INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gardabani Holdings B.V.
and Silk Road Holdings B.V.

CLAIMANTS

v.

Georgia

RESPONDENT

ICSID Case No. ARB/17/29

DISSENTING OPINION

PROFESSOR ZACHARY DOUGLAS KC

A INTRODUCTION

1. I respectfully dissent from the Award of the majority of the Tribunal in respect of all the dispositive findings set out in the concluding section save as to the dismissal of the Supplemental Claims and the decision on costs.[1] As two of those findings raise legal issues of general importance, I propose to set out my views on them in some length in this dissenting opinion. Those two findings are that: (i) the Claimants are entitled to a further award of compensatory damages in this ICSID Arbitration for the same loss in respect of which they have already received full compensation in the SCC Arbitration; and (ii) the Respondent violated the umbrella clause in The Netherlands/Georgia BIT on the basis of a breach of contract established in the SCC Arbitration (a finding of strict liability based on the "elevation theory" of the umbrella clause).

[1] I do not join the majority in their interpretation of the investment treaty obligations in the Award but as our differences do not change the outcome save as for the umbrella clause I will focus exclusively on that obligation in this dissenting opinion.

B DOUBLE COMPENSATION FOR A SINGLE LOSS

2. The majority of the Tribunal has awarded damages twice for the same loss.

3. The Claimants Gardabani and Telasi brought claims for breach of contract under the Khrami SPA and the 2013 Memorandum, respectively, and were awarded USD 27,499,000 and USD 84,500,000 plus interest for these losses in the SCC Arbitration. The Final Award in the SCC Arbitration was rendered on 9 September 2022. The Claimants Gardabani and Silk Road (which owns 75.11% of Telasi) also pursued a claim for breach of the umbrella clause on the theory that the same breaches of contract are elevated to a breach of The Netherlands/Georgia BIT in the ICSID Arbitration. The ICSID Arbitration was consolidated with the SCC Arbitration before the same Tribunal. The majority today has awarded the Claimants the same damages again for the same loss in the SCC Arbitration.[2]

4. It might have been expected when the parties in this case agreed to consolidate the contractual claims and the treaty claims into a single procedure before a single tribunal that that tribunal would avoid rendering awards that are contradictory and mutually exclusive. The SCC and ICSID Awards are contradictory and mutually exclusive because everyone agrees that they cannot both be enforced. The majority, however, considers that any mischief that might attend this state of affairs is eliminated by the Claimants' assurance that they will not seek double recovery. I do not agree.

5. **First**, it is now open to the Claimants to seek the enforcement of each award in multiple jurisdictions simultaneously. It is by no means certain that any undertaking on the part of the Claimants not to pursue double recovery will eliminate the risk of such. The Tribunal is *functus officio* upon the issuance of the ICSID Award and cannot supervise or enforce any undertaking given by the Claimants. Relying upon national judges in different jurisdictions (with powers, among other things, to order *ex parte* relief in enforcement proceedings) to somehow coordinate their actions to prevent double recovery is unrealistic. Even if one award is paid in full, how might the Claimants be compelled to give up their legal rights

[2] The only difference is that, in relation to Silk Road, the amount is reduced because it is shareholder of Telasi and the damages are calculated on a Free Cash Flow to Firm basis. In my dissenting opinion in the SCC Arbitration, I concluded that the amount awarded to Telasi by the majority represented a windfall that no party expected at the time the 2013 Memorandum was executed (the whole rationale of that contract was to guarantee to Telasi the recovery of its costs plus a reasonable rate of return and the parties had made detailed forecasts of what that was to mean in practice over the life time of the contract) and that the proper interpretation of the key terms of the 2013 Memorandum excluded the possibility of awarding that windfall.

under the other award, which will remain valid and binding? To put all this in context, the Russian Federation is standing behind the Claimants, and the Georgia is the Respondent.

6. **Second**, an arbitral award for a sum of money is a chose-in-action. It is a property right. It can be assigned to a third party and enforced by that third party.[3] The Claimants' personal assurance about not pursuing double recovery operates *in personam* and has no impact on the proprietary rights created by each Award. What is the value of the Claimants' undertaking in circumstances where one or both Awards are assigned to third parties?

7. **Third**, the majority's findings of liability and their quantification of damages in the ICSID Award are entirely parasitical upon their conclusions in the SCC Award. In other words, if they are wrong in the SCC Award about the interpretation of the contracts and the quantification of damages flowing from any breach, then they are also wrong in the ICSID Award. This is the consequence of their strict liability approach to the umbrella clause: a breach of contract is automatically a breach of the umbrella clause with the same entitlement to compensation. The SCC Award is currently being challenged before the courts at the seat of the arbitration in Stockholm. Suppose that challenge is successful, is it fair that the Claimants will possess the second ICSID Award for the same damages to enforce regardless? Is it fair that the Respondent will then be compelled to mount a separate challenge to the ICSID Award in order to resist enforcement?

8. Given (i) the serious practical and legal problems attending the existence of two awards of damages for the same loss, (ii) the considerable scope now granted to the Claimants to amplify the existing dispute by launching multiple and conflicting enforcement proceedings or assigning one or more of the awards to third parties who might be incentivized to do the same and, (iii) the absence of any precedent of a tribunal embarking upon this course of action in consolidated proceedings, one might expect that the legal principle invoked to cement the Claimants' right to two awards of damages for the same loss would be rather robust.

9. But it is not. The sole legal principle relied upon by the majority to justify awarding double the damages for a single loss is the distinction between contract claims and treaty claims. That distinction is a truism; it does not provide an answer to any specific legal problem.

---

[3] E.g. *CMS Gas Transmission Company v Argentina*, 902 F Supp 2d 367, 378 (S.D.N.Y. 2012) where the rights of the assignee to enforce the award were upheld. At least four more ICSID awards against Argentina are known to have been assigned.

Pretending otherwise means that slogans will triumph over substance in the adjudication of investment disputes.

10. Contract claims have a different legal foundation to tort claims as well and yet there is unlikely to be a legal system that would allow a claimant to obtain a judgment for damages in respect of a loss resulting from a breach of contract, and then to pursue the respondent for a second judgment for damages in relation to exactly the same loss but on the basis of a delictual theory of liability. Some legal systems recognize a principle of concurrent liability in the sense that the same set of facts may give rise to claims in contract and tort (e.g. England after *Henderson v Merrett Syndicates Ltd*[4]); others eschew the possibility of concurrent actions (e.g. France and the principle of "*non-cumul des responsabilités contractuelle et délictuelle*"[5]). But no legal system to my knowledge allows a claimant to obtain two judgments awarding full compensation for the same loss against a single respondent.

11. A contract claim and a claim for breach of the umbrella clause have the same remedial objective: compensation for a particular loss suffered. In the circumstances where legal systems do allow the combination of remedies, it is because the remedies in question have different objectives. For instance, English law allows the combination of compensatory and exemplary damages (an exceptional remedy with the objective of punishing, deterring and expressing disapproval for a civil wrong).[6] If the Claimants were to enforce both awards in these proceedings, then sums recovered in the second award would effectively amount to exemplary or punitive damages, despite the fact that international law does not recognize either.[7] It does seem rather extreme that the Claimants have been granted a valid, binding and enforceable right to obtain exemplary or punitive damages subject only to their undertaking of self-restraint that the Tribunal will have no jurisdiction to supervise or enforce.

12. The majority has offered no reason why the distinction between contract and treaty claims compels this result. Why should that be the position under international investment law? Why is it necessary to achieve justice between the parties to award damages twice for the same loss? No explanation is provided. As a matter of substantive law, it is not a result that is countenanced by the general principles of law of major legal systems in respect of the

4 [1994] 3 WLR 761.
5 E.g. Cass. com., 4 décembre 2019, n°17-20.032.
6 S Watterson, 'Alternative and Cumulative Remedies: What is the Difference?' (2003) 11 *RLR* 7.
7 *Velásquez Rodríguez v Honduras (Compensation)* (1989) *Inter-Am. Ct.H.R., Series C, No 7*, 52.

analogous instance of concurrent liability in contract and in tort. But it is also inconsistent with general principles of procedural law designed to prevent an abuse of process, which are finally attracting the attention of tribunals and scholars.[8]

13. In *Ampal-American Israel Corporation v Arab Republic of Egypt*,[9] the tribunal hearing claims under the US/Egypt BIT had to consider a plea of abuse of process on the ground that there were claims against Egypt in parallel proceedings under the Poland/Egypt BIT brought by other entities in the same corporate chain as Ampal in relation to the same underlying dispute and same alleged loss. The tribunal said that this was "*tantamount to double pursuit of the same claim in respect of the same interest*".[10] The tribunal continued:

> In the tribunal's opinion, while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals.[11]

14. The tribunal then directed Ampal to elect to pursue the overlapping portion of its claim exclusively in one or another forum.[12]

15. In *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*,[13] which the majority has summarized in the ICSID Award,[14] there was a similar scenario of multiple entities in the same corporate chain claiming damages for the same underlying loss. The tribunal found that certain claims were inadmissible and the pursuit of them constituted an abuse of right. The tribunal found that, whilst it may be legitimate to structure an investment through several layers of corporate entities, "*[t]his possibility… does not mean that the host state has accepted to be sued multiple times by various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm*".[15] Further:

> [W]here multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights

---

8 E.g. E Gaillard, 'Abuse of Process in International Arbitration' (2017) 32 *ICSID Review* 17; Y Fukunaga, 'Abuse of Process under International Law and Investment Arbitration' (2018) 33 *ICSID Review* 181.
9 ICSID Case No ARB/1/12/11, Decision on Jurisdiction, 1 February 2016.
10 Ibid §331.
11 Ibid §331.
12 Ibid §339.
13 ICSID Case No ARB/12/35, Award, 31 May 2017.
14 Award, §476.
15 ICSID Case No ARB/12/35, Award, 31 May 2017, §542.

> for purposes that are alien to those for which these rights were established.[16]

16. The majority says that all this is irrelevant in the present case for two reasons. The first is that we are concerned with a contract claim and a treaty claim rather than multiple treaty claims.[17] But this is an argument of form over substance. The object of the contract claim and the treaty claim in this case is identical: for the Claimants to be put in the position as if the contract in question had been fully performed by an award of compensatory damages. There is no dispute that the Claimants fully achieved that object in the SCC Arbitration. According to the majority:

> The Claimants say that damages for treaty and contractual breaches must restore claimants to the economic position they would have been in had the breaches not occurred…
>
> Having carefully reviewed the Parties' submissions on damages and in their Experts' joint reports, the Tribunal fixed the compensation payable by the Respondents for breach of contract in the SCC Final Award. The damages claimed by Silk Road and Gardabani in this arbitration under the umbrella clause in the BIT relate to the same underlying obligations and, with one exception, have been calculated in the same manner.[18]

17. It is also obvious from the manner in which tribunals in cases such as *Ampal v Egypt* and *Orascom v Algeria* treated the problem of the multiplicity of actions in respect of a single loss that they were concerned with substance over form: the abuse inherent in the "*double pursuit of the same claim in respect of the same interest*" is not deflected by the majority's simplistic insistence that contract claims and treaty claims are different:

> While the contractual agreements between Inter RAO, Telasi, Gardabani and Georgia, (and others), play an important role in the relationship between the Parties, the Claimants do not pursue claims for breach of contract in this arbitration. Rather, they claim breaches of various aspects of Article 3 of the BIT in relation to Georgia's conduct.[19]

18. This appeal to form over substance is brought into sharp relief if one considers the majority's reasoning in respect of its finding of liability under the BIT, which rests exclusively on a breach of the umbrella clause in Article 3(4). Despite the length of the ICSID Award, the

---

16 Ibid §543.
17 Award, §§475-6.
18 Award, §745, §748.
19 Award, §475.

majority's reasoning in applying its interpretation of the umbrella clause to the facts of the case is contained in a few sentences. In relation to the Claimant Silk Road:

> As indicated above, in the SCC Arbitration the Tribunal determined the obligation to compensate that the Respondent was required to observe. Having failed to observe that obligation and compensate Silk Road, the Respondent has breached its obligation entered into in the 2013 Memorandum. Accordingly, the Respondent has failed to observe its obligation with respect to Silk Road's investment, Telasi.[20]

19. And in relation to the Claimant Gardabani:

> In the Partial Award on Liability and the Final Award in the SCC Arbitration, the Tribunal determined that the Respondents, the Government, the MOE and the SSB, are required to compensate Gardabani and finally determined the extent of compensation due, in the amount of USD 27,499,000. As there is no indication that the Respondent has paid compensation to Gardabani to date, the Respondent must now compensate Gardabani in that amount pursuant to its obligation under Article 3(4) of the BIT.[21]

20. The brevity of this analysis is the natural consequence of the majority's strict liability approach to the umbrella clause: a breach of contract is *ipso facto* a breach of the treaty. I disagree with that approach and that is the subject of the second part of my dissent. But the idea that the law or justice requires the simultaneous pursuit of a contract claim and a treaty claim in respect of the same loss and two separate awards of compensatory damages for that loss is indefensible.

21. The second reason provided by the majority for rendering two awards of damages for the same loss is that "*it was clear from the outset that the Claimants were pursuing remedies in the SCC and ICSID Arbitrations on the basis of largely the same facts and that the relief pursued would overlap*" such that the Respondents "*were content to proceed with coordinated, separate arbitrations and the issuance of separate awards in each case*".[22] The fact that these proceedings were consolidated and required the issuance of two separate awards does not in any way provide a justification for the majority's decision to render two awards of damages for the same loss. After the SCC Award made the Claimants whole, the Respondent was entitled to submit that the pursuit of further claims in relation to the same loss would be an abuse of process. There is obviously no contradiction between that position and the Respondent's original agreement

---

20 Award, §701.
21 Award, §705.
22 Award, §479.

to consolidate the two proceedings, even less some sort of implicit agreement with the proposition that the distinction between contract and treaty claims entails the award of double compensation for the same loss.

22. And why does the prospect of the issuance of two awards rather than a single award make any difference? A tribunal constituted under an investment treaty can have jurisdiction over contract claims and treaty claims. Would a tribunal in its single award make an order of full compensation for the breach of contract claim, and then make a second order of the same amount of compensation for the breach of the umbrella clause, thereby doubling the damages for the single loss? There is no difference in substance between that approach and what the majority has done in this case.

C STRICT LIABILITY UNDER THE UMBRELLA CLAUSE

23. The so-called "umbrella clause" is contained in Article 3(4) of the BIT and reads: "*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.*"

24. The majority has interpreted the umbrella clause in Article 3(4) of the BIT as supporting the following principles:

24.1. A contractual obligation "*entered into*" by a Contracting Party with the foreign investment company that is a signatory to a contract is also an obligation towards any member of the corporate group of the signatory (i.e. the principle of privity of contract does not apply) such that any member of that corporate group has standing to invoke the umbrella clause in respect of that obligation;[23]

24.2. A contractual counterclaim by the Contracting Party against the signatory is opposable against the member of the corporate group invoking the umbrella clause;[24]

24.3. The umbrella clause is a strict liability regime: any breach of contract by the Contracting Party is automatically a breach of the umbrella clause;[25]

---

23 Award, §689.
24 Award, §736.
25 Award, §701 (in relation to Silk Road) and §705 (in relation to Gardabani).

24.4. "*Any obligation*" extends to obligations in legislation or regulations.[26]

25. The only authority cited by the majority in support of these propositions is the "*plain meaning*"[27] of Article 3(4) itself. There is no analysis of the context or the object and purpose of the BIT or general rules of international law despite all these elements being an obligatory part of a single interpretative exercise under Article 31 VCLT.[28]

26. I disagree with all four of the majority's propositions in respect of the interpretation of the umbrella clause. I also do not fathom how these propositions can be said to be encrusted in the slender text of Article 3(4).

27. I will first provide my own interpretation of Article 3(4) by reference to the elements in Article 31 VCLT and then consider the majority's propositions and the consequences that flow from them.

C1 The proper interpretation of the umbrella clause

28. The treaty obligation in Article 3(4), like all the obligations in the BIT, is an obligation addressed to a Contracting Party as a sovereign—a subject of international law that has the capacity to enter into treaty relations with another sovereign. From the perspective of international law, a State is a unitary entity and the internal separation between the different branches of power (legislative, executive and judicial) is largely irrelevant in respect of its engagements towards another State. When an organ of the State enters into a contract with a private party, however, it is not contracting on behalf of the State as a subject of international law. It is normally the government, or other manifestation of the executive branch, that enters into contracts with private parties, and it certainly does not bind the legislative or the judicial branches when it does so. This follows both from the distinction between the "State" as a subject of international law and the "government" as the internal

---

26 Award, §691.

27 Award, §§687-8.

28 The ILC made this point explicitly in its commentary on the draft articles that later became the VCLT: "The Commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connection between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, Article [31] is entitled 'General *rule* of interpretation' in the singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule." [1966] *Yearbook of the ILC*, vol II, p 219, §8.

division of the State that enters into contracts with private parties, as well as the fact that such contracts are governed by domestic law and not international law.[29]

29. This provides the essential context for Article 3(4). Article 3(4) is not addressed to the organs of the State that contract with private parties; it is addressed to the State as a subject of international law. It is not, in other words, directed to regulating the infinite number of contractual relationships entered into between executive organs of the State and private parties; it is rather directed to regulating the conduct of a State as a sovereign, just like every other obligation of protection in an investment treaty.

30. The State as a sovereign has plenary powers over persons and things within its territory and foreign investments are thus exposed to an abuse of those powers. The object and purpose of an investment treaty is to mitigate the sovereign risk associated with making investments in the territory of either Contracting Party to an acceptable degree and thereby encourage the inflow of foreign investment capital.

31. The State as a sovereign has the power to interfere in contractual relationships entered into between its executive organs and private parties and that power is regulated by Article 3(4). The State as a sovereign and subject of international law must not use its sovereign powers to undermine contracts that its organs have "*entered into*" with private parties. It must "*observe*" the obligations under these contracts. "*Observe*" is not the same thing as "*perform*". To "*perform*" a contractual obligation implies being a party to the contract in question. The State as a subject of international law and the Contracting Party to a treaty does not generally contract with any private party. The State as a subject of international law and unitary entity is also not "*bound*" in the contractual sense by obligations undertaken by state organs or other instrumentalities with private parties. That would be absurd: for instance, it would mean that the judicial branch would effectively be bound by obligations contracted by the executive branch despite that fact that the judiciary is often called to adjudicate disputes relating to those obligations.

32. The State as a sovereign and subject of international law must not use its sovereign powers to undermine contracts that its organs have "*entered into*" with private parties. And the State will be responsible for a failure to "*observe*" the obligations under these contracts whether that failure emanates from the executive, legislature or judiciary despite the fact that the

---

[29] The classic study of this distinction is by P Mayer, 'La neutralization du pouvoir normative de l'Etat dans le contrat d'Etat' (1986) 113 *Journal du droit international* 5.

legislative and judicial organs are not "*bound*" by contractual obligations entered into by an executive organ under the applicable domestic law. This makes perfect sense because the functional purpose of the umbrella clause is to protect the contractual bargain from extra-contractual (sovereign) interference. That interference can potentially come from any state organ exercising sovereign power whether or not it is bound by the contract in question. The State's duty on behalf of all its organs to "*observe*" contractual obligations undertaken towards foreign investments is apt to capture this.

33. The functional purpose of an umbrella clause can thus be succinctly stated. If a State uses its sovereign powers to interfere with a contractual bargain entered into between a state organ and a private party, then the State is stepping outside the contractual realm, to obtain an advantage that it could not secure within that realm. The equality of the parties to the contract is disrupted. International law needs to intervene.[30]

34. Thus far I have focused on the text of the umbrella clause in Article 3(4), the context and the investment treaty's object and purpose. A further element of decisive importance by reference to Article 31(3)(c) VCLT is that this interpretation of the umbrella clause is harmonious with the general rules of international law. It upholds the principle of systemic integration[31] and the idea conveyed by Verzijl that "*[e]very international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.*"[32]

35. The functional purpose that has been assigned to the umbrella clause is consistent with the orthodox position in general international law. In the words of Schwebel:

> [W]hile a mere breach by a State of a contract with an alien (whose proper law is not international law) is not a violation of international law, a 'non-commercial' act of a State contrary to such contract may be. That is to

---

30 Several tribunals have found that the umbrella clause, and investment protection obligations more generally, only relate to sovereign acts: *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v Republic of Paraguay* (ICSID Case No. ARB/07/9) Further Decision on Objections to Jurisdiction, 9 October 2012, §§240-1; *Consutel Group S.P.A. in liquidazione v People's Democratic Republic of Algeria* (PCA Case No. 2017-33) Final Award, 3 February 2020, §321; *El Paso Energy International Company v The Argentine Republic* (ICSID Case No ARB/03/15) Decision on Jurisdiction, 27 April 2006, §§77-85; *Impregilo S.p.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) Decision on Jurisdiction, 22 April 2005, §278; *Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No ARB/03/11) Award on Jurisdiction, 6 August 2004, §§72-82; *Muhammet Çap & Sehil Inşaat Endustrive Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6) Award, 4 May 2021, §§709, 962. See also: T Wälde, 'The Umbrella Clause in Investment Arbitration—a Comment on Original Intentions and Recent Cases' (2006) 6 *JWIT* 183.

31 C McLachlin, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279.

32 Verzijl P, *Georges Pinson Case* (1927-8) AD No. 292.

> say, the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law.[33]

36. FA Mann described the distinction between a State's contractual liability and its international responsibility for interference with contracts in the following illuminating terms:

> One is thus confronted with the duality of the contracting State's capacities (and its firm appreciation is likely to assist in exposing the heart of the problem). The contracting State, as a fisc, is under contractual duties towards the alien to whom it is bound on the footing of private law; yet, in addition to or in place of that liability in private law, the contracting State, as a sovereign, may be under a delictual liability in international law towards the claimant State. The tort, if any, is of a very specific character: is it unlawful for a State to invoke its own legislative or executive measures, taken by it as a sovereign, to justify what *prima facie* constitutes a breach of its own contract made by it as a fisc?[34]

37. The inclusion of an umbrella clause in an investment treaty answers this question in the affirmative. It was a question that was far from controversial as the debate among the leading scholars before the rise of the modern investment treaty testifies. There was, therefore, ample justification to settle the matter by express language in an investment treaty.

38. The orthodox position thus reflects a fault-based ground for liability for interference in a contractual relationship with a foreign national: the State has abused its sovereign power to deprive the foreign national of a benefit or to impose an additional burden that was not envisaged under the terms of the contract or its applicable law. There is unlikely to be a remedy under the contract to redress this injustice, especially when the governing law of the contract is the law of the host State. The State can use its sovereign powers to modify that law and/or the contractual terms such that there will be no action available to the foreign national for any breach under the applicable law.[35]

39. The identification of a ground of fault in the interpretation of the umbrella clause is important because general international law on the protection of aliens has always rested on fault and not strict liability[36] and the other standard investment protection obligations in investment treaties have also generally been interpreted as encompassing fault-based liability

---

33 S Schwebel, *Justice in International Law* (1994) 431-2.
34 FA Mann, 'State Contracts and State Responsibility' in *Studies in International Law* (1973) 303.
35 Ibid 304, 313.
36 R Jennings & A Watts, *Oppenheim's International Law* (9th edn, 1996) 508-511.

as well.[37] It would be surprising if the umbrella clause were to be a glaring exception against the background of general international law and the other obligations in the investment treaty itself. That, however, would be the consequence of adhering to the "elevation theory" of the umbrella clause and its insistence on strict liability.

40. This fault-based interpretation of the umbrella clause does not only chime with general international law on the liability of States for the interference in contracts with foreign nationals. It is also harmonious with general international law on state immunity, which also provides relevant rules of international law for the purposes of Article 31(3)(c) VCLT when interpreting the umbrella clause. The law on state immunity also has a distinction between commercial acts (*jure gestionis*) and sovereign acts (*jure imperii*). That distinction is deployed to determine whether a dispute with a State is amenable to adjudication before a national court or instead should be resolved at the international level.[38] If the dispute relates to a State's commercial acts, then it cannot invoke sovereign immunity before the courts of a foreign State with jurisdiction to adjudicate that dispute with a private party. If the dispute relates to a State's sovereign acts, then it can invoke sovereign immunity and the rationale is that such a dispute should be channelled to a form of international dispute resolution. Investment treaty arbitration is precisely that. A neat symmetry, therefore, arises between the circumstances in which a State is obliged to submit to adjudication before a foreign court (contractual disputes) and before an investment tribunal (sovereign acts relating a contract under the umbrella clause) by reference to the law of state immunity.

41. This recognition that the domestic and international legal orders have complimentary rather than conflicting roles to play in respect of disputes relating to state contracts with foreign nationals also resolves another perennial problem which is the significance of an exclusive jurisdiction clause or arbitration clause in those contracts. The majority in this case,[39] and adherents to the "elevation theory" more generally, dismiss the relevance of such clauses by appealing to formalistic labelling: contract claims and treaty claims are different and these clauses are only concerned with the former. This does not, of course, explain why some contractual obligations are "elevated" but not others. More about that later. But pursuant to the majority's application of the umbrella clause, there is no substantive difference

---

37 I recently examined the schism between the strict liability and fault-based notions of "legitimate expectations" as part of the FET standard in *Mathias Kruck et al v Kingdom of Spain* (ICSID Case No ARB/15/23) Partial Dissenting Opinion, 13 September 2022.

38 H Fox, 'In Defence of State Immunity: Why the UN Convention on State Immunity is Important' (2006) 55 *ICLQ* 399, 405.

39 Award, §438.

between the adjudication of a contract claim and a claim under the umbrella clause. As the previous extracts from the majority's reasoning in the ICSID Award reveal, the findings on the Claimants' claims for breach of contract were dispositive for their conclusion that there was also a breach of the umbrella clause. There is no independent analysis of additional elements pertaining to liability or quantum under the umbrella clause and no daylight between the claims. A breach of contract is *ipso facto* a breach of the umbrella clause.

42. If the function of an umbrella clause is to protect a foreign investment against sovereign abuse and that is the essence of an umbrella clause claim, then a contract claim and a treaty claim are different in substance and not just in form. An exclusive jurisdiction clause or arbitration clause in a state contract cannot apply *ratione materiae* to a claim that the State has abused its sovereign powers by acting outside the legal framework for the contractual relationship. It is no longer a dispute arising out of the contract and its governing law: the essence of the claim is precisely that the State has undermined the contractual bargain from outside the contractual realm. And the adjudication of such a claim is not preconditioned on the preliminary resolution of the full extent of any contractual dispute between the parties to the contract in accordance with its applicable law. As previously stated, international law needs to intervene in this context precisely because the aggrieved private contracting party is unlikely to have any contractual remedy if the State has used its sovereign powers to modify the applicable law or abrogate the contract.

* * *

43. Applying this interpretation of the umbrella clause to the facts of this case, the Government of Georgia submitted to the contractual procedure for disputes arising under the 2013 Memorandum and the Khrami SPA (the SCC Arbitration). In that arbitration, this Tribunal awarded Telasi and Gardabani full compensation on the basis that the Government had failed to indemnify them against the negative impact of changes to the tariff regime in breach of the express contractual obligations in those contracts in the amounts quantified by the Tribunal (which did not coincide with the positions taken by the Claimants or the Respondent). At no point has the Government sought to repudiate its contractual obligations or otherwise modify or abrogate the contracts by resorting to sovereign powers. This is a perfect example of a dispute that has never left the boundaries of a contractual dispute. There is no conduct on the part of Georgia that can be the object of a claim under the umbrella clause. Unless the function of an umbrella clause is to impose a supplementary

punishment for a breach of contract upon a State, and there is no functional reason for international law to intervene in this dispute.

* * *

44. Although it has become unfashionable to confront opposing arguments in investment treaty arbitration, I now propose to address the points made in the jurisprudence and the literature against the interpretation of the umbrella clause that I have defended here.

45. The **first** argument is that the rules of attribution in respect of the conduct of state organs apply to both commercial acts (*jure gestionis*) and sovereign acts (*jure imperii*) and hence it is impermissible to interpret the scope of the umbrella clause as extending to the latter but not the former. This logic is flawed. It amounts to arguing backwards from the content of the secondary rules of responsibility to fill in the content of the primary rules of responsibility (in this case the content of a substantive obligation of investment protection). The rules on attribution in the ILC's Articles on State Responsibility were drafted as the lowest common denominator of principles that would apply to the breach of any international obligation. Some primary obligations of international law are apt to extend to the commercial activities of States, others are not. The secondary rules had to cover all the possibilities that might arise from the diverse range of primary obligations in international law. There is no doubt that a breach of contract by a state organ is capable of being attributed to the State but that says nothing about the content of the relevant primary obligation. The commentary to the ILC's Articles makes this clear:

> It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as "*acta iure gestionis*". Of course the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice…[40]

46. The ILC's commentary gives several examples of debates about the inclusion of various elements in the secondary rules that were ultimately discarded for the reason that such elements could not be generalized across the entire spectrum of primary rules. The requirement of damage was one example; the role of fault was another. But the ILC was

[40] ILC's Commentary to Article 4, §6 in J Crawford, *The International Law Commission's Articles on State Responsibility* (2002) 96.

careful to emphasize that the exclusion of these elements from the secondary rules was without prejudice to their inclusion in primary rules.[41]

47. The **second** argument is that the distinction between commercial acts (*jure gestionis*) and sovereign acts (*jure imperii*) requires an analysis of the motives of a state organ in breaching a contract with all the problems that entails. This is false. Just like the law of state immunity from jurisdiction,[42] what matters is the nature of the act alleged to violate the umbrella clause and not its purpose. The test is very straightforward: could the act in question have equally been adopted by the private party to the contract or does the act rest upon the exercise of sovereign power only available to a state organ?[43]

48. The **third** argument is that the only way to give the umbrella clause an *effet utile* is to adopt the "elevation theory" because otherwise there would be too much overlap with the fair and equitable treatment obligation. This is more of a rhetorical device than an argument of legal principle. The truth is that there is much overlap between all the different obligations of investment protection. When, for instance, is an unlawful expropriation not also a breach of the FET standard? And yet it is extremely common in investment treaty practice to include both obligations. The umbrella clause reflects a basis for international responsibility in general international law just like the prohibition of unlawful expropriation and the other common investment protection obligations (including the FET standard for which the international minimum standard was at least the predecessor). There was thus a rationale for including it among the overlapping obligations in a typical investment treaty. The idea that the drafters of investment treaties must have intended to revolutionize the approach of international law to state contracts so that the umbrella clause would have an *effet utile* completely independent of the other investment protection obligations is quite absurd. It is certainly not supported by any available *travaux préparatoires*. And one might expect that the

---

41 Crawford's introduction to the ILC's Articles explains the position taken: "It was sometimes suggested that the absence of any reference in Part One to damage, or to any form of fault (intention, lack of due diligence, etc.) implied that international law did not treat these as pre-requisites for responsibility. In the sense that it did not require these in every case this was true; but it might require them in some or many cases. By referring these issues to the interpretation and application of the primary rule, the Draft Articles took an essentially neutral position, neither requiring nor excluding these elements in any given case." J Crawford, *The International Law Commission's Articles on State Responsibility* (2002) 13.

42 H Fox & P Webb, *The Law of State Immunity* (2013, 3rd edn) 411.

43 See the detailed discussion and application of this test in: *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v Republic of Paraguay* (ICSID Case No. ARB/07/9) Further Decision on Objections to Jurisdiction, 9 October 2012, §§254-79.

revolutionary aims of the umbrella clause would have been spelt out in more than a single sentence of treaty text.

C2 The majority's interpretation of the umbrella clause: the "elevation theory"

49. I start by repeating Verzijl's statement that "*[e]very international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.*"[44] This is the essence of the principle of systemic integration and Article 31(3)(c) VCLT. The burden is on those asserting that the umbrella clause encapsulates a fundamental departure from general principles of international law to make their case by reference to the interpretative elements set out in Article 31 VCLT (and the supplemental means envisaged in Article 32 if appropriate).

50. There is not a single precedent in general international law for the proposition that a breach of contract is *ipso facto* a breach of international law.[45] There has been debate among writers as to what additional element is required to attract the opprobrium of international law but there has never been serious dissent about the necessity of that additional element. This is the essential background to the interpretation of the umbrella clause and it would surely be reasonable to assume that if the drafters of investment treaties had intended to depart from the settled position in general international law then they would have expressed that intention clearly and unequivocally.

51. Far more importantly though, if the drafters had really intended to embark upon a radical departure from the position in general international law, they would have had to resolve the fundamental problems that arise from the elevation of contractual breaches to treaty breaches. These problems are reflected in some of the majority's four propositions, others do not arise in this case. For an interpretation of an umbrella clause to be coherent, however, it has to make sense if it is generalized for all cases. It must yield answers at least to the issues that have and will frequently arise in practice.

52. **First**, I have already referred to the issue of how to give effect to dispute resolution clauses in contracts with state organs. In this case the problem was dodged because the contract

---

44 Verzijl P, *Georges Pinson Case* (1927-8) AD No. 292.

45 In an exhaustive account of the precedents and scholarly writings, FA Mann could cite only the pleadings of Switzerland and France as claimants in *Losinger & Co*, PCIJ (Series C) No 78 in support of this proposition (the Court ultimately did not render a judgment). FA Mann surmised: "When one comes to judicial practice, it would appear that no international tribunal has ever expressed approval of the Swiss-French doctrine…" FA Mann, 'State Contracts and State Responsibility' in *Studies in International Law* (1973) 308-12.

claims were determined first in the SCC Arbitration by the same tribunal constituted to hear the treaty claims in the ICSID Arbitration in a consolidated procedure. But this is an extremely rare occurrence in practice; any interpretation of the umbrella clause has to work in all cases; and the problem generally arises when a claimant seeks to bypass an exclusive jurisdiction clause in a contract with a state organ by advancing an umbrella clause claim in investment treaty arbitration. What legal principle can be deployed to allow a claimant to enforce some obligations in the contract but ignore others? To approbate and reprobate in respect of the same contract? Unless a contract is applied holistically by a tribunal in accordance with its applicable law, the effect is to allow one party to rewrite the contractual bargain by securing the benefits and avoiding the burdens. Unless one adheres to the position that the claimant should have the right to pick and choose, the only other possibility is that the umbrella clause implicitly abrogates all dispute resolution clauses in contracts with state organs. That would be an extraordinary interpretation of the text of the umbrella clause and demonstrates the implausibility of the elevation theory.[46]

53. **Second**, and continuing with the theme of having to apply the contract holistically, the majority in this case have sought to do just that by allowing the Government of Georgia to bring a counterclaim against the Claimants under the umbrella clause. This allows the majority to avoid driving a wedge between the findings on liability and quantum on the contract claims (and counterclaims) in the SCC Award and the conclusions on liability and quantum in respect of the umbrella clause in the ICSID Award. One is the mirror image of the other. That is in a sense laudable, but it is a result that cannot possibly be reconciled with the express terms of Article 3(4). The umbrella clause speaks only of obligations entered into by the State. It is expressed in unilateral terms like all other investment protection obligations because it is addressed solely to the State as a subject of international law. There is no textual basis in Article 3(4) for the proposition that a state organ's counterclaim for breach of contract in domestic law is opposable to the claimant who advances a claim under the umbrella clause in international law. One is forced into a result that is irreconcilable with the terms of Article 3(4) in their context because otherwise a

46 Several tribunals have rejected a claimant's attempt to bypass the dispute resolution clause in a contract by labelling its claim as for breach of an investment treaty obligation: *Consutel Group S.P.A. in liquidazione v People's Democratic Republic of Algeria* (PCA Case No. 2017-33) Final Award, 3 February 2020, §321 ("The contract forms a whole, and the investor cannot, through an umbrella clause, invoke some of the clauses of the contract while exonerating others, such as the arbitration clause"); *Kontinental Conseil Ingénierie v. Gabonese Republic* (PCA Case No 2015-25) Final Award, 23 December 2016, §§180-3; *SGS Société Générale Surveillance S.A. v. Republic of the Philippines* (ICSID Case No ARB/02/6) Decision on Objections to Jurisdiction, 29 January 2004, §141; *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No ARB/07/12) Decision on Jurisdiction, 11 September 2009, §202.

claimant would be able to enjoy the benefits of the contract without the burdens. But this quandary is the direct result of the elevation theory.

54. The unilateral terms of the umbrella clause, by contrast, make perfect sense if the conduct sought to be regulated is the sovereign acts of the State. Only the State, and not the private contracting party, can abuse its sovereign power to interfere with the contractual bargain.

55. **Third**, there is the problem of privity of contract. The majority has permitted Silk Road to enforce the rights of Telasi under the 2013 Memorandum on the basis that it has an equity interest in Telasi. More generally, the parties to an investment treaty arbitration in which an umbrella clause claim is being litigated are rarely the same as the parties to an investment contract with a state organ or instrumentality. On the side of the investor, the signatory party to the investment contract is often a locally incorporated company that is owned or controlled by a foreign investor with access to investment treaty arbitration. It is also often the case, especially for construction contracts, that there will be two or more parties representing different private interests: one or more joint venture parties signing on behalf of foreign investors, and another joint venture party signing on behalf of a local enterprise in circumstances where these parties have jointly tendered for the government works. On the side of the State, the signatory party might be a state organ but is also often an entity with separate legal personality and, in an event, the government as an executive organ is not the same as the State as a subject of international law.

56. The first difficulty arising from the idea that anyone with an equity interest in a signatory party to a state contract can enforce a benefit under it through the umbrella clause is that essential parties to what is in substance a contractual dispute will often be absent from the investment treaty arbitration. The rights of parties to the state contract who cannot be parties to the investment treaty arbitration are effectively eviscerated. It is a folly to assume that the contractual parties who have no standing in the investment treaty arbitration can always resort to the contractual forum to vindicate their rights. An order of full compensation on the basis of the elevation theory of the umbrella clause will effectively bring the contractual relationship to an end for those parties because the value of the state organ's contractual performance would have already been monetized and assigned to the party invoking the umbrella clause. Moreover, there will be no opportunity for those parties to present their positions on the interpretation of the contractual terms and their own entitlements under the state contract in the investment treaty arbitration (all of which might be relevant for the adjudication of the umbrella clause claim pursuant to the elevation

theory). One of the reasons that parties to a contract include an exclusive jurisdiction clause or arbitration clause is to ensure that each and every party to the contract can vindicate its rights (both substantive and procedural) before a single forum.

57. The second difficulty is that allowing non-parties to enforce benefits under a state contract is to rewrite that contract. The question of who can and cannot enforce benefits under a contract is hardly something beyond the contemplation of the contracting parties and is expressly regulated by the contract and its applicable law.[47] In jurisdictions that recognize exceptions to privity of contract for third party beneficiaries, the common position is that the stipulation of a benefit to a third party must be express and unequivocal in the contract itself.[48] Merely having an equity interest in one of the signatory parties would obviously not suffice. Moreover, the *quid pro quo* for being allowed to enforce a benefit as a third party is often that any dispute resolution procedure in the contract be respected by that third party.[49] The common theme here is that third parties cannot be permitted to undermine the sanctity of the contract.

58. **Fourth**, there is the problem of the applicable law. In this case, the majority has applied the elevation theory so that its conclusions in respect of liability and quantum under Georgian law in the SCC Arbitration are automatically replicated in international law under the umbrella clause in the ICSID Arbitration. The proposition that might be said to derive from this approach is that the contractual issues must be first adjudicated in accordance with their proper law and then those conclusions are elevated as findings on breach and quantum for the umbrella clause. But that is not how the elevation theory has been applied in most other cases. Tribunals have asserted that they do not need to resolve the contractual issues first in accordance with their applicable law, and in any event those issues can be characterized as factual questions in the eyes of international law and the umbrella clause.[50] No

---

47 In the words of the Ad Hoc Committee in *CMS Gas Transmission Company v Argentina* (ICSID Case No ARB/01/08) Decision on the Application for Annulment, 25 September 2007, §95: "The effect of the umbrella cause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e. the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella cause." The same conclusion was reached in: *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Liability, 14 December 2012, §§214-7; *WNC Factoring Limited v The Czech Republic* (PCA Case No 2014-34) Award, 22 February 2017, §§321-3.

48 The French doctrine of *stipulation pour autrui* is one example; as is section 1 of the Contracts (Rights of Third Parties) Act 1999 (UK).

49 For instance, a third-party beneficiary would have to enforce any benefit against the parties to the contract though the arbitration clause in that contract pursuant to section 8 of the Contracts (Rights of Third Parties) Act 1999 (UK).

50 This following dictum is typical among tribunals taking this approach: "The distinction between treaty claims and contract claims is well established, and it disposes of the Respondent's second admissibility objection.…

explanation is ever provided as to how the disputed scope of a contractual term, for instance, can be resolved as a factual question in a void of the usual legal framework for interpretation. Ruling on issues of law by pretending they are issues of fact is likely again to result in rewriting the contract.

59. One is left with the notion that the approach to the applicable law of the contract by adherents of the elevation theory is strategic. If the claimant is seeking to leapfrog the contractually chosen forum to resolve disputes arising from the contract by bringing a claim under the umbrella clause, then the law governing the contract is necessarily irrelevant (it would not permit the claimant to bypass the exclusive jurisdiction clause or the arbitration clause and would insist on privity of contract) and contractual issues can be repackaged as issues of fact (to avoid the impression that the tribunal constituted under the investment treaty is usurping the role of the contractually chosen forum). If, however, the contractual forum has already decided the contractual issues (as is the case here), then those conclusions based on the law governing the contract can be adopted wholesale to condemn the State under the strict liability regime of the umbrella clause (as per the elevation theory).

60. One consequence of failing to apply the law governing the contract holistically is that the state organ may be deprived of a defence under that law for its non-performance of a contractual obligation despite the fact that the same defence would have been available to the private party if the shoe were on the other foot. How would a state organ, for instance, raise a defence based on force majeure or frustration or some other excuse for non-performance recognised by most systems of contract law if a tribunal applies the elevation theory to an umbrella clause?

61. The tribunal might say that: (i) the umbrella clause is a one-way street so a state organ cannot raise a contractual defence to the non-performance of an obligation; or (ii) it can raise that defence but not before the contractually-chosen forum as a legal question but as an issue of fact to be taken into account by the tribunal in its adjudication of the umbrella clause claim; or (iii) it can rely on the secondary rules on circumstances precluding wrongfulness (which include force majeure) as per the international law of state responsibility in place of any contractual defences; or (iv) the entire dispute under the contract should be adjudicated first

---

If, in order to assess whether there was a treaty breach, the Tribunal must first determine whether or not the relevant contractual obligations have been observed, then the Tribunal may hear evidence and make that determination. That some of the facts underlying the umbrella clause claim could also be the basis for a separate breach of contract claim–in another forum, on another day–is immaterial." *Georg Gavrilović and Gavrilović d.o.o. v Republic of Croatia* (ICSID Case No ARB/12/39) Award, 26 July 2018, §§420-421.

in accordance with its proper law and then the tribunal's conclusion on non-performance of the state organ (if applicable) can be elevated to establish a breach of the umbrella clause. Each of these possibilities is deeply flawed:

61.1. In respect of (i): Creating a mechanism whereby one party can enforce contractual benefits but escape any corresponding burdens or avoid defences available to the counterparty is obviously tantamount to rewriting the contract for the parties.

61.2. In respect of (ii): To relabel a contractual defence as a question of fact is to deprive the party raising it of its legal rights under the law applicable to the contract.

61.3. In respect of (iii): The rules on circumstances precluding wrongfulness in state responsibility are not applicable to a state organ's conduct as a contracting party. They apply only when a breach of an international legal obligation has been established. Contractual defences are defences to a breach of contract such that if they upheld then there is no breach. The functions of the doctrine of "force majeure" in state responsibility and in contract law are thus completely different, as are the legal tests for their application.

61.4. In respect of (iv): Assuming the dispute resolution clause in the contract would not prevent an investment tribunal's adjudication of the contract dispute pursuant to its applicable law, this approach would not be possible unless the parties to the contract are the same parties to the investment treaty arbitration (otherwise it would result in rewriting the contract again). And like all these possibilities, it imposes strict liability in international law for a breach of contract.

62. **Fifth**, the imposition of strict liability in international law by elevating a breach of a contractual obligation to a breach of the investment treaty violates basic notions of fairness and justice. The present case provides a good example. In the SCC Arbitration, the Tribunal had to adjudicate highly complex and technical claims and counterclaims in respect of contractual provisions that were open to different interpretations by reasonable people. The Tribunal ultimately did not uphold the position advanced by either party and the Tribunal itself was split on one of the more difficult contractual issues. The Tribunal repeated on several occasions in the SCC Award and in the ICSID Award that both sides to the contractual dispute acted in good faith in presenting their alternative positions on the interpretation of the contacts in issue.

63. Despite all this, one side to the contractual dispute is now being condemned as having violated international law for its breach of contract with all the consequences that might entail. So if a State, in good faith, contests the interpretation of a contract advanced by its private counterparty, and a tribunal concludes that the State's interpretation is wrong or at least partially wrong, then under the elevation theory it will be found to have violated the umbrella clause on the date of the breach of contract, despite submitting to a process of third-party adjudication to determine whether it has breached the contract at all. It follows that to avoid the risk of being condemned for a violation of international law, a State should accede to any plausible interpretation of a contract advanced by its private counterparty.

64. The general rationale for the imposition of strict liability is that the respondent should be liable if, in order to obtain a gain for itself, it has exposed the claimant to an especially high risk of loss. The classic example in national legal systems is when the respondent has engaged in hazardous industrial activities. There are very few examples of strict liability in international law but the same rationale applies. Article 7 of the Convention on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (1967) makes state parties strictly liable for damage caused by space objects launched from their territories to other state parties or their nationals. Needless to say that the functional justification for a strict liability regime in relation to damage caused by space objects is not easily transposed to a breach of contract situation.

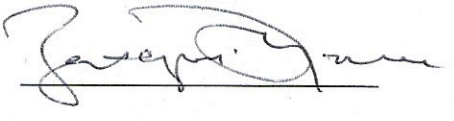
65. **Sixth**, the elevation theory of the umbrella clause is likely to result in increased costs in transacting with state parties and thus discourage foreign investment. The bottom line is that state parties can no longer rely on full force and effect being given to the terms of their contracts with foreign investors if the umbrella clause is applied in this way. The sanctity of the contract is diminished because one of the parties is permitted to avoid certain key provisions (the dispute resolution clause and the choice of applicable law) and non-parties are entitled to enforce part of the contractual bargain in another forum, often in the absence of one or more of the actual parties to the contract.[51] The equality of the parties—normally a fundamental assumption in contractual relationships—is thereby abrogated in

[51] "To hold the parties to their own choice of a legal system as the proper law of their contract and to judge the existence or non-existence of a 'breach' by the law so chosen is imperatively demanded by any legal order which cherishes certainty, equitable treatment, and sound results." FA Mann, 'State Contracts and State Responsibility' in *Studies in International Law* (1973) 315-6.

circumstances where the state party's conduct might just as well have been the conduct of the private party (i.e. because there has been no resort to sovereign powers).

66. The result of this approach is the distortion of the legitimate expectations of both parties founded upon the rights and obligations memorialized in the contract and founded upon the law of contract that sustains those rights and obligations. That is not in the long-term interests of foreign investors, who above all else cherish stability and certainty in their relationships with governments and state enterprises. They are entitled to expect that their contracts will be performed in accordance with their proper law but not transformed by the parochial application of international law. State parties will have to look other arrangements such as performance bonds, guarantees, money in escrow and so on to preserve the sanctity of the contract and the principle of *pacta sunt servanda*. Those arrangements come at a cost and the effect is likely to be less foreign investment.

67. I have not addressed the majority's additional proposition that "*legislation or regulations are capable of creating obligations that are protected by an umbrella clause*".[52] As this does not appear to be relevant to their disposition of the case, which rests instead on the contractual obligations in the 2013 Memorandum and the Khrami SPA, I will not lengthen my dissent further in respect of this point.



Prof. Zachary Douglas KC

27 October 2022

52 Award, §691.