COLLISIONS OF LEGAL REGIMES IN WORLD SOCIETY. THE UMBRELLA CLAUSE AS A SUBSTANTIVE AND PROCEDURAL MECHANISM OF LEGAL COORDINATION

Elina MEREMINSKAYA[2423]
Aldo MASCAREÑO[2424]

This contribution aims to shed light into substantive and procedural problems resulting from the emergent fragmentation and collision of legal regimes in the highly complex world society. Our point of departure is a growing differentiation and autonomy of social systems, transnational organizations, corporate actors, and specialized networks, bringing into question the ability of the national legal systems to cope with colliding legal demands. This phenomenon has led to one of the most outstanding processes in international law in the last decades: the proliferation of multiple tribunals and legal courts beyond the national space.

A research on International Courts and Tribunals in the late nineties identified a number of 125 institutions with autonomous legal-deciding bodies (Fischer-Lescano/Teubner 2005). This has been called fragmentation of international law or legal pluralism. Examples of this recent trend are tribunals such as the International Tribunal for the Law of the See, the International Criminal Court, the European Court of Justice, the Arbitration Court of

(2423) PhD in Law Sciences, University of Göttingen, Germany. Counsel for International Arbitration at the Arbitration and Mediation Centre of the Santiago Chamber of Commerce, Santiago de Chile. Email: emereminskaya@ccs.cl

(2424) PhD in Sociology, University of Bielefeld, Germany. Head of the Department of Sociology at the University Alberto Hurtado, Santiago de Chile. Email: amascaren@uahurtado.cl

Sports, the various panels of experts in informational law, the Appellate Body of the WTO, and multiple arbitration panels in commercial affairs and foreign investment. Nonetheless —and in spite of the fragmentation of international law— national legal systems do not resign the expectation of exerting some influence or holding some degree of control over the operations of those autonomous tribunals. This tension between the national and the supranational level of the law system is the primary source of this collision. This leads to critical consequences for the involved actors: legal insecurity, delay of legal decisions, and to high temporal and material investment in legal procedures.

Three kinds of legal-theoretical reactions have emerged against this fragmentation. All of these are based on the classical paradigm of national and international law, namely: a) the reintegration of the dogmatic unity of the legal system through a hierarchy of norms, b) the hierarchical procedural institutionalization of courts, and c) the politicization of conflicts of norms against the supra-nationality of controversies. These reactions are generally oriented to promote a unity of law that can harmonize the collision of different legal regimes in the world society.

The main problem with these solutions lies in the fact that they are not able to observe the sociological roots of these regime collisions, for they cannot be merely described as conflict of norms or contradictory political interests. They are an indicator of the deterritorialization of multiple social operations of supranational actors with a high level of specialization and almost incompatible legitimate criteria. In this regard, the diagnosis of Fischer-Lescano and Teubner (2007: 40) is critical: «The fragmentation of law cannot be overcome. At best, a weak normative compatibility can be constructed if a particular network logic is drawn in order to create a lose coupling between the colliding unities.» The concept of the *weak normative compatibility* seems to be of the highest interest. However, Fischer-Lescano and Teubner do not develop this category. Hence, the question is what the weak normative compatibility could possibly mean. This category can be operationally defined through mechanisms capable of translating the internal operations of other multiple societal spheres into the internal operations of law. The function of these mechanisms would be to connect the supranational operations of autonomous legal-deciding bodies with legal expectations at a national level. Our hypothesis is that the weak normative compatibility is the only possible option to link colliding legal regimes.

In order to develop this hypothesis, the chapter begins with a description of the major traits of the modern world society (I) as a theoretical background for the legal fragmentation and emergence of supranational deciding bodies (II). The possibility of increasingly stabilized weak normative compatibility between the colliding regimes through the *(un)*stable bridge of the so-called *umbrella clause* is then explored (III) and its function analyzed (IV) in both substantive (V) and procedural terms (VI), and also as a mechanism for the reduction of legal uncertainty (VII). Finally, we provide some concluding remarks (VIII).

I. DIFFERENTIATION OF WORLD SOCIETY AND NORMATIVE EXPECTATIONS

Functional differentiation is the *modus operandi* of modern society (Luhmann 1997a; Stichweh 2000; Willke 1993). Systems such as politics, law, and economy, have developed

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their own functions and structures that, on the one hand, go far beyond the boundaries of the national states but enable comparable locally institutionalized responses to similar social problems, on the other. Organizations, corporate actors, and institutionalized coordinating networks allow, simultaneously, homogeneity and specificity in the increasingly globalized world society: states promote politically based operational logic in different regions, markets and enterprises embrace an economically based logic, and tribunals and courts support legally based operational logic for organizations, corporate actors, and institutionalized coordinating networks acting in different social spaces. Such operational logic and structures are flexible enough to adapt the institutional responses to the specific territorially defined social spaces with their own traditions, possibilities and expectations.

Stabilization of systems, organizations, corporate actors and institutionally coordinating networks presuppose building of socially structured systems or fields in which social problems of whatever kind can be processed and managed. Politics is mainly interested in the problem of order and makes collective binding decisions within a politically and legally defined territory in order to deal with (Luhmann 2000, 2005; Willke 1996, 1997; Stichweh 2003). At the global level this function applies to all territories, but in each territory decisions taken are dissimilar. This means that functional differentiation promotes the development of a set of relatively homogeneous institutions for those regions; it does not force however the same specific decision for each case. Law, as a functionally differentiated system, deals mainly with regulatory problems among individuals, corporate actors and organizations and their uncertainty by stabilizing their normative expectations into legal acts and procedures (Luhmann 1983, 1997b, 1999). This function involves each territory, regional space or global context through different levels of legal structures. Nonetheless, the very fact that individuals, corporate actors, and organizations pursue diverse interests results in higher levels of autonomy, self-regulation, and a more specific translation of their own normative expectations into legal acts and procedures. From this diversity of expectations and from the pressures to juridification of multiple normative expectations, legal (and also political) tensions in the world society arise. The outcomes of these tensions are normative conflicts, proliferation of tribunals and courts, social self-constitutions, and self-contained formal procedures of legal decision-making (Luhmann 1997b, 1999a, 1999b; Teubner 1993, 1996, 1997, 2000, 2002, 2007).

World society does not mean thus social homogeneity. Yet from an empirical point of view, this is an untenable position. Different regions and territories develop structural and semantic particularities that become the source of the emerging conflicts and collisions in supranational or even national contexts (Luhmann 1997a, 1997b; Stichweh 2000; Habermas 2004). On the other hand, the unfolding —at a global level— of functional systems, organizations, corporate actors and institutional networks, promotes observation of the society from the perspective of each field. Thus, the unity of that society becomes a polymorphous unity of different interpretations (Stichweh 2000; Habermas 2004; Willke 2006, 2007). Conflicts arising from that fact push forward not only a self-closure of each field, but also a self-limitation of their own operational forms and interests. Therefore, functional systems, organizations, corporate actors and institutional networks require coordinating mechanisms in order to cope with the external restrictions to their own autonomous functioning. In doing so, the amount of confliction can be compensated by a continuous inter-

play and exchange of risk factors (Willke 1993, 1996, 1997). The goal of weak normative compatibility may be purposefully aimed by coordinating normative expectations.

II. LEGAL FRAGMENTATION AND EMERGENT LEVELS OF LAW

Two levels of legal regime are regularly distinguished by the classical legal doctrine: the national law (domestic law) and the law of the relations among national states (international law) (Sohn 1963; Slauther 1993; Kelsen 2002). The categorization developed here put forward the idea of the existence of other two complementary forms of legal regime: the supranational and the neo-spontaneous regime. These two regimes seem to be crucial to understand the fragmentation of law in the modern world society. The supranational regime is characterized by the sovereign delegation of decisional autonomy made by a state in favor of an independent legal forum whose decisions must be, as a matter of principle, followed by the members of this forum. Regarding the delegated field of competence, states, in the supranational regime, do not preserve, as an imaginary last instance, the power to decide about their own position in political or legal conflicts. In contrast, the parties agree to submit any disputes arising from the obligations contained within the agreement to an *ad-hoc* forum (Mereminskaya 2003a, 2003b, 2004, 2006; Mereminskaya/Mascareño 2005). A *transfer of sovereignty* from states to the forum, in particular matters, takes place here (Hahn 1963; Helfner/Slauther 1997; Lindseth 1999; Habermas 2000, 2004; Tallberg 2002; Berger 2002; Mascareño 2009).

On the other side, a neo-spontaneous legal regime does emerge as a correlate of the de-territorialization of social processes in the complex world society. This takes place around the interchange zones between social fields such as commerce, science, digital media, transport, construction, and sports as a correlate of the de-territorialization of social processes in a complex world society (Berger 1998, 2002; Hafner 2000; Teubner 2000; Fischer-Lescano/Teubner 2006, 2007). Material law *without state* —that means: without the classical democratic procedures of national legislation— is here conceived as a semi-spontaneous outcome of the self-coordination of functional systems, organizations, corporate actors and institutional networks. Non-intended consequences of their self-reproducing actions do take place in the interchange or transfer zones between the operating social fields. The nation-state is involved neither as a driving force of the legal coordination nor as an origin or a main reference point of the decisional authority. What here matters is merely the relationship between particular actors located beyond the interests of the state.

The proliferation of different tribunals and courts at supranational or neo-spontaneous levels is one of the most characteristic features of the constitution of the modern world society. Tribunals such as the European Court of Justice, the Appellate Body of the World Trade Organization, or multiple arbitral tribunals, are uncontestable examples of currently existing supranational forums that cannot technically be identified as «international law» (Hafner 2000; Oellers-Frahm 2001; Berger 2001, 2002; Albert 2007, Mascareño 2009). They arise in the context of the growing complexity of the world society and are functionally oriented to coordinate the relationship of law with other social fields such as the economic system (*lex mercatoria*), financial system (*lex financiaria*), foreign investment, digital media (*lex digitalis*), transport (*lex maritima*), construction (*lex constructionis*), and sports

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(*lex sportiva*) (Oellers-Frahm 2001; Teubner 1997, 2000; Berger 1998; Fischer-Lescano/ Teubner 2006, 2007). In all of these cases, decisional autonomy remains in the hands of a specific tribunal by which states, persons, organizations, and corporate actors are legally bound (Martins/Mawson 1982; Gruber 2000; Yee 2004).

This proliferation of tribunals and courts may be called fragmentation of the world-law or legal pluralism (Teubner 1997; Fischer-Lescano/Teubner 2006, 2007). None of these terms refer to the parallel existence of totally different legal systems. There is no law outside the law with a distinctive function other than the stabilization of normative expectations. Legal pluralism does not presuppose a transversal segmentation of the legal system in state terms, but rather in functional terms, namely in relation to the legal operations and normative expectations of supranational actors and organizations which tend to a self-regulating *modus operandi* (Zumbansen 2006). The novelty of fragmentation and legal pluralism comes from the recursive selection of issues in different social fields at the supranational level. It can be argued that the undercomplexity of the national and international legal system in the highly differentiated world society leads to the expansion of the legal function beyond the political and legal boundaries of the national-international system, thus promoting the self-regulation of mainly private fields.

As stated above, the classical paradigm of international law has reacted to this fragmentation trying to keep the integrity of the system by means of a hierarchy of norms, a hierarchy of courts, and the politicization of conflicts (Hafner 2000; Oellers-Frahm 2001). These reactions show that the advanced solutions do not take into account social fragmentation and differentiation of the world society, and pretend to reestablish its unity through legally based solutions grounded on the principles of sovereignty, hierarchy and control. Such principles are well known at nation-state level, although their efficacy is at least questionable at supranational level. The growing functional differentiation has been radicalized by the specialization of global and regional corporate actors, to whom the boundaries of the nation-state are secondary priorities with regard to the interests and the functional requisites of their fields of operation (Willke 2006, 2007). States act segmentarily; corporate actors do it transversally. Against this, state sovereignty has a lower control capacity than it had before.

Nevertheless, this cannot be understood as a post-state era in which the control possibilities of the nation-state are completely meaningless. Indeed, this shows at least a path for its self-transformation, namely the adaptation of the national legal systems to the fragmented operational logic of an emerging supranational level. If the nation-state seeks to preserve some influence beyond its frontiers or aims to manage the risks coming from supranational levels, it cannot leave the self-regulatory mechanisms of this level unconsidered. This implies to understand what lies behind them, which are their preference criteria, operational forms, normative expectations and legitimating procedures. State authority falls short to provide coordination criteria for those who consider such an authority as a secondary or tertiary preference (Lindseth 1999, Brunkhorst 2007; Fischer-Lescano/Teubner 2006, 2007). Weak normative compatibility and binding mechanisms for connecting national and supranational legal operations become thus a basic need for a cognitively open and normatively self-adapting modern state.

III. WEAK NORMATIVE COMPATIBILITY: DEFINITIONS AND OPERATIONAL CRITERIA

The weak normative compatibility points out to the fact a) that a state of pure harmony inside the legal pluralism cannot be established, b) that for this reason collisions of legal regimes are part of the everyday life inside the legal realm of the world society, and c) that in order to avoid that these collisions become paralyzing legal paradoxes for the involved actors, substantive and procedural mechanisms of legal coordination must be created.

The weak normative compatibility implies the development of legal institutions whose substantive and procedural legitimacy may be recognized in three dimensions: factually, socially and temporally. This does not mean a generalized harmonization of the involved regimes, but it rather points out to the creation of an *ad-hoc* mechanism for the conflicting issue (factual dimension) that may be accepted by the colliding actors (social dimension), and temporally stabilized by them, which means that it is applicable in future events (temporal dimension). A search for coordination criteria like this avoids the traditional responses of the legal dogmatics that are always related to the primacy of the national legal systems, the hierarchy of tribunals, and the politicization of disputes. Consequently, a weak normative compatibility does not imply a unification-promoting authoritative principle, but rather it is based on the supra-national heterarchical orientation, which must be flexible enough to include and consider factually observable operational differences between conflicting regimes (factual dimension), diverse interests and expectations of the conflicting actors (social dimension), and always changing conditions of conflicting issues (temporal dimension).

Therefore, the weak normative compatibility does not support the organization and classification of the colliding regimes into a world decisional pyramid, but it rather fosters decentralized coordination between them. There are three principles that build the base of weak normative compatibility: a) it factually includes legal-material considerations of colliding regimes, b) it is socially legitimate on both sides and has a binding effect for the involved actors, and c) it is able to stabilize expectations in the temporal sense by creating a legal basis for future coordination. Summarizing, it finally aims to reduce legal uncertainty in the legally fragmented world society.

Yet, the disparity of norms, social expectations and temporal projections in this legal area, moves the analysis from this conceptual definition and principles towards the development of operational criteria for the evaluation of possible mechanisms of legal coordination. Three criteria are crucial for this operationalization: a) coordination mechanisms must be able to connect different levels of the legal world system (national, international, supranational and neo-spontaneous levels) in a substantive way, b) whilst functioning as a substantive coordination mechanism they must take also into account the procedural dimension, and c) they must be able to offer to the parties reduction of legal uncertainty in the factual, social and temporal sense. Reduction of uncertainty means in this case that the parties are able to apply the mechanism even if they do not know the final outcome of its operation. In other words, they must trust the mechanism itself as a medium to deal with legal conflicts and cope with legal uncertainty. According to these parameters, we analyze in the following sections the so-called *umbrella clause* as a mechanism of coordination in the legally fragmented world society.

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IV. FUNCTION OF THE UMBRELLA CLAUSE

In general terms, the umbrella clause means a disposition of an international treaty pursuant to which a state commits itself to honor all undertakings concerning a foreign investor or a foreign investment. A typical wording of the umbrella clause makes the following claim: «Each Party shall observe any obligation it may have entered into with regard to investments». A foreign investment is usually governed by the contract between an investor and a host state. Alternatively, investment is protected by international law and more recently by international investment treaties. Disputes arising from the contractual relation between a state and a foreign investor are regularly processed by national courts, unless the umbrella clause is established at the level of the international treaty. By invoking the treaty, investors may turn to an arbitral tribunal seeking for a dispute resolution. Arbitral tribunals are neither linked to any particular state nor to international political forums; yet, their decisions take both sources clearly into account: the international level of treaties and the national level of domestic law, but they cannot be considered as an element of either of them. According to the previously developed categories, an arbitral tribunal operates at the supranational level as a neo-spontaneous legal regime. The umbrella clause opens up the possibility to link those three levels of legal regimes (national, international, supranational) by offering substantive and procedural mechanisms of legal coordination when conflicts between contract and treaty-based obligations do arise. The function of these mechanisms is to articulate different rationalities, interest and preferences of the participant actors by providing an *(un)*stable bridge to produce the increasingly stabilized weak normative compatibility.

By «providing an *(un)*stable bridge» we mean that the umbrella clause becomes a new evolving legal institution with substantive norms and procedural mechanisms at the supranational level. First introduced as a problematic issue in 2003 in the case of *Societé Générale de Surveillance S.A. (SGS) v. Islamic Republic of Pakistan* (SGS v. Pakistan 2003), the umbrella clause was rejected by the arbitral tribunal as a norm that protects the right of a foreign investor to present his contract claims before the panel established according to the bilateral investment treaty (BIT). Yet, four months later, another arbitral tribunal in the case of *Societé Générale de Surveillance S.A. (SGS) v. Republic of Philippines* (SGS v. Philippines 2003), accepted that contractual rights were indeed protected by the umbrella clause. However, the demand was declared inadmissible because of procedural reasons. Since then, arbitral decisions on the umbrella clause have been rather oscillating. The oscillation depends on whether tribunals invoke the principle of state sovereignty and thus reintroduce the old fashioned hierarchy of norms to resolve investment disputes, or they recognize the autonomy of fragmented legal regimes. The still restricted evolution of the umbrella clause does not provide a clear empirical answer to this problem. Nonetheless, the current extensive use of the umbrella clause points out to three main issues: firstly, the umbrella clause is an indicator of the autonomy of supranational legal regimes; secondly, it fills out previously empty space for legal reflection by providing substantive norms and procedural mechanisms to connect different levels of the world legal system through weak normative compatibility; and thirdly, it proves that domestic law is no more an obvious option when it comes to international contract-related disputes.

From its inception, the umbrella clause discusses the classical primacy of domestic law. Such a legal institution would not simply be necessary under the unquestionable primacy of

a sovereign state. But it goes further. The novelty of the umbrella clause and its broad leave the question of its correct interpretation in hands of international arbitral tribunals. This fosters notoriously the relevance of the supranational legal regime within the world legal system. As said, the umbrella clause operationally fosters a substantive and procedural horizon to deal with legal collisions between treaty-based and contract-based obligations beyond the domestic law but alternatively including it as a party of the conflict in two forms: a) substantively, by setting up normative obligations to host states, and b) procedurally, by establishing the possibility to accede to supranational tribunals when a state does not follow the treaty prescriptions. All this leads c) to the development of a supranational legal structure whose operation may reduce legal uncertainty in investment matters and provide weak normative compatibility to the involved actors. The following three sections deal with these topics.

V. SUBSTANTIVE OBLIGATIONS UNDER THE UMBRELLA CLAUSE

This section deals with the scope of obligations created by an umbrella clause as a substantive coordination mechanism between different legal regimes. We argue that the umbrella clause establishes international liability of a state for all kinds of contract breaches. This interpretation derives from the fact that the umbrella clause is a substantive obligation created by an international treaty. Pursuant to the rule of treaties' interpretation laid down in Article 31 of the Vienna Convention on Law of Treaties, the umbrella clause should be interpreted according to the ordinary meaning of its terms (Schill 2009; Crawford 2007; Gaffney/Loftis 2007; Schramke 2007; Tawil 2006; Sinclair 2004). As stated above, the most common language of an umbrella clause is as follows: «Each Party shall observe any obligation it may have entered into with regard to investments». As argued by the arbitral tribunal of the case *Eureko B.V. v. Republic of Poland*, the ordinary meaning of those terms was «imperative» and «categorical» and covers *any* obligation between the host state and the foreign investor (Eureko 2005 § 246).

This broad interpretation does not transform *per se* any contract celebrated by a state into a treaty-protected investment. The contract must be, firstly, qualified as an investment, according to the definition of the applicable BIT and the ICSID Convention —in case of arbitration under this Convention.[2425] Therefore, the definition of «investment» becomes crucial for the correct application of the umbrella clause (Wälde 2004; Schramke 2007; Schill 2009). The BIT usually includes a broad definition of investment as «all kind of assets' and «contract rights», but there is no consensus within the theory and praxis of international investment law on the concept of investment under the ICSID Convention (Hiscock 2009). In any case, after having established that the contract amounts to an investment, the umbrella clause creates an international obligation upon a host state to observe all contractual undertakings. Yet, the protection offered by the umbrella clause can only be triggered by the contract breach, and this must be confirmed or denied on the basis of the underlying legal framework govern-

(2425) This was the issue in the case of *Joy Mining Machinery Limited v. Arab Republic of Egypt*. The ICSID tribunal declined that there was an investment dispute (Joy Mining 2004 § 92). Consequently, the umbrella clause could not have turned *per se* the contract claim into a treaty claim, triggering by these means the substantive protection of the BIT (§ 81). In the absence of independent treaty claims, the contractually agreed arbitration provision had to prevail (§ 89).

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ing the contract (Schill 2009), namely the domestic law (national level) or the so-called *lex mercatoria* (neo-spontaneous level) (Gaillard/Banifatemi 2003). Therefore, the international obligation under the umbrella clause is substantively related to the commitments that are deep-seated in different legal levels. In this sense, it functions as an *(un)*stable bridge to produce increasingly stabilized weak normative compatibility.

In order to illustrate that, we discuss at this point if all contractual breaches fall within the scope of the umbrella clause (a), and if a contractual obligation should be attributed to the host state according to the rules of international law (b).

(a) The overarching operation of the umbrella clause is well illustrated by the case of *Societé Générale de Surveillance S.A. (SGS) v. Republic of Philippine*. The arbitral tribunal stated that the expression «shall observe» pointed out an imperative legal obligation regarding *any* kind of commitment «arising under national law, e.g. those arising from a contract» (SGS v. Philippine 2004 § 115). The arbitral tribunal of the case *Duke Energy Electroquil Partners y Electroquil S.A. v. República del Ecuador* used a similar approach. Based on Article 31(1) of the Vienna Convention on Law of Treaties, the award specified the following criteria for the application of the umbrella clause: «that (i) there exists an «obligation» of the state which is (ii) «entered into with regard to investments' and which (iii) has not been observed» (Duke Energy 2008 § 318). Those criteria are necessary, but also sufficient in order to give rise to the international liability of the state.

Within the same line of arguments, the arbitral tribunal of *Noble Ventura v. Rumania* came also to the conclusion that the umbrella clause would be «very much an empty base unless understood as referring to contracts» (Noble Ventura 2005 § 51). The tribunal relies upon the widely recognized theory that the breach of a contract only causes responsibility at the level of domestic law, unless at the same time it violates one of the principles of customary international law or the treaty provisions. Only in this last case, it would trigger the international responsibility of the state (§ 53). At the same time, states may opt to «internationalize» contractual obligations towards private investors by giving them international protection through treaties, namely through the umbrella clause. In doing so, an umbrella clause «introduces an exception to the general separation of state's obligations under municipal and under international law» (§ 54), and a host state may incur international responsibility by reason of the breach of its contractual obligations.

In contradistinction to the above-cited case law, some arbitral tribunals, through the concept of «sovereign activities of the state», tend to limit the substantive scope of the obligations created by the umbrella clause. For instance, the tribunal of *El Paso Energy International Company v. Argentina* ruled that the umbrella clause did not elevate all contract claims to the treaty level (El Paso 2006 § 71). By distinguishing between the acts of the state as a *merchant* (commercial activities) and as a *sovereign*, the tribunal came to the conclusion that the umbrella clause would not cover ordinary commercial contracts. It only offers additional protection for contractual arrangements entered into with the state as a sovereign.[2426] The classification of acts of the state into commercial and sovereign was

(2426) An example of such undertaking protected by the umbrella clause would be a *stabilization clause* included in an investment agreement (§ 81, 86).

also applied in the case of *Sempra Energy International v. Argentine Republic*. The dispute arose from the modification —made by Argentina— of the contractually agreed tariff system applicable to the investors' activities (Sempra 2005 § 20). The award establishes that the modification of the tariffs was made within the scope of the regulatory powers of the state and «only the state, and not an ordinary contract party, can decide that such sweeping changes will operate as part of the public function» (§ 311).

The classification of the state acts into commercial and sovereign can be traced back to the origins of the modern international investment law. It aimed to counterweigh the sovereign discretion of host states *vis-à-vis* the foreign investors (Wälde 2004). However, this vision is not supported by international rules of state responsibility as reflected by the International Law Commission's (ILC) —an organ of the United Nations in charge of the progressive codification of international law. The ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts do not distinguish between a state's conduct as *iure imperii* (state as sovereign) o as *iure gestionis* (state as merchant) (Crawford 2007). It is irrelevant for the purposes of the Draft whether a particular act of a state is considered as commercial or sovereign (Comment to Article 4(6)). As stated above, the umbrella clause creates an international obligation of the state and its coverage should be determined according to international rules. Without any specific limitation to the scope of the umbrella clause, there is no basis for the distinction between commercial and sovereign acts of the state. Therefore, an umbrella clause covers all kind of contractual breaches committed by the host state.

(b) The following analysis focuses on the question if the responsibility under the contract protected by the umbrella clause should be attributed to the host state according to the rules of national or international law. It concerns particularly the contracts entered into by a foreign investor and a legally independent entity of the host state. In other words, it must be determined whether the conduct of the entity is attributable to the host state according to the international rules of attribution or if its legal autonomy under the domestic law should prevail (Gallus 2008). In order to answer this question, it must be recognized that the umbrella clause creates —on the level of the international law— the obligation of a state to comply with a contract. The binding promise given by the host state under the proper law of the contract still remains in force and constitutes, at the same time, a *de facto* condition for the international liability of the state under the umbrella clause. Because the umbrella clause is a genuine international obligation of a state, the international attribution rules of responsibility as established by the ILC's Draft Articles should apply (Newcombe/Paradell 2009: 465). As a consequence of that application, the increasingly stabilized weak normative compatibility can be achieved through the *(un)*stable bridge of the umbrella clause.

In technical terms, there are two distinct legal aspects that must be attributed to the state: the contractual obligation itself and its breach. The ILC's Draft Articles rule explicitly on the latter. However, the ILC's Commentary considers the possibility to apply it also to the former: the entry into a contract as well as a breach committed by a state organ should be both attributable to the state pursuant to Article 4 (ILC Commentary Article 4(6)). Therefore, within the framework of an international obligation created by the umbrella clause, the undertaking of a contractual obligation by domestic entities as well as its breach should be ascribed to the state according to the rules of the international law.

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The case law on this topic follows this solution partially. In the case of *Eureko B.V. v. Republic of Poland* the tribunal's ruling —based on Article 4 of Draft Articles— attributed the acts of the State Treasury to the Republic of Poland (Eureko 2005 § 134). In the case *Noble Ventura v. Rumania*, the contract was celebrated between a foreign investor and a legally autonomous (under the domestic law) national entity. Pursuant to Article 5 of the Draft Articles, the conduct of an entity which is not a *de jure* organ of the state but legally authorized to exercise elements of governmental authority, is attributed to the state once provided that the entity acts in that capacity in a particular case (§ 70-80). The arbitral tribunal came to the following conclusion: «where the acts of a governmental agency are to be attributed to the state for the purposes of applying an umbrella clause, (...) breaches of a contract into which the state has entered are capable of constituting a breach of international law by virtue of the breach of the umbrella clause» (§ 85).

On the other hand, we may find awards that apply the international attribution rules to the breach of the contract, but refer to the domestic law in order to decide who the real parties to the contract are. In the case of *EDF (Services) Limited v. Romania*, the conduct of two legal entities with own legal personality under Romanian law was attributed to the host state in accordance with the Article 8 of the ILC's Draft. The tribunal concluded that they had acted under the direction and control of the state because their board members had received instructions of compelling nature from the Ministry in charge «in order to achieve the particular result of bringing to an end the contractual arrangements» (EDF 2009 § 199-213, 209). However, the award argues that the state of Romania did not enter into the contractual obligation towards the investor as required by the wording of the umbrella clause of the BIT. Consequently, the attribution of the responsibility confirmed by the arbitral tribunal «does not change the extent and content of the obligations» arising under both contracts (§ 317-319). In other words, the arbitral tribunal applied the international attribution rules to the issue of the allegedly illicit conduct, but, on the other hand and based on the applicable domestic law, it refused to consider the state a party to the contract.

This last approach also characterizes the position of the Annulment Ad Hoc Committee in the case *CMS Gas Transmission Company v. Argentine Republic*. The Committee defined the scope of the umbrella clause as follows: «The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.*, the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause» (CMS 2007 § 95.c). We disagree with the rationale behind the statement. Such a transformation does not take place. The contract claim and a claim based on the umbrella clause are already different in all their distinctive features: their legal sources, the parties involved, the applicable rules, the type of responsibility and the content of the obligation (Cremades/Cairos 2004). Although both controversies concern to a breach of the contract, they create substantive obligations with a different legal content. The contractual obligation is a specific one and supposes that the debtor must undertake particular actions or restrain herself from doing so. In contradistinction, the obligation under the umbrella clause consists rather in the commitment to respond for contractual breaches attributable to the host state according to the rules of international law. In order to apply the umbrella clause, the existence of a contractual breach under the proper law of the contract should be established. Therefore, a treaty-based tribunal does not actually rule

on the contractual breach itself, but rather on the alleged violation of the umbrella clause. The contractual breach is just a *de facto* requisite of the umbrella clause.

As seen, there are divergent positions among different arbitral tribunals about the meaning of the umbrella clause. However, the interpretation that provides a more consistent legal effect upon the umbrella clauses is based on the general principles of international law. On the one hand, the interpretation according to the ordinary meaning of the umbrella clause leads to the conclusion that any contractual commitment entered into by the state falls within its scope. On the other hand, the attribution of responsibility has to follow the rules of international law. Therefore, the umbrella clause does not override obligations under the law of the contract. Instead, it recreates such obligations in a different legal level, producing thus an increasing stabilization of the weak normative compatibility between different legal orders.

VI. PROCEDURAL PROBLEMS UNDER THE UMBRELLA CLAUSE

In order to claim their substantive rights under the umbrella clause, foreign investors need to have access to a jurisdictional forum designated by the BIT. However, it is widely recognized that treaty claims have different legal nature as the contract claims (Compañía de Aguas del Aconquija S.A./Vivendi 2002 § 95-101). This means —as a general rule— that a treaty-based tribunal can only solve the dispute by means of substantive treaty standards; it cannot decide on the contract breach under the proper law of the contract. Nonetheless, the umbrella clause protects the contractual obligation by transforming it into a treaty obligation. This suggests that the treaty-based tribunal has jurisdiction to rule on the contract claim by invoking the umbrella clause. At the same time, the contract may include a direct agreement on dispute resolution between the investor and the host state. Regularly, such an agreement would submit all disputes either to the local judicial forum or to international commercial arbitration. This allows foreign investor to file a claim before a treaty-based tribunal —thus relying on the umbrella clause— and also to start proceedings in the contractually agreed forum. However, both claims concern the contract breach. This makes controversial whether the contractually agreed dispute resolution clause constitutes a waiver of the investor's right to present a claim under the umbrella clause or if multiple jurisdictions can be established to rule on the same issue. In order to answer these questions, we discuss the case law about the submission of the contract claim to a treaty-based tribunal (a), and the investor's right to present a claim under the umbrella clause notwithstanding the existence of a contractually agreed dispute resolution clause (b).

(a) Based on the different legal nature of contract and treaty claims, the contractually agreed dispute resolution clauses cannot obstruct the access to a treaty-based forum if the lawsuit relies on substantive treaty's standards (Azurix 2003 § 76-80; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. 2005 § 166-167). But the claim under the umbrella clause invokes precisely the breach of the contract committed by the state. It is thus possible that the treaty— and the contract-based forum would have to rule on the exact same matter, namely the breach of the contract. This situation implies possible colliding decisions among multiple jurisdictions that can be considered as a negative outcome from an efficiency-based perspective and a detrimental effect for the credibility of the international investment law as well (Cremades/Cairos 2004, Bjorklund 2007).

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