Master's Thesis

Umbrella Clauses and the Investment Protection

- a Study of the case of the Philippines

포괄적 국가계약의무 준수조항과 투자자 보호 연구: 필리핀 사례를 중심으로

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Graduate School of International Studies

Seoul National University

Area Studies Major

Louis Girardeau

Umbrella Clauses and the Investors' Protection:

- a Study of the case of the Philippines

Thesis Advisor: Prof. Oh Yoon Ah

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International Area Major

Louis Girardeau

Confirming the Master's Thesis written by

Louis Girardeau

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Chair: Prof. Ahn, Dukgeun _____(Seal)

Vice-Chair: Prof. Byun, Oung _____(Seal)

Examiner: Prof. Oh, Yoon Ah _____(Seal)

Abstract

The legal protection conferred by the states to the international investors is increasingly regarded as a strategic tool to augment the level of FDIs. While the international investments are regulated most directly by the domestic regulations of each state, the number of instruments of international law - the Bilateral Investment Treaties (BITs) - have inflated in recent decades. By opening the possibility to the investors to have their disputes with the state adjudicated by an international tribunal, the investments have increasingly been protected by the international law principles. Within the BITs' content, the umbrella clauses enhance this possibility of arbitration and widen the scope of application of the treaty. These clauses have held the international community's attention after a plethora of different jurisprudential interpretation. Although a myriad of studies has been conducted to elucidate their meaning, no studies have applied these findings to a particular case. This thesis aims to analyze the Philippines' umbrella clauses and BIT policy to evaluate the level of protection that it confers to international investors. This research finds that, although the umbrella clauses are not sacrosanct protective instruments, they carry uncertainties as to their effects on the protection of the investments. This legal unpredictability is harmful to investments in the Philippines and needs to be addressed. The Philippines can adopt a different policy to review its BIT program and its umbrella clauses. The study recommends that the governments engage in a revision of the existing clauses to add further precisions, to better guide the arbitrators who interpret them. This action would lead to an increase in the regulatory framework as a whole.

Korean Abstract

국가가 국제 투자자들에게 부여하는 법적 보호는 점점 더 해외직접투자의 수준을 높이기 위한 전략적 도구로 간주되고 있다. 외국인투자는 각국의 국내 규제에 의해 가장 직접적으로 규제되고 있지만, 국제법의 기구인 양자투자조약의 수는 최근 수십 년간 증가해왔다. 투자자들에게 국가와의 분쟁을 국제 재판소에 의해 판결받을 가능성을 열어줌으로써, 해당 투자는 국제법 원칙에 의해 보호되어왔다. 양자투자조약의 내용 내에서, 포괄적 국가계약의무 준수조항은 이러한 중재 가능성을 높이고 조약의 적용 범위를 넓힌다. 이 조항들은 다양한 법학적 해석이 난무하는 가운데 국제사회의 관심을 끌었다. 비록 그 의미를 해명하기 위해 무수한 연구가 행해졌지만, 어떤 연구도 이러한 연구 결과를 특정 사례에 적용하지 않았다. 본 논문은 필리핀의 우산 조항과 양자투자조약 정책을 분석해 국제 투자자들에게 부여하는 보호 수준을 평가하는 것을 목적으로 한다. 이 연구에서는 포괄적 국가계약의무 준수조항이 신성불가침 보호장치는 아니지만, 투자 보호에 미치는 영향에 대한 불확실성을 안고 있다는 것을 발견했다. 이러한 법적 예측 불가능성은 필리핀 투자에 해로우며 이에 대한 해결이 필요하다. 필리핀은 그들의 양자투자조약 프로그램과 포괄적 조항을 검토하기 위해 다른 정책을 채택할 수 있다. 이 연구는 정부가 조항을 해석해야 하는 중재자의 이해를 돕기 위해 기존 조항을 수정하여 더 많은 세부사항을 추가할 것을 권고. 이 조치는 전체적으로 규제 체제의 증가로 이어질 것이다.

Chapter I - Introduction

1-1. The importance of international investors' protection

The attraction of foreign capital to boost the domestic economic development has been one of many preoccupations of the states since the aftermath of the Second World War. Foreign direct investments (FDIs) fulfill several roles that are crucial for the growth of countries' economies and competitiveness. The economic literature is extensive on the extents to which an increase in the FDIs inwardness boosts the recipient's economic development. This phenomenon has led the international organizations to qualify the dynamic of foreign investments as "*a major catalyst to development*" (OECD, 2002). It can be noted that beyond the direct macroeconomic stimulus initiated by the increased foreign capital, FDIs also stimulate the growth of the recipient's economy by raising the total factor productivity, by creating higher output and jobs, and by improving the wages and the working conditions.

Although the magnitude of the impact is assessed with more difficulty, FDIs ought to have positive linkages with *inter alia* trade openness, technology transfers, human capital enhancement, and competition. Notably, FDIs enhance the production facilities, add investible resources and capital formation, transfers production technology, skills, foster innovation, and know-how in business that are crucial in management (Mallampally & Sauvant 1999). This makes FDIs even more desirable for developing countries such as the Philippines.

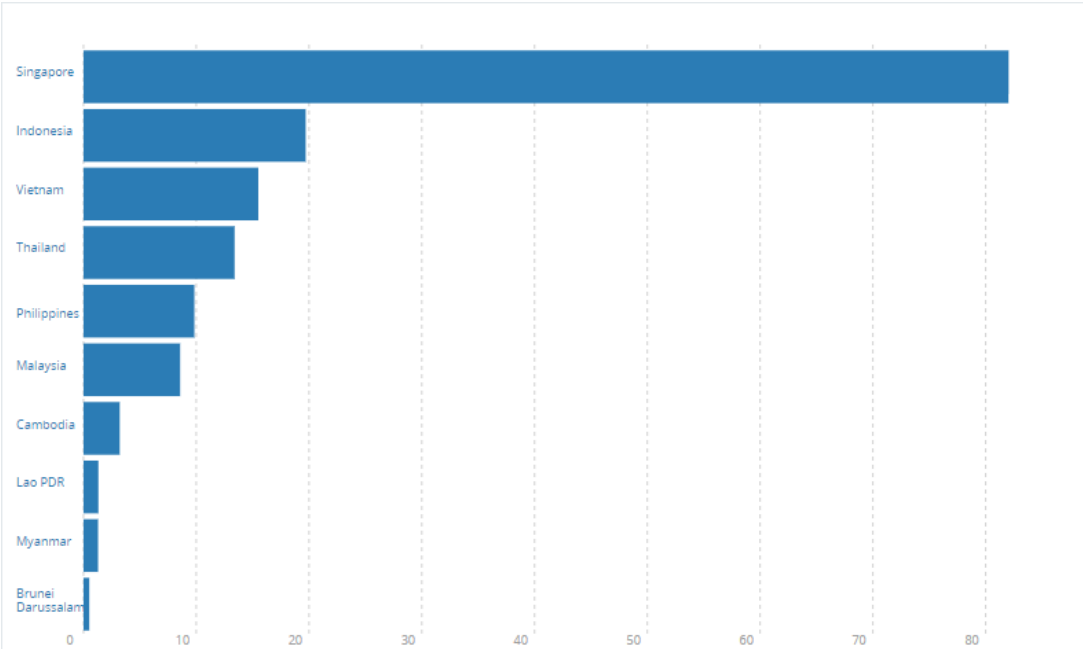

Figure 1: Foreign direct investment in ASEAN countries in 2018, net inflows (BoP, current US$), (source: WorldBank Data)

FDIs' figures show that foreign investments have historically stood behind in the Philippines' economy. Amongst the ASEAN members, Viet Nam, Singapore, and Thailand prosperously attracted foreign capital into their domestic market and all in their ways became major forums for regional investment opportunities. It is only recently that the Philippines' FDIs inflows have shown significant figures.

In 2018, intra-regional FDIs inflows were $23.1 billion in ASEAN, with $1.2 billion coming from the Philippines. A closer look at the figures shows the Philippines stand behind as a recipient. In 2018, the Philippines' net inflows totaled $9.8 billion, down from an all-time high of $10.25 billion in 2017[1]. Regionally, the Philippines are lagging behind other ASEAN member countries, namely Singapore with more than $80 billion in 2018, followed by Indonesia, Vietnam, and Thailand.

[1] Data available at the following address, accessed on March 20, 2020: https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=PH

The legal protections of international investors, either substantial or procedural, are amongst the parameters that have a direct and significant impact on foreign direct investments (Franck, 2007). Indeed, as the number of international investments drastically increased with the liberalization of trade and commerce, the choice of the investments' forum has been influenced by a multitude of framework parameters. Amongst them can be distinguished from the hard factors that can be scientifically calculated. They encompass, inter alia, the tax rate, the infrastructure, and the labor cost.

On the other hand, the soft factors encompass the incentives that defeat precise estimations. Among them, we can note that there is a literature on the evaluation of, inter alia, the effects on FDIs of the level of governmental and administrative corruption, the rule of law, and the political risks. Amongst these soft factors, one has been identified as having a positive effect on the investments' environment attractiveness: the legal protection conferred to the international investors (Franck 2007).

As a result, investigating the level of protection conferred by the legal instruments to international investors is relevant to the economic development of the Philippines.

1-2. Bilateral Investment Treaties: primary sources of protection

These legal instruments can be of many facets: administrative acts, laws, constitution, or treaties. In the domain of international investment law, treaties are regarded as the primary sources. Their exponential development in the second part of the twentieth century correlates with their importance on the regulation of the investments and the protection of the investors. Mainly, these treaties take the form of Bilateral Investment Treaties (BITs), sometimes referred to as International Investment Agreements (IIAs).

The literature's analysis on this international level of regulations has begotten a continuing chicken-or-egg dilemma that has ignited the debate around the causality between the increase of FDIs and the establishment of Bilateral Investment Treaties (BITs). This thesis posits that, although this debate captures the dynamics of international investments in the post-second World War era, the characteristics of the contemporary international liberal order renders it marginal. It is so since there has been a visible and patent race towards the ratification of BITs in emerging countries with relatively few FDI inflows. Rather, a more fruitful interrogation is whether investors in the Philippines get accretive rights and remedies guaranteed by these international instruments.

Yet, this question locates itself into a more global and complex structure of investments' regulation. The differences in formulations of the umbrella clauses are symptomatic of and have participated in a larger phenomenon in the realm of supra-national regulations known as the *fragmentation of international law*. First identified in 1953 by Wilfred Jenks in an article entitled "The Conflict of Law-

Making Treaties", this phenomenon highlights the lack of coherent and structural unity of international law. This public law system located at the supra-national level has experienced the expansion of its scope of application, the specialization of its rules, and the diversification of its practice. These dynamics led to the emergence of several distinct and autonomous regimes which overall threaten the unity of international law.

More specifically, the different regimes of international investment law have fragmented sources. Once only concealed in bilateral instruments, they recently and extensively developed in multilateral instruments. Some of them are regional and specifically aim to regulate the international investments (ex.: ASEAN Comprehensive Investment Agreement of 2009), some others which nature don't frontally tackle the topic of investments still impact their regulatory framework with dedicated parts and chapters (ex.: Energy Charter Treaty of 1998). Finally, Free-Trade Agreements (FTAs) are all the rage and increasingly incorporate investment chapters, therefore participating in this fragmentation.

These instruments are referred to as *lex specialis* as opposed to the *lex generalis*. In other words, the international treaties and agreements regarding investments represent derogating regimes to the standard regime of international law whose general principles apply to every of its specialization, and therefore to investment law. Rare are the arbitrational tribunals that don't summon the *lex generalis* in investment disputes. It is worth noting that not only the standard regime's principles concerning treaties and international responsibility apply to the international investment disputes, but also the principles on human rights and the environment increasingly find ground in these contentions.

It results in an absence of "clinical isolation"[2] of investment law from international public law as stated by the WTO Appellate Body. Overall, in absence of an overarching framework, international investment laws are primarily defined by the conventional sources - the treaties -, which are heterogeneous, and the jurisprudence which is often time described as inconsistent or unpredictable.

These bilateral treaties on investment, the primary source of their regulatory framework, is a creation of the states. As a result, the legal protection of the international investors granted by these treaties is malleable. It represents one parameter amongst a complex matrix that the State can calibrate to enhance its attractiveness as a chosen forum for investments. As it mainly depends on the content of the BITs, it has been admitted that these treaties can strategically be written and adopted for this purpose (Fox 2014). More importantly, strategizing the enactment of BITs is relevant for the government of the Philippines in as much as it has been noted that "*the value of these treaties is especially potent for developing nations, where judicial systems often fail to measure up to investor expectations*" (Potts 2011).

As a result, analyzing the BITs is an adequate method to assess the quality of international investors' protection in the Philippines. The BITs are relatively short in size, with usually ten pages length, and around fifteen articles. Amongst them all, the umbrella clauses are singularly unique in international investment law and represent the original content of BITs.

[2] WT/DS2/AB/R, accessed on March 21: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=14573&CurrentCatalogueIdIndex=0&FullTextHash=

1-3. Umbrella Clauses in the Philippines: an opportunity for a study

Unfortunately, the umbrella clauses have not received specific attention in the case of the Philippines. Yet, these clauses have been incrementally commented by the scholars of international law, and mostly the interpretation that the arbitrational tribunals have given to them. In essence, these clauses extend the scope of protection conferred by the BITs. Alongside this theorization of the umbrella clauses, few studies have accentuated their implications on specific cases.

The significance of studying the degree of protection given by the umbrella clauses in the Philippines is multiple. First, the Philippines' authorities continuously emphasize their will to sustainably attract new foreign investments. Second, the recent development of a fragmented international investment law has reinforced the necessity to conduct case studies. Third, the Philippines has serendipitously found itself amid the legal debates on the interpretation of the umbrella clauses in the famous precedent *SGS Société de Surveillance v. Philippines* case of 2002.

The significance of the thesis is therefore to analyze the current umbrella clauses by applying the most recent legal developments to the umbrella clauses applicable to investor-state disputes in the Philippines. This research will provide comprehensive regard on the level of protection conferred to the international investors by these legal sources, and therefore add to the existing literature a direct relationship between the theorization of umbrella clauses and the Philippines' case study. Furthermore, this thesis will evaluate the Philippines' policies regarding its BITs through the lens of this clause.

1-4. Scope of the study

The present thesis aims to analyze the umbrella clauses inserted in the different international legal instruments signed by the Government of the Philippines. The umbrella clauses, original creations of the BITs, are mostly found in them. Recently also, some Free-Trade Agreements (FTAs) and some multilateral legal instruments have included direct or indirect references to the umbrella clauses. As a party to a BIT or an FTA, a government may freely negotiate with the other government the type of umbrella clauses it desires. This practice paves the way for a large variety of types of umbrella clauses worded differently. However, there are noticeable uniformed patterns on which the legal doctrine - scholars and arbitrators - have built their analysis on. Moreover, the governments may publish a 'BIT Model', a document in which they reveal their common standards of the enactment of the different clauses. This model reveals a tendency in the different governmental investment policies and therefore provides a fertile ground for analysis. All these materials - the umbrella clauses, the academic literature, the arbitrational jurisprudence, and the government's documents relative to the BITs and the umbrella clauses - will be studied. Furthermore, recommendations will be given to enhance the overall FDI's legal framework in the Philippines, focusing specifically on the umbrella clauses.

In short, the scope of the thesis extends these materials to build an analysis of the coherent structure of investment protection in the Philippines characterized by 1) the level of protection given to the international investors through the lens of the umbrella clauses, 2) and the overall investment policies reflected in the potential BIT Model and public declarations.

Chapter II - Background

2-1. Factual background

2-1-1. On the BITs

The literature has given incremental attention to the Bilateral Investment Treaties (BITs) as they represent a tool designed to "*stimulate foreign investments by reducing political risks*"[3]. In other words, the treaties are crafted to guarantee the investors with an impartial treatment from the host state of the investment. Starting with the governments of Germany and Pakistan in 1959, these instruments of international law developed after the Second World War and are considered to have created "*new patterns of economic relations among nations*" (Miller 1959)

The number of ratifications of International Investment Agreements (IIAs), in which the BITs are included alongside with the Treaties with Investment Provisions (TIPs) that encompass notably the Comprehensive and Progressive Transpacific Partnership (CPTPP) and the North American Free Trade Agreement (NAFTA), have been exponentially increasing in the last decades. While they were around 385 at the end of the 1980s[4], there are a total of almost 2900 BITs today with about 2300 that came into force, and 390 TIPs with about 320 that came into force in the world[5]. The country that has currently signed the most IIAs is Germany (200 in total), followed by China (148 in total) and Switzerland (145 in total).

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[3] American Bar Association, available at the following address, accessed on April 13, 2020: https://www.americanbar.org/groups/business_law/publications/blt/2014/03/01_sprenger/
[4] Ibid 3
[5] Data visible on the UNCTAD Website, accessed on March 30, 2020: https://investmentpolicy.unctad.org/international-investment-agreements

Although most of the high ranked countries in that list are developed economies, it is worth noting that Turkey (129 in total) and Egypt (113 in total) make the top ten, suggesting that IIAs are not the only concerns of developed economies.

It also appears on the list that the countries can be distinguished between several categories. First, some of them heavily rely on multilateral agreements for regulating the investments at the international level. Those countries are mostly among the European members, notably Ireland which has ratified no BITs. Contrastingly, some other countries heavily rely on bilateral instruments to forge their international investment regulatory framework. As a result, they carry a disproportion in their BITs/TIPs ratio. Those are *inter alia* some countries from the Middle East region (ex.: Syrian Islam Republic, Yemen, Azerbaijan, Islamic Republic of Iran), or some countries whose international relations have been limited in the recent history (ex.: Cuba, Serbia).

The Philippines are between these two groups of countries with 37 BITs and 16 TIPs signed. In the following table, we can observe that the Philippines regionally stand in a middle position in terms of IIAs signed. Malaysia has appreciably participated in IIAs to forge its investment international regulatory framework, with over 90 of them; while Brunei and Myanmar show relatively low numbers of BITs and TIPs with about less than 30 IIAs signed. Also important is the ratio of signature and the ratification of IIAs. Indonesia has particularly ratified fewer BITs than it has signed. In that regard, the Philippines rank amongst the other ASEAN members, with a medium number of IIAs (53 in total) and a relatively equal ratio of ratification and signature (only 6 not ratified, and therefore

not enforceable), which shows a positive commitment to giving force to the treaties the government enters into, therefore giving further protection to the investors.

The following table summarizes the numbers of IIAs to which every ASEAN member countries are a party to.

Countries	**BITs signed**	**TIPs signed**
Indonesia	42 (26 in force)	19 (15 in force)
Malaysia	66 (54 in force)	25 (22 in force)
Philippines	37 (32 in force)	16 (15 in force)
Singapore	34 (38 in force)	35 (31 in force)
Thailand	39 (36 in force)	23 (21 in force)
Brunei	8 (6 in force)	20 (18 in force)
Viet Nam	41 (48 in force)	24 (19 in force)
Laos	23 (21 in force)	16 (14 in force)
Myanmar	10 (8 in force)	15 (13 in force)
Cambodia	26 (16 in force)	15 (14 in force)

Figure 2. Numbers of IIAs signed by ASEAN members

(source: UNCTAD)

Not only have their numbers drastically increased in the last decades, but so have their role in the protection of the international investments, the development of the investment arbitrational procedure, and the role of international law in dealing with globalized commercial activities. This is visible in the recent emergence of modern procedures to settle a dispute between an international investor and the host state.

2-1-2. On ISDS

The development of bilateral instruments to regulate the international investments amongst the countries is coincidental with the development of Investor-State Dispute Settlement (ISDS).

It refers to an exception to the general international public law of state-to-state disputes. Individuals – or private persons – have traditionally been excluded as potential subjects of international law. Previously, international public law didn't give to a private investor the possibility to bring its claim directly before an international tribunal. Still today, this sealing is visible in the procedural rules of certain international bodies that only receive the claims brought by the states (ex.: ICJ, WTO). However, in the 1960s and with the multiplication of BITs began gradual emancipation from this rigid exclusion of the private persons from international law procedures. The burgeoning of investor-state disputes sharply developed after WWII, and the rise of international investment law has been materialized by the multiplication of BITs and other investment-related treaties.

Before that, international investors could only seek redress through the practice of 'gunboat diplomacy'. In practice, commercial entities had to convince their government to espouse claims on their behalf. The state would then use the threat of military force to defend its commercial interests. This non-jurisdictional channel of disputes settlement has given reasons for the realist authors in the realm of international politics to develop their theory on states and interests defined in terms of military power. However, it must be noted that in the realm of international investment, it seldom happened (Potts 2011).

Moreover, even though private persons could seek redress before the domestic tribunals of the foreign government, the likelihood of action and - if so - of success remained extremely low. As a reaction to these inefficient procedures and the subsequent insecurity of the investments, the investors pushed for new solutions. This is how ISDS provisions started to be included by the states in their BITs through an arbitration clause.

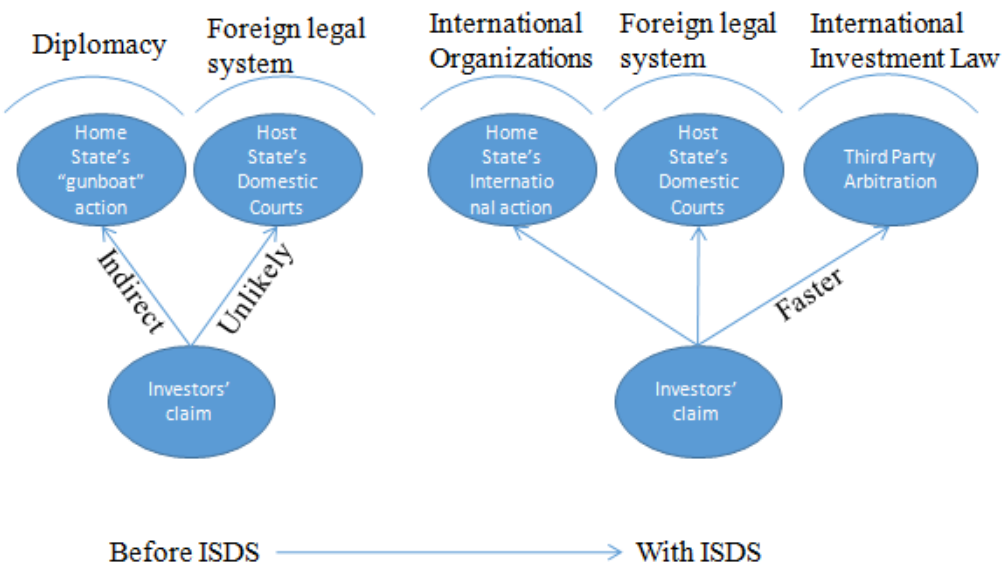

Figure 3. Evolution of the possible recipients of the investors' claims

Practically, the recent increasing enforcement of the umbrella clauses in the investor-states disputes have resulted in the consolidation of ISDS practices. As shown in Figure 3, the arbitrational procedure framed by international investment law has provided the investors with a faster method to settle their disputes with the state recipient of their investment. Also, the previous 'gunboat diplomacy' has become institutionalized. Indeed, the former diplomatic actions of the states have been organized within international organizations. These unlikely bilateral pressures have turned into multilateral dialogues within the WTO, notably.

Contrastingly, the ISDS has not been subject to the same level of organization. Indeed, the fragmentation phenomenon of international law has also invested in the realm of international investment arbitration. The reason lies in the absence of a formal doctrine of *stare decisis*. This doctrine, which means "to stand by things decided" in Latin, is commonly present in common law jurisdictions. In essence, a *stare decisis* doctrine – or the doctrine of precedents – commands the judges to cite previously ruled issues that are similar to the case brought before them. As the Supreme Court of the United States noted in Kimble v. Marvel Enterprises, "[*stare decisis*] *promotes the evenhanded, predictable, and consistent development of legal principles fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process*", although it is "*not an exorable command*"[6]. It results that different arbitrators, faced with the same legal problem, may as well render two contradictory decisions.

Ad hoc[7] – constituted for a specific purpose - or *sui generis*[8] – its kind –, the arbitrational system is a hybrid creation of the states and the commercial entities. The International Center for Settlement of Investment Disputes (ICSID) and the United Nations Conference on International Trade Law (UNCITRAL) are the most summed venues for international investment disputes settlement, and still, both participate to the mentioned fragmentation phenomenon. Not only these venues are multiple, but the arbitrational decisions they issue don't share an absolute and systemic relationship.

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[6] Decision available at the following link, accessed on May 4, 2020, at p.10 (III): https://www.supremecourt.gov/opinions/14pdf/13-720_jiel.pdf
[7] For further detail, see Cornell LII, accessed on May 5, 2020: https://www.law.cornell.edu/wex/ad_hoc
[8] Ibid, accessed on May 5, 2020: https://www.law.cornell.edu/wex/sui_generis

However, it must be noted that the international investment arbitrators don't operate in fact in an absolute 'clinical isolation'. Scholars have highlighted a *de facto* doctrine of precedent amongst these arbitrators in the realm of international investments. Some have even suggested the promotion of "*robust and contentious dialogues*" between arbitrators to enhance the "*predictability, accuracy, and legitimacy*" that a system of a precedent offer to a judicial ensemble (Chen 2019). In other words, although each arbitrational forum may use an independent rationale, references to precedent cases are often made. As a result, there are informal patterns of interpretation of the BITs' clauses amongst the different arbitrational tribunals upon which a legal analysis can be drawn.

Most importantly, ISDS currently represents the chosen procedure for the international investors, making ISDS the interpretative authority for BITs' clauses. In 2015, "*at least 70 claims*" by investors were brought before an arbitrational tribunal, which represents a sharp contrast with the 14 requests for consultation at the WTO the same year (OECD 2016). ISDS amounted to 71 cases in 2018 and 55 in 2019 (UNCTAD 2019). The Philippines have been party to 5 cases that were brought to the ICSID and to one that was brought to the Permanent Court of Arbitration (PCA). While these figures seem low, it must be noted that they only represent the cases open to public information. Additionally, there is a subsequent amount of cases that are resolved before even being brought before an arbitrational tribunal. Moreover, the Philippines have been party to a historical and influential case in ISDS related matters in the case *SGS v. the Philippines* where the Umbrella Clause, which opens the possibility of arbitration, has been interpreted.

2-1-3. On the umbrella clauses

BITs traditionally cover four substantive issues: the entry of the investment into the host state, the standard of treatments, the protection against expropriation, and the procedural aspects of investment disputes resolution. Among the protective provisions included in the treaties, the "Umbrella Clauses", also referred to as the *Observance of Commitments Clause*, have triggered many controversies.

When summoned in a dispute and when enforceable, the umbrella clause elevates a breach of contract to the level of a breach of the treaty, thereby rendering applicable the protections conferred by the *lex specialis,* i.e.: the BIT. As it has been noted, "*these "umbrella clauses" are considered innovative because, by general consensus, a "mere violation" of a contract cannot trigger treaty protection under customary international law*" (Potts 2011). Although some exceptions are worth noting (e.g.: an arbitration clause in the investment contract), in most cases, a breach of an investment contract between a state and an investor will be adjudicated by the domestic courts.

As arbitrational tribunals have increasingly become the favorite venues for investment dispute resolution, law practitioners have pleaded that an umbrella clause should extend the scope of the BITs to the breach of contracts. These arguments in favor of the inclusion of umbrella clauses in IIAs have patently been heard by the states, as it has been noted that "*umbrella clauses implicate countless investment contracts, considering that approximately forty percent of BITs possess some version of an umbrella clause*" (Potts 2011). Consequently in these cases, contractual breaches will in principle fall under the treaty's protective umbrella.

Then, subsequently become applicable to the different substantial clauses protecting the investment, as well as arbitrational procedure established in the BIT. The consequences are beneficial to the international investors who find in arbitration a faster and more impartial alternative mode of justice. Overall, this possibility gives the investments a higher degree of protection against the states' unilateral and discriminatory acts, against corruption, and the relatively unreliable sentiment on the alleged biased domestic courts and tribunals.

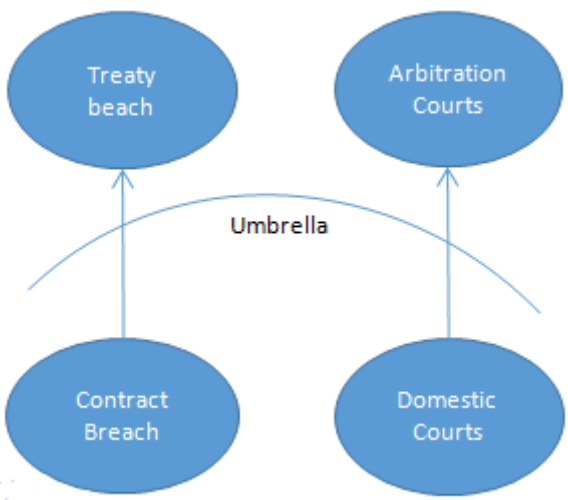

Figure 4: Concept of umbrella clauses

Historical traces of the umbrella clause's mechanism arose from an international case starring the Anglo-Iranian Oil Company (AIOC) and the Iranian government over an oil nationalization dispute. As the British government failed to espouse the AOIC's claim before the ICJ, the AOIC suggested lifting the contention into the realm of international law, thereby dragging the dispute out of the authority of the respective municipal laws of both countries.

The company's advisor Elihu Lauterpatch formulated the goals of what is now considered to be the umbrella clauses. This advisor suggested the British government to 1) ensure that the dispute settlement isn't subject to the domestic legal systems where the investment can be subject to unilateral variation, and suggested to 2) add an inter-state remedy for the breach of the international agreement, leading to arbitration. In this regard, this case paved the way for the development of forum selection and choice of law mechanisms. The British government ultimately espouse this claim and went before the ICJ. Yet, this case didn't see its umbrella clause embryo project come to fruition as the ICJ declared that it had no jurisdiction over this claim, due to an absence of a prerequisite: a treaty between Iran and the UK. However, this case represents the first intellectual construction of the clause that turned out to be fundamental to the development of the investment arbitration practice.

The first umbrella clause appeared in Article IV of the 1957 aforementioned Code:

"*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 shall prevail*"

This formulation is singular and corresponds to the first materialization of a distinct investment protection clause (OECD 2006). Yet, it is the 1959 Abs-Shawcross Draft Convention that first formulated the umbrella clause in the way that it is commonly found in most of the BITs:

"*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*"

It is worth noting that "any undertakings" have been immediately interpreted as including the contractual obligations between the host state and the investor, therefore giving effects to what constitutes the core of an umbrella clause. As a result, "any undertakings" were both subject - indirectly - and object - directly - of international law. This derivate of the *pacta sund servanda* principle qualifies the Abs-Shawcross Draft's umbrella clause as an innovation in international investment law.

Finally, Article II of the 1967 OECD aforementioned Draft Convention embodied an umbrella clause which was "*one of the core substantive rules*" of the Convention. The notion of "property" meant to be widely interpreted to cover all property, rights, and interests, whether held directly or indirectly. Like the Abs-Shawcross, consensual bargains and unilateral engagements by the host states were covered by the scope of this new type of clause written as follow:

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

Ultimately, umbrella clauses made their first appearance in the BIT between Germany and Pakistan in 1969. Article VII was written as follow:

"*Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other party*"

Still today, these formulations exemplify the common writing of an umbrella clause: it refers to a mandatory observance by the state of:

- "*any other obligation*" - in some variants, it is written "*any obligation*" or "*any undertakings*"-…
- …that it "*may have entered into*" - in some variants it is written "*may have assumed*" or "*may have given*" -…
- …with regard to the "*investments*" - in some variants, it is written "*specific investments*" -.

Any undertaking	*May have entered into*	*Investments*
Any obligation	*May have assumed*	*Specific investments*
Any other obligation	*May have given*	/

Figure 5. Classic variations of the umbrella clause

Although these clauses seem patently comprehensible, their legal interpretation still feeds the jurisprudential and scholarly debates to this day: "*despite the apparent clarity of these clauses, they have led to considerable confusion and to conflicting decisions by tribunals*" (Schreuer 2005). Especially during the first decade of the twenty-first century, they have been under the spotlights in international investment arbitration disputes.

Indeed, the umbrella clauses have been by far the most debated ones inside a BIT's structure. Yet, no particular studies have been conducted on the particular case of the Philippines. Rather, the debate has been oriented on the definition of the legal notions contained within an umbrella clause. Furthermore, international legal

scholars have endeavored to reveal the patterns of interpretation amongst the arbitrational tribunals. From this literature, the specific umbrella clauses of the Philippines can be analyzed.

In the first movement of the second part of the twentieth century, the umbrella clauses have first been regarded as merely ornamental in comparison to the other protective clauses previously mentioned. The superficiality of the umbrella clauses was explained by both their vagueness and their unlikely summoning in a dispute. Originally, the spirit of the umbrella clause was to grant the aggrieved investor with diplomatic immunity, while maintaining the possibility for the states to access a dispute settlement possibility before an international forum. This occurred only in cases where a host state abusively used its sovereign power to the detriment of the investor, which is to say rarely. It is only when the ICSID Convention of 1965 was adopted that foreign investors could settle their dispute with the host state, under certain conditions mentioned previously, to the ICSID Dispute Settlement system. Since then, an open-door emerged for any type of claim, notably those seeking compensation and resulting from the damage of contractual violations.

As they augment the possibility for the investors to seek redress before an arbitrational tribunal, it is significant and relevant to conduct an analysis of the umbrella clauses to assess the protection of the international investors in the Philippines.

2-2. Theoretical framework

The legal studies commonly follow the same methodology. This is explained by the predominant positive analysis of the law that is found throughout every research. As it became a common tool for the legal field, its citation is often forgotten. The legal problems are built on the starting point consisting of the complex factual aspect of the situations. They find answers through the application of the current norms which have also a complex relationship with one another. This intellectual route is followed in both of the two following schools.

From a positivist's point of view, the "*current state of positive law is enough justification for doing research*" (Taekema 2018). Some authors argue that the theoretical framework in the legal field is "*the current legal system itself*" (Westerman 2011). From a normativist's point of view however, the legal researches are intertwined with moral and political philosophy, and ought the analyze the balance of rights and obligations. The first school attaches more importance to pragmatic analysis whereas the second school relocates the debates in a broader social complex. As Alain Supiot noted in a lecture at the Collège de France in 2015: "*the role of the legal though, and the ideal of the legal scholars, is to tear oneself away from the weight of the world, to project oneself into the world as it should be*".

Both schools will be summoned in this thesis. First, the research will analyze the current legal system of international investment law primarily defined by the BITs. Second, the research will question the desirability of such a system and the core values that matter for the protection of international investors.

Chapter III - Literature review

3-1. On the Philippines' domestic regulation

The literature on international investment law has developed with the increasing numbers of international instruments and arbitrational litigations. On the Philippines' level, the existing legal literature has primarily focused on the national legal constraints and restrictions on international investments. Regarding the domestic regulations, the legal framework of FDIs in the Philippines faces a lack of attractiveness at both the liberalization and incentivization levels. Although the relatively recent ASEAN Comprehensive Investment Agreement (ACIA) in 2009 has paved the way for a more consolidated and opened regional economic community, a readable singular philosophy of economic nationalism continues to be embedded in the constitutional and legal provisions of the Philippines (Reyes, 2017). Mainly, the reproachable culprits are the Article XII of the 1987 Philippine Constitution, which limits the foreign ownership furthered by the Omnibus Investment Code, and the 1991 Philippine Foreign Investment Act. Albeit enacted in an apparent motivation to promote foreign investments, the almost concealed intention of these last two regulations was too merely enhance the limitations imposed by the Constitution on foreign economic agents. Yet, by no means do these regulations entirely obstruct the investors from entering the Philippines' economy. The governments usually delimit what is subject to FDI and what is excluded from foreign ownership. The degree to which an investment, made possible under domestic regulation, is protected under international law, is of greater importance. Consequently, a focus on the IIAs will better reveal the degree to which the international investments are legally protected.

3-2. On the Philippines' investments treaties

Although the literature has given an extensive focus on domestic regulations, the IIAs have also received a consequent amount of studies in the international investment law literature. As to the BITs to which the Philippines are party to, the existing literature has mostly devoted their analysis on the sources of protection other than the umbrella clause.

First, these protective clauses are commonly divided between different chapters under the treaty. After the preamble comes the chapter covering the scope of the BIT and the definitions of the notions. The most detailed clauses here are the definitions of investment and of an investor. Then usually comes after a chapter entitled standards of treatment. In this chapter are found most of the substantial protective clauses such as the Fair and Equitable Treatment (FET) clause, the Most Favored Nation (MFN) treatment clause, and the clause protecting the investors from expropriation. When present in the treaty, the umbrella clause is most of the time located in this chapter, which magnifies the role they are intended to play in the international investors' protection.

Second, the development of multilateral agreements containing clauses that are similar to those of the BITS has triggered many studies on their compatibility. Indeed, as a bilateral agreement and a multilateral instrument cover the same scope and apply to the same parties, the subsequent question of their conflict emerges. These various degrees of potential overlap reinforce the importance of understanding "*how these agreements would continue to interact and how their overlaps and differences could be managed in a harmonious way*" (OECD 2004).

However, it must be noted that ISDS is mostly found in BITs and in some regional agreements (OECD 2004). In the case of the Philippines, ISDS mechanisms are indeed present in all the BITs, and in the ASEAN - India Investment Agreement of 2014 to which the Philippines are a party to but which hasn't been ratified yet, and therefore not in force. Two treaties have excluded ISDS as a mechanism of dispute settlement: the first BIT with France in 1976 which is terminated, and the ASEAN - Hong Kong, China SAR Investment Agreement of 2017 which is in force. The latter case represents the only source of potential overlapping with other BITs concluded with ASEAN members. In the case of the Philippines, only the case of the Philippines - Thailand BIT of 1995 raises interrogations. Mostly, it raises legal interrogations concerning ISDS for a Thai investor in the case of a dispute arising from an investment in the Philippines. The reason lies in the unequal presence of ISDS clause in the regional agreement, which excludes such possibility of dispute resolution, and the Thailand - Philippines BIT of 1995 which includes it. The potential consequences of these conflicts between bilateral treaties and multilateral agreements have been mentioned. (Desierto 2018).

Third, as the clauses that include ISDS are consistently present in the Philippines' BITs, it results that any alleged breach by the Philippines of its obligations covered by the BIT will receive an arbitrational adjudication. These clauses are written fairly similar across all the BITs to which the Philippines is a party to. These clauses ultimately support the umbrella clauses as they enshrine the materialization of the elevation from a contractual breach to a breach of treaty adjudicated by international arbitration.

The ISDS clause in the Austria - Philippines BIT of 2002 is classically written and reads as follow:

(1) Any dispute arising out of an investment, between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.

(2) In the event that the dispute cannot be settled amicably, the party concerned may choose to submit the dispute for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute settlement procedures.

(3) If such a dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of six months, the investor shall be entitled to submit the case either to: (a) international arbitration of the International Centre for Settlement of Investment Disputes established pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965 (ICSID Convention), or (b) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

(4) Each Contracting Party, by this Agreement irrevocably and unconditionally consents in advance to submit any such disputes to international arbitration, if the investor so chooses.

(5) The award shall be final and binding; it shall be executed according to national law; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its relevant laws and regulations.

(6) A Contracting Party which is a party to a dispute shall not, at any stage of conciliation or arbitration proceedings or enforcement of an award, raise the objection that the investor who is the other party to the dispute has received indemnity by virtue of a guarantee in respect of all or some of its losses.

The first paragraph incites the government of the Philippines and the aggrieved investor to settle the dispute amicably, "*as far as possible*". Vaguely written, this paragraph is merely ornamental. Indeed, nothing in this paragraph binds the two parties to find an amicable solution to their dispute. The second paragraph invites the investor to either submit the dispute for resolution either to the Philippines' courts and tribunals. Again, this paragraph isn't binding as the investor "*may*" do so. These two paragraphs, although not binding, are always included in the treaties, signifying that arbitration should represent the ultimate action in ISDS, and that the states may solve their disputes amicably to their "best efforts". The third paragraph of this clause opens the possibility for the investors to submit the dispute to international arbitration 1) either to the ICSID pursuant to ICSID Convention of 1965, 2) or to an *ad hoc* tribunal constituted pursuant to the UNCITRAL. It must be noted that this possibility is open to the investors only if the dispute could not be settled amicably after a certain period of time. To settle the dispute amicably isn't an obligation of result but an obligation of diligence. The fourth paragraph of this clause then locks the contracting states to the treaty to accept the arbitration procedure "*irrevocably and unconditionally*" if the investor chose this mode of dispute resolution. This paragraph is binding and a refusal to submit the dispute to international arbitration would constitute a breach the treaty. Finally, ISDS will come into force if the umbrella clause is applicable.

3-3. On the umbrella clauses

Among the discussed notions, the first one concerns the investment itself. Among the myriad of contracts a state can enter into, not all are destined to be covered by the BITs. The umbrella clause requires the contracts to have a linkage with the definition of investment contained in its BIT. The definition is not uniformed, and varies from narrowed scopes often times limited to public concessions, to wider scopes which encompass a multitude of contract. Oppositely, the notion of *undertakings* has received a homogeneous reception in arbitral jurisprudence and is deemed narrower than the notion of investment (OECD 2004).

Another common issue is whether unilateral acts of the state can fall into the scope of the umbrella clauses. In *LG v. Argentina*, the state was held liable for a breach of its treaty obligations by enacting the Emergency Law of 2002 which modified the regulatory environment for the natural gas distribution, and therefore subsequently impacted the claimant's investments. The arbitrational tribunal concluded that this unilateral act by Argentina gave rise to its liability under the umbrella clause of the Argentina-US BIT[9] of 1991. This case has solidified the arbitrational jurisprudence on the matter and settled that not only contractual obligations can fall under the protection of the umbrella clauses. The article II.1(c) was written following a classic formulation:

> "*Each Party shall observe any obligation it may have entered into with regard to investments*"

[9] Available at the following address, accessed on March 13, 2020: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/127/download

Another debated issue is the *privity of contract*. This doctrine of common law refers to the impossibility of a third party to seek the enforcement of the contract although the contract originally aimed at providing him some benefits. In the realm of investment, it means that the subsidies of the investors should not be protected under the BIT.

On that point, the arbitrational jurisprudence is once again divided. In *Noble Ventures v. Romania*, the government had political control on and financially fueled an ownership fund with which the claimant contracted. The tribunal, for these reasons, decided that the fund was a state legal entity and therefore was party to the contract. In *Impregilo v. Pakistan* however, the umbrella clause did not apply although the facts were similar. In this case, the Water and Power Development Authority was appreciated by the tribunal as a distinct entity. Therefore, Pakistan was not part of the contract. Regarding the investors' side, *L.P v. Argentine* widened the scope of the umbrella clause's protection to the persons or entities contractually tied to the state with regards to the investment. Oppositely, the tribunal in *Siemens A.G. v. Argentine* found that local subsidies of the investors aren't entitled to the protection offered by the umbrella clause.

Also, another debate has questioned the importance of the location of the umbrella clause within the BIT. According to the UNCTAD Investment Policy Hub's classification of the BITs' clauses, the umbrella clauses are included in the "standards of treatment" section. Yet, in the BIT's practice, the umbrella clauses can either be located at the beginning of the treaty or at the end of it. The effects of the location remain uncertain.

In the case of the Philippines, there is visible evolution towards placing the umbrella clause at the end of the treaty. Indeed, in the first generations of BITs, the umbrella clauses are located at Article II or III entitled "general obligations" or "protection to the investment". Starting with the Switzerland - Philippines BIT of 1997, the umbrella clauses of the following BITs are located at the end of the treaty around the articles IX, X or XI entitled "other commitments". On that point, the jurisprudence has given a different interpretation. In the *SGS v. Pakistan* case, where the umbrella clause was located in an article entitled "other commitments", the arbitrators estimated that the government had not made the umbrella clause a substantial obligation. Contrastingly, the tribunal in *SGS v. Philippines* declared that the location of the umbrella clause was "*entitled to some weight*", but that the location should not lead the arbitrators to give two different interpretations of two identical umbrella clauses.

Another aspect of the umbrella clauses is the mandatory characteristic of the state's observance of the obligations or commitments. The umbrella clauses vary between "*shall observe*" and "*shall respect*". These formulations, straightforwardly enacted, leave no room to debates and bind the state. Some other formulations are more vague and ambiguous and read "*undertakes to observe at all time*" (BLEU - Philippines BIT 1998), "*must comply*" (Portugal - Philippines BIT 2002) or "*shall constantly guarantee the observance*" (Switzerland - Pakistan BIT 1998). Although such differences have not received contradictory jurisprudential interpretations yet, the rationale behind the differences in writing is questionable.

3-4. The debate on the broad and the narrow interpretation

The interpretation of the umbrella clauses has divided the doctrine and the jurisprudence between mostly two schools: a narrow and a broad interpretation. The division arose from two cases involving the same investor, namely *Société Générale de Surveillance* (SGS), who had a dispute with the Pakistanis government on one hand and with the government of the Philippines on the other. These two cases have not successfully crystallized a common analytical trend amongst the judges and the legal scholars. It yet fed the jurisprudence with not diametrically opposed view on the subject as it is often said, but rather with two diverging analysis or nuanced understanding of quasi similar clauses. Finally, a third analytical trend among the jurisprudence has emerged in a case involving once again the same investor 'SGS' and the government of Paraguay.

In these three cases, the facts share common and almost identical features. According to SGS, the company is described as the "*world's leading inspection, verification, testing and certification company*". SGS provides the foreign governments with thorough verifications of the shipments that are being imported. The Swiss company – herein, the investor – is therefore accountable for any mistakes or defaults of the quality, the quantity, and the price of the goods being exported to the Philippines, Pakistan, and Paraguay. As it assures the states with the reception of a product that conforms to its order, the control process is made before shipment and therefore outside the territory of the state. This activity is characterized as a service and is governed by a state-company contract.

In the Philippines' case, the service consisted in "*improving the customs clearance and control process of the Philippines*"; in the Pakistan case, the service consisted in ensuring that "*goods were classified properly for duty purposes and to enable Pakistan to increase the efficiency of its customs revenues collection*"; in the Paraguay case, the service consisted in inspecting "*imports to ensure that correct customs duties were collected*". In these three cases, the government left several invoices unpaid and notified SGS with the termination of the contract – also, Pre-Shipment Inspection Agreement (PSI) –. As the three governments missed their contractual obligation to pay for the pre-shipment inspection, the three cases were characterized by a breach of the service contracts. However, only the case of the Philippines amounted to an elevation of a treaty breach. The tribunal in the Paraguay case, although adopting a broad interpretation, restricted the umbrella clause to the only cases where "*the host state abuses its power or exerts undue governmental influence in breaching a contract or any other type of undertaking*".

The investor - SGS - in all three cases brought the dispute before an arbitrational tribunal. Both procedural and substantive claims were debated by the arbitrators of the ICSID. As to the issues raised before the tribunal, some of them were orbiting around the activation of the umbrella clause. For example, the arbitrators had to decide whether the contract for the provision of services, which performance was made mostly outside the state's territory, could be considered as an investment with regards to the BIT's standards - and if so, therefore whether the umbrella clause should apply to this investment. Also in these cases, SGS claims that several provisions of the BIT were violated, with notably the fair and equitable treatment, the most favored nation principle, the expropriation, the arbitrary and

discriminatory treatment, and the umbrella clause. The governments' line of defense was to convince the arbitrator that they acted as a contractual agent and not as a sovereign power. As the BITs cover the relationship between an investing person or entity and the state, the qualification of the state is crucial to activating the BIT's protection. The most common legal denominator for the judges and the arbitrators to qualify a person or an entity acting for the state is the notion of *pouvoir de puissance publique* - or public authority -. If an agent is vested with it, then the state is held accountable for its action. As a result, the commercial relationship between the state and the investor is a public-private one, and the treaty applies to the disputes arising from this relation in which the state acts as a sovereign agent. In all the three cases an umbrella clause was present in the BIT. They were written in similar ways, yet with some differences. In the Switzerland-Pakistan BIT of 1995, the umbrella clause contained in Article 11 is written as follow:

"*Either Contracting Party shall constantly guarantee the observance of <u>the commitments</u> it has entered into with respect to the investments of the investors of the other Contracting Party*."

In the Switzerland-Philippines BIT of 1997, the umbrella clause is written as follow in the Article X paragraph 2:

"*Each Contracting Party shall observe <u>any obligation</u> it has assumed with regard to <u>specific</u> <u>investments</u> in its territory by investors of the other Contracting Party*"

Finally, the umbrella clause of the Switzerland-Paraguay BIT of 1992 is written as follow in the Article 11:

"*Either Contracting Party shall constantly guarantee the observance of* <u>*the commitments*</u> *it has entered into with respect to the investments of the investors of the other Contracting Party.*"

It is worth noting several comparison points. First, all clauses were located at the end of the BIT. Second, the articles share approximately the same title: *Observance of commitments* for Pakistan and the Paraguay BITs, and *Other commitments* for the Philippines' BIT. Whereas the umbrella clauses in Pakistan and in the Paraguay cases are identical, the Philippines clause features two distinguishable differences. Whereas the other clauses refer to the *commitments*, the umbrella clause in the Switzerland - Philippines BIT of 1997 refers to *any obligation*, therefore seemingly encompassing any rights the investor SGS has under the domestic law of the Philippines, under the international law principles, and the contractual obligations. Additionally, whereas the other clauses refer to the *investments*, the umbrella clause in this BIT limits its scope to only those that are *specific* with regards to the treaty.

These differences in wordings could be considered *prima facie* as not important enough to create conflicting arbitrational jurisprudences. Yet, these three cases have begotten three varieties of interpretation, among which two remain predominant: a narrow and a wide interpretation. While the first one locates the adjudication of contractual breaches at the domestic courts and tribunals, the second materializes the elevation into a treaty breach and an adjudication at an arbitrational tribunal. Regrettably enough, it leaves the international investors and the states with a degree of legal predictability that is not entirely satisfactory.

3-5. Consequences of a wide or a narrow interpretation

A wide interpretation of the umbrella clause elevates contractual claims to treaty claims, therefore providing the investor with dispute settlement provisions of the BIT. If a tribunal decides to interpret an umbrella clause widely, legal questions consequently arise, mainly on the 1) exclusive forum selection clauses and on 2) the scope of the obligations affected (Jonckheere 2015).

First, an umbrella clause widely interpreted could give precedent over a forum selection clause inserted in a state-investor contract. This interpretation has for effect to negate the free will of the parties and their contractual freedom, justified by the application of international law and the umbrella clause. On the other hand, a narrow interpretation gives the contractual clause precedent over the dispute resolution clause of the BIT. The outcomes will depend on two variables reproduced in the following table:

	Forum selection clause	No forum selection clause
Wide interpretation	**Uncertain**	ICSID decides on the merits of any contractual claim
Narrow interpretation	The chosen forum decides on the merits of any contractual claim	Local courts decide on the merits of any contractual claim

Figure 6. Degree of interpretation of the umbrella clause and the presence of forum selection clause

If the umbrella clause is interpreted narrowly, no uncertainties emerge from the presence or the absence of a forum selection clause in the contract between the state and the investor. If the parties chose not to include such clause, then a narrowly interpreted umbrella clause would have for consequence to relocate the dispute in the hands of the domestic courts and tribunals. In this case scenario, the dispute would receive a domestic adjudication and any breach of contract by the state would be governed by the domestic contractual law of the state. In a presence of a forum selection clause, then a narrowly interpreted umbrella clause would have no consequences on an arbitrational settlement, provided that the parties would have chosen this alternative mode of justice to settle their disputes. However, this narrowly interpreted umbrella clause would still operate a dichotomy between contractual breaches and treaty breaches, the former being appreciated under the domestic contractual law and the latter under the protection of the BIT.

As a result, a narrow interpretation of an umbrella clause has several effects on the investors' protection. First, and in any case, any breach of contract will be regarded as a contractual law issue rather than an international law issue. Second, only a forum selection clause in the investment contract will enable the constitution of an *ad hoc* arbitrational tribunal to settle the dispute. As a result, if a BIT includes an umbrella clause that is most likely to be narrowly interpreted, the level of investors' protection is reduced since it deprives them of the protection of the BIT's umbrella. This lower level of protection from a substantial point of view can be addressed by the state with two measures: either inserting a forum selection clause in the investment contracts, either reviewing the BIT.

From a procedural point of view however, the legal predictability is at an appreciable level as no uncertainties emerge from a narrowly interpreted umbrella clause. The investors are assured with the knowledge that their claims will receive a domestic adjudication in the absence of a forum selection clause, and that they can bring the dispute before an arbitration forum of their choice if such clause is inserted in the investment contract. Only two problems remain.

First, even though has emerged from the arbitrational jurisprudence a *de facto* relative consistency in the interpretation of the umbrella clauses that enable such analysis, nothing is set in stone. In the absence of a formal *stare decisis* and of systemic relations between the different arbitrational tribunals, autonomous interpretations can challenge the current scope of the narrow interpretation. What is procedurally clear today could result in a thicker midst tomorrow.

Second, the distinction between contractual breaches and treaty breaches gives birth to two different regimes that can simultaneously apply to an investor-state dispute. This duality, heterogeneous in nature (contractual v. international), further divides the investments into parts that are unequally protected. This situation could foster even more jurisprudential confusion among the arbitrators whose decisions, exponentially increasing in number, could contradict each other.

If the umbrella clause is interpreted widely, other legal consequences are worth noting regarding the investors' protection. In the absence of a forum selection clause, an umbrella clause will unavoidably give jurisdiction to the ICSID or the UNCTAD, as written in the BIT's ISDS clause, as it enlarges the matters of dispute adjudicated by arbitration, including thereby the contractual breaches.

As to the types of obligations, a broad interpretation of the umbrella clauses suggests a trend in favor of the incorporation of the contractual obligations following the *SGS v. Philippines* case. Yet, a disagreement still lingers to this day. It has been suggested that unilateral promises, different from contractual arrangements, should be covered by the umbrella clauses, as well as regulations purposefully implemented to stimulate the foreign investments (Scheffer 2011). On the other hand, some authors advocate for a clear confinement of notions. In *El Paso v. Argentine*, M. Sornarajah suggested that incorporating such promises or regulations "*would be a startling proposition in any system of contract law that the regulatory system is a part of the contract, unless[,] of course, they were mandatory provisions that required their incorporation into contracts*". On that matter, the arbitrational jurisprudence in *SGS v. Philippines* tried to adopt an intermediary position, stating that such obligations "*must have been assumed vis-à-vis the specific investment—not as a matter of the application of some legal obligation of a general character*". This position had a positive reception amongst arbitrators and was followed in later decisions[10].

In conclusion, the consequences of the degree of interpretation of the umbrella clauses, creations of the states, are closely linked with the presence of a forum selection clause, a creation of the investor and the state. The umbrella clauses, interpreted with a relative heterogeneity, can be rendered either effective or non operational by the grace of a forum selection clause differently interpreted by the arbitrators. This emphasizes the subsequent necessity for the states to absorb this legal unpredictability through a revision of their BIT program and policy.

[10] See *LG&E Energy Corp v. Argentine* or *Sempra Energy International v. Argentine*

3-6. On the Philippines' umbrella clauses

The Philippines have entered into 37 BITs with 5 of them being not ratified, therefore not in enforceable. The Philippines' gradual approach toward international investment law can be divided between 3 generations of treaties (Desierto 2017) which commonly presents two features. The first batch of BITs settled the first classical type of features, i.e.: the legal foundations for the regime of foreign investments. It subsequently defined the *ratione materiae* and implemented protections against expropriation, enshrined traditional guarantees such as the Most-Favored Nation (MFN) clause or the Umbrella clause which elevates contractual claims to treaty claims. The second generation, essentially similar to those of the third generation (3 BITs), comprises 23 BITs signed in the 1990s in a national context of privatization, liberalization and globalization policies under the presidency of Fidel V. Ramos (1992-98) and Joseph Ejercito Estrada (1998-2001). This generation of BITs massively incorporated the second feature, i.e.: the Investor-State Dispute Settlement (ISDS) possibilities against substantial violations of the BITs.

Among the 32 BITs the Philippines ratified, 10 of them contain an umbrella clause. In that regard, the Philippines lags behind its regional neighbors. As summarized in the following table, the Philippines includes an umbrella clause at a rate of around 18,8% in its the IIAs to which it is a party to (BITs, TIPs, and multilateral agreements included).

Countries	**IIAs signed**	**Umbrella clauses**
Indonesia	61	56 (91,8%)
Malaysia	91	50 (54,9%)
Philippines	53	10 (18,8%)
Singapore	69	22 (31,8%)
Thailand	62	24 (61,5%)
Brunei	28	3 (10,7%)
Viet Nam	65	13 (19,1%)
Laos	39	11 (28,2%)
Myanmar	25	10 (40%)
Cambodia	41	21 (51,2%)

Figure 7. Percentage of umbrella clauses within ASEAN members' IIAs

Indonesia in that regard has the most consistent approach toward the umbrella clauses in its international investment regulatory framework - although the country plans on withdrawing from BITs and ISDS and therefore limit the umbrella clauses effects. As to the other countries, Thailand, Malaysia, Myanmar and Cambodia include an umbrella clause in about half of their treaties, while the Philippines, Singapore, Brunei, Viet Nam, and Laos mostly omit them.

The absence of an umbrella clause in an IIA is a result of the policy. Consequently, while Indonesia has carried out an almost uniformed approach toward the umbrella clauses, it appears that the ASEAN region is heterogeneously distributed. Such disproportions can receive different explanations.

First, according to Poulsen's 'bounded rationality' theory, the developing states' government has entered into BITs without any enlightened approach and without fully understanding the consequences of their contents. Following this argument, the foreign states and the legal experts operating as advisors during the negotiations would have selectively pushed for the inclusion of the umbrella clauses in certain treaties only. While this thesis has recently received incremental attention, it is worth noting that a series of papers have disproven this argument amongst most of the ASEAN members, with inter alia Indonesia (Crockett 2017) and the Philippines (Reyes 2017). As they represent two diametrically opposed cases, with one fully loaded with umbrella clauses and the other with about a fifth of them in its BITs, it seems difficult to support this argument.

Second, and as suggested in this series of papers, the Philippines was fully aware of the content of the BITs it was entering into. Following this argument, the disproportion could either result from a meticulous selection or a more randomized approach. In that regard, it has been noted that the treaties, be they bilateral or multilateral, were negotiated and drafted with a thoughtful analysis by the governments at the time (Desierto 2017). Moreover, the author argues that " *the Philippines strategically courted FDI and purposely extended generous terms of investment protection as incentives to attract foreign investment*", but that the policy-makers failed to "*programmatically scrutinized the short-term and long-term strategic costs of investor-State arbitration on the country's future ability to sustainably incentivize FDI*".

Interestingly enough, while the first affirmation may be correct for the other sources of legal protection in the BITs, the current analysis of the umbrella clauses doesn't suggest the same affirmation. Not only did the Philippines inserted few umbrella clauses in its treaties, but the successive governments failed to review and reform the shortcomings and imprecision of these clauses even though they have been unveiled for almost twenty years. As a result, it indeed confirms that the Philippines' decision-makers failed to build a long-term policy with regards to the umbrella clauses.

In conclusion, the literature has given extensive attention to the Philippines' domestic regulation and came up with the conclusion that certain constitutional limitations on foreign investments are negatively affecting their development. On the international level, the literature has thoroughly analyzed the BITs as the primary source of international investment law, and draw a perfectible portrait of its harmony. Ultimately, the umbrella clauses have stimulated a large panel of controversies in the jurisprudence and among the doctrine. Given these contributions, an analysis can be drawn for the Philippines' case to answer the following question: to which degree do the umbrella clauses contained in the different legal instruments to which the Philippines are a party to confer judicial protection to the international investors? Ultimately, recommendations can be addressed to the situation to enhance the attraction of FDIs in the Philippines through the mean of legal predictability.

Chapter IV - Analysis

4-1. The wording and the meaning of the Philippines' umbrella clauses

The following table synthesizes the variation of the umbrella clauses' wording in the different BITs to which the Philippines are a party to.

United Kingdom BIT (1980)	Shall observe	Any obligation	Specific investments
Netherlands BIT (1985)	Shall observe	Any obligation	Specific investments
Thailand BIT (1995)	Shall observe	Any obligation	Specific investments
Switzerland BIT (1997)	Shall observe	Any obligation	Specific investments
Denmark BIT (1997)	Shall observe	Any obligation	Investments
BLEU BIT (1998)	Undertakes to observe at all time	The commitments	Investments
Finland BIT (1998)	Shall observe	Any other obligation	Investments
Mongolia BIT (2000)	Shall observe	Any obligation	Investments
Austria BIT (2002)	Shall observe	Any contractual obligation	Investments approved
Portugal BIT (2002)	Must comply	Any obligation, not included in this agreement	Investments

Figure 8. Variation of umbrella clauses in the Philippines' BITs

When present in the BITs, the umbrella clauses often share the same wording and *a priori* lead to the same interpretation. The vast majority of these clauses refer to *any obligations*, which plead in favor of a wider interpretation of the clause. This situation is in favor of the international investors who are almost guaranteed, unless a jurisprudential reversal, that any breach by the host state of their investment will result in a breach of the treaty, which has for consequence to activate the protective international public law principles and to allow international arbitration as a venue for their dispute.

Only one exception can be found in the BLEU (Belgium-Luxembourg Economic Union) - Philippines BIT of 1998 where the concept *commitments* have been preferred, which overall suggests that Philippines BITs have a preference for the terms *any obligations*. This preference does not however result from an official BIT model. Indeed, as the Philippines have not made public any model, the consistency of their approach toward regulating international investments is only readable through the analysis of their BITs.

Two exceptions are also worth noting. First, the BIT with Austria of 2002 clearly refers to the contractual obligations that are being covered by the scope of the umbrella clause. This formulation stands out as it is rarely found in most of the BIT models of any country. Indeed, still to this day, the vast majority of umbrella clauses are written in broad terms and therefore do not specify whether they must be read in accordance with the *SGS v. Philippines* or the *SGS v. Pakistan* jurisprudence.

Second, the BIT with Portugal of 2002 refers to any obligations, even those that are not included in the agreement, i.e.: those that are not included in the BIT. Whereas the first settle the elevation of contractual breaches to treaty breaches, the second reinforces the belief for the arbitrational tribunal that an elevation is intended by the parties. Yet, such wording does not put an end on the debates and an arbitrational tribunal could render a controversial award depending on the circumstances of the case brought before it.

It results from this analysis that the Philippines had consciously and voluntarily given further precisions on the meaning of the umbrella clauses in two BITs of 2002, the year of the *SGS v. Philippines* decision, and when these clauses began to surface in arbitrational litigations. Regrettably, this has not been reproduced in the BITs signed and ratified later on, nor do the umbrella clauses contained in the previous BITs have been subject to precisions in interpretive statements. This is unfortunate for every party.

From these variations and based on the studied literature, the level of protection of the international investors can be assessed.

4-2. The subsequent level of international investors' protection in the Philippines

The international investment law, regarding the umbrella clauses, continues to carry an inherent instability that is harmful for the investors' protection. Yet, this level of protection can be augmented if by states thoughtfully calibrate the enactment of their umbrella clauses. Given the heterogeneous presence of umbrella clauses in the BITs to which the Philippines are a party to, and given the relative consistency of their enactment in broad terms, the level of protection of the international investors in the Philippines can be described as ambiguous.

It appears prima face that the umbrella clauses contained in the Philippines' BITs offer to the international investors a greater scope of application of the treaty, and therefore of international law protection. Except for the BLEU BIT of 1998, which shows two singularities with the use of "*commitments*" and "*undertakes to observe at all time*", the BITs are usually written in almost absolute terms. First, the BITs usually oblige the Philippines to comply with the clause by using the terms "*shall observe*", which leaves no doubts on the mandatory character of the clause. Second, the obligations covered by the BIT are large: "*any obligations*".

This reinforces the sentiment of greater legal protection by likely encompassing both contractual obligations and unilateral acts under the umbrella clause in accordance with the *LG v. Argentina* case. As a result, the Philippines gives to the international investors of this BIT the guarantee that any violations of its obligations under the investment contract or under its legislative and executive acts will amount to a violation of the treaty.

However, the Philippines' BITs belonging to the old generations usually contain an umbrella clause that has not been revisited, and therefore continuously carry vagueness which leads to legal uncertainty. Contrastingly, the more recent BITs usually omit to include such clauses. Not only does it give to the international investors unparalleled protection depending on their nationality, but it reflects a lack of coherent policy approach towards IIAs. This is reflected inter alia in the variation between "*investments*" and "*specific investments*", the former being broader and the latter being unclear as to which investments are specifically covered by the treaty.

As to the further precisions given to the broadly written umbrella clauses, the Philippines only shows two singular and isolated ameliorations in its 2002 BITs batch. This absence of reproduction is regrettable to several levels. First, on the international investment law level, the fragmentation continues. Reminded that there is no formal doctrine of *stare decisis* in investment arbitration, there is consequently no *de jure* binding for the arbitrational tribunals to use precedents. It means that the decisions emerging from the litigations covered by the 2002 BITs will have no direct and formal effects on the decisions emerging from other litigations where the other BITs apply.

Consequently, the enhanced predictability of these umbrella clauses does not automatically reflect on the others. It results in a likely continuous fragmentation of the arbitrators' interpretations of similar umbrella clauses, and the legal effects attributed to them, which harms the legal system of the Philippines overall. In this puzzling environment, the investors' protection is not only unbalanced depending on the origins of the investors, and therefore on the BIT that

will apply to the litigation, but is also uncertainly determined due to factors that are both general (the absence of formal *stare decisis* doctrine in investment arbitration) and particular (the absence of harmonization of the Philippines' umbrella clauses).

In 2016, the OECD had noted that the Philippines was currently engaged in a vast review policy of its BITs, which is the first time since its first review of the BIT with France. In 2009, the Philippines set out the Philippines Model Investment Agreement (PMIA) which was not publicly available. Still to that day, and after the Office of the President issued a directive in 2011 to order a review of all the Philippines' BIT according to the terms set out in the PMIA, it is still not available to the public.

As a result, the Philippines have maintained a status quo in terms of their BIT policy. The absence of a BIT model certainly leaves room for more flexibility in negotiating and drafting potential new BITs, but fails to ensure the state and the international investors with a coherent and structured approach toward the Philippines' international investment regulatory framework. Whilst most countries are adopting a dynamic attitude toward reforming their international investment regulations, the Philippines have yet to decide the next maneuver if it desires to remain regionally competitive in attracting foreign capital in its economy.

The following chapter will consider the possible options that the Philippines have to remodel its approach towards the umbrella clauses, ISDS, and the protection of the international investors.

4-3. Possible paths of amelioration

4-3-1. Umbrella clauses and its consequence: ISDS

On a purely legal level, the umbrella clauses have continuously triggered tumultuous debates since the dissonant *Société Générale de Surveillance SGS* cases. On a more political level, the matter is the 'arbitrationalization' of disputes arising from a contractual breach that should have received a domestic adjudication in the absence of an umbrella clause. As many States have expressed concerns about the investment arbitration being 'skewed in favor of the international investors' (Born 2012), it is unsurprisingly that attempts to reduce it or abolish it have emerged. This almost systemic and growing aversion to the costly investment arbitration is reflected in several experiments designed to limit its occurrence.

However, this philosophy of 're-domestication' of the investment disputes is not shared by all. Some states are very attached to this *ad hoc* settlement system, as exemplified by the multilateral instruments with an ISDS clause. However, some of these states also argue for a revision that emphasizes a more teleological approach toward investment arbitration. According to this logic, the problem is not located at the material or quantitative level but rather at a more spiritual level, questioning the purpose of international investment arbitration itself.

Therefore, two main trends can be distinguished. First, international investment policies could be revised to limit the possibility of international investment arbitration. Second, the revision of the states' policies could at heart modifies the international investment arbitration or could subordinate its practice to social goals whose importance is increasing in modern societies.

4-3-1-1. Limiting international investment arbitration

The idea of abandoning ISDS has emerged when some states have started to negatively react to the umbrella clauses and their far-end consequences. In an issue note of March 2019[11], the UNCTAD noticed that reforms toward the ISDS system were launched by several countries. It mentioned several paths to conduct the reform: improve the ISDS procedure, limit ISDS, standing ISDS tribunal, and abandoning ISDS. It notes that "in Asia, regional ISDS reform efforts have been limited", with India being the regional state which proactively pursues reforms. Oppositely, Vietnam, and Singapore carried out the ISDS tribunal system with the EU in recent treaties. The Philippines have not made public any thoughts on that topic. However, the topic has been tackled by different international organizations.

The International Institute for Sustainable Development (IISD) in cooperation with the United Nation Environment Program (UNEP) recently published a toolkit for policymakers to design trade arrangements. In this publication[12], it is reported that states often refuse to include umbrella clauses due to the extension of responsibility and the multiplication of proceedings. It argues that ISDS access could be carefully limited when local remedies are exhausted – which would parallel the EUCJ procedural rules –; or be conditional to the existence of prior written consent of the states; or by limiting the scope of BITs' provisions subject to ISDS; or substituting the ISDS to classic judicial systems.

[11] Available at the following address, accessed on March 27, 2020: https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf

[12] The toolkit's part on umbrella clauses can be found at the following address, accessed on March 23 : https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-6-umbrella-clause/

This first trend aiming to limit ISDS can be achieved by different policy options that have different consequences on the umbrella clauses.

The first and most absolute option would be for the Philippines to withdraw from the established arbitrational procedures regarding ISDS. This could be achieved either by revisiting the existing BITs to delete the ISDS provision. In this scenario, the umbrella clauses would be deprived of any arbitrational effect. Still, an umbrella clause would bind the Philippines' domestic courts and tribunals to apply the protections guarantees by the BIT to the international investors. It would be so, provided that the domestic judges would apply a *de facto* doctrine of precedents of the ICSID cases. The Philippines could also operate a full withdrawal and delete the umbrella clauses of their BITs. These two possibilities cannot be immediate as the BITs are concluded for a certain period of time. These actions would then either require the Philippines to undergo several negotiations between ten to thirty governments. Moreover, the desirability of this action is debatable.

As the treaties apply to commercial entities of both the Philippines and the other contracting state, both the foreign investors in the Philippines and the Filipino's investors in the partner states would see the legal protection of their investments devalued on the international level. These reciprocal consequences would likely extend to the destination of the investments, with foreign companies migrating to other countries where international protection has been maintained. Moreover, the likelihood of this occurrence is reinforced as it has been noted that the trust in the Philippines' domestic legal system is low. In the absence of arbitration, this first option would thus re-politicize the ISDS system, in the sense that it would put on trial the States' investment policies.

Arbitration currently solves this problem as it locates the contention at the international public law level. As a result, the re-domestication of the international investment disputes will put great pressure on the domestic courts to adjudicate contentions, which would unavoidably increase the friction between different governments on their FDIs policies.

The second option, more eclectic, consists in the method of contractual waivers. Inserted in contracts between the State and the investor, such clause requests the latter to waive its right to arbitration under the BIT. This limitation in dispute resolution possibilities for the investors seemed impossible until the Republic of Colombia published a model concession agreement in which an express waiver clause was included in 2013.

This option is legally controversial. First, there exist two doctrines amongst the arbitrators, the panelists, and the scholars which call into question the validity of such clause. On one hand, some consider irrevocable the offer to arbitrate made by the State to the investors. Therefore, no contracts signed after the BITs could potentially limit the investors' right to arbitration under international law. On the other hand, some consider that the BITs constitute a "third-party beneficiary system" where such a waiver is admissible. This doctrine regards the contractual freedom of private persons as a possible limitation of the rights and the protections guaranteed under international law, if voluntarily accepted by the investors. In both cases, the States have no control over the arbitrators' interpretation, and no interpretive statement could influence the outcome.

Yet, this option also subjects the umbrella clauses to the domestic judges' interpretation. Not only does it expel the impartibility attributed to arbitration, but this measure taken alone does not solve the imprecision of the existing umbrella clauses. This option, therefore, represents a risky move. Indeed, promoting and inserting in the state-investor contracts such controversial clauses that still carry divided legal interpretations is not desirable. These 'uncharted waters' (Strong 2014) would be detrimental to the judicial predictability that is already problematic under the current Philippines' BIT policy. Moreover, it would potentially result in longer procedures which would only increase the costs of litigation.

A third option, which has been taken by the IISD for its hereinabove toolkit, has been suggested and consists in transforming the international investment arbitration as the last of the possible options to settle a dispute between a state and a foreign investor (Fox 2014). This works based on the exhaustion of local remedies. This third option presents some patent disadvantages. The reason lies in the great degree of variation of the domestic judicial procedures. The domestic courts and tribunals already have to settle a vast array of "domestic" disputes. Increasing the number of international investment cases brought before them will lengthen the duration of the overall dispute settlement system and largely delay the arbitration, reputed for its relative celerity. This might as well reduce the number of arbitrational procedures as the investors will face discouragement throughout the procedure's lengthening. Moreover, the investors' claims will stay unsettled longer than it would be with an arbitrational procedure. This option would mean that the umbrella clause will be not directly applicable to the dispute as it adds procedural requirements.

In sum, limiting the international investment arbitration may not be beneficial to the Philippines' regulatory and judicial ensemble. This affirmation stands as the domestic courts and tribunals will have additional responsibilities, which generate greater public expenses, and as their nationals acting as foreign investors will likely face political backlashes, and surely experience a degradation in the protection of their investments abroad. As ISDS represents an impartial venue for dispute resolutions, it highly marks a contrast with the reportedly partial and dubious domestic tribunals of the Philippines, and in ASEAN overall. Moreover, international arbitration is limited to what the States decide.

Therefore, most of the alleged misdemeanors of the international investment arbitration system can be mitigated with a proper selection of clauses, and with proper wording. In that sense, the technique of contractual waiver isn't a satisfactory tool for the legal predictability and the investors' protection.

These attempts to regulate the possibility of investment arbitration remain nonetheless inspiring for the revision of the Philippines' BIT policy. However, this question needs to be thoroughly studied on the economic and political level, which was not the goal of this thesis.

Contrary to the previous options aiming to limit the occurrence of investment arbitration through the umbrella mechanism, other attempts have adopted a more drastic reverse of the course of the evolution of international investment law and its dispute resolution procedures.

4-3-1-2. Modifying international investment arbitration

One constant problem regarding the interpretation of the umbrella clauses is the lack of clear visibility of the states' intentions when enacting these clauses. Arbitrational tribunals often refer to the legislators' intentions when doubt persists on the interpretation of domestic regulation. This underlines that international investment law remains a parameter of international relations. Consequently, more precise and clear-cut defined intentions could provide the arbitrational tribunals with sufficient guidance and clearance on what effects to give to the umbrella clauses. Resultantly, legal certainty will prevail and enhance the overall dispute settlement process. This non-zero-sum game between the investors and the states calls for such unveiling. Amongst the possible maneuvers, the government of the Philippines can provide additional comments on its drafting intention by issuing a joint interpretative statement after consultations with the other state (Begic Sarkinovic 2011). Nonetheless, the method to achieve such a joint statement isn't explicitly defined. Negotiating a balanced approach toward the interpretation of umbrella clauses requires diplomatic skills that are not given.

More frontally, the Philippines could modify their umbrella clauses. As the legal unpredictability rises from the vagueness of the clauses' enactment, some attempts to reduce the midst have been witnessed in some states. The recent Austria-Kyrgyz Republic BIT of 2016 decided to demystify the unpredictable outcomes of a dispute and enacted the umbrella clause clearly in Article XI.1[13]:

[13] Available at the following address, consulted on March 12, 2020: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5500/download

"*Each Contracting Party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party. This means, inter alia, that the breach of a contract between the investor and the host State will amount to a violation of this treaty*."

Two remarks can be drawn upon this formulation. First, it goes against the trend of eliminating the umbrella clauses in the BITs, meaning that some states still welcome positively the possibility to elevate contractual breach to treaty breach. Second, this formulation does not solve all the lingering controversies. By maintaining a general language in the first sentence, Austria and the Kyrgyz Republic intended to leave an open door for arbitrators' appreciation. It is evident that they solve the uncertainties arising from the three *SGS* jurisprudence by undoubtedly stretching the scope of the umbrella close to include the breaches of contract. Although they benefit from a seemingly constant jurisprudence, unilateral acts of states could have been clearly added. This formulation missed the opportunity to enshrine them definitely in an international treaty - that is to say almost 'codify' it -, thus not risking any jurisprudence reversal.

What is clear however is that Austria generalized the use of this wording for every BITs they entered into, as evidence in the Austria BIT Model Draft of 2010[14]. This change was already visible in their BIT Model of 2008[15] which was a shift from their first model[16].

[14] Available at the following address, accessed on March 13th, 2020: https://pca-cpa.org/wp-content/uploads/sites/6/2016/11/Agreement-Between-the-Republic-of-Austria-and-the-_____-for-the-Promotion-and-Protection-of-Investments-2010.pdf

Lastly, and following Poulsen's 'bounded rationality' theory, some movements have put forward a need to rebalance ISDS. International economic law could be described as a field in which the legal instruments are purposefully crafted to protect the investors in their disadvantaged and unbalanced commercial relationship with the state. Umbrella clauses have extended this protection to investment contracts, with more or less success due to a lack of strong legal predictability. Practically, it has resulted in more contentions that have allegedly advantaged the investors. A lucrative business of arbitration lawyers is denounced, where small portions of international elite law firms are "*fueling the investment arbitration boom*". This is allegedly made at the expense of the taxpayers, the environmental norms, and human rights (CEO 2012).

This publication has gradually urged a reforming movement toward international investment law. States increasingly value other objectives than the mere protection of the investors' interests. The substantive protections of the BITs, including the umbrella clauses, could be oriented "*towards today's sustainable development imperative*" (UNCTAD 2019). This position argues that the states must increasingly take into account development goals when crafting their policy on IIAs and more specifically on ISDS. These development objectives and their legal surroundings have yet to be clearly defined, and in absence of limpid clarification on what it means, such maneuver could result in another legal and jurisprudential disarray that would add up to the existing umbrella clauses' one.

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[15] Available at the following address, accessed on March 13th, 2020: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4770/download

[16] Available at the following address, accessed on March 13th, 2020: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2848/download

4-3-2 Considering the subsequent tradeoffs

4-3-2-1 The political tradeoffs

The revision of the Philippines' BITs policy entails the calibration of the Philippines' political autonomy and reliance on multilateral forums. Indeed, where the Philippines abandoning their BITs to the benefits of multilateral instruments, their political autonomy - characterized in this case by the ability to define the international investment regulatory framework bilaterally - would decrease to profit the multilateral agencies.

First, the ability of a State to choose the legal protections it desires for international investors is linked with the concept of political autonomy. A parallel could be drawn between this debate and the one regarding the European Union and the alleged loss of states' sovereignty. In essence, the nationalism movements claim that the member states have lost their political sovereignty to the advantage of Brussels'' technocratic institutions. Legally speaking, the member states have waived and delegated a portion of their sovereignty to the Union. Such action presupposes the use of sovereignty and merely results in an adjustment in their political autonomy in some subjects. As a result, the concept of political autonomy betters reflects the tradeoff made by the Philippines in the context of a potential BITs reform. The case of ASEAN regional investment treaties accentuates the necessity of the BITs.

While containing innovative features for the foreign investments' regional regulatory framework, especially regarding the ability for the states to contain the investor-states disputes, it has been noted that "*ASEAN Member states have not*

given any formal precedent to these treaties" (Desierto 2018). The consequence is the prevalence of the older BITs in arbitrational disputes. As a result, the pathway consisting in reinforcing the political autonomy of the Philippines is not commanded by nationalist sentiments like in Europe but rather by legal considerations. While multilateral agreements are desirable for a more consolidated regional regulatory framework on foreign investment, the legal instruments are not ready to serve their protective purpose.

4-3-2-2 Legal tradeoffs

The protection or the entrenchment of one legal principle has to be balanced by the restriction of another principle. For example, in the realm of contracts, domestic laws, and international principles which guarantee a certain degree of actions that are non-contractible unavoidably shorten the scope of the parties' contractual freedom (ex.: one may not sell a part of his body).

In the realm of investor-state disputes, two legal principles are seemingly in balance. On one hand, widening the scope of the umbrella clauses has for effects to multiply the potential claims brought before the ICSD by the investors, thus reinforcing the principles of access to justice and of judicial impartiality for the investors. On the other hand, narrowing the scope of the umbrella clauses so as to exclude the contractual obligations, or suppressing the umbrella clauses, have for effects to negate the legal unpredictability of the international investment law as a whole. However, as demonstrated previously, the legal unpredictability can be adjusted without compromising the validity of the umbrella clauses.

In conclusion, the Philippines have a multitude of choices to resolve the problems surrounding the umbrella clauses and international investment arbitration.

Abandoning ISDS - and therefore, removing the umbrella clauses from the existing BITs - does not represent a viable solution to put an end on the legal controversies on the investors' protection. Moreover, ISDS is reportedly not as skewed as some states pretend it to be: around sixteen percent of the cases where ruled in favor of the investors in 2014, and most of the state-investors contentions are actually settled through the conciliatory mechanism enshrined in the first paragraph of the ISDS clause in the BITs (ECIPE 2014). Limiting ISDS to development goals is laudable. However, this linkage between commercial interests and the public good has yet to receive a jurisprudential interpretation to unveil the midst. It indisputably provides the states and the arbitrators with new grounds to explore, but it does not reinforce the subject matter: the level of protection of the investors.

Rather, it appears that giving further precisions to the existing umbrella clauses is the recommended plaster for now. As the government has announced a review of its BIT program, it should take into account the recent developments of the arbitrational jurisprudence regarding the issues surrounding the umbrella clauses. To respond accordingly, the Philippines should re-write them or issue an interpretive statement. In that regard, the Austria BIT model is inspiring. While extending the umbrella clauses' scope to contractual obligations results in more protection, legal predictability should be the first priority to build a readable investment framework.

Chapter V - Conclusion

5-1. Contributions and gaps

The Philippines, with regards to the umbrella clauses, offer an ambiguous degree of legal protection to the international investors. Within the existing umbrella clauses, most of them are written in broad terms that are commonly found in other models of umbrella clauses, with the notable exceptions of Austria and Portugal's BITs. Given the recent development in international jurisprudence, such clauses are most likely to receive a broad interpretation. It results in an elevation of the contractual claim protected by the Philippines' laws to a breach of treaty protection by international principles. This mechanism unavoidably enhances to investment security and augments the potentiality of the entrance of future foreign capital into the Philippines market. As a result, the writing of most of the umbrella clauses contained in the BITs to which the Philippines is a party to has positive effects on both the securing of the currents investments and on the incitation of new investments.

However, a large portion of BITs to which the Philippines is a party to doesn’t contain an umbrella clause. The literature has analyzed the level of understanding the governments of developing countries had when they entered into BITs. While this debate has focused on the *why generally*, the *why specifically* to countries has been neglected. The absence of umbrella clauses in two-third of the BITs to which the Philippines is a party to could be attributed to many reasons. First of all, because they emerge out of the negotiations of two sovereign states, there is a possibility that the other contracting party has refused to insert an

umbrella clause. It was not the purpose of the thesis to investigate the reasons for each contracting States behind signing a BIT with the Philippines, which further researches could. Second, the Philippines could have voluntarily excluded the umbrella clauses from these BITs for valid commercial reasons, fearing that costly arbitrational procedures might inundate the international tribunals. Third, the Philippines could have not thought thoroughly regarding the desirability of umbrella clauses in the BITs they have ratified, although Poulsen's 'bounded rationality' theory has been refuted by Filipino's legal scholars (Reyes 2017). All-in-all, it remains an unexplained disparity that still goes on and which reflects a lack of revision by the Philippines government of its BIT program. This thesis hasn't investigated the political reasons for this variation of umbrella clauses' presence in the BITs. Rather, it has focused on the consistency in legal writing and in jurisprudence to assess the level of the protection conferred to the investors

The umbrella clauses do not constitute the inexorable and ultimate legal protection that can be granted to international investors. Rather, legal predictability and jurisdictional impartibility create a reassuring environment in which foreign investments can prosper. These qualities are determined by the arbitrational tribunals based on the enactment of the clauses of the BITs designed by the states. As a result, the protection of the international investors is not only determined by the content of the treaties as interpreted by the arbitrators, but also by the overall government policy and the state's BIT program.

Thus, there is an opportunity to audit the policy options that the Philippines have in order to enhance the protection given to the international investors by their BIT program.

5-2. Ending remarks

The Philippines has yet to decide whether umbrella clauses, when explicitly formulated in ways that comfort a broad interpretation by the arbitrational tribunal, are beneficial to their interests, be they commercial, financial, or political. Although some voices have been raised to warn on the extreme profitability that the international investors have benefitted from this wide interpretation of the umbrella clause, evidence shows that the Philippines have been spared for now. Still, the ten BITs containing an umbrella clause represents ten potential Pandora boxes sheltering a large gamut of possible contention.

In any case, the examination of the arbitrational practice has shown that the investors are better off with a greater legal certainty which grants them a predictable business. International investment arbitration, although an example of judicial impartiality, entails heterogeneous decisions. Their unpredictability can partially be resolved by the Philippines with an appropriate policy. The objectives should be to ensure the investors with a consistent and coherent BIT policy. As the UNCTAD noted in a note in March 2019: "*the future outcomes of large regional negotiations are difficult to predict*" in Asia. As a result, the Philippines must not solely rely on the regional forums to enhance the viability of its foreign investments' protection. Adding a homogenous clarification to the existing umbrella clauses could show a positive sign of a well-thought investment policy. This however requires the Philippines to engage in delicate diplomatic maneuvers, where ultimately an advantageous compromise could arise for the Philippines, for the international investors, and the international investment law.

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Annex 1. The list of the Philippes' BITs

Bilateral Investment Treaties	Generation	Umbrella Clause	Wording
Philippines - United Kingdom BIT (1980)	1st	Article III.3	Each Contracting Party shall observe **any obligation** arising from a particular commitment it may have **entered into** with regard to a specific investment of nationals or companies of the other Contracting Party.
Netherlands - Philippines BIT (1985)	1st	Article III.3	Each Contracting Party shall observe **any obligation** arising from a particular commitment it may have **entered into** with regard to a specific investment of nationals of the other Contracting Party
Italy - Philippines BIT (1988)	1st	/	/
Philippines - Viet Nam BIT (1992)	2nd	/	/
Philippines - Taiwan Province of China BIT (1992)	2nd	/	/
China - Philippines BIT (1992)	2nd	/	/
Philippines - Spain BIT (1993)	2nd	/	/
Korea, Republic of - Philippines BIT (1994)	2nd	/	/
Philippines - Romania BIT (1994)	2nd	/	/
France - Philippines BIT (1994)	2nd	/	/
Philippines - Saudi Arabia BIT (1994)	2nd	/	/
Australia - Philippines BIT (1995)	2nd	/	/
Czech Republic - Philippines BIT	2nd	/	/

(1995)			
Philippines - Thailand BIT (1995)	2nd	Article III.3	Each Contracting Party shall observe **any obligation** arising from a particular commitment it may have **entered into** with regard to a specific investment of nationals or companies of the other Contracting Party.
Iran, Islamic Republic of - Philippines BIT (1995)	2nd	Yes	Text not available Signed but not ratified
Canada - Philippines BIT (1995)	2nd	/	/
Chile - Philippines BIT (1995)	2nd	/	/
Philippines - Switzerland BIT (1997)	2nd	Article X.2	Each Contracting Party shall observe **any obligation** it has **assumed** with regard to specific investments in its territory by investors of the other Contracting Party.
Germany - Philippines BIT (1997)	2nd	/	/
Bangladesh - Philippines BIT (1997)	2nd	/	/
Philippines - Russian Federation BIT (1997)	2nd	/	/
Denmark - Philippines BIT (1997)	2nd	Article II.3	Each Contracting Party shall observe **any obligation** it may have **entered into** with regard to investments of investors of the other Contracting Party
BLEU (Belgium-Luxembourg Economic Union) - Philippines BIT (1998)	2nd	Article IX.2	Each Contracting Party undertakes to ensure at all times that **the commitments** it has **entered into** vis-a-vis investors of the other

			Contracting Party shall be observed
Myanmar - Philippines BIT (1998)	2nd	/	/
Finland - Philippines BIT (1998)	2nd	Article III.5	Each Contracting Party shall observe **any other obligation** it has **assumed** with regard to investments in its territory by investors of the other Contracting Party
Philippines - Turkey BIT (1999)	2nd	/	/
Pakistan - Philippines BIT (1999)	2nd	/	Signed but not ratified
Philippines - Sweden BIT (1999)	2nd	/	Signed but not ratified
Argentina - Philippines BIT (1999)	2nd	/	/
India - Philippines BIT (2000)	2nd	/	/
Kuwait - Philippines BIT (2000)	2nd	N/A	Signed but not ratified
Cambodia - Philippines BIT (2000)	2nd	/	Signed but not ratified
Mongolia - Philippines BIT (2000)	2nd	Article X.2	Each Contracting Party shall observe **any obligation** it has **assumed** with regard to investments in its territory by investors of the other Contracting Party
Indonesia - Philippines BIT (2001)	2nd	N/A	Signed but not ratified
Austria - Philippines BIT (2002)	3rd	Article VIII.2	Each Contracting Party shall observe **any 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.
Philippines - Portugal BIT (2002)	3rd	Article X.2	Both Contracting Parties must comply **any obligations**, **not included in this Agreement**, **assumed** in relation to investments made by other Contracting Party in its territory.
Philippines - Syrian Arab Republic BIT (2009)	3rd	N/A	N/A