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RESEARCH ARTICLE

The Evolution of Umbrella Clauses and the Interpretation of Chinese Concession Loan Agreements in Nigeria

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Abstract

This article proposes that, based on the evolution of international investment law and investment arbitration, umbrella clauses are substantially implicated in the interpretation of Chinese concession loan agreements in Nigeria. So far, the outcome of the oversight functions of the National Assembly of Nigeria indicates that umbrella clauses have not been considered a significant legal issue in the negotiation of these agreements. With the growing use of Chinese concession loan agreements in Nigeria, this article offers a historical analysis that should be a guide to organs of government, policy advisers and others charged with the sourcing and negotiation of concession loans for development projects in Nigeria. The article makes the case that a proper understanding of the evolution of umbrella clauses is germane to the negotiation and interpretation of these agreements, compared to standard immunity clauses that appear to have overtaken in the debate about these loans in Nigeria.

Keywords: Chinese concession loan agreements; investment arbitration; foreign direct investments; economic development; international investment law

Introduction

This article examines the increasing use of Chinese concession loan agreements in Nigeria that are negotiated to fund development projects. As a matter of law and public policy, the negotiation of these agreements should proceed with the assumption that investment disputes arising from these loans are more likely to occur than not. Concession loans of this nature implicate international investment law and qualify as foreign direct investment (FDI) in the host country. Beyond the host country's own legal system, these types of loans are governed by the rules and obligations inherent in international investment law and FDI dispute-settlement mechanisms.[1] The development opportunities offered by these loans in the host country are enormous, and in many instances in the national interest. In Nigeria, the use of concession loans from foreign investors has been a recurring policy thrust of successive administrations since the advent of the Fourth Republic on 29 May 1999.

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1 Y Radi *Rules and Practices of International Investment Law and Arbitration* (2020, Cambridge University Press) at 135. See also FO Okpe "The definition of investment and the ICSID Convention: Matters arising under the Nigerian Investment Promotion Act" (2017) *Afe Babalola University Journal of Sustainable Development Law and Policy* 133 at 134–35. Also see M Solanes and A Jouravlev "Revisiting privatization, foreign investment, international arbitration, and water" (2007), available at: <https://archivo.cepal.org/pdfs/Waterguide/LCL2827e.pdf> (last accessed 10 March 2023).

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In a bold move that would pass as a consolidation of this policy, Muhammadu Buhari's administration revised the External Borrowing Guidelines for the Federal and State Governments to streamline the process of negotiating these loans with foreign investors to fund development projects in Nigeria.[2]

Recently, as part of its oversight functions, the House Committee on Treaties, Protocols, and Agreements of Nigeria's National Assembly (NASS) queried the immunity clause under article 8(1) of the loan agreement signed between Nigeria and the Export–Import Bank of China (EIBC), worth USD 500 million, to fund Phase II of Nigeria's information and communication technology infrastructure backbone.[3] The focus on the EIBC's standard concession loans agreement is pertinent because the latter is the major financing institution for Chinese companies investing in Nigeria and the African continent. Also under consideration is the Nigerian government's negotiation with the EIBC to obtain a USD 8.3 billion concession loan facility to construct a railway line that will link the commercial city of Lagos with the northern city of Kano. Nigeria is Africa's largest economy, with enormous oil and gas resources and other development potential; perhaps this explains Chinese investment interests in Nigeria. Understandably, the questions raised by the House Committee generated uproar and legitimate public debate. Some argued that this waiver is tantamount to ceding Nigeria's sovereignty to China, while the government responded that the clause is effectively an undertaking by Nigeria that it will meet its obligations under the concession loan agreement.[4] Under international investment law, the immunity clause is standard in most FDI agreements; it is a means for protecting FDI and is utilized by foreign investors to remove interpretation of the agreement from the reach of local jurisdiction and jurisprudence. The clause does not cede Nigeria's sovereignty to China.

However, considering China's ratification of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the Federal Government of Nigeria's (FGN) open offer of investment arbitration to foreign investors under the same Convention, the concession loans negotiated by the FGN with Chinese entities to fund development projects in Nigeria raise a weightier legal and economic question: the implications of umbrella clauses in the interpretation of concession loan agreements under international investment law and arbitration.[5] Nigeria's admission that the standard immunity clause in the

2 Debt Management Office Nigeria "Revised external and domestic borrowing guidelines for the federal government, state governments, FCT, and their agencies" (12 May 2020), available at: <https://dmo.gov.ng/publications/other-publications/borrowing-guidelines> (last accessed 10 May 2023). The guidelines are a good source for compliance, procedural and regulatory information for foreign investors who want to negotiate international commercial loan agreements with the federal and other levels of government and agencies covered by the guidelines in Nigeria. Based on a press release dated 18 June 2020 from Nigeria's Debt Management Office, an agency in the presidency, as of 31 March 2020, Nigeria has borrowed a total of USD 3.121 billion, negotiated as international concession loans from entities controlled by China. The loan amount accounts for 11.28% of the external debt portfolio of Nigeria. The rates for these loans are pegged at 2.5% pa, with a tenor of 20 years and a grace period of 7 years.

3 L Baiyewu "NASS break: House mega probes may suffer delay" (25 July 2022) *The Punch Newspaper* (Lagos, Nigeria), available at: <https://punchng.com/nass-break-house-mega-probes-may-suffer-delay/> (last accessed 14 February 2024).

4 Responding on behalf of the federal government, Minister of Transport Rt Hon Rotimi Amaechi, as he then was, stated that there is a difference between international diplomatic immunity, which deals with a country's sovereign immunity, and "commercial immunity which has to do with the commitment to ensure the repayment of loans". See "Amaechi, Malami correct NASS on sovereign immunity" (4 August 2020) *Vanguard Newspaper* (Lagos, Nigeria), available at: <https://www.vanguardngr.com/2020/08/amaechi-malami-correct-nass-on-sovereign-immunity/> (last accessed 14 February 2024).

5 The ICSID Convention, 17 UST 1270, was opened for signature 18 March 1965 and entered into force 14 October 1966; it is available at: <https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf> (last accessed 14 February 2024). For a more detailed analysis of the ICSID Convention, see LG Radicati di Brozolo and C Benini *The ICSID Convention, Regulations and Rules* (2020, Oxford University Press). On Nigeria's offer, see FO Okpe "Economic development and the utility of local content legislation in the oil and gas industry: Conflicts and effects of Nigeria's Local Content Act in the context of international investment law" (2015) 28 *Pacific McGeorge Global Business and Development Law Journal* 256 at 281.

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concession loan agreement is an undertaking to meet its obligation under the contract elevates the so-called immunity clause to the status of an umbrella clause. Consequently, under international investment law, the ICSID Convention and umbrella clauses are elements of the regulatory regime of FDI in Nigeria.[6] Beyond the ICSID Convention and other implicative international norms in the interpretation of FDI in Nigeria, the country's FDI regulatory regime comprises other local laws and institutions designed to attract, monitor and regulate the conduct of FDI.[7] The combination of these laws and institutions represents the FDI regulatory architecture in Nigeria.

It is arguable whether the extant FDI regulatory regime meets current realities.[8] Proceeding with reference to an emerging status quo on the use of concession agreements as a means of FDI, this article is an attempt to address the implications of standard umbrella clauses in the context of Chinese concession loan agreements in Nigeria. The use of concession loan agreements by Chinese entities in developing countries, including Nigeria, is a part of China's "One Belt, One Road" (OBOR) foreign investment policy initiated over two decades ago. Through this policy, China continues to give loans running into billions of dollars, mostly under concession agreements, as a means of investing in the Middle East, Central Asia, Europe and Africa. Its loans and projects have been extended to more than 150 countries.[9] Following diplomatic relations signed between China and Nigeria in 1972, the latter has become one of China's major trading partners in Africa.[10] Between the suspicion of economic colonization and domestic economic development considerations, the exact intent of China's OBOR foreign investment policy is still a matter of serious public debate in African economies.[11] While there are valid reasons to applaud China's economic interests in Africa, it is important not to lose sight of the legal meaning and implications of the international instrument Beijing uses to conduct FDI in the continent.[12] China's approach is a reflection of its distinct multinational and transactional FDI policy in developing countries that merits attention because of its powers and enormous resources.[13]

This article offers a historical analysis of umbrella clauses and their likely implications in the interpretation of Chinese concession loan agreements in Nigeria under international investment law. Based on Nigeria's FDI architecture, the arbitral award for breach of a concession loan

6 K Yannaca-Small "Interpretation of the umbrella clause in investment agreements", available at: <https://www.oecd-ilibrary.org/finance-and-investment/interpretation-of-the-umbrella-clause-in-investment-agreements_415453814578> (last accessed 12 September 2024).

7 See A Mbah "Legal framework for international investment arbitration in Nigeria – a critique" (2019), available at: <https://ssrn.com/abstract=3440618> (last accessed 11 October 2024).

8 EO Ekhator and L Anyiwe "Foreign direct investment and the law in Nigeria: A legal assessment" (2016) 58/1 *International Journal of Law and Management* 126. The authors argue that for FDI to have a significant effect on the Nigerian economy, the regulatory regime should be revised to "reflect current realities".

9 "China's Belt and Road Initiative will keep testing the West" (7 September 2023) *The Economist* (London), available at: <https://www.economist.com/leaders/2023/09/07/chinas-belt-and-road-initiative-will-keep-testing-the-west> (last accessed 4 January 2024). For a more detailed analysis of China's OBOR policy in Africa, see CC Ajibo "Belt and Road Initiative meets Africa: Exploring the state of play, implications, and the imperative for complementarities of interests" (2021) 8/2 *Journal of Comparative Law in Africa* 1.

10 KH Ibrahim and DW Sari "Nigeria–China: An examination of recent bilateral trade relations" (2019) 1/5 *International Journal of Applied Research in Social Sciences* 172. See also W Xiang and O Oluduro "China's investment in the Nigerian energy sector: A prognosis of the dispute settlement paradigm" (2023) 12/5 *Laws* 81. Beyond the use of concession loan agreements by Chinese investors to fund economic projects in developing countries, the authors observe that Nigeria is one of the top five destinations of Chinese FDI in the global energy sector.

11 Ibid.

12 UE Ofodile "Africa–China bilateral investment treaties: A critique" (2013) 35/1 *Michigan Journal of International Law* 133 at 134 argues that African leaders should pay more attention to the legal tools that form the substratum of China's FDI in Africa.

13 J Chaisse and KF Olaoye "The tired dragon: Casting doubts on China's investment treaty practice" (2020) *Berkeley Business Law Journal* 136 at 137. See also Y Zheng *China's Foreign Investment Legal Regime* (2023, Brill Nijhoff) at 124, who states that China's aggressive conclusion of investment treaties in the last four decades "reflects China's approach to participate [sic] in global economic governance and rule-making".

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agreement could be economically and politically dire for the host country, leading to serious economic and legal challenges because of the implications, application and interpretation of umbrella clauses inherent in agreements of this nature.[14] Consequently, a proper historical understanding and analysis of umbrella clauses is a more serious legal and policy question in the negotiation of these loans compared to the standard immunity clauses that appear to have overtaken in this debate in Nigeria.

The article is divided into six sections. The next section explores the fluidity and broad meaning of umbrella clauses and how they have influenced the shaping of FDI in host countries within the framework of the settlement of FDI disputes. The history and metamorphosis of the umbrella clause into one of the most important factors in the interpretation and settlement of FDI disputes is then traced. The emergence of the clause in international investment and arbitration is testament to the need for the protection of FDI in the host country. There then follows a commentary on the jurisprudence and conflicts surrounding the interpretation of umbrella clauses by arbitral tribunals; this section lays the foundation for analysis of Nigeria's FDI regime and the implication of umbrella clauses. The subsequent section references Nigeria's primary FDI legislation to address the implication of umbrella clauses in the context of the country's open offer of ICSID arbitration to foreign investors that include Chinese entities. The conclusion recommends that the implication of umbrella clauses in the interpretation of the legal obligations of the host country should be considered a more serious factor than the sovereign immunity clause in the negotiation of concession loan agreements in Nigeria.

The meaning and nature of umbrella clauses in concession loan agreements

Under international investment law, the meaning and effect of an umbrella clause is the host country's undertaking to abide by its contractual obligations with the foreign investor.[15] It is a clause through which the host agrees that it will be liable under international law for any breach of an underlying investment agreement between the investor and the host state.[16] I argue that article 8(1) of the concession loan agreement between Nigeria and the EIBC has the effect of an umbrella clause under international investment law and arbitration; this article provides that "the borrower irrevocably waives any immunity on the grounds of sovereign or otherwise for itself or its property, in connection with any arbitration proceeding pursuant to Art. 8(5), thereof with the enforcement of any arbitral award pursuant thereto, except for the military assets and diplomatic assets". This provision brings the concession agreement within the protection and umbrella of international law, within the framework of investment treaty arbitration. Umbrella clauses create international obligations for the host country towards foreign investors by raising contract claims to the level of international investment law and arbitration. In Nigeria's case, as the host country of this form of FDI, the umbrella clause is applicable in the interpretation of its legal obligations under the agreement, such that any breach of its terms automatically grants standing to Chinese lenders and investors to seek redress through international investment arbitration.[17]

14 See *Zhongshan Fucheng Industrial Investment Co Ltd v The Federal Republic of Nigeria* (Investor–State UNCITRAL Arbitration, Final Award of 26 March 2021), available at: <https://jusmundi.com/en/document/decision/en-zhongshan-fucheng-industrial-investment-co-ltd-v-federal-republic-of-nigeria-final-award-monday-1st-march-2021> (last accessed 18 March 2024).

15 Scholars and commentators sometimes refer to the clause as "observance of obligations" provision in a bilateral investment treaty (BIT). For example, see KJ Vandevelde *Bilateral Investment Treaties: History, Policy, and Interpretation* (2010, Oxford University Press) at 256–60. Vandevelde notes that the observance of obligations clause is referred to as an umbrella clause "because it brings contractual commitments within the coverage, or umbrella, of the BIT". Other formulations of the umbrella clause include "mirror effect", "elevator", "parallel effect", "respect clause", etc.

16 L Carroll "What place does an umbrella clause have in the new generation of bilateral investment treaties" (2023) 40/2 *Journal of International Arbitration* 125.

17 There are different forms of foreign investment contract in international investment law. These include joint venture agreements (JVAs), licensing and transfer of technology agreements, turnkey contracts, concession contracts and production sharing contracts (PSCs). PSCs and JVAs represent the most common forms of foreign investment contracts in

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Apart from the admission of Nigeria's Minister of Transport, I argue that the host country may unilaterally assume the obligation connected to an umbrella clause in favour of the investor through the enactment of FDI legislation.[18] In the case of Nigeria's FDI architecture, this argument is valid, and a unilateral assumption of the obligations under an umbrella clause will be upheld by an arbitral tribunal based on three reasons. Firstly, Nigeria's open offer to foreign investors to ICSID arbitration under the Nigerian Investment Promotion Commission (NIPC) Act without any pre-conditions is a unilateral assumption of the obligations of an umbrella clause.[19] Secondly, the obligations connected to an umbrella clause may still be applied under the NIPC Act through the application of the customary international law norm of *pacta sunt servanda*.[20] Thirdly, the obligation required by an umbrella clause may be independently imposed by international law through the expropriation provision of the NIPC Act in the absence of an applicable substantive bilateral investment treaty (BIT). These reasons will be examined in the context of Nigeria's international investment regime later; for now, let us examine the origin and development of umbrella clauses under international investment law and arbitration.

A short history of umbrella clauses

The origin of umbrella clauses may be traced to the 1959 Abs–Shawcross Convention, article 2 of which provides that "[e]ach party shall at all times ensure the observance of *any undertakings* which it may have given in relation to the investments made by nationals of any other party" (emphasis added).[21] However, the umbrella clause might have first appeared in the Abs Draft Convention for the Protection of Private Property Rights in foreign countries.[22] The Abs Draft Convention contains a specific provision that a promise of better treatment to non-nationals, including most-favoured nation clauses, must prevail.[23] It was after the occurrence of the clause in the Abs–Shawcross Convention that it then appeared in the first Germany–Pakistan BIT.[24]

Historically, the concept of an umbrella clause, as the term is understood in international investment law, is the direct result of lack of trust in the host country's legal system to resolve investment

Nigeria, particularly in the oil and gas industry. The multinational oil and gas companies operate in partnership with the Nigerian National Petroleum Corporation under PSCs. For a more detailed discussion of the new forms of foreign investment contract in host states, see M Sornarajah *The International Law on Foreign Investment* (3rd ed, 2020, Cambridge University Press) at 118.

18 In Nigeria the primary FDI legislation is the Nigerian Investment Promotion Act, cap N117 (Decree No 16 of 1995), Laws of the Federation of Nigeria 2004. See also Vandevelde *Bilateral Investment Treaties*, above at note 15 at 258.

19 This is premised on the notion that ICSID arbitration may internationalize investment disputes, which will in turn impose a responsibility on the host country to guarantee the observance of its contractual obligations towards the foreign investor. See Okpe "Economic development", above at note 5 at 281; KUK Ekwueme "Nigeria's principal investment laws in the context of international law" (2005) 49 *Journal of African Law* 177 at 199–200.

20 This is a Latin phrase for a basic principle of international law that means "agreements must be kept". By analogy, it means states are bound by their commitment and undertaking pursuant to an agreement. For further reading on this principle with reference to international investment law, see JW Yackee "Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: Myth and reality" (2008) 32/5 *Fordham International Law Journal* 1550.

21 Abs–Shawcross Draft Convention on Foreign Investment, 1959. A full text of the Convention is reprinted in UNCTAD "International investment instruments: A compendium in United Nations" (vol 5, 2000), 395, available at: <https://unctad.org/publication/international-investment-instruments-compendium-volume-v> (last accessed 11 October 2024). For a more detailed analysis of the origins of the umbrella clause, see AC Sinclair "The origins of the umbrella clause in the international law of investment protection" (2004) 2/4 *Arbitration International* 411.

22 See HJ Abs "Proposals for improving the protection of private foreign investments", cited by Sinclair, ibid.

23 Art 4 of the Abs Draft Convention provides that "[i]n 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 shall prevail".

24 Art 7 of the Agreement between the Federal Republic of Germany and the Islamic Republic of Pakistan on the Encouragement and Reciprocal Protection of Investments, signed 25 November 1959 (entered into force 28 April 1962), available at: <http://www.unctadxi.org/templates/DocSearch____779.aspx> (last accessed 10 December 2023).

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disputes impartially. From the perspective of foreign investors from developed economies, there was a widely held belief that there is a profound absence of a culture of commitment to investment contracts in the host countries, in contrast to in developed economies, such that the host country's commitment to an investment contract could be subject to the dictates of domestic politics, corruption, the failure of government institutions and other forms of socio-political risk. This notion raised legitimate concerns about the protection of foreign investments in the host country, particularly with respect to the protection of FDI contracts. The protection of FDI and property was seen as a pillar for economic prosperity and integration in the context of international trade.[25]

Writing against the background of the metamorphosis of the umbrella clause, Wälde argues that to achieve economic prosperity, there is a need for "investment-receiving societies" to adopt a culture of contractual commitment to do away with anachronistic and xenophobic perceptions of legal anarchy that comes to light "under the cloak of popular and legal sovereignty".[26] After making this argument, he goes on to complain, albeit accepting the reality, that in practice, arbitral tribunals subtly espouse the view that the legal systems of developing countries are not seen to be independent enough for the settlement of investment disputes. But he is more unequivocal when he states that the underpinning of an umbrella clause arose from the universally held notion that a foreign investor should not be expected to have confidence in the impartiality of the domestic legal system of the host country. Wälde's thesis may be connected to the widely held view that a host country's legal systems are usually influenced by their governments, against the interests of foreign investors.[27]

Wälde's characterization is convincing when the history of the umbrella clause is viewed against the spate of uncompensated expropriation of alien property, particularly in the Calvo and Hull era.[28] At the same time, the subjection of investment contracts to the vagaries of domestic law provided little or no compensation for expropriated alien property. Customary international law was also at a crossroads regarding the protection of foreign investments, which was mainly in the traditional sense of states protecting the investments of their citizens. This particularly related to the question of whether a breach of contract by the host country is tantamount to a violation of international law.[29] The debate generated in the attempt to answer this question created what appears to be a quagmire of conflicting views in international investment law with respect to the conduct of FDI in host countries. I nevertheless suggest that the question has been answered through the evolution of international investment law by the operation of umbrella clauses. The most fundamental effect and implication of umbrella clauses is the granting of standing to foreign investors to directly arbitrate investment disputes in international arbitration forums, including ICSID arbitration mechanisms.

Some interesting legal developments in the 1950s further influenced the need to consolidate the focus on the internationalization of the contract obligations of the host country through the application of umbrella clauses to investment disputes. Most scholars agree that the 1954 draft settlement agreement in the Anglo-Iranian Oil Company's (AIOC) claims is the pivotal moment in the crusade for the internationalization of host countries' contractual obligations.[30] The AIOC claims were essentially a claim on the expropriation of the claimant's assets in the Iranian oil and gas industry

25 TW Wälde "The 'umbrella clause' in investment arbitration: A comment on original intentions and recent cases" (2005) 6 *Journal of World Investment and Trade* 183 at 201.

26 Id at 187.

27 Id at 190.

28 FO Okpe "Foreign direct investment and investment treaty arbitration with reference to Nigeria" (PhD dissertation, University of Aberdeen, 14 August 2014).

29 J Gill, M Gearing and G Brit "Contractual claims and bilateral investment treaties: A comparative review of the SGS cases" (2004) 21/5 *Journal of International Arbitration* 403; see also L Oppenheim, R Jennings and A Watts *Oppenheim International Law* (9th ed, 1992, Longman) at 927: "it is doubtful whether a breach by a State of its contractual obligations with aliens constitute per se a breach of an international obligation".

30 See Sinclair "The origins", above at note 21 at 415–17.

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through the promulgation of the Iranian Oil Nationalization Law that terminated the AIOC's long-term concessionary oil contract; the AIOC was unsuccessful in its attempt to arbitrate the claims or to seek other legal remedies pursuant to the concession agreement. After unsuccessful legal attempts to resolve the dispute, a United States-sponsored coup that changed the political landscape in Iran at the time presented an opportunity to settle the AIOC investment claims with the government of Iran.[31] To settle the dispute, the AIOC sought legal advice from Elihu Lauterpacht; the substance of his advice was premised on the idea that any future investment contract between his client and the government of Iran should 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".[32]

The premise of Lauterpacht's legal advice is understandable for obvious reasons. For instance, it echoed the need to counter the view that investment contracts should be anchored in and subject to domestic law and jurisdiction that is likely to be subjected to legislative interference or oversights by the host country.[33] Sinclair reports that to achieve the objectives outlined in his landmark legal advice to the AIOC, Lauterpacht proposed two legal instruments, "a Consortium Agreement and an Umbrella Treaty". According to Sinclair's findings, the Consortium Agreement would henceforth regulate the activities of oil companies, with a guarantee by Iran to fulfil the terms of the agreement such that any breach would be elevated to a treaty claim by operation of the proposed umbrella treaty.[34] Thus under Lauterpacht's proposed framework, it was anticipated that the umbrella treaty would provide an international and neutral forum for the settlement of potential claims, thereby excluding Iranian domestic jurisdiction.[35]

However, Lauterpacht's advice never came to fruition because the proposed settlement could not be consolidated, and the anticipated umbrella treaty articulated by Lauterpacht never saw the light of day.[36] Despite the misfortune of the framework of Lauterpacht's legal advice to the AIOC, I argue that the attempt laid the foundation for the resurrection of the idea in the Abs and Abs–Shawcross Draft Conventions about five years later. Indeed, this may be the context in which the umbrella clause emerged on the stage of investment treaty arbitration in connection with FDI. Thus I would argue that the framework for the application of umbrella clauses has been consolidated through an enforcement mechanism provided by international arbitration. As a result of the introduction of umbrella clauses, two developments in international investment law are discernible: firstly, umbrella clauses became the catalyst for the internationalization of investment disputes. Secondly, international arbitration tribunals provided a neutral forum for the settlement of investment disputes, outside the reach of the domestic jurisdiction of the host country.

However, in more recent times, the umbrella clause has not been present in all the BITs or other international loan agreements which have been executed: of the 2,500 or more BITs currently in force globally, only about 40 per cent expressly contain an umbrella clause.[37] At the same time, there is no uniform approach by states in the formulation of umbrella clauses. While umbrella clauses in some BITs or commercial agreements contain language that mandates the observance

31 See FJ Gavin "Politics, power, and US policy in Iran, 1950–1953" (1999) 1/1 *Journal of Cold War Studies* 56.

32 Sinclair "The origins", above at note 21 at 415. The British lawyer Elihu Lauterpacht was a Queen's Counsel (QC) and a notable legal practitioner in public international law. See E Lauterpacht "International law and private foreign investment" (1997) 4/2 *Indiana Journal of Global Legal Studies* 259.

33 Wälde "The 'umbrella clause'", above at note 25 at 202.

34 Sinclair "The origins", above at note 21 at 415–16.

35 Id at 417.

36 JB Potts "Stabilizing the role of umbrella clauses in bilateral investment treaties: Intent, reliance, and internationalization" (2011) 51/4 *Virginia Journal of International Law* 1010.

37 Yannaca-Small "Interpretation", above at note 6. See also OECD "The future of investment treaties" (2024), available at: <https://www.oecd.org/investment/investment-treaties.htm> (last accessed 18 March 2024). The OECD, referencing a work programme it launched in 2021 on the future of foreign investments, reports that about 2,500 investment treaties are currently in force between most countries of the world.

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of any obligation the host country may have entered into, others "require each party to observe any obligation it has entered into with investors of the other [party] with regard to their investment".[38]

The interpretation of umbrella clauses in investment treaty arbitration

The interpretation of umbrella clauses in FDI agreements with developing countries has become one of the most contentious issues in investment arbitration.[39] The umbrella clause in a concession loan agreement presupposes the existence of an agreement between the host country and the foreign investor that creates two sources of legal obligation for the host country. According to Mills, these sources are usually within an applicable BIT and the actual investment agreement. Thus there is a treaty and a contractual obligation that operates to elevate a contractual breach to a parallel violation of the applicable BIT between the host country and the home country of the investor.[40]

The difficulty that may be associated with the interpretation of an umbrella clause is the fundamental premise of the controversy surrounding the meaning and effect of such clauses in international investment law and arbitration. This issue is usually brought to the forefront of investment arbitration to answer the question of whether a breach of the investment contract is also a breach of the umbrella clause in the concession loan agreement or BIT. Often, arbitral practice has espoused the view that the answer is in the affirmative.[41] But there is a real debate surrounding the question of whether this affirmation ought to be upheld in cases where there is also an exclusive forum selection clause in the pertinent provision of the investment contract or legislation. In some agreements, the exclusive forum selection clause makes it mandatory that disputes should be settled through a framework different from the dispute resolution mechanism in the applicable agreement.[42] In such scenarios, an arbitral tribunal is faced with the task of determining the proper forum to settle the investment dispute in view of a valid umbrella clause in the agreement.

Arbitral tribunals have often addressed this question in the context of the exercise of jurisdiction over the contract claims subject matter of the investment dispute and investment arbitration under applicable international agreements. While attempting to resolve this quagmire of views in international investment law and arbitration, Wong explains that the umbrella clause "means that the investor can now seek redress of a breach of any investment contract between it and the host country through international arbitration under the agreement"and that "an umbrella clause enables an arbitral tribunal to exercise jurisdiction over claims concerning such breaches of contract, which are also BIT violations under the clause".[43] According to Wong, this interpretation of an umbrella

38 Sweden–Kazakhstan BIT, art 2(4), cited by Vandevelde *Bilateral Investment Treaties*, above at note 15 at 258.

39 See for example J Wong "Umbrella clauses in bilateral investment treaties: Of breaches of contract, treaty violations, and the divide between developing and developed countries in foreign investment disputes" (2006) 14 *George Mason Law Review* 135; Yannaca-Small "Interpretation", above at note 6. See also Gill, Gearing and Brit "Contractual claims", above at note 29; J Crawford "Treaty and contract in investment arbitration" (2008) 24/3 *Arbitration International* 351; M Sasson *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (2010, Kluwer International); S Schill "Enabling private ordering: Function, scope and effect of umbrella clauses in international investment treaties" (2009) 18 *Minnesota Journal of International Law* 1; B Kunoy "Singing in the rain: Development in the interpretation of umbrella clauses" (2006) 7 *Journal of World Investments and Trade* 275; and B Cremades "Clarifying the relationship between contract and treaty claims in investor–state arbitration" (2003) 3 *Business Law International* 207.

40 A Mills "The public–private dualities of international investment law and arbitration" in C Brown and K Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (2011, Cambridge University Press) 105.

41 See *SGS Société de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003), available at: <https://icsid.worldbank.org/cases> (last accessed 14 June 2023).

42 See *SGS Société de Surveillance SA v Republic of the Philippines* (ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004), available at: <https://icsid.worldbank.org/cases> (last accessed 14 June 2023).

43 Wong "Umbrella clauses", above at note 39 at 137.

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clause allows an arbitral tribunal to exercise jurisdiction over contract claims regardless of an exclusive forum selection clause in the investment contract.

Essentially, what is at stake in the debate over the interpretation of umbrella clauses is the neutrality that international investment arbitration offers to foreign investors, as opposed to investment disputes being subjected to domestic jurisdiction by operation of an exclusive forum selection clause in the investment contract. In other words, the issue revolves around the question of whether jurisdictional clauses in investment contracts between the host country and the foreign investor should supersede the jurisdiction of treaty-based tribunals by virtue of an exclusive forum selection clause. Proponents of neutrality, in favour of international investment arbitration, hinge their argument on the history and purpose of the umbrella clause: the history supports the proposition that the clause emerged because of the need to elevate the contractual obligation of the host country "to allow for their breach to be resolved as BIT violations".[44] This internationalizes the contractual obligations of the host country. The international law obligation, in a mirror of investment arbitration, is grounded in the provision of the umbrella clause in the international agreement that binds the host country.[45] This is the case in the concession loan agreement between Nigeria and the EIBC.[46]

However, the encompassing effect of an umbrella clause on the conduct of foreign investment in the host country has been well elaborated by Mann, who writes that the umbrella clause:

> "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 non-payment, the dissolution of the local company with which the investor may have contracted and the transfer of its assets (with or without liabilities) – these and similar acts the treaties render wrongful."[47]

Mann's reasoned analysis spotlights the effect of an umbrella clause on a host country's exercise of a legitimate regulatory objective in the form of any act, legislative or administrative, that may adversely affect foreign investments, for example a negative or overbearing legislative oversight by an organ of the host country, such as the NASS oversight committee. In this regard, the umbrella clause operates to make the alleged breach treaty-based in order to activate the investment arbitration mechanism under the BIT or the concession loan agreement. While it may be convincing that umbrella clauses operate to grant jurisdiction to an arbitral tribunal over breach of contractual claims, the interpretation that a different forum designated by an exclusive forum selection clause should deal with incidental contract claims has been a topic of serious debate.[48] In recent times, the debate has been brought to ICSID arbitration by the contrasting decisions of two tribunals that specifically addressed the application and interpretation of umbrella clauses in investment treaty arbitration.[49] Indeed, Wong's thesis is a response to the confusion generated by the conflicting interpretations of umbrella clauses in the decisions of these tribunals.

44 Id at 149.

45 See FA Mann "British treaties for the promotion and protection of investments" (1981) 52 *British Yearbook of International Law* 241.

46 See A Leiter "Protecting concessionary rights: General principles and the making of international investment law" (2021) 35/1 *Leiden Journal of International Law* 55–59.

47 Mann "British treaties", above at note 45 at 246.

48 For example, see J Crawford "Treaty and contract", above at note 39, and MCG Salias "Do umbrella clauses apply to unilateral undertakings?" in C Binder, U Kriebaum, A Reinisch and S Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009, Oxford University Press) 490.

49 *SGS v Pakistan*, above at note 41; *SGS v Philippines*, above at note 42.

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The dispute in *SGS v Pakistan* arose from the termination of a Pre-Shipment Inspection (PSI) agreement between the investor and the Islamic Republic of Pakistan. The ICSID arbitration was mainly centred on the application, interpretation and effect of an umbrella clause in the context of a valid forum selection clause in the contract between the host country and the foreign investor. Pursuant to article 2 of the PSI agreement, the parties agreed to refer "[a]ny dispute, controversy or claim arising out of, or relating to the agreement or breach, termination or invalidity thereof, to arbitration in accordance with the Arbitration Act of Pakistan as presently in force". The applicable Switzerland–Pakistan BIT also contains a valid umbrella clause.[50] After the termination of the PSI agreement, necessitated by alleged unsatisfactory performance of the claimant, the respondent commenced arbitration in Pakistan in accordance with the provisions of the agreement. Thereafter, the claimant commenced ICSID arbitration, alleging that the respondent's conduct and their termination of the PSI agreement violated pertinent provisions of the Switzerland–Pakistan BIT. The claimant specifically alleged a violation of the fair and equitable treatment standard under the BIT and asserted that the respondent was liable for breaches of the PSI agreement by operation of the umbrella clause in the BIT.[51] On the effect of this clause, the claimant argued that the alleged unlawful termination of the PSI contract by the respondent elevated its claim to a treaty claim under international law. The claimant's contentions on the effect of the umbrella clause were premised on the obligation of the respondent to constantly guarantee its commitments to Swiss investors in relation to all contractual undertakings in accordance with the clause.[52] In its counter-memorial to the submissions of the claimant on this issue, the respondent countered that the claims in the ICSID arbitration were contractual in nature and should not be allowed by the arbitral tribunal to be reformulated as BIT claims. The respondent drew support for its argument from the PSI agreement, which "requires the parties to bring any dispute to the PSI agreement arbitrator, regardless of whether such claims are found in contract, tort, or treaty".[53] The arbitral tribunal rejected the submissions of the claimant on the interpretation of the effect and scope of the umbrella clause in view of the forum selection clause in the PSI agreement, which the tribunal recognized as valid and binding.[54]

Based on its reasoning on the scope and application of the umbrella clause, the arbitral tribunal went on to conclude that it has no jurisdiction over contractual claims submitted by the claimant based on alleged breaches of the PSI agreement. The tribunal based its reasoning on the ground that breaches of the PSI agreement were not tantamount to breaches of the substantive provisions of the Switzerland–Pakistan BIT.[55] Therefore, the arbitral tribunal's view on this issue proposed that umbrella clauses do not apply to set aside a valid forum selection clause in investment treaty arbitration.

About six months after the decision in *SGS v Pakistan* on the scope and interpretation of umbrella clauses, the *SGS v Philippines* tribunal examined a similar case but adopted a different approach and reached a different conclusion.[56] This ICSID arbitration was commenced by the claimant over an alleged breach of the investment agreement between the claimant and the respondent. On the question of the interpretation of the umbrella clause in the Switzerland–Philippines BIT, this arbitral tribunal was called upon to make a determination on the following queries: whether the umbrella clause in the BIT grants jurisdiction over investor–state contract claims; whether the

50 Art 11 of the Switzerland–Pakistan BIT provides that "[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party".

51 *SGS v Pakistan*, above at note 41, paras 1–6.

52 Id, paras 98–99. See also Wong "Umbrella clauses", above at note 39 at 151.

53 *SGS v Pakistan*, above at note 41, paras 43–45.

54 Id, paras 160–62.

55 Id, para 162.

56 *SGS v Philippines*, above at note 42.

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phrase "dispute concerning an investment" covers claims that are contractual in nature; the effect of article 12 of the investor–state agreement on the ICSID proceedings that provides for a forum selection clause; and whether the present claims could be interpreted as a breach of the BIT, independent of the investor–state agreement, by operation of the umbrella clause.[57] The claimant in this arbitration proceeding argued in the affirmative with respect to the issues raised by the interpretation and scope of the umbrella clause in the Switzerland–Philippines BIT. The respondent disagreed with the submissions of the claimant, relying substantially on the reasoning and decision of the *SGS v Pakistan* tribunal.

To answer the questions raised in this ICSID arbitration with specific reference to the effect of the umbrella clause, this tribunal began by criticizing the analysis and conclusion of the tribunal in *SGS v Pakistan*.[58] It particularly questioned the restrictive approach adopted by that tribunal on the interpretation of the umbrella clause in the context of the specific language in article X(2) of the Switzerland–Pakistan BIT. The text of the umbrella clause in the latter is *in pari materia* with a similar provision in the Switzerland–Philippines BIT. Proposing its own theory on the interpretation of the umbrella clause, the tribunal questioned the rationale of the *SGS v Pakistan* tribunal in reaching its conclusion and distinguished between contractual obligations and obligations assumed by the host country "with regard to specific investment". It appears to make the case that an umbrella clause should be upheld where the host country assumes a legal obligation with reference to a specific investment and "not as a matter of the application of some legal obligation of a general character".[59] It is important to note that the Nigeria–EIBC concession loan agreement referenced above is specific to an investment – the funding of a development project in Nigeria.

The *SGS v Philippines* tribunal particularly noted that the established notion that "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" may be rebuttable where a clause requires a state to "observe specific domestic commitments".[60] The tribunal concluded that the *SGS v Pakistan* tribunal missed an opportunity to give a clear meaning to the umbrella clause in the context of investment arbitration, stating that the reasons advanced by the earlier tribunal were not convincing. It then presented what it considered the proper interpretation of the umbrella clause in an international agreement:

> "it [an umbrella clause] does not convert non-binding domestic commitments 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 [the investor–state agreement] from the law of the Philippines [the host state] to international law."[61]

In light of this reasoning and the interpretation of umbrella clauses in a BIT, the *SGS v Philippines* tribunal reached a different conclusion on the effect of an umbrella clause vis-à-vis a valid forum selection clause.[62] The tribunal thus assumed jurisdiction in the ICSID arbitration over the contractual claims, which arose from the investor–state contract whether or not such claims were independent of treaty claims contrary to the decision on the interpretation of umbrella clauses in the earlier case of *SGS v Pakistan*. Still, this tribunal violated its own logic when it ultimately declined to exercise the same jurisdiction over the claimant's contractual claims. The decision of the arbitral

57 Id, para 92(b–e). The Switzerland–Philippines BIT, art X(2), provides that "[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party"; available at: <https://oxia.ouplaw.com/display/10.1093/law:iic/bt731.regGroup.01/law-iic-bt731> (last accessed 8 October 2024>.

58 *SGS v Philippines*, above at note 42, paras 113–29.

59 Id, para 121.

60 Id, para 122.

61 Id, para 126.

62 Id, paras 136–68.

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tribunal to decline jurisdiction in this respect was based on its interpretation of the effect of the forum selection clause in the CISS Agreement between the claimant and the respondent.[63] It should be noted that the dispute resolution mechanism under the Switzerland–Philippines BIT has a contrasting provision that gives the option to the investor to submit disputes with respect to investment to domestic jurisdiction of the host country or to international arbitration under ICSID or United Nations Commission on International Trade Law (UNCITRAL) rules.[64]

Pursuant to article 12 of the CISS Agreement, it was mandatory for all contractual disputes arising out of the agreement to be submitted to specific courts in the Philippines. The tribunal rejected the submission of the claimant that the investment disputes resolution mechanism under the Switzerland–Philippines BIT supersedes the forum selection clause contained in article 12 of the CISS Agreement; according to the tribunal, the substance of the claims was within the scope of this article. Thus, "prima facie[,] article 12 is a binding obligation, incumbent on both parties, to resort exclusively to one of the named Regional Trial Courts in order to resolve any disputes".[65] The tribunal relied on the Latin canon of statutory construction, *generalia specialibus non derogant*, to make the proposition that the dispute resolution mechanism in the Switzerland–Philippines BIT is not "intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned".[66]

The rationale for the *SGS v Philippines* tribunal's reasoning was that the BIT under reference was not concluded with respect to any specific investment agreement. Therefore a presumption cannot be made that "a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties".[67] The arbitral tribunal noted that the BIT was intended by state parties to supplement investor–state agreements, as opposed to replacing or setting aside the express provisions of the latter.[68] It also considered and distinguished article 26 of the ICSID Convention.[69] The claimant had submitted that this article operates to override the forum selection clause under article 12 of the CISS Agreement; the tribunal held that such an argument is not supported by the Convention's legislative history. It relied on Schreuer's analysis to explain that article 26 "was intended as a rule of interpretation, not a mandatory rule".[70] Thus the tribunal posited that the proper question is to what extent the forum selection or exclusive jurisdiction clause under the CISS Agreement affects the substance of the claimant's contractual claims for non-payment for services under that agreement.[71] In its answer to this characterization, the tribunal sought to distinguish between the admissibility of and jurisdiction over contractual claims. It then answered the question by making the determination that it is not a matter for the jurisdiction of the arbitral tribunal but of the admissibility of the contractual claims of the claimant.[72] It noted that compliance with the terms of a contract in this regard "is more naturally considered as a matter of admissibility than jurisdiction".[73] Ultimately, the tribunal stayed the proceedings of

63 Id, para 155.

64 Id, para 34. See also Switzerland–Philippines BIT, art 8, above at note 57.

65 *SGS v Philippines*, above at note 42, para 137.

66 Id, paras 140–41. The Latin maxim means that specific or detailed provisions of a legal instrument should prevail over more general conflicting provisions. See AX Fellmeth and M Horwitz *Guide to Latin in International Law* (2011, Oxford University Press).

67 *SGS v Philippines*, above at note 42, para 141.

68 Ibid.

69 The ICSID Convention, above at note 5, art 26, provides that "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local or judicial remedies as a condition of its consent to arbitration under this Convention."

70 *SGS v Philippines*, above at note 42, paras 146–48. See C Schreuer *The ICSID Convention: A Commentary* (2001, Cambridge University Press) at 347.

71 *SGS v Philippines*, above at note 42, para 149.

72 Id, paras 149–55.

73 Ibid.

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the ICSID arbitration, giving effect to article 12 of the CISS Agreement to resolve the contractual claims of the claimant in accordance with the national jurisdiction of the Philippines.[74]

The decisions in the *SGS* cases on the scope and interpretation of umbrella clauses in the context of a valid forum selection clause have been widely criticized.[75] With reference to the effect of umbrella clauses in light of these clauses, the *SGS v Pakistan* arbitral tribunal held that a valid forum selection clause should be upheld to override the effect of the umbrella clause in order to prevent the elevation of contractual claims to treaty violation. Conversely, the *SGS v Philippines* tribunal opined that an umbrella clause applies to all alleged breaches of an investor–state agreement but should not be applied where there is a valid forum selection clause contrary to the provisions of the applicable BIT. The synthesis of the two conflicting approaches to the effect and application of umbrella clauses in the *SGS* cases raised more questions than it resolved the issue about the proper scope and interpretation of an umbrella clause in the context of investment treaty arbitration. Following the decisions of the *SGS* tribunals, the additional question that now arises is whether an arbitral tribunal can exercise jurisdiction over contract claims in view of a valid umbrella clause and a forum selection clause that designates a different mechanism for resolution.[76]

Nigeria's FDI regime and umbrella clauses

There has been mixed jurisprudence generated by arbitral tribunals in the wake of the *SGS* cases on the interpretation of umbrella clauses in the context of forum selection clauses in investor–state contracts in investment treaty arbitration. For instance, it is still controversial whether or not tribunals should extend the application of an umbrella clause to all contractual obligations where they tend to follow the approach in *SGS v Philippines*.[77] While some arbitral tribunals have held that umbrella clauses apply to some contractual obligations of the host state and the investor, other tribunals espouse the view that they apply to all contractual obligations without exceptions, to the extent that the dispute relates to an investment covered by the applicable BIT.[78] It is beyond the scope of this article to discuss the merits of the jurisprudence since the decisions of the *SGS* cases; suffice to state that the prevailing view in investment treaty arbitration appears to be that umbrella clauses should apply to all contractual obligations of the host country in connection with FDI.[79] I would argue that this prevailing view is the more convincing one; it aligns better with the theory of the internationalization of state contracts regarding FDI and investment treaty arbitration.[80]

In view of the preceding analysis, in practice it is likely that the umbrella clauses in Nigeria's BIT regime would be broadly interpreted by an arbitral tribunal.[81] This could create potential liability for

74 Id, para 175.

75 For example SA Alexandrov "Breaches of contract and breaches of treaty: The jurisdiction of treaty-based arbitration tribunals to decide breach of contract claims in SGS v Pakistan and SGS v Philippines" (2004) 5 *Journal of World Investment and Trade* 555.

76 See Wong "Umbrella clauses", above at note 39 at 137.

77 For example, see *Joy Mining Machinery Limited v The Arab Republic of Egypt* (ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004), paras 64–99, available at: <https://icsid.worldbank.org/cases> (last accessed 21 July 2023).

78 Compare paras 297–301 of *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No ARB/01/8, Award, 12 May 2005), available at: <http://italaw.com/cases/documents/290> (last accessed 21 July 2022), with *Consorzio Groupement LESI–DIPENTA v People's Republic of Algeria* (ICSID Case No ARB/03/08, Award, 10 January 2005), para 21(ii) (translation by the Secretariat), cited by Yannaca-Small "Interpretation", above at note 6. The full English translation of the latter is available at: <http://arbitrationlaw.com/library/consortium-groupement-lesi-dipenta-v-algeria-icsid-case-no-arb0308-algeriaitaly-bit-award> (last accessed 13 March 2021).

79 Wong "Umbrella clauses", above at note 39 at 162–66.

80 See AFM Maniruzzaman "State contracts in contemporary international law: Monist versus dualist controversies" (2001) 12/2 *European Journal of International Law* 309.

81 For example, see the umbrella clauses contained in art 2(2) of the Agreement between the Government of the Federal Republic of Nigeria and the Government of the United Kingdom of Great Britain and Northern Ireland, signed 11 December 1990 (entered into force 11 December 1990), available at: <https://investmentpolicy.unctad.org/

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Nigeria in the context of investment treaty arbitration on many fronts, beyond the Chinese concession loan agreements. For example, foreign investors (such as those operating in the oil and gas industry in Nigeria) whose home countries have concluded a BIT with Nigeria containing an umbrella clause could allege a violation of a BIT based on the discriminatory principle against the interest of foreign investors embedded in Nigeria's Local Content Act.[82] This view is based on the prevailing proposition that an umbrella clause extends to any breach of an investor–state contract relating to an investment covered by a BIT; therefore the argument that umbrella clause provisions do not offer protection for energy-related FDI is not accurate and is a misunderstanding of the interpretative implications of standard umbrella clauses contained in FDI contracts such as concession loan agreements.[83]

The combination of articles 2, 6 and 10 of the China–Nigeria BIT and Nigeria's open offer of ICSID arbitration to foreign investors under the NIPC Act is a further reinforcement of Nigeria's acceptance of the implications of an umbrella clause under the EIBC concession loan agreement.[84] Recently, a Chinese investor took advantage of investment treaty arbitration to settle an investment dispute in Nigeria in *Zhongshan Fucheng Industrial Investment Co Ltd v The Federal Republic of Nigeria*, where the Chinese company had acquired rights to develop a huge area of land it called the Ogun Guangdong Free Trade Zone in Ogun State, southwestern Nigeria.[85] The acquisition of the rights was made pursuant to an investment contract entered into by the foreign investor with a subsidiary of the Ogun State government. Under the agreement, the Nigerian subsidiary of the foreign investor developed infrastructure such as roads, constructed perimeter fencing, a sewage system and a power and water network and committed substantial resources for marketing.[86] The claimant was appointed a permanent manager of the trade zone, acquiring a majority shareholding under a 2013 joint venture agreement executed by the parties. In 2016, the Ogun State government allegedly terminated the claimant's appointment and took a series of actions aimed at driving the claimant out of Nigeria, including police and immigration harassment of the claimant's foreign staff to make it impossible for them to work in the country.[87] The claimant initially challenged the actions of the Ogun State government in local courts, seeking possession of the trade zone, damages and interests. Dissatisfied with the outcome of the cases in the Nigerian courts, in August 2018 the claimant commenced investment treaty arbitration against Nigeria under the China–Nigeria BIT.[88] In March 2021, the arbitral tribunal found Nigeria in breach of its obligations under the China–Nigeria BIT and awarded the claimant USD 70 million.[89]

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international-investment-agreements/countries/153/nigeria> (last accessed 8 October 2024), and art 3(4) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria, signed 1 February 1994 (entered into force 1 February 1994), available at: <http://www.unctadxi.org/templates/DocSearch____779.aspx> (last accessed 14 March 2023).

82 Nigerian Oil and Gas Industry Content Development Act, Laws of the Federation of Nigeria, 2010. A full text of the Act is available at: <http://www.oandoplc.com/wp-content/uploads/Nigerian%20Content%20Act.pdf> (last accessed 15 March 2024).

83 OA Oniyinde and TE Ayo "The protection of energy investments under umbrella clauses in bilateral investment treaties: A myth or a reality?" (2017) 61 *Journal of Law, Policy, and Globalization* 161.

84 The China–Nigeria BIT is the Agreement between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria on the Promotion and Protection of Investment 1997, available at: <https://edit.wti.org/document/show/69f6807c-20bd-4730-8eef-884669e2b2ef> (last accessed 2 January 2024).

85 *Zhongshan v Nigeria*, above at note 14.

86 Id, paras 21–22.

87 Id, paras 13–15, 39–41.

88 Based on the China–Nigeria BIT, the claimant instituted an investor–state ad-hoc arbitration under the UNCITRAL Arbitration Rules 2013. For further reading on investor–state arbitration under UNCITRAL arbitration rules, see K Loken "Uncitral rules on transparency in treaty-based investor–state arbitration" (2013) 52/6 *International Legal Materials* 1300, available at: <https://www.cambridge.org/core/journals/international-legal-materials/article/abs/uncitral-rules-on-transparency-in-treatybased-investorstate-arbitration/06313F07402845CC89EB9CC9FFBF2500> (last accessed 3 January 2024).

89 *Zhongshan v Nigeria*, above at note 14, para 198.

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The investment in the *Zhongshan* arbitration case is an example of the active use of the establishment and development of special economic zones by Chinese investors as a means of FDI in developing countries.[90] The final arbitral award against Nigeria underscores the futility, and the abysmal reputation, of local courts in the settlement of investment disputes. The *Zhongshan* award also exemplifies foreign investors' penchant for and recourse to international law against host states where norms and gradations of international law have been breached or implicated under applicable BITs.[91] From the perspective of mitigating or avoiding the risks of umbrella clauses, the Morocco–Nigeria BIT has been hailed for not containing an express umbrella clause.[92] Further, this BIT has been commendable for making important progress in the standard of protection for and obligations of foreign investors in the host state. The BIT broadened the definition of investment by adding commitment of capital, search for profit and assumption of risks, and specifically excluded portfolio investments.[93] The Morocco–Nigeria BIT is significant from the perspective of its contribution to the economic development of the host state. However, it does not resolve the implications of umbrella clauses in light of Nigeria's open offer of ICSID arbitration under the NIPC Act and is certainly not relevant to the interpretation of Chinese concession loan agreements in Nigeria.

Nevertheless, it is my proposition that foreign investors whose home country has no BIT in force with Nigeria can still take advantage of the protection of an umbrella clause in two ways. Firstly, Nigeria's open offer to foreign investors for ICSID arbitration creates the opportunity for the application of the customary international law norm of *pacta sunt servanda* in the context of investor–state contracts made pursuant to the NIPC Act. In this respect, the application of *pacta sunt servanda* in the interpretation of FDI-related agreements in Nigeria requires consistent conduct with respect to FDI on the part of the host country. Secondly, *pacta sunt servanda* also presents an avenue for the consideration and application of the fair and equitable treatment standard under international investment law.[94] In the context of umbrella clauses, there is an established principle

90 For further reading on the unique relationship between special economic zones as a means of FDI, settlement of investment disputes and international investment law, see J Chaisse and KF Olaoye "*Zhongshan Fucheng Industrial Investment Co Ltd v The Federal Republic of Nigeria*: Special economic zones and investment treaty arbitration at crossroads" (2023) *ICSID Review – Foreign Investment Law Journal* 1.

91 JJ Lu and B Sanderson "The tale of Zhongshan Fucheng v. Nigeria: How investment treaties help safeguard Chinese investments abroad" (2022), available at: <https://www.dlapiper.com/en-us/insights/publications/2022/06/the-tale-of-zhongshan-fucheng-v-nigeria> (last accessed 30 December 2023).

92 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco–Nigeria BIT) 2016, available at: <https://edit.wti.org/document/show/bde2bcf4-e20b-4d05-a3f1-5b9eb86d3b3b> (last accessed 30 December 2023). See O Ejims "The 2016 Morocco–Nigeria bilateral investment treaty: More practical reality in providing a balanced investment treaty?" (2019) 34/1 *ICSID Review – Foreign Investment Law Journal* 62 at 64–84.

93 T Gazzini "The 2016 Morocco–Nigeria BIT: An important contribution to the reform of investment treaties" (2017) *Journal on Investment Law and Policy from a Sustainable Development Perspective* 3.

94 JR Picherack "The expanding scope of the fair and equitable treatment standard: Have recent tribunals gone too far?" (2008) 9/4 *Journal of World Investment and Trade* 255. Picherack notes that the fair and equitable treatment standard has been invoked more than any other standard of international investment law as the basis for awarding damages against states, and tribunals are increasingly willing to grant significant damage awards for failure to accord fair and equitable treatment even where they find that no expropriation or discrimination of a foreign investor's investment has occurred. Picherack also observes that the "decisions and reasoning of many recent tribunals as to the standard's scope and content are fragmented, inconsistent and conflicting". See also JC Boue "Enforcing *pacta sunt servanda*? Conoco-Phillips and Exxon-Mobil versus the Bolivarian Republic of Venezuela and Petroleos de Venezuela" (2008) (University of Cambridge, Centre of Latin American Studies, Working Paper Series 2, No 1) at 37; available at: <https://www.researchgate.net/publication/274792883_Enforcing_Pacta_Sunt_Servanda_Conoco-Phillips_and_Exxon-Mobil_Versus_the_Bolivarian_Republic_of_Venezuela> (last accessed 8 October 2024). Boue is emphatic when he states that "it is no exaggeration to say that FET [fair and equitable treatment], rather than expropriation proper, has become the heart and soul of investor–state arbitration … FET has proved to be remarkably malleable and elastic and, like beauty, very much in the eyes of the beholder." However, in contrast to what seems to be the prevailing commentary on the elasticity of

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that foreign investment treatment standards should be considered in the interpretation of the obligations of the host country even if not covered by the investment contract.[95] Therefore, in the absence of an applicable BIT, the application of the effect of an umbrella clause is possible with respect to concession loan agreements and the conduct of FDI in Nigeria generally; there are no better examples than the Chinese concession loan agreements with the FGN. This possibility supports the contention that Nigeria, as a host country, has unilaterally assumed the obligations associated with the effect and operation of an umbrella clause through legislation.

Furthermore, section 25 of the NIPC Act makes provision for the standard guarantee against expropriation of FDI in Nigeria. Section 25(2)(b) grants the foreign investor "a right of access to the courts for the determination of the investor's interest or right and the amount of compensation to which he is entitled". It may be argued that this section is a valid forum selection clause with respect to any investment dispute relating to the amount of compensation payable in the occurrence of a valid act of expropriation exercised by the FGN. However, when read together, the combined effect of sections 26(2)(c) and 26(3) of the NIPC Act, granting the option of ICSID arbitration to aggrieved foreign investors in respect of "*any* dispute" (my emphasis) arising from an investment made pursuant to the NIPC Act, makes the forum selection clause under section 25(2)(b) contentious. Considering the analysis of the *SGS* cases above, the phrase "any dispute" will be interpreted broadly in the context of investment treaty arbitration.

Based on prevailing arbitral practice on the interpretation of the obligations of the host country to guarantee the observance of its contractual obligations, an arbitral tribunal may give effect to sections 26(2)(c) and 26(3) of the NIPC Act to elevate investment claims to the altar of the principles of international law that include the concept of *pacta sunt servanda*. In this respect, the obligation imposed by an umbrella clause may be independently imposed by international law in the absence of an express provision in an applicable BIT. Moreover, through the NIPC Act, Nigeria guarantees any obligation that may be attributable to any interest connected to the investment.[96]

Conclusion

Barring any interference or corruption in the regulatory framework for negotiating concession loans from international sources to fund development projects in Nigeria, it is often true that the economic development considerations behind this policy are in the national interest. However, because of the legal effects of umbrella clauses, based on the election of both parties to opt for arbitration to address potential investment disputes, the need for a proper understanding of the implications of umbrella clauses in the interpretation of these agreements is a weightier issue than what appears to be an obsession in Nigeria with standard immunity clauses. Thus appreciation and understanding of umbrella clauses is a better approach, through which a reasoned and well-informed concession loan agreement may be negotiated by Nigeria.

Competing interests. None

FET, in *Duke Energy International Peru Investment No 1 Ltd v Republic of Peru* (ICSID Case No ARB/03/28, Decision on Jurisdiction of 1 February 2006), available at: <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/03/28> (last accessed 13 March 2022), the arbitral tribunal seems to suggest that an investor should not be allowed to rely on general treaty standards as the basis of its claim against the host state.

95 Wälde "The 'umbrella clause'", above at note 25 at 198.

96 NIPC Act, above at note 18, sec 24(c).

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