not mean claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterpise in the territory of a Party to an enterpise in the territory of another Party”

### 3.2. Undertakings covered: General and Specific Undertakings.

After establishing that investment is a broad concept and can cover various kind of investment relate activities, one should establish whether all investment related

\textsuperscript{63} Id. p. 61.
\textsuperscript{64} Japan and Korea BIT.
\textsuperscript{65} Mexico and Korea BIT of 2002. “… but investment does not include, a payment obligation from, or the granting of a credit to a Contracting Party or to a state enterprise… but investment does not mean, claims to money that arise… from: i) commercial contracts for the sale of goods or services by an investor in the territory of a Contracting Party to a company or a business of the other Contracting Part, or ii) the extension of credit in connection with commercial transaction… iii) any other claims to money that do not involve the kinds of interests set out in subparagraphs a) through c)”
undertakings of the state are essentially undertakings for the purpose of Umbrella Clause? If no so what are those undertakings?

In practice, there is no uniform language of Umbrella Clause but most of the international investment agreement refer to "any obligations".... "entered into", but lacks any clarification of what those obligations must cover. Tribunals' opinion over this matter can be said to have been divided into three group, one of which considers Umbrella Clause covers "obligations" arising not only from contractual relations between state and investor, but also from municipal law and unilateral undertakings. For example, Pakistan Tribunal in interpreting the provision that stipulated "Either Contracting Parties shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of investors of the other Contracting Party", had stated: "The “commitments” the observance of which a Contracting Party is to “constantly guarantee” are not limited to contractual commitments. The commitments referred to may be embedded in, e.g., the municipal legislative or administrative or other unilateral measures of a Contracting Party." Nevertheless, further Pakistan Tribunal refused to give any meaning to Umbrella Clause by applying it too restrictively. Broad approach was taken in LNG v. Argentina case, where the Tribunal encountered with issue if Gas Law and its implementing regulations were obligations made to towards investment. In that case, Respondent argued that Umbrella Clause can not be extended to its general legislation relating to gas distribution and transportation industry, but must limited to specific commitments. Tribunal disagreed and had taken very broad reading of Umbrella Clause by considering that Gas Law and its implementing regulation not general but specific obligations. As it stated:

The issue for the Tribunal’s consideration is whether the provisions of the Gas Law and its implementing regulations constitute (i) “obligations” (ii) “with regard to” LG&E’s capacity as a

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66 See Chapter II which deals with different types of Umbrella Clauses. According to Modern BITs, Umbrella Clauses refer to "undertakings"...."entered into", "any obligations"...."entered into" "contractual obligations"...."entered into".

67 Switzerland - Philippines BIT., USA - Argentine BIT., Netherlands - Poland BIT.,

68 SGS v. Pakistan. Decision of the Tribunal on the Objection to Jurisdiction. ICSID CASE No. ARB/01/13. para. 166

69 LG&E Energy Corp. LG&E Capital Corp. LG&E International Inc. v. Argentine Republic. Decision on Liability. ICSID Case Nº ARB/02/1. para. 172.

70 LG&E v. Argentina. para 167.
foreign investor (iii) with respect to its “investment,” such that abrogation of the guarantees set forth in the Gas Law and its implementing regulations give rise to a violation of the Treaty.  

In order to determine the applicability of the umbrella clause, the Tribunal should establish if by virtue of the provisions of the Gas Law and its regulations, the Argentine State has assumed international obligations with respect to LG&E and its investment. To this end, it is necessary to remember that the provisions of the Gas Law and its regulation fixed and regulated the tariff scheme ensuring the value of Claimants’ investment; that the purpose of Claimants’ investment was to increase the value of its shares in the Licensees through a fragile balanced management of profits and costs, represented by the tariffs fixed by Argentina in light of the already mentioned Gas Law and its regulation. In view of the statements above, the Tribunal concludes that these provisions were not legal obligations of a general nature. On the contrary, they were very specific in relation to LG&E’s investment in Argentina, so that their abrogation would be a violation of the umbrella clause. However, it is doubtful that Umbrella Clause could be extended to general commitments of the host state. This case is exceptional where the Tribunal was not really concerned with Umbrella Clause formulation that referred to "entered into with regard to investment". Second, Tribunals discussion was more likely to fall within Fair and Equitable Treatment that protects legitimate expectations (changes in the legislation of host states that can negatively effect expectations of investors) of investors that may negatively effect to their contractual rights and investments. Eureko v. Poland also read the clause quiet extensively while interpreting the clause "shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party" stated:

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73 Tribunal in Noble Ventures v. Romania case while interpreting the similar provision states that “any obligation [a party] may have entered into with regard to investments”, it is difficult not to regard this as a clear reference to investment contracts. In fact, one may ask what other obligations can the parties have had in mind as having been “entered into” by a host State with regard to an investment. The employment of the notion “entered into” indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. para. 62.
74 Dolzer and Schreur. p. 146. In National Grid v. Argentina case, Tribunal stated: this standard protects the reasonable expectations of the investor at the time it made the investment and which were based on representations, commitments or specific conditions offered by the state concerned. Thus, treatment by the state should not effect the basic expectations that were taken into account by the foreign investor to make the investment. para. 173.
75 Netherlands and Poland BIT.
The plain meaning – the 'ordinary meaning' - of a provision prescribing that a State 'shall observe any obligation it may have entered into' with regard to certain foreign investment is not obscure. The phrase, 'shall observe' is imperative and categorical. 'Any' obligations is capacious; it means not only obligations of certain type, but 'any' – that is to say, all – obligations entered into with regard to investments of investors of the other Contracting Party. Although, unlike the previous case, Eureko v. Poland dispute concerned dispute related to contractual commitments of the state. However, Umbrella Clauses set the limit on "any obligations" by requiring that those obligations must "be entered" which disregards general commitments of the state as undertaking within the meaning of Umbrella Clause. This can be observed in practical interpretation of Umbrella Clauses in Arbitral Jurisprudence and works of many commentators. For example, Annulment Committee in CMS v. Argentina: "in speaking of “any obligations it may have entered into with regard to investments”, it seems clear that Article II(2)(c) is concerned with consensual obligations arising independently of the BIT itself (i.e. under the law of the host State or possibly under 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. Similarly, in SGS v. Philippines case, Tribunal "The term “any obligation” is capable of applying to obligations arising under national law, e.g. those arising from a contract; indeed, it

76 Eureko B.V. v. Poland case. Partial Award. Ad Hoc Arbitration. para 246
77 According to F.Mann: “This is a provision of particular importance in that it protects the investor against any interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act, and independently of the question whether or not such interference amounts to expropriation. The variation of the terms of a contract or license by legislative measures, the termination of the contract or the failure to perform any of its terms, for instance, by nonpayment, the dissolution of the local company with which the investor may have contracted and the transfer of its assets (with or without the liabilities) – these and similar acts the treaties render wrongful.” (cited in: OECD (2008). "Interpretation of Umbrella Clause in Investment Agreements", in International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Law Perspectives, OECD Publishing. http://dx.doi.org/10.1787/9789264042032-3-en); In Hague Academy lectures in 1969, Professor Prosper Weil concluded that: "The intervention of the umbrella treaty transforms contractual obligations into international obligations ... " (cited in: Eureko v. Poland case. para. 251). Historical origin of the clause indicates that the clause was not intended to be limited only to sovereign breaches. As Lauterpacht suggested that: "the idea that any contract made between, on the one hand, the Company and such other oil companies as may be concerned in the settlement, and NIOC and/or the Iranian Government on the other, shall be incorporated or referred to in a treaty between Iran and the United Kingdom in such a way that a breach of the contract or settlement shall be ipso facto deemed to be a breach of the treaty." (Anthony Sinclair. The Origins of Umbrella Clause in the International Law of Investment Protection. 20 Arb. Int'l 411 2004. p.415)
78 CMS Gas Transmission Co. v. Argentina (ICSID Case No.ARB/01/8) Decision on Annulment. para. 93 (a)
would normally be under its own law that a host State would assume obligations “with regard to specific investments in its territory by investors of the other Contracting Party”. 79

......it will often be the case that a host State assumes obligations with regard to specific investments at the time of entry, including investments entered into on the basis of contracts with separate entities. Whether collateral guarantees, warranties or letters of comfort given by a host State to induce the entry of foreign investments are binding or not, i.e. whether they constitute genuine obligations or mere advertisements, will be a matter for determination under the applicable law, normally the law of the host State. But if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X(2). 80

Third approach was taken by Tribunal in El Paso case which took a different position than Tribunals discussed above. It went on establishing the scope of Umbrella Clause not in reference to the clause itself, but rather it decided to establish the scope of Umbrella Clause through integrated reading with dispute settlement provisions. As it stated:

"In view of the necessity to distinguish the State as a merchant, especially when it acts through instrumentalities, from the State as a sovereign, the Tribunal considers that the "umbrella clause" in the Argentine-US BIT, which prescribes that "[e]ach Party shall observe any obligation it may have entered into with regard to investments", can be interpreted in the light of Article VII (1), which clearly includes among the investment disputes under the Treaty all disputes resulting from a violation of a commitment given by the State as a sovereign State, either through an agreement, an authorisation, or the BIT:

"an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Parties foreign investment authority (if any such authorization exists); or, (c) an alleged breach of any right conferred and created by this Treaty with respect to an investment". 81

Tribunal seemed to confuse substantive effect of the clause with its jurisdictional authority. 82 Tribunals approach can not be upheld for the reason that it failed to give any effect to the ordinary meaning used in the clause which referred to "any obligations" "entered into". 83 From the wording of the clause, it is hard to find that treaty parties

79 SGS v. Philippines para 115.
80 SGS v. Philippines para 117.
81 El Paso v. Argentina case. Decision on Jurisdiction. ICSID Case No. ARB/03/IS. para 81.
83 Argentina - USA BIT.
intended to protect those contracts where the state would act as a sovereign party. But Tribunals approach seem to be supporting historical approach taken by Lauterpacht, where suggestion of concluding Umbrella Treaty between British Government and Iran was made in relation to concession belonging to British - Iran company. However, Tribunal's suggestion could achieve support if applicable BIT recognizes only public concessions or as stabilization clauses where the state promises as a sovereign state. From the consideration of the Tribunal one may arrive at confused understanding that investment activity is narrow concept which protects only state's concessions as protected assets belonging foreign investors, although USA - Argentina BIT formulates the notion of "investment" very broadly. In modern Investment Treaties it is common to extend protection of investment regime to wider scope of contracts rather than only to public concessions. It is natural, since execution of those contracts may involve huge investment in the form of technology, workforce or establishing various facilities related to contract performance. Moreover, If to look back at the historical development of Umbrella Clause, there is lack of evidence that observance of undertakings clause had been limited to certain types of contracts while disregarding others. For example, OECD

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84 Anthony Sinclair. p.417
85 According to Article 1. a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation: (i) tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value and directly related to an investment; (iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, knowhow, and confidential business information, and trademarks, service marks, and trade names; and (v) any right conferred by law or contract, and any licenses and permits pursuant to law; b) "company" of a Party means any kind of corporation, company, association, state enterprise, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, and whether privately or governmentally owned; c) "national" of a Party means a natural person who is a national of a Party under its applicable law; d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capita gain; royalty payment; management, technical assistance or other fee; or returns in kind; e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase, issuance, and sale of equity shares and other securities, and the purchase of foreign exchange for imports.
86 Japan and Korea BIT of 2003.
Draft Convention from 1967\textsuperscript{87} provided almost similar Umbrella Clause as Argentina - USA BIT. Notes and Comments to the Draft Convention determines scope of undertakings even in broader manner and states:

*An undertaking may be embodied in a contract or in concession – it is not possible on legal grounds to draw a distinction between the two, and such an undertaking may represent a consensual or a unilateral engagement on the part of the Party concerned.*\textsuperscript{88}

### 3.3. Concluding Remark.

As has been observed in arbitral jurisprudence the concept of undertakings under Umbrella Clauses seem to be narrower concept than the notion of investment. Considering state general commitments achieved little support among Tribunals, instead they support that entered into meant existence of some form linkage between undertakings and particular investment of investor. According to their view this linkage should be with investment related contract.

### IV. Umbrella Clause and State Acts.

In this chapter it will be addressed whether all investment related contracts can cause international obligation of the state or certain of them? Whether state breach matters for holding state liable for its contractual commitments towards investment of investors?

\textsuperscript{87} Draft OECD Convention. Article 2. "Each Party shall all times ensure the observance of undertakings given by it in relation to property of nationals of any other Contracting Party."

\textsuperscript{88} Id.
4.1. International obligations and state responsibility.

Extent of international obligations of the every state depends on the extent of its international obligations in international treaty and customary law world. Current international law of foreign investment includes standards of rule that regulates the behavior of the state in its domestic area. These standards are promises between two states and these promises made in exercising their sovereign authority.\textsuperscript{89} If any state steps out from the boundary of these standards, then state will be held responsible for breaching of its promises because of existence of international obligation. However, violation of international obligation is different than violation of domestic law obligations and state can not be held liable for violating its domestic law unless that violation amounts to violation of international obligation.\textsuperscript{90} Clarification of international law position on this matter is briefly expressed by Stephan Shwebel, as he states: "...\textit{while mere breach by a state of a contract with an alien (whose proper law is not international law) is not a violation of international law, a 'non-commercial' act of a State contrary to such a contract may be. That is to say, the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is an violation of international law.}"\textsuperscript{91} In the law of foreign investment sovereign breach requirement is necessary element for establishing whether particular treaty standard has been breached and this will help to avoid any domestic breaches to be considered as international obligation of the state concerned.\textsuperscript{92} For example, in \textit{Consortium RFCC v. Morocco} case, Tribunal while discussing the claim over the breach of the contract relating to

\textsuperscript{90} Vivendi v. Argentina. Decision on Annulment. Case No. ARB/97/3. para 96-97
\textsuperscript{92} Vivendi Annulment Committee: “A state may breach a treaty without breaching a contract, and vice versa…The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law… In accordance with this general principle (which is undoubtedly declaratory of general international law), 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 Concession Contract, by the proper law of the contract…”
construction of motorway had stated that only sovereign breaches committed by Morocco capable of causing the breach under applicable FET standard of BIT.\textsuperscript{93} Similarly, Tribunal, in \textit{Waste Management v. Mexico} case, dismissed the arguments developed by the claimant that failure to pay sums due under concession contract by the city of Acapulco could amount to breach of Article 1105 (1) of the NAFTA.\textsuperscript{94} As it held: even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem.\textsuperscript{95}

Commenting on Article 1105 of NAFTA, Tribunal, in \textit{S.D Myer} stated that breach occurs: “only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.”\textsuperscript{96}

Sovereign interference is also one of the conditions that investor should rely on for raising claims under expropriation cases. Tribunal, in \textit{Siemens v. Argentina}, after discussing several cases under expropriation claims stated that: What all these decisions have in common is that for the State to incur international responsibility it must act as such, it must use its public authority. The actions of the State have to be based on its “superior governmental power”. It is not a matter of being disappointed in the performance of the State in the execution of a contract but rather of interference in the contract execution through governmental action.\textsuperscript{97}

As has been observed requirement of sovereign act in relation to investment is perfectly operable in relation to international obligations of the state. As the nature and content of obligation holds some form of promise between sovereign states of not to expropriate or not to discriminate. This implies that ordinary contractual breach does not trigger those interstate promises, or treaty rules, in general. For example, if state does not pay the

\begin{itemize}
\item \textsuperscript{93} Dolzer and Schreur. p. 153.
\item \textsuperscript{94} Waste Management v. United Mexico States. Award. ICSID. Case N° ARB(AF)/00/3. para. 73-76
\item \textsuperscript{95} Waste Management v. United Mexico States. para 115.
\item \textsuperscript{96} S.D..Myers v. Canada. Partial Award. In a NAFTA Arbitration under the UNCITRAL Arbitration Rules. 13, Nov. 2000. para 266.
\item \textsuperscript{97} Siemens v. Argentina Award. ICSID CASE No. ARB/02/8. para 253.
\end{itemize}
money for services rendered, even though those services can satisfy the condition of being investment within broadly formulated investment under BIT, then that does not lead to be breach of those interstate promises.98

4.2. State undertakings and international responsibility.

a) Private Undertakings of the State.
Umbrella Clause as a Treaty provision is different than other standards. The clause is a holder of state promise not to breach of its undertakings. This is clearly interstate obligation that is included as a treaty provision by the consent of the Treaty Parties. However, this undertakings must be entered into between host state and investor and other between private parties. From one side, one can easily reach a conclusion that if any breach is to be considered as a breach of Umbrella Clause, then applying any breach as a breach of international obligation, by virtue of Umbrella Clause, should not be a problem.99

However, here one must note that holder of obligation must belong state according to Umbrella Clauses formulation. The latter includes "Either Contracting Party shall observe any obligations entered into with regard to investment". This means if there is no any element of state involvement, or state undertaking, then that any other obligation is excluded from the scope of Umbrella Clause and simply those kind of private claims would be disregarded by the Tribunal. From the perspective of Articles on state responsibility for international wrongful acts state is to be liable for its promises given towards investors and conduct of any organs of states are to be considered as state conduct that lead to international responsibility of the state.100 If to apply this rule in relation to state's private undertakings one can reveal that state is responsible for only those undertakings that arise from promises given by the state in exercise of its

98 See Chapter II discussion.
99 Most of the claimants in Arbitral proceedings argued that Umbrella Clauses to be read as Treaty standard that protects the investor from all breaches. For example, two SGS cases can be a good example. Claimant in GSG v. Philippines case argued that non-payment for inspection services could rise to Umbrella Clause breach, thus leading to international responsibility of Respondent - Philippines.
100 Article 4 of ILC Articles on State Responsibility.
legislative, executive, judicial or other functions. This means that state's contractual undertakings can potentially be narrowed only to those contractual undertakings where the state is involved as not ordinary commercial party but sovereign. In that case, only stabilization clauses or public licenses or concessions can qualify to be undertakings for the purpose of attribution, notwithstanding the existence of investment under BIT and ICSID. For example, in the Republic of Uzbekistan Ministry of Finance is authorized body to issue licenses for insurance and audit activities. Since Ministry of Finance of the Republic of Uzbekistan is governmental body of the state, so then breach of license will be considered as a breach of the state, thus causing international obligation of the state, by virtue of Umbrella Clause. However, states do not necessarily enter into contractual arrangements with investors but may delegate the private parties to exercise "sovereign authority" and only acts in exercise of "sovereign authority" granted by the state will be act of the state for the purpose of attribution. However, ILC Articles leaves open the question what is governmental authority for the purpose of attribution. But according to the Commentary to Article 5 of ILC Articles:

"Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances. Reference to particular society, history and traditions means one should refer to domestic law of every country to determine what is governmental authority in the absence of any provision in treaty that determines what is governmental for the purpose of attribution. For example, in practice of USA Model BIT of 2004 state authority is addressed in the treaty provision for the purpose of attribution.

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101 Article 4 of ILC Articles: The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. See also. Eureko v. Poland case., Noble Ventures v. Romania case.

102 Article 9 of the Regulation of Ministry of Finance. Translated from Russian language.


104 Commentary to ILC Articles on state responsibility.
of Party under Treaty. Article 2 (2) (a) provides that a Party's obligations under a USA BIT apply "to a state enterprise or other person when it exercises any regulatory, administrative, or any other governmental authority delegated to it by that Party". NAFTA 1503 (2) 'governmental authority' includes the power to grant import or export licenses, approve commercial transactions to impose quotas, fees or other charges'. Article 1503 (2) adds another example, the 'power to expropriate'. Attribution issue was extensively discussed in Arbitral cases while applying Umbrella Clauses. In Eureko v. Poland case where the dispute related to Share Purchase Agreement concluded by investor Eureko and State Treasury of the Republic of Poland. The Respondent argued that:

[... ]"The Minister of the State Treasury has the dual role of exercising state authority in its executive functions but also of acting as a private commercial actor in certain transactional matters (where the Minister of the State Treasury is treated in the same manner as any other private party).

It is in this latter capacity - and only in that capacity - that the concerned Ministers of the State Treasury negotiated, executed and performed the SPA and the First Addendum. The Minister was a business partner of Eureko, and the SPA and the First Addendum constituted civil law agreements between two equal and equally sophisticated commercial actors. Under Polish law, actions undertaken by the Minister of the State Treasury with respect to the SPA and its First Addendum are not the result of the exercise of governmental executive powers and thus are not attributable to the ROP."s (Emphasis omitted)

Tribunal disagreed with arguments of the Respondent that SPA and the First Addendum constituted purely civil law contract and held:

In the view of the Tribunal, there can be no doubt that the Minister of the State Treasury, in the present instance, when he sold to the Eureko Consortium 30% of the State Treasury's shareholding interest in PZU by virtue of the SPA and undertook in the First Addendum to carry out an IPQ as to an additional 21 % of the shareholding, or, under the Second Addendum, sell it outright to Eureko, was acting pursuant to clear authority conferred on him by decision of the Council of Ministers of the Government of Poland in conformity with the officially approved

106 Model BIT of USA 2004.
108 Eureko v. Poland. Partial Award. Ad Hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment. para. 123
privatization policy of that Government. As such, the Minister of the State Treasury engaged the responsibility of the Republic of Poland. Moreover, the record before the Tribunal is spangled with decisions of the Council of Ministers in respect of the PZU privatization which authorize the State Treasury Minister or Ministry to take actions, some of which the Tribunal concludes later in its Award were in breach of Poland's obligations under the Treaty.\textsuperscript{109}

Tribunal further, referring to Crawford work, added:
"..... all organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its own law.(emphasis omitted)\textsuperscript{110}

Similarly, in Noble Ventures v. Romania case, the Respondent argued that Share Purchase Agreement entered into by State Ownership Fund with investor could not be attributable to the Romanian State. As it contends under the Romanian law SOF is a separate legal body and concluded SPA is governed by municipal civil law.\textsuperscript{111}

Tribunal disregarded the argument of the Respondent but established the connection between state FOB in accordance with national and international law. According to its findings:
"The 2001 Draft Articles go on to attribute to a State the conduct of a person or entity which is not a de jure organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. This rule is equally well established in customary international law as reflected by Art. 5 2001 ILC Draft. While not being de jure organs, SOF as well as APAPS were at all relevant times acting on the basis of Romanian law which defined their competence."\textsuperscript{112}

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\textsuperscript{109} Eureko v. Poland case. para. 129
\textsuperscript{110} Eureko v. Poland case. para. 131
\textsuperscript{111} Noble Venture v. Romania. p.66.
\textsuperscript{112} Noble Ventures v. Romania. p.70. Tribunal further noted: " Even if one were to regard some of the acts of SOF or APAPS as being ultra vires, the result would be the same. This is because of the generally recognized rule recorded in Art. 7 2001 ILC Draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. Since, from the Claimant’s perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown." para. 81.
The relevant provisions can be found in Government Ordinance 88/1997 (GO 88/1997) as amended by Law 99/1999. In what here follows we refer to GO 88/1997, thus amended, as the Privatization Law (using the Article numbers introduced by Law 99/1999 where that Law made changes); the amendments effected by Law 99/1999 came into operation in August 1999.\textsuperscript{113}

Chapter II of the Privatization Law defined the relevant competence and powers of the Government, the Romanian Development Agency (with which the Tribunal is not concerned) and the empowered public institutions. Article 3(g) of the Privatization Law included SOF in the definition of “empowered public institution.”\textsuperscript{114}

\textbf{b) Breach of Private Undertakings.}

Whether state breach matters for international responsibility to occur by virtue of Umbrella Clause.? According to ILS Articles on state responsibility it is irrelevant to distinguish between acta juris imperii and acta guestiones when state acts through its organs, even though they are acting ultra virus.\textsuperscript{115} In case if breaches committed by private parties, the responsibility of the state occurs if state delegated that private party with some governmental authority and during the breach that private party must be acting in exercise of governmental functions given by the state.\textsuperscript{116} This a logical construction of how international law on responsibility works. As was discussed in the beginning of the chapter the similar approach occurs in case of breaches of other standards of foreign investment law, whether they derive from treaty obligation or from international customary law.

However, Arbitral jurisprudence has extensively discussed this point. Number of Tribunals required from the claims to prove that state breach involved some elements of abuse of state power in relation to contractual undertakings of the state.

\textsuperscript{113} Noble Ventures v. Romania. p.71.
\textsuperscript{114} Noble Ventures v. Romania. p.72.
\textsuperscript{115} Commentary to ILC Articles on State Responsibility.
\textsuperscript{116} Eureko v. Poland, Noble Ventures v. Romania.
Tribunal, in Joy Mining v. Egypt case, dealing with claim that derived exclusively from sales contract between had stated that:

"it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. This might be perfectly different in other cases where that link is found to exist, but certainly it is not the case here."\textsuperscript{117} From the consideration of Joy Mining Tribunal one could conclude that Umbrella Clause could cause the international obligation of the state. But, as discussed above, Tribunal did not find any relevance between contract of claimant and investment it made for the purpose of ICSID and BIT.

Restrictive approach was taken in SGS v. Pakistan where the Tribunal refused the contention of the claimant that ordinary contract breach amounted to breach of Treaty obligation, e.g. Umbrella Clause contained in Switzerland - Pakistan BIT.\textsuperscript{118} Tribunal in its reasoning held: "......Article 11 would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments to an investor of the other Contracting Party. Any alleged violation of those contracts and other instruments would be treated as a breach of the BIT. Secondly, the Claimant’s view of Article 11 tends to make Articles 3 to 7 of the BIT substantially superfluous. There would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract, or of municipal statute or regulation, by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party."\textsuperscript{119} Further on, its reasoning practically

\textsuperscript{117} Joy Mining v. Egypt. Decision on Jurisdiction. para. 81. Similar view was expressed by Tribunal in CMS v. Argentina case
\textsuperscript{118} SGS v. Pakistan case. para. 98.
\textsuperscript{119} SGS v. Pakistan case. para. 168. Superfluous argument was also expressed by Tribunal El Paso in commenting to the argument by the SGS v. Philippines case: According to the Tribunal in El Paso case: "......interpretation given in SGS v. Philippines does not only deprive one single provision of far-reaching consequences but renders the whole Treaty completely useless: indeed, if this interpretation were to be followed - the violation of any legal obligation of a State, and not only of any contractual obligation with respect to investment, is a violation of the BIT, whatever the source of the obligation and whatever the seriousness of the breach - it would be sufficient to include a so-called "umbrella clause" and a dispute settlement mechanism, and no other articles setting standards for the protection of foreign investments in any BIT. If any violation of any legal obligation of a State is \textit{ipso facto} a violation of the treaty, then that violation needs not amount to a violation of the high standards of the treaty of "fair and equitable
deprived the Umbrella Clause of its any meaning. As it stated: Considering the widely accepted principle with which we started, namely, that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law, and considering further that the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant. Clear and convincing evidence of what? Clear and convincing evidence that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan Investment Protection Treaty in incorporating Article 11 in the BIT. We do not find such evidence in the text itself of Article 11. We have not been pointed to any other evidence of the putative common intent of the Contracting Parties by the Claimant.

In the case brought by US investor CMS against Argentina the investor claimed that Argentina government breached stabilization clause where the former was assured by the

treatment" or "full protection and security". El Paso v. Argentina case. In response to superfluous argument, August Reinisch argues such consequence can occur only in circumstances when Umbrella Clause was interpreted as to protect not only contractual undertakings of the state, but also general obligations that contained in municipal law of the host state. (Seminar on International Investment Protection. Winter Semester 2006/2007. p. 25.

Principle of treaty interpretation requires that treaty provisions must be interpreted effective rather than ineffective. For example, "In the Case Concerning the Territorial Dispute (Libya/Chad), 1994 ICJ Rep. 6, the Court interpreted an article in bilateral treaty between the parties as providing for the settlement of all frontier disputes according to a specific list of instruments in an Annex to the treaty. In rejecting Libya’s claims that other instruments not in the Annex could be considered, the ICJ stated that the parties could have made other choices to resolve their boundary disputes, but the language of the treaty showed that they did not, and that “[a]ny other construction would be contrary to one of the fundamental principles of interpretation of treaties. . . . , namely that of effectiveness.” (Professor Steven R. Ratner. Expert opinion on the case Murphy Exploration and Production Company International, Claimant v. The Republic of Ecuador, Respondent); Tribunal in Eureko v. Poland: " It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective."

Further, Tribunal in SGS v. Philippines Tribunal disagreeing with such restrictive approach taken by SGS v. Pakistan Tribunal stated: But this is not what Article X(2) of the Swiss Philippines Treaty says. It does not convert non-binding domestic blandishments into binding international obligations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law of the Philippines to international law. Article X(2) addresses not the scope of the commitments entered into with regard to specific investments but the performance of these obligations, once they are ascertained.61 It is a conceivable function of a provision such as Article X(2) of the Swiss Philippines BIT to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments—in effect, to help secure the rule of law in relation to investment protection. In the Tribunal’s view, this is the proper interpretation of Article X(2). SGS v. Philippines case. para. 126.
state not to freeze the tariff regime and not to modify basic rules governing the license without consent of investor. According to license the tariff was to be calculated in US dollars but expressed in pesos and adjustable every 6 month according to Producer Price Index (PPI).\textsuperscript{122} As a result of economic crises, Argentina had adopted Emergency Law and removed tariff adjustment according to PPI and the right to calculate tariff in US dollars.\textsuperscript{123}

Tribunal, in discussing the case within the context of Fair and Equitable Treatment, had reached that the standard was breached. As it stated: "fair and equitable treatment is desirable to 'to maintain a stable framework for investments and maximum effective use of economic resources.' There can be no doubt, therefore, that a stable and legal and business environment is an essential element of fair and equitable treatment."\textsuperscript{124} Further on, it added that: "fair and equitable treatment is inseparable from stability and predictability."\textsuperscript{125}

Tribunal, turning on to the issue of Umbrella Clause, had taken affirmative result that the clause was breached.\textsuperscript{126} However, at the end, Tribunal left unclear which undertaking was breached when it held that Respondent was also liable for Umbrella Clause breach.\textsuperscript{127} In Eureko v. Poland case Tribunal dealt with state interference into contractual obligations of american investor Eureko which bought the shares of state owned insurance company. Tribunal turning to the issue of Umbrella Clause stated that Umbrella Clause is not similar to standards of fair and equitable, national treatment, most favored nation treatment, deprivation of investments and full protection and security, but it must mean something else.\textsuperscript{128} Tribunal, further examining the historical origin of Umbrella Clause and rulings of Tribunals\textsuperscript{129} in previous cases reached the conclusion that "the actions and

\begin{thebibliography}{99}
\bibitem{122} Bjorn Kunoy. Signing in the Rain: Developments in the interpretation of Umbrella Clauses.
\bibitem{124} CMS v. Argentina. Award. para 274.
\bibitem{125} Id. para. 276. Dolzer and Schreur stressed the importance of both Umbrella Clause and Fair and Equitable Treatment for the promotion and stability of contractual relations. (Rudolf Dolzer and Christoph Schreuer. Principles of International Investment Law. Oxford University Press. 2012. p.82)
\bibitem{126} CMS v. Argentina: "The Tribunal therefore conclude that the obligation under the Umbrella Clause of Article II (2) (C) of the Treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under Treaty." award. para. 303.
\bibitem{128} Eureko v. Poland. Award. para. 249.
\bibitem{129} Eureko v. Poland. para. 251 - 258.
\end{thebibliography}
inactions of the Government of Poland that are in breach of Poland's obligations under the Treaty those that have been held to be unfair and inequitable and expropriatory in effect - also are in breach of its commitment under Article 3.5 of the Treaty to "observe any obligations it may have entered into with regards to investments of investors" of the Netherlands." 130 Unfortunately, Tribunal left open the issue whether it still would hold the same approach if violation would arise from ordinary contract breach that could satisfy to be an investment under applicable BIT and ICSID.

Tribunal in Noble Ventures v. Romania also took broad approach while dealing with issue of state interference into Share Purchase Agreement.

In that case, the Respondent contended that Umbrella Clause provision of Art. II(2)(c) does not elevate breaches of contract to BIT breaches and Umbrella clauses are only intended to create a treaty obligation on States to protect against the exercise of sovereign powers in a manner that interferes with contractual commitments and other legal obligations entered into with respect to investments (R-PHB I, para. 65; R-PHB II, para. 38) 131 Tribunal disagreed with argument of the Respondent and stated:

"...none of the above mentioned general rules is peremptory in nature. This means that, when negotiating a bilateral investment treaty, two States may create within the scope of their mutual agreement an exception to the rules deriving from the autonomy of municipal law, on the one hand and public international law, on the other hand. In other words, two States may include in a bilateral investment treaty a provision to the effect that, in the interest of achieving the objects and goals of the treaty, the host State may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus "internationalized", i.e. assimilated to a breach of the treaty. In such a case, an international tribunal will be bound to seek to give useful effect to the provision that the parties have adopted." 132

Tribunal in SGS v. Paraguay case in responding to the objection of the Respondent 133 stated that:

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130 Eureko v. Poland case. para. 260.
131 Noble Ventures v. Romania. para.44.
132 Noble Ventures v. Romania. para. 54.
133 According to the Paraguay as Respondent: “umbrella clause” provision in a BIT such as Article 11 cannot “elevate a pure breach of a commercial contract into a treaty violation.” In its Reply, Respondent argued that an umbrella clause is implicated only if the host state abuses its power or exerts undue governmental interference in breaching a contract or any other type of undertaking. In Respondent’s view, any ordinary commercial counterparty could fail to pay under a contract, and Claimant has failed to allege that Paraguay committed any other wrongful action constituting an abuse of governmental power. On that
Given the unqualified text of Article 11 of the Treaty, and its ordinary meaning, we see no basis to import into Article 11 the non-textual limitations that Respondent proposed in its Reply. Article 11 does not exclude commercial contracts of the State from its scope. Likewise, Article 11 does not state that its constant guarantee of observance of such commitments may be breached only through actions that a commercial counterparty cannot take, through abuses of state power, or through exertions of undue government influence. Respondent’s appeal to the putative “true meaning” of umbrella clauses cannot take precedence over the plain language of the umbrella clause that is before us. In effect, we see no basis on the face of the clause to believe that it should mean anything other than what it says—that the State is obliged to guarantee the observance of its commitments with respect to the investments of the other State party’s investors.\(^{134}\)

However, Tribunal in that also dealt with issue of Fair and Equitable breach clause. According to its findings, non-payment for the services rendered was also a breach of Respondent's obligation under the Treaty.\(^{135}\) However, Tribunal preferred not to clarify whether it would hold the same approach if the dispute concerned ordinary contract breach only under Umbrella Clause.

SGS v. Philippines case should have been one of the interesting cases among others. Because the breach was actually involved ordinary non-payment for the services due under contract between Swiss company SGS and Philippines. Tribunal seemed to support the claimants arguments that Umbrella Clause could also elevate ordinary contract breaches into treaty breaches. It stated that: "Article X(2) 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 of such obligations into an issue of international law. That issue (in the present case, the issue of how much is payable for basis, Respondent contended that Claimant did not allege a viable claim under Article 11." SGS v. Paraguay case. para.164.

\(^{134}\) SGS v. Paraguay. Decision on Jurisdiction. para. 168.

\(^{135}\) Tribunal supporting the argument of the claimant that FET standard breached by the Respondent, stated: "dismissing the contention of the Respondent on the Claimant also contends generally that Respondent acted in bad faith, capriciously, arbitrarily and in a non-transparent manner towards SGS. In particular, Claimant alleges that Respondent subjected SGS to spurious administrative investigations that, according to Claimant, were not required by law or fact but instead were conducted with the purpose of thwarting or delaying payments due to SGS. According to Claimant, these internal administrative investigations lacked transparency, were untimely and unnecessary and again contradicted various Paraguayan officials’ alleged acknowledgments of the debt owed to SGS at the time the investigations were conducted. Of course, our recitation of these allegations does not reflect any views on the Tribunal’s part about their veracity or about whether Claimant will be able to prove them at the merits stage. The point is simply that Claimant’s allegations with respect to unfair or inequitable treatment by Paraguay extend beyond mere non-payment in breach of the Contract. Thus the necessary premise of Respondent’s objection—that Claimant is alleging only nonpayment—fails, and its objection to jurisdiction on that ground must be rejected. For both of the foregoing reasons, the Tribunal is content that Claimant has met—at this stage—the requirements for a claim for breach of Article 4(2) of the BIT, and Claimant’s fair and equitable treatment claim should be taken up on the merits."
services provided under the CISS Agreement) is still governed by the investment agreement.\textsuperscript{136} Despite its affirmative position, in further consideration Tribunal refused to take jurisdiction over the claims on the grounds that investor - state contract had a dispute settlement provision in favor of Philippines Court.\textsuperscript{137}

V. Conclusion.

From the examination of practical application of Umbrella Clauses reveal that the clause is yet to be clarified in further practice. Since non - uniform language and absence of clarification of the terms used in BITs creating substantial challenges for Tribunals in the phase of interpretation.

\textsuperscript{136} SGS v. Philippines case. para. 128  
\textsuperscript{137} SGG v. Philippines case. para. 155.
Nevertheless, analysis of the judicial practice and relevant legal sources relating to the determining the scope of Umbrella Clauses reveal that they prefer to limit the scope of state undertakings to contractual ones. Since formulation of clauses require some connection between the investment and state undertakings. Whether general laws can be considered as a connection to investment is questionable. Rather, they are general commitments of every state and extending the clause's authority to those general commitments can potentially be dangerous for the sovereign power of the state. Because Umbrella Clauses would then have the effect of freezing the existing domestic law regime at the time of making the investment. Usually, in practice, states give those kind of promises in written agreements between investor. Moreover, in LG&G v. Argentina case, Tribunal's ruling seemed to equalize the clause with authority of Fair and Equitable Treatment when it stated that breach of Gas Law and its implementing regulations were...

Furthermore, the notion of investment and scope of contractual undertakings is seen as distinct concepts. Investment can be a wider concept than scope of contractual undertakings of the state under Umbrella Clauses. Obviously, contractual undertakings must satisfy the condition of being investment under applicable treaty. But, for the purpose of international responsibility that contracts must additionally satisfy the condition of being attributable to the state, or in other words, contractual promises must be made in exercise of sovereign authority of particular state. This will exclude not only non-investment related contracts from the scope of Umbrella Clause but also commercial contracts where there is lack of state promise for the purpose of attribution in international law. For example, those kind of contracts can be provision of services, turkey contracts, sales contracts even thou they qualify to be an investment within respective BITs and ICSID. Because, their nature is concerned with exchange some good or service for certain amount of pay.

To sum up, Umbrella Clauses in current practice can extend its protection only to those contract where there is involvement of the state for the purpose of exercising of its main function as a state.

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138 Dolzer and Schreur. p.82.
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